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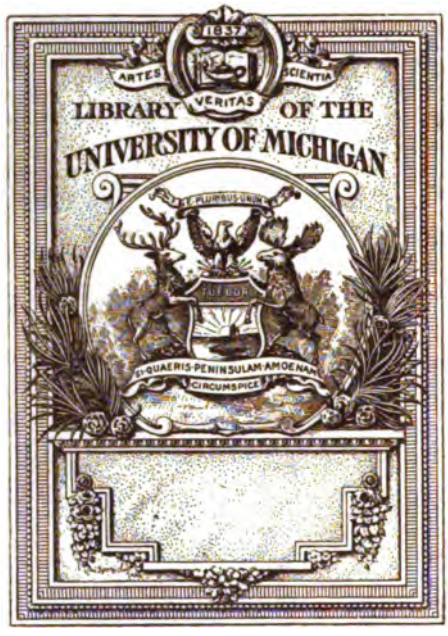
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U. S. Supreme Court

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERMS, 1884, 1885, IN

114, 115, 116, 117 U. S.

BOOK 29,

LAWYERS' EDITION,

COMPLETE WITH HEADLINES, HEADNOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOTNOTES AND PARALLEL REFERENCES,

BY

STEPHEN K. WILLIAMS, LLD.

WITH

"NOTES ON U. S. REPORTS"

BY

WALTER MALINS ROSE.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY,

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THE first republication, nearly twenty years ago, of the United States Supreme Court Reports in the Lawyers' Edition, was an event of public importance. It has resulted, not merely in the increase, but in the literal multiplication, of the number of lawyers and judges who own and use this great series of decisions. It has, therefore, materially extended the influence of those decisions upon the general jurisprudence of the country. Now the inclusion of Rose's Notes obviously adds great value to these reports.

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MORRISON R. WAITE.

ASSOCIATE JUSTICES,

HON. SAMUEL F. MILLER,
HON. STEPHEN J. FIELD,
HON. JOSEPH P. BRADLEY,
HON. JOHN M. HARLAN
HON. WILLIAM B. WOODS,
HON. STANLEY MATTHEWS,
HON. HORACE GRAY,
HON. SAMUEL BLATCHFORD.

ATTORNEY-GENERAL,

HON. AUGUSTUS H. GARLAND.

SOLICITORS-GENERAL,

HON. SAMUEL F. PHILLIPS.

to May 4, 1885; after that

HON. JOHN GOODE.

CLERK,

JAMES H. MCKENNEY, ESQ.

REPORTER,

J. C. BANCROFT DAVIS, ESQ.

MARSHAL,

JOHN G. NICOLAY, ESQ.

ALLOTMENTS, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TERMS OF 1834–5, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND TERMS OF SERVICE, RESPECTIVELY.

(Allotment Apr. 3, 1882.)

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS, 1881, 1883.	COMMISSIONED.	SWORN IN.
ASSOCIATE JJ. HORACE GRAY, Massachusetts.	President ARTHUR.	FIRST. ME., N. H. MASS., RHODE ISLAND.	1881. (Dec. 20.)	1882. (Jan. 9.)
SAMUEL BLATCHFORD, New York.	President ARTHUR.	SECOND. VERMONT, CONN., NEW YORK.	1882. (Mar. 22.)	1882. (April 3.)
JOSEPH P. BRADLEY, New Jersey.	President GRANT.	THIRD. NEW JERSEY, PENN., DEL.	1870. (Mar. 21.)	1870. (Mar. 23.)
CHIEF JUSTICE. MORRISON R. WAITE, Ohio.	President GRANT.	FOURTH. MD., VA., N. C., W. VA., S. C.	1874. (Jan. 21.)	1874. (Mar. 4.)
ASSOCIATE JJ. WILLIAM B. WOODS, Georgia.	President HAYES.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1880. (Dec. 21.)	1881. (Jan. 5.)
STANLEY MATTHEWS, Ohio.	President GARFIELD.	SIXTH. KY., TENN., OHIO, MICH.	1881. (May 12.)	1881. (May 17.)
JOHN M. HARLAN, Kentucky.	President HAYES.	SEVENTH. IND., ILL., WIS.	1877. (Nov. 29.)	1877. (Dec. 10.)
SAMUEL F. MILLER, Iowa.	President LINCOLN.	EIGHTH. MINN., IOWA, MO. KAN., ARK.., NEB. COL.	1862. (July 16.)	1862. (Dec. 1.)
STEPHEN J. FIELD, California.	President LINCOLN.	NINTH. CALIFORNIA, OREGON, NEVADA.	1863. (Mar. 10.)	1863. (Dec. 7.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

ORDERED, That the following regulations be established under section 765 of the Revis Statutes:

RULE 34.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant t writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the w after it has been issued, the prisoner shall be remanded to the custody from which he v taken by the writ, or shall, for good cause shown, be detained in custody of the court or jud *or be enlarged upon recognizance as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the p oner, he shall be enlarged upon recognizance, with surety, for appearance to answer the ju ment of the appellate court, except where, for special reasons, sureties ought not to be requir

(Promulgated March 29, 1886.)

*This clause added, by order announced May 10, 1886.

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IN

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT OCTOBER TERM, 1884.

JESSE J. MURPHY, *Appt.*,

v.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE AND ARTHUR PRATT.

MARY ANN M. PRATT, *Appt.*,

v.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE AND JOHN LINDSAY

[illegible] E. RANDALL AND ALFRED RANDALL, *Appts.*,

v.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE AND HARRIS PRATT

[illegible] C CLAWSON AND HIRAM B. CLAWSON, *Appts.*,

v.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE AND JAMES [illegible] LITTLE.

JAMES M. BARLOW, *Appt.*,

v.

ALEXANDER RAMSEY, A. S. PADDOCK, G. L. GODFREY, A. B. CARLETON, J. R. PETTIGREW, E. D. HOGE AND HARRIS PRATT.

([illegible] S. C., Reporter's ed., 15-47.)

[illegible] *of the Act of March 22, 1882, as to* [illegible] *of Board of Commissioners* [illegible] *of Utah—duties of Registra-* [illegible] *definition of Bigamist or Polyg-* [illegible] *not* Ex Post Facto.

[illegible] of Commissioners appointed for the [illegible] Utah in pursuance of sec. 9 of the Act of Congress approved March 22, 1882, entitled "An Act to Amend Sec. 5352 of the Revised Statutes of the United States in Reference to Bigamy, and for Other Purposes," (22 Stat. at L., 30) have no power over the registration of voters or the conduct of elections. Their authority is limited to the appointment of registration and election officers, to the canass of the returns made by such officers of election, and to the issue of certificates of election to the persons appearing by such canvass to be elected.

2. The registration and election officers thus appointed are required, until other provisions be made by the Legislative Assembly of the Territory, to perform their duties under the existing laws of the United States, including the Act of March 22, 1882, and of the Territory, so far as not inconsistent therewith.

3. As the Board of Commissioners had no lawful power to prescribe conditions of registration or of voting, any rules of that character promulgated by them to govern the registration and election officers were null and void; and as such rules could not be pleaded by the registration officers as lawful commands in justification of refusals to register persons claiming the right to be registered as voters, their illegality is no ground of liability against the Board of Commissioners.

4. The registration officers were bound to register only such persons as, being qualified under the laws previously in force, and offering to take the oath as to such qualifications prescribed by the Territorial Act of 1878, were also not disqualified by the eighth section of the Act of Congress of March 22, 1882.

5. That section provides, as to males, that no polygamist, bigamist, or any person cohabiting with more than one woman; and, as to females, that no woman cohabiting with any polygamist, bigamist, or man cohabiting with more than one woman, shall be entitled to vote, and, consequently, no such person is entitled to be registered as a voter; and the registration officer must either require such disqualifications to be negatived by a modification of the oath, the form of which is given in the Territorial Act, or otherwise to satisfy himself by due inquiry that such disqualifications do not exist; but which course he is bound to adopt it is not necessary in these cases to decide. [16]

6. The plaintiffs in these actions, seeking to recover damages for being unlawfully deprived of their right to be registered as voters, must allege in their declarations, as matter of fact, that they were legally qualified voters, or, that allegation being omitted, must allege all the facts necessary to show, as matter of law, that they were qualified voters; and to this end it is necessary that they should negative all the disqualifications pronounced by the law.

7. A bigamist or polygamist, in the sense of the eighth section of the Act of March 22, 1882, is a man who, having contracted a bigamous or polygamous marriage, and become the husband, at one time, of two or more wives, maintains that relation and *status* at the time when he offers to be registered as a voter; and this without reference to the question whether he was at any time guilty of the offense of bigamy or polygamy, or whether any prosecution for such offense was barred by the lapse of time; neither is it necessary that he should be guilty of polygamy under the first section of the Act of March 22, 1882. The eighth section of the

* Head notes by *Mr. Justice* MATTHEWS.

Act is not intended, and does not operate, as an additional penalty prescribed for the punishment of the offense of polygamy, but merely defines it as a disqualification of a voter. It is not, therefore, objectionable as an *ex post facto* law, and has no retrospective operation. The disfranchisement operates upon the existing state and condition of the person and not upon a past offense.

8. It was accordingly *held:*

1. That, as to the five defendants below, composing the Board of Commissioners under the ninth section of the Act of March 22, 1882, the demurrers were rightly sustained, and the judgments are affirmed.

2. That, in the cases in which Jesse J. Murphy and James M. Barlow respectively were plaintiffs, they do not allege that they were not polygamists or bigamists at the time they offered to register, although they deny that they were at that time liable to a criminal prosecution for polygamy or bigamy, and deny that they were cohabiting with more than one woman, and not showing themselves to be legally qualified voters, the judgments on the demurrers as to all the defendants are affirmed.

3. That, in the case in which Ellen C. Clawson, with her husband, is plaintiff, as the declaration does not deny the disqualification of one who is at the time cohabiting with a polygamist or bigamist, the judgment as to all the defendants is affirmed.

4. That, in the cases in which Mary Ann M. Pratt and Mildred E. Randall, with her husband, are the respective plaintiffs, as all the disqualifications are denied, and it is alleged that the defendants, the registration officers, willfully and maliciously refused to register them as voters, the judgments as to Hoge and Lindsay in one, and as to Hoge and Harmel Pratt in the other, are reversed, and the causes remanded for further proceedings.

[Nos. 1027, 1028, 1029, 1030, 1031.]

Argued Jan. 28, 29, 1885. Decided Mar. 23, 1885.

APPEALS from the Supreme Court of the Territory of Utah.

The history and facts fully appear in the o

Statement of the case by *Mr. Justice* **Matthews:**

In these actions, five in number, Alexander
[17] Ramsey, A. S. Paddock, G. L. Godfrey, A. B. Carleton and J. R. Pettigrew, defendants in all, were persons who composed the board appointed under section 9 of the Act of Congress approved March 22, 1882, entitled "An Act to Amend Section Fifty-three hundred and fifty-two of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes." 22 Stat. at L. 30. E. D. Hoge, also a defendant in all the cases, was appointed registration officer for the County of Salt Lake in the Territory of Utah, by that board, in pursuance of that section of the Act. The other defendants (one of whom is joined in each action), to wit: Arthur Pratt, John S. Lindsay, Harmel Pratt and James T. Little, were respectively deputy registration officers in designated election precincts in which the plaintiffs in the actions severally claimed the right to be registered as voters. The object of the actions was to recover damages, alleged to have arisen by reason of the defendants wrongfully and maliciously refusing to permit the plaintiffs respectively to be registered as qualified voters in the Territory of Utah, whereby they were deprived of the right to vote at an election held in that Territory on November 7th, 1882, for the election of a delegate to the forty-eighth Congress.

In the case in which Jesse J. Murphy is plaintiff below and appellant here, the complaint is as follows:

"The plaintiff above named complains of the defendants, and on information and belief alleges, that after the 22d day of March, 1882, and prior to the first day of July, 1882, unde the provisions of section 9 of an Act of th Congress of the United States, approved Marc 22, 1882, and entitled 'An Act to Amend Sec tion 5352 of the Revised Statutes of the Unite States, in Reference to Bigamy, and for Othe Purposes,' the President of the United States by and with the consent of the Senate of th United States, duly appointed the defendants Alexander Ramsey, A. S. Paddock, G. L. God frey, A. B. Carleton, and J. R. Pettigrew, t perform the duties mentioned in said section to be performed by a board of five persons, an by virtue of said appointment they became board of five persons with the powers name in said section.

"And, on information and belief, the plaint iff alleges that, after such appointment, an prior to the first day of August, 1882, the las named five defendants, duly qualified as suc appointees, came to Utah and organized as board and entered upon the exercise of th powers and the discharge of the duties grante and imposed by said section 9 of said Act o Congress. That after said organization, sai five defendants were commonly called 'com missioners,' and are hereinafter referred to an called the 'Board of Commissioners.'

"That said Board of Commissioners afte ward ordered, directed and supervised a regi tration of the the voters of the Territory o Utah, for the general election in said Territory to be held on the 7th day of November, 188 for the election of a Delegate for said Territor to the Forty-eighth Congress, and for such othe elections as might be held prior to another reg istration of voters of said Territory; and on o about the 10th day of August, 1882, the sai Board of Commissioners made and publishe rules providing for said registration, for the ap pointment of registration officers and judges o election, and the canvass and return of the votes directed said registration to be made during th week commencing on the second Monday o September, 1882, and, among other rules, wil fully and maliciously made and published th following:

'Rule I.

'There shall be appointed one registratio officer for each county, and one deputy regi tration officer for each precinct thereof.

'Rule II.

'Such registration officer shall, on the sec ond Monday of September next, proceed by him self and his deputies in the manner following The registration officer of each county shall pro cure from the clerk of the county court the las preceding registry list on file in his office, an shall, by himself or his deputies, require of eac person whose name is on said list, or who ap plies to have his name placed on said list, t take and subscribe the following oath or af firmation:

'Territory of Utah, }
County of ——— } *ss:*

'I, ——— ———, being first duly swor (or affirmed), depose and say: That I am ove twenty-one years of age, and have resided in th Territory of Utah for six months, and in th precinct of ——— one month immediatel preceding the date hereof, and (if a male) am native born or naturalized (as the case may be citizen of the United States, and a taxpayer i

the Territory (or if a female) I am native born, or naturalized, or the wife, widow or daughter (as the case may be) of a native born or naturalized citizen of the United States; and I do further solemnly swear (or affirm) that I am not a bigamist nor a polygamist; that I am not a violator of the laws of the United States prohibiting bigamy or polygamy; that I do not live or cohabit with more than one woman in the marriage relation, nor does any relation exist between me and any woman which has been entered into or continued in violation of the said laws of the United States prohibiting bigamy or polygamy, and if a woman) that I am not the wife of a polygamist, nor have I entered into any relation with any man in violation of the laws of the United States concerning polygamy or bigamy.

'Subscribed and sworn to before me, this ——— day of ———, 1881.

———

'*Registration Officer*, ——— *Precinct*.'

And said registration officer, or his deputies, shall add to said lists the names of all qualified voters in such precinct whose names are not on the list, upon their taking and subscribing to the aforesaid oath; and the said registration officer shall strike from said lists the names of said voters who fail or refuse to take said oath, or are died or removed from the precinct, or are disqualified as voters under the Act of Congress approved March 22d, A. D. 1882, entitled 'An Act to Amend Section 5352 of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes;' *Provided*, that the action of any registration officer may be revised and reversed by this commission, upon a proper showing; *And provided, further*, that if the registration officer be unable to procure the registration list from the office of the clerk of the county, or if the same have been lost or destroyed, the said officer and his deputies shall make a new registry list in full of all legal voters of each precinct of the county, under the provisions of these rules.'

That said Board of Commissioners also, by [illegible] provided for the appointment of and appointed three judges of election for each election precinct in said Territory.

And on information and belief, the plaintiff alleges that the defendant E. D. Hoge, was appointed registration officer for the County of Salt Lake, in said Territory of Utah, and the defendant Arthur Pratt, was appointed deputy registration officer for the fourth election precinct of the City of Salt Lake in said county, and that each accepted the appointment, duly qualified, and respectively acted throughout the said registration as such registration and deputy registration officer.

And the plaintiff alleges that on the second Monday of September, 1882, the defendant Arthur Pratt, as deputy registration officer for the fourth precinct in the City and County of Salt Lake aforesaid, acting under the direction of the other defendants, commenced registering the voters of said precinct and making a registration list of such voters, and continued daily thereto until the evening of Saturday of the same week, when the registration was closed.

And the plaintiff alleges that he is a native citizen of the United States of America, and, prior to the 22d day of March, 1882, was more than twenty-one years of age; that he has resided continuously in the Territory of Utah for more than eleven years, and resided continuously in the fourth precinct of Salt Lake City in said Territory for more than two years past; that he has, for more than ten years prior to the November election in 1882, lawfully exercised the rights and enjoyed the privileges of the elective franchise in said Territory, and has, for more than ten years last past, owned taxable property and been a taxpayer in said Territory; and that his name was on the last registration list of the voters of the second precinct, Ogden City, Weber County Utah, made prior to the second Monday of September, 1882.

"And the plaintiff alleges that he has not, since more than three years prior to March 22, 1882, married or entered into any marriage contract or relation with any woman, or in anywise violated the Act of Congress approved July 1, 1862, defining and providing for the punishment of bigamy in the Territories, and has resided continuously and openly in the counties of Weber and Salt Lake, Utah, for ten years last past, and has not violated any of the provisions of the Act of Congress approved March 22, 1882, entitled 'An Act to Amend Section 5352 of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes;' and that he has not, on or since the 22d day of March, 1882, cohabited with more than one woman, and has never been charged with or accused or convicted of bigamy or polygamy, or cohabiting with more than one woman, in any court or before any officer or tribunal. [21]

"And the plaintiff alleges that on the 13th day of September, 1882, he personally went before the defendant Arthur Pratt, then acting as deputy registration officer in and for the fourth precinct in Salt Lake City aforesaid, and signed and presented to said defendant, and offered to verify, and requested the said defendant to take and certify plaintiff's oath to the following affidavit, to wit:

'Territory of Utah, }
County of Salt Lake, } ss:

'I, Jesse J. Murphy, being first duly sworn, depose and say: I am over twenty-one years of age, and have continuously resided in the Territory of Utah for more than six months, to wit: for more than eleven years last past; I have resided in the fourth precinct of Salt Lake City more than six months next preceding the date hereof, and now reside therein; I am a male native born citizen of the United States of America, and a property owner and taxpayer in said Territory of Utah. I have, under the laws of the Territory of Utah, exercised the elective franchise in said Territory for more than ten years last past. I have not, within three years prior to the 22d day of March, 1882, or since, having a wife living, married another, or another woman; and I have continuously and openly resided in the counties of Weber and Salt Lake, in the Territory of Utah, for more than three years prior to the 22d day of March, 1882, and I have not, on or since the 22d day of March, 1882, having a wife living, married another, or simultaneously, or on the same day, married more than one woman, or on or since said last named date married or entered into any marriage contract or relation with any woman, [22]

or cohabited with more than one woman, or in anywise violated the Act of Congress entitled 'An Act to Amend Section 5352 of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes,' approved March 22d, 1882. My name is on the last registry list of voters of the second precinct, Ogden City, Weber County Utah.

Jesse J. Murphy.

'Subscribed and sworn to before me, this thirteenth day of September, A. D. 1882.'

"And at the same time the plaintiff requested the said defendant Arthur Pratt, to put plaintiff's name on the registry list of voters of said precinct, and to register him as a voter therein. That the said defendant Arthur Pratt, acting under the directions of the other defendants, willfully and maliciously refused to receive said affidavit or to swear plaintiff thereto, or to register him as a voter of said precinct, but on the contrary willfully and maliciously struck plaintiff's name off the list of registered voters of said precinct, and left his name off the list of voters of said precinct, made at said registration.

"That afterwards, before the close of said registration, and on the 14th day of September, 1882, the plaintiff presented a duplicate of said last named affidavit to the defendant E. D. Hoge, then acting as county registration officer for said County of Salt Lake, and informed him of the ruling and action as aforesaid of the defendant Arthur Pratt, and requested the defendant E. D. Hoge to correct and reverse said ruling, and to instruct the defendant Arthur Pratt to swear plaintiff to said affidavit and register him as a voter, and the said defendant E. D. Hoge willfully and maliciously refused to correct or change said ruling and action, and approved and affirmed the same.

[23]

"That on the 16th day of September, 1882, the plaintiff presented to said Board of Commissioners a duplicate of said last named affidavit and informed them of the action and ruling of the defendants Arthur Pratt and E. D. Hoge, and requested said board to reverse and correct said rulings and action, and to direct that plaintiff's oath to said affidavit be taken, and that he be registered as a voter of said precinct, and the said Board of Commissioners willfully and maliciously refused to correct or change said rulings, and affirmed and approved the same; and said last named ruling was made before the close of the registration in said precinct, and when there was still time for plaintiff to have registered before the close of the registration.

"And, on information and belief, the plaintiff alleges that the defendants all knew that, unless the plaintiff's name appeared on the registration list then being made of the voters of said precinct, his vote would not be received at the election to be held November 7, 1882, or at any election until after another registration of voters.

"That at an election held throughout the Territory of Utah on the 7th of November, 1882, for the election of a delegate for the Territory of Utah for the Forty-eighth Congress, the plaintiff went before the judges of election in said fourth precinct of the City of Salt Lake, in the County of Salt Lake, at the place where the votes in said precinct were being taken, and offered to vote at said election, and tendered and offered to take the same affidavit; but the said judges refused to receive his vote, on the ground that he was not registered as a voter in said precinct.

"And, on information and belief, the plaintiff alleges that the defendants, and each of them, intending to wrongfully deprive the plaintiff of the elective franchise in said Territory, willfully and maliciously, by the acts and in the manner aforesaid, refused the plaintiff registration as a voter at the said registration commenced on the second Monday of September, 1882, and deprived the plaintiff of the right to vote at the election held in said Territory on the 7th day of November, 1882, and at all elections under said registration, whereby plaintiff has sustained damage to the amount of $1,200.

"Wherefore the plaintiff prays judgment against the defendants for the sum of $1,200 and costs of suit."

In the case in which Mary Ann M. Pratt is plaintiff and appellant the complaint is similar in all respects, except the allegations as to her qualifications as a voter, and the contents of the affidavit which she offered to the deputy registration officer. The averments as to her qualifications are as follows:

"And the plaintiff alleges that she is a native citizen of the United States of America, and prior to the 22d day of March, 1882, was more than twenty-one years of age; that she has resided continuously in the Territory of Utah for more than thirty years, and resided continuously in the third precinct of Salt Lake City, in said Territory, for more than two years last past; that she has, for more than five years prior to the November election in 1882, lawfully exercised the rights and enjoyed the privileges of the elective franchise in said Territory, and has, for more than five years last past, owned taxable property and been a taxpayer in said Territory, and that her name was on the last registration list of the voters of the third precinct, made prior to the second Monday of September, 1882.

"And the plaintiff alleges that she is not, and never has been, a bigamist or a polygamist; that she is the widow of Orson Pratt, Sen., who died prior to the 22d day of March, 1882, after a continuous residence in said Territory of more than thirty years, and that since the death of her said husband she has not cohabited with any man."

The affidavit proposed by her contained the same allegations.

Alfred Randall and Mildred E. Randall, plaintiffs in another action, sue as husband and wife, in the right of the wife, for injury to her by reason of being deprived of her right to vote. The averments in the complaint as to her qualifications are as follows:

"And the plaintiffs allege that the plaintiff Mildred E. Randall, is a native citizen of the United States of America, and prior to the 22d day of March, 1882, was more than twenty-one years of age; that she has resided continuously in the Territory of Utah for more than twenty years, and resided continuously in the second precinct of Salt Lake City, in said Territory, for more than two years last past; that she has, for more than ten years prior to the November election in 1882 lawfully exercised the rights

[illegible] the privileges of the elective fran-[illegible] said Territory, and has, for more than [illegible] years last past, owned taxable property and [illegible] taxpayer in said Territory; and that her [illegible] was on the last registration list of the vo-[illegible] of the second precinct, made prior to the [illegible] Monday of September, 1882.

And the plaintiffs allege that the plaintiff [illegible] E. Randall, for more than three years [illegible] has been and is the wife of the plaint-[illegible] Randall, who is, and prior to March [illegible] was, a native born citizen of the Unit-[illegible] States of America; that she has not on or [illegible] March 22, 1882, cohabited with any biga-[illegible] polygamist, or with any man cohabiting [illegible] more than one woman; that she is not a [illegible] or polygamist, and never has been a [illegible] or polygamist, and has not in any way [illegible] the Act of Congress entitled 'An Act [illegible] section 5352 of the Revised Statutes [illegible] United States, in Reference to Bigamy, [illegible] Other Purposes,' approved March 22, [illegible]

The affidavit presented by her to the deputy [illegible] officer and rejected by him con-[illegible] the same allegations. In all other re-[illegible] the complaint is similar to all the others.

[illegible] B. Clawson and Ellen C. Clawson also [illegible] husband and wife, in the wife's right, [illegible] averments in the complaint as to her [illegible] are as follows:

And the plaintiffs allege that the plaintiff [illegible] Clawson is a native citizen of the [illegible] States of America, and prior to the 22d [illegible] of March, 1882, was more than twenty-one [illegible] of age; that she has resided continuously [illegible] the Territory of Utah for more than thirty-[illegible] years, and resided continuously in the fifth [illegible] of Salt Lake City, in said Territory, [illegible] than two years last past; that she has, [illegible] more than ten years prior to the November [illegible] 1882, lawfully exercised the rights [illegible] enjoyed the privileges of the elective fran-[illegible] said Territory, and has, for more than [illegible] years last past, owned taxable property and [illegible] taxpayer in said Territory, and that her [illegible] was on the last registration list of the vo-[illegible] of said fifth precinct, made prior to the sec-[illegible] Monday of September, 1882.

And the plaintiffs allege that the plaintiff, [illegible] Clawson, is not and never has been a [illegible] or polygamist, and is not cohabiting [illegible] never has cohabited with any man except [illegible] husband, the co-plaintiff herein, to whom [illegible] was lawfully married more than fifteen [illegible] ago, and of whom she is the first and law-[illegible] wife.

That the plaintiff Hiram B. Clawson has [illegible] married or entered into any marriage con-[illegible] relations with any woman within the [illegible] years and has continuously and openly [illegible] in the City of Salt Lake, in said Terri-[illegible] of Utah, for more than twenty years last [illegible]

[illegible] presented to the deputy registration offi-[illegible] affidavit setting forth the same facts.

[illegible] case in which James M. Barlow is [illegible] and appellant the averments in the com-[illegible] are altogether like those in the case of [illegible] which has been set out in full.

[illegible] case a demurrer was filed to the com-[illegible] by all the defendants on the ground that [illegible] facts sufficient to constitute a cause of action. These demurrers were sustained, and the plaintiffs electing to abide by their pleadings, judgment was rendered for the defendants, which are now brought by appeals for revision to this court.

The Act of March 22, 1882, is as follows:

"An Act to Amend Section Fifty-three hundred and fifty-two of the Revised Statutes of the United States in Reference to Bigamy, and for Other Purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section fifty-three hundred and fifty-two of the Revised Statutes of the United States be and the same is hereby amended so as to read as follows, namely:

"Every person who has a husband or wife [27] living who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract.

"Sec. 2. That the foregoing provisions shall not affect the prosecution or punishment of any offense already committed against the section amended by the first section of this Act.

"Sec. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.

"Sec. 4. That counts for any or all of the offenses named in sections one and three of this Act may be joined in the same information or indictment.

"Sec. 5. That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any Statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman, first, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable by either of the foregoing sections, or by section fifty-three hundred and fifty-two of the Revised Stat- [28] utes of the United States, or the Act of July first, eighteen hundred and sixty-two, entitled 'An Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States

[illegible] citizen of the United States. (Act [illegible] a territorial government for Utah, [illegible] September 9, 1850, 9 Stats. at L., 453; [illegible] Laws of Utah, 1876, p. 88).

At the same time there was also in force chap. [illegible] of the laws of Utah, 1878, providing for the [illegible] of voters and to further regulate [illegible] manner of conducting elections in that Territory.

That Act contains the following provisions:

"That the assessors in their respective counties are hereby constituted the registration officers, and they are required to appoint a resident agency in each precinct to assist in carrying out the provisions of this Act, and before the first Monday in June, 1878, in person or by deputy, they shall visit every dwelling in each precinct, and make careful inquiry as to any or all persons entitled to vote, and each assessor or deputy, in all cases, shall ascertain upon what ground each person claims to be a voter, and he shall require each person entitled to vote and desiring to be registered to take and subscribe in evidence the following oath or affirmation:

"Territory of Utah, }
"County ———, } ss:

"I, ———, being first duly sworn, depose and say that I am over twenty-one years of age and have resided in the Territory of Utah for six months, and in the precinct of ——— one month next preceding the date hereof, and (if a male) am a 'native born' or 'naturalized,' as the case may be) citizen of the United States, and a taxpayer in this Territory; (or, if a female, I am 'native born' or 'naturalized,' or the 'wife,' 'widow,' or 'daughter' (as the case may be) of a native born or naturalized citizen of the United States.

"Subscribed and sworn to before me this — day of ———, A. D. 18—.

'———, *Assessor.*'

"Upon the receipt of such affidavit the assessor as aforesaid shall place the name of such voter upon the register list of the voters of the county.

"Sec. 2. It shall also be the duty of the assessor of each county, in person or by deputy, at the time of making the annual assessment for taxes in each year, beginning in 1879, to take the transcript of the next preceding registration list and proceed to the revision of the same, and for this purpose he shall visit every dwelling house in each precinct, and make careful inquiry if any person whose name is on his list has died, or removed from the precinct, or is otherwise disqualified [illegible] voter of such precinct [illegible] therefrom; [illegible] besides therein [illegible] so, to add [illegible] provided in [illegible]

"Sec. 3. It shall [illegible] assessor [illegible] week [illegible] each [illegible] of the [illegible] provisions of [illegible]

all the registered voters of such precinct, and he shall, on or before the first day of July in each year, deliver all of said lists and affidavits to the clerk of the county court.

"Sec. 5. The clerk of the county court shall deliver to the assessor the registry lists whenever necessary for the revision thereof, or adding names thereto, and the assessor in person or by deputy shall, during the week commencing the second Monday in September in the year 1878 and every second year thereafter, enter names of voters on the registry list in the manner provided in section three of this Act, and upon the list being completed, proceed as required by section four of this Act; *Provided*, That in such case he shall deliver the list and affidavits on or before the 10th day of October in such year.

"Sec. 6. Voters removing from one election precinct to another in the same county may appear before the assessor at any time previous to the delivery of the registry list to the clerk of the county court, and have their names erased therefrom, and they may thereupon have their names registered in the precinct to which they may remove. [33]

"Sec. 7. The clerk of the county court shall file and carefully preserve all said affidavits and registry lists, and shall make a copy of each precinct registry list, and cause the same to be posted up at least fifteen days before any election, at or near the place of election, and shall make and transmit another copy to the judges of election.

"Sec. 8. The clerk of the county court shall cause to be printed or written a notice which shall designate the offices to be filled, and stating that the election will commence at ——, [designating the place for holding the polls], one hour after sunrise, and continue until sunset on the — day of ———, 18— [naming the day of election]. Dated at ———, A. D. 18—.

———, ———,
Clerk of the County Court.

"A copy of which shall be posted up at least fifteen days before the election, in three public places in said precinct best calculated to give notice to all the voters. It shall also be the duty of the clerk of the county court to give notice on the lists so posted that the senior justices of the peace for said precinct will hear objections to the right to vote of any person registered until sunset of the fifth day preceding the day of election. Said objections shall be made by a qualified voter, in writing, and delivered to the said justice, who shall issue a written notice to the person objected to, stating the place, day and hour when the objection will be heard. The person making the objection shall serve, or cause to be served, said notice upon the person objected to, and shall also make returns of such service to the justice before whom the objection shall be heard. Upon the hearing of the case, if said justice shall find that the person objected to is not a qualified voter, he shall, within three days prior to the election, transmit a certified list of the names of all such unqualified persons to the judges of election, and said judges shall strike such names from the registry list before the opening of the polls.

"Sec. 9. The county court shall, at its first [illegible] in June of each year, appoint three capable and discreet persons in each precinct in the

[34] county, one at least of whom shall be of the political party that was in the minority at the last previous election, if any such party there be in such precinct, to act as judges of general and special elections; and they shall designate one of the persons appointed to preside, and the other two to act as clerks of said elections. And the clerk of said court shall make out certificates of said appointments, and transmit the same by mail or other safe conveyance to the persons so appointed, who, previous to entering upon said office, shall take and subscribe an oath to the effect that they will well and faithfully perform all the duties thereof to the best of their ability, and that they will studiously endeavor to prevent any fraud, deceit or abuse at any election over which they may preside. If, in any precinct, any of such judges decline to serve or fail to appear, the voters of said precinct, first assembled on the day of election, to the number of six, at or immediately after the time designated for opening the polls, may elect a judge or judges to fill the vacancy, and the persons so elected shall qualify as hereinbefore provided."

Sections 10 and 11 prescribe how ballot-boxes, keys, etc., shall be procured, and provide for envelopes and ballots, and for keeping the boxes during the voting and until the canvass; and section 12 provides how the judges shall keep the lists, etc.

"Sec. 13. Every voter shall designate on a single ballot, written or printed, the name of the person or persons voted for, with a pertinent designation of the office to be filled, and when any question is to be decided in the affirmative or negative, he shall state the proposition at the bottom of the ballot, and write thereunder yes or no, as he may desire to vote thereon, which ballot shall be neatly folded and placed in one of the envelopes hereinbefore provided for, and delivered to the presiding judge of election, who shall, in the presence of the voter, on the name of the proposed voter being found on the registry list, and on all challenges to such vote being decided in favor of such voter, deposit it in the ballot box, without any mark whatever being placed on such envelope; otherwise the ballot shall be rejected."

The remainder of the Act relates to the can-
[35] vass, returns and certificates of election.

Messrs. **George G. Vest, Wayne MacVeagh,** *Franklin S. Richards* and *Charles W. Bennett,* for appellants.

Messrs. **S. F. Phillips,** *Solicitor-Gen.,* and **Benjamin H. Brewster,** *Atty-Gen.,* for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

These cases, although actions at law, were not tried by jury; and therefore are rightly brought here by appeal, according to the provision of the Act of Congress of April 7, 1874, 18 Stat. at L., pt. 3, p. 27; Supplement Rev. Stat., 12; *Stringfellow* v. *Cain,* 99 U. S., 610 [Bk. 25, L. ed., 421]; *Hecht* v. *Boughton,* 105 U. S., 235 [Bk. 26, L. ed., 1018]; *Woolf* v. *Hamilton,* 108 U. S., 15 [Bk. 27, L. ed., 635].

The wrong complained of in each case by the respective plaintiffs is, "That the defendants, and each of them, intending to wrongfully deprive the plaintiff of the elective franchise in said Territory, willfully and maliciously, by the acts and in the manner aforesaid, refused the plaintiff registration as a voter, at the said registration commenced on the second Monday of September, 1882, and deprived the plaintiff of the right to vote at the election held in said Territory on the 7th day of November, 1882, and at all elections under said registration."

The acts, which it is alleged were done by the five defendants, as a Board of Commissioners or Canvassers, under the law of March 22, 1882, and which contributed to the wrong and constituted part of it, are, that they prescribed as a condition of registration an unauthorized oath, set out in the complaint, in a rule promulgated by them for the government of the registration officers; and that the deputy registration officer having, in obedience to such rule, "acting under the directions of the other defendants," willfully and maliciously refused to receive the affidavit tendered by the plaintiff in lieu of that prescribed by the rule of the board, and to register the plaintiff; and that the county registration officer, on appeal, having refused to order otherwise, the Board of Commissioners also refused to reverse and correct these rulings and to direct the registration of the plaintiffs respectively, but affirmed and approved the same.

But an examination of the ninth section of the Act of March 22, 1882 [22 Stat. at L., 30], providing for the appointment and prescribing the duties and powers of that board, shows that they have no functions whatever in respect to the registration of voters, except the appointment of officers in place of those previously authorized, whose offices are by that section of the law declared to be vacant; and the persons appointed to succeed them are not subject to the direction and control of the board, but are required, until other provision be made by the Legislative Assembly of the Territory, to perform all the duties relating to the registration of voters, "under the existing laws of the United States and of said Territory." The board are not authorized to prescribe rules for governing them in the performance of these duties, much less to prescribe any qualifications for voters as a condition of registration. The statutory powers of the board are limited to the appointment of the registration and election officers, authorized to act in the first instance under the law until provision is made by the Territorial Legislature for the appointment of their successors, and to the canvass of the returns and the issue of certificates of election "to those persons who, being eligible for such election, shall appear to have been lawfully elected." The proviso in the section does indeed declare "that said board of five persons shall not exclude any person otherwise eligible to vote from the polls on account of any opinion such person may entertain on the subject of bigamy or polygamy;" but, in the absence of any general and express power over the subject of declaring the qualifications of voters, it is not a just inference from the words of this proviso that it was intended to admit by implication the existence of any authority in the board to exclude from registration or the right to vote, any person whatever, or in any manner to define and declare what the qualifications of a voter shall be. The prohibition against excluding any pe

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negative the fact. It cannot therefore be inferred that she was a lawfully qualified voter.

The cases of Murphy and Barlow are alike in substance. In Murphy's case, the allegations are, "that he has not since more than three years prior to March 22, 1882, married or entered into any marriage contract or relation with any woman, or in anywise violated the Act of Congress approved July 1. 1862 [12 Stat. at L., [40] 501], defining and providing for the punishment of bigamy in the Territories, * * * and has not violated any of the provisions of the Act of Congress approved March 22, 1882, etc., * * * and that he has not, on or since the 22d day of March, 1882, cohabited with more than one woman, and has never been charged with or accused or convicted of bigamy or polygamy, or cohabiting with more than one woman, in any court or before any officer or tribunal." In Barlow's case, the statement on one point is stronger. It is, "that he has not, on or since the first day of July, 1862, married or entered into any marriage contract or relation with any woman, or in anywise violated the Act of Congress approved July 1, 1862, defining and providing for the punishment of bigamy in the Territories." That is to say, that, although he may have married a second wife, it was before any law existed in the Territory prohibiting it, and, therefore, it could not have been a criminal offense when committed.

But in both cases the complaints omit the allegation that, at the time the plaintiffs respectively claimed to be registered as voters, they were not each, either a bigamist or a polygamist.

It is admitted that the use of these very terms in the complaint is not necessary, if the disqualifications lawfully implied by them are otherwise substantially denied. That such is their case is maintained by the appellants.

The words "bigamist" and "polygamist" evidently are not used in this statute in the sense of describing those who entertain the opinion that bigamy and polygamy ought to be tolerated as a practice not inconsistent with the good order of society, the welfare of the race, and a true code of morality, if such there be; because, in the proviso in the ninth section of the Act, it is expressly declared that no person shall be excluded from the polls, or be denied his vote, on account of any opinion on the subject.

It is argued that they cannot be understood as meaning those who, prior to the passage of the Act of March 22, 1882, had contracted a bigamous or polygamous marriage, either in violation of an existing law, such as that of July 1, 1862, or before the enactment of any [41] law forbidding it; for to do so would give to the statute a retrospective effect, and by thus depriving citizens of civil rights, merely on account of past offenses, or on account of acts which when committed were not offenses, would make it an *ex post facto* law, and therefore void. And the conclusion is declared to be necessary, that the words polygamist and bigamist, as used in the 8th section of the Act, can mean only such persons as, having violated the first section of the Act, are guilty of polygamy; that is, "Every person who has a husband or wife living, who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously or on the same day marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction."

But there is another meaning which may be given to these words, which, we think, is the one intended by Congress. In our opinion, any man is a polygamist or bigamist, in the sense of this section of the Act, who, having previously married one wife, still living, and having another at the time when he presents himself to claim registration as a voter, still maintains that relation to a plurality of wives, although from the date of the passage of the Act of March 22, 1882, until the day he offers to register and to vote, he may not in fact have cohabited with more than one woman. Without regard to the question whether at the time he entered into such a relation it was a prohibited and punishable offense, or whether by reason of lapse of time since its commission a prosecution for it may not be barred, if he still maintains the relation he is a bigamist or polygamist, because that is the *status* which the fixed habit and practice of his living has established. He has a plurality of wives, more than one woman whom he recognizes as a wife, of whose children he is the acknowledged father, and whom with their children he maintains as a family, of which he is the head. And this *status* as to several wives may well continue to exist, as a practical relation, although for a period he may not in fact cohabit with more than one; for that is quite consistent with the constant recognition of the same relation to many, accompanied with possible intention to renew cohabitation with one or more of the others when it may be convenient.

It is not therefore because the person has committed the offense of bigamy or polygamy at some previous time, in violation of some existing statute, and as an additional punishment for its commission, that he is disfranchised by the Act of Congress of March 22, 1882; nor because he is guilty of the offense as defined and punished by the terms of that Act; but because having at some time entered into a bigamous or polygamous relation by a marriage with a second or third wife while the first was living, he still maintains it and has not dissolved it, and though for the time being he restricts actual cohabitation to but one. He might in fact abstain from actual cohabitation with all, and be still as much as ever a bigamist or a polygamist. He can only cease to be such when he has finally and fully dissolved in some effective manner, which we are not called on here to point out, the very relation of husband to several wives, which constitutes the forbidden *status* he has previously assumed. Cohabitation is but one of many incidents to the marriage relation. It is not essential to it. One man, where such a system has been tolerated and practiced may have several establishments, each of which may be the home of a separate family, none of which he himself may dwell in or even visit. The statute makes an express distinction between bigamists and polygamists on the one hand, and those who cohabit with more than one woman on the other; whereas, if cohabitation with several wives was essential to the

[illegible] of those who are bigamists or polygamists, these words in the statute would be superfluous and unnecessary. It follows, therefore, that any person having several wives is a bigamist or polygamist in the sense of the Act of March 22, 1882, although since the date of its passage he may not have cohabited with more than one of them.

Upon this construction the statute is not open to the objection that it is an *ex post facto* law. It does not seek in this section and by the penalty of disfranchisement to operate as a punishment upon any offense at all. The crime of bigamy or polygamy consists in entering into a bigamous or polygamous marriage, and is complete when the relation begins. That of actual cohabitation with more than one woman is defined and the punishment prescribed in the third section. The disfranchisement operates upon the existing state and condition of the person, and not upon a past offense. It is, therefore, not retrospective. He alone is deprived of his vote who, when he offers to register, is then in the state and condition of a bigamist or a polygamist, or is then actually cohabiting with more than one woman. Disfranchisement is not prescribed as a penalty for being guilty of the crime and offense of bigamy or polygamy; for, as has been said, that offense consists in the fact of unlawful marriage, and a prosecution against the offender is barred by the lapse of three years, under section 1044 of the Revised Statutes. Continuing to live in that state afterwards is not an offense, although cohabitation with more than one woman is. But as one may be living in a bigamous or polygamous state without cohabitation with more than one woman, he is in that state a bigamist or a polygamist, and yet guilty of no criminal offense. So that, in respect to these disqualifications of a voter under the act of March 22, 1882, the objection is not well taken that it represents the inquiry into the fact by the officers of registration as an unlawful mode of prosecution for crime. In respect to the fact of actual cohabitation with more than one woman the objection is equally groundless, for the inquiry into the fact, so far as the registration officers are authorized to make it, or the judges of election, on challenge of the right of the voter if registered, are required to determine it, is not, in view of its character as a crime, for the purpose of punishment, but for the sole purpose of determining as in case of any other condition attached to the right of suffrage, the qualification of one who alleges a right to vote. It is precisely similar to an inquiry into the fact of nativity, of age, or of other status made necessary by law as a condition of the elective franchise. It would be the imperative duty of the sovereign power to determine that no one but a married person shall be entitled to vote, and in that event the election officers would be authorized to determine for themselves, in case of question in any instance, upon the fact of marriage as a continuing status. There is no greater objection, in point of law, to a similar inquiry for the like purpose into the fact of a subsisting and continuing bigamous or polygamous relation, when it is made, as by the statute under consideration, a disqualification to vote.

No reason for the appellants in argument seems to question the constitutional power of Congress to pass the Act of March 22, 1882, so far as it abridges the rights of electors in the Territory under previous laws. But that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment. The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. But in ordaining government for the Territories and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law from time to time the form of the local government in a particular Territory and the qualifications of those who shall administer it. It rests with Congress to say whether, in a given case, any of the people, resident in the Territory, shall participate in the election of its officers or the making of its laws; and it may therefore take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the Government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; [45] their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States. This doctrine was fully and forcibly declared by the Chief Justice, delivering the opinion of the court in *Nat. Bk.* v. *Yankton Co.*, 101 U. S., 129 [Bk. 25, L. ed., 1046]. See also, *Am. Ins. Co.* v. *Canter*, 1 Pet., 511; *U. S.* v. *Gratiot*, 14 Pet., 526; *Cross* v. *Harrison*, 16 How., 164; *Dred Scott* v. *Sandford*, 19 How., 393 [60 U. S., bk. 15, L. ed., 691]. If we concede that this discretion in Congress is limited by the obvious purposes for which it was conferred, and that those purposes are satisfied by measures which prepare the people of the Territories to become States in the Union, still the conclusion cannot be avoided, that the Act of Congress here in question is clearly within that justification. For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization, the best guaranty of

[illegible] monthly which is the source of all [illegible] political in- [illegible] means are more [illegible] than those pa- [illegible] which endeavors to with- [illegible] influence from those who are [illegible] to be competent.

[illegible] is to be considered whether, in the [illegible] Mary Ann M. Pratt and [illegible] husband are respect- [illegible] plaintiffs and in which the plaintiffs [illegible] the defendants who [illegible] charged [illegible] justice.

[illegible] they were bound by [illegible] under the 8th sec- [illegible] of the act of March 3, 1873, as perform [illegible] of the [illegible] The law of the [illegible] 'An Act Provid- [illegible] of Voters and to Facil- [illegible] of Registering Electors [illegible] approved February 28, 1872. [illegible] the registration officers and [illegible] inquiry as to [illegible] and [illegible] [illegible] the [illegible] [illegible] [illegible]

[illegible] 7, 1875, was also granted to the appellee for an "improvement in street cars," consisting in placing a mirror in the hood of an ordinary street car to enable the driver to see what was occurring in and behind the car.

The bill charged an infringement of each of these patents by the appellee in all of its cars.

The answer of the appellee denied infringement of any of the patents sued on; averred that all had been anticipated by specified American and foreign patents and by certain persons in this country, naming them; that none of the devices were patentable; and that the devices described in the second and third patents were in public use and on sale for more than two years prior to the application for letters patent therefor respectively.

Upon final hearing the Circuit Court dismissed the bill, and the plaintiff appealed.

Mr. **William Allen Butler, Benjamin F. Thurston,** *George Gifford* and *Philip J. O'Reilly*, for appellant.

Mr. **Francis Rawle** and *Walter George Smith*, for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

We shall consider each of the patents in the order above stated.

The invention described in the O'Haire patent consists of a combination and arrangement of devices by which the rear door of a street car can be opened and closed by the driver from the front platform where he stands, in order to let passengers into or out of the car.

The drawing by which the specification is illustrated shows the frame of an ordinary street car provided with a door which is supported upon and moves back and forth upon suitable rollers and ways, which, it is said, may be arranged in any desired manner. Passing through the bar from which the hand straps are suspended, and which is made hollow, is a rod or shaft which has a lever or crank upon its front end within easy reach of the driver. Upon its rear end is a similar lever or crank carrying a roller, which works up and down in a rectangular guiding-frame secured to the rear edge of the door and by which the door is opened and closed. The driver, by a slight push upon the front lever, can open the door, or by a pull toward him, can close it without moving off his seat.

The claim is as follows: "The rod 5, crank or lever 3, and guiding-frame 6, secured to the door and combined with an operating lever for the driver, substantially as shown and described."

The infringement charged against the defendant was the use of cars containing an "improvement in operating car doors," described in the patent of George M. Brill, dated December 1st, 1874. The device covered by this patent was essentially the same as that described in the O'Haire patent, except that the rock shaft ran along the bottom of the car instead of through the bar from which the hand straps were suspended.

There is no evidence to show that O'Haire's invention antedates the application for his patent, which was made on June 27, 1873. Considering the state of the art at that time, we are of opinion that the device [illegible] tent does not embody anything new which the defendant infringes. The opening and closing of the rear door of a street car from the front platform is not new. The specification of the O'Haire patent says: "I am aware that it is not new to operate the door from the front platform of the car, as this has heretofore been accomplished by means of an endless cord which passes through the rods to which the holding-straps are secured, and I therefore disclaim such invention." [152]

At the date of O'Haire's application it was well known, as is shown by the evidence, that doors and window shutters guided by slides, both in vehicles and apartments, were opened and closed by mechanism used by persons placed in such situations that they could neither reach nor open and close the doors or shutters directly. The device of O'Haire must, therefore, to be the subject of a valid patent, embody some new means for accomplishing this end.

The elements of which his contrivance was made up were the rod or rock shaft, reaching from the front to the rear of the car, the lever by which a rocking motion was given to the shaft, and the means used for communicating motion from the shaft to the door.

The testimony is conclusive to show that there is nothing new in the rock shaft or in the lever by which it is moved. Long before the date of O'Haire's application, the evidence is clear that rock shafts operated by a lever or crank were used to open and close the doors of furnaces, and the window and door openings of sugar refineries, by persons standing at a distance from the windows and doors to be opened and closed. A rock shaft moved by a lever at the end of a railway carriage for the purpose of opening and closing the sliding doors of the carriage was described in the English letters patent set out in the record of John Johnson, dated March 8, 1857. The use of a rock shaft for a similar purpose, namely: the opening and closing of sliding window blinds, is also shown in the patent of Daniel Kidder, dated June 8, 1869. Rock-shafts, for the same purpose, are shown in the patent of Darwin D. Douglass, dated June 11, 1861, and the patent of W. H. Brown, dated February 23, 1864. The shaft in the Brown patent was moved by a lever, and in the Kidder and Douglass patents by a knob attached to its end, which is the well known equivalent of a lever. It appears, therefore, that the use of a rock shaft actuated by a lever for communicating motion was an old device which had been in use long before the date of the O'Haire patent. [153]

It remains to consider the mode adopted by O'Haire for communicating motion from his rock shaft to the door of the car. We find it to be one of a number of old and well known devices for changing rotary into horizontal or rectilinear motion. The testimony shows that the devices long used for this purpose are a pinion or segment of a pinion whose teeth interlock with the teeth of a straight bar or rack or a rigid lever attached at one end to the rock-shaft, and having on the other a pin or roller working in a slot formed on the door or shutter to be moved. Sometimes the slot is in the lever, and the pin or roller is on the door or shutter. These devices perform the same functions in substantially the same manner, and

have long been recognized as mechanical equivalents.

The device covered by the patent of O'Haire, therefore, consists of a rock shaft with a lever attached for the purpose of giving the shaft a rocking motion, combined with a well known and long used device by which the rocking motion was changed into a rectilinear motion and communicated to the door of a car. No one of these devices can be claimed as new.

If there is any ingenuity displayed in the contrivance described in the O'Haire patent, it must, therefore, be in the combination of these devices to attain a result. The claim of the patent is for such a combination. But in our opinion this combination was anticipated by the patents of both Douglass and Brown before mentioned.

The inventions described in these patents are for the opening and closing of outside shutters from the inside of a house without opening the windows, and they consist of a rock shaft passing through the wall of the house to which a rocking motion is imparted from the inside of the house in the one case by a knob, and in the other by a lever or handle on the inner end of the shaft. By means of a pinion on the outer end of the rock shaft applied to a toothed rack [154] on the shutter, a rectilinear sliding motion is imparted to the shutter, which is thus opened and closed. The rock shafts in these patents are identical with the rod or shaft in the O'Haire patent; the lever in the Brown patent, by which the rock shaft is moved, is the same as the lever in the O'Haire patent, and the knob in the Douglass shaft is its well known equivalent; and the contrivance by pinion and rack for transmitting motion from the rock shaft to the shutter is the well known and long used equivalent of the devices used for a similar purpose in the O'Haire contrivance. We find, therefore, that none of the separate elements of the devices described in the O'Haire patent are new, nor is the combination new. So far, therefore, we find no patentable invention in the contrivance described in the patent under consideration. It was said by this court in *Smith* v. *Nichols*, 21 Wall., 112 [88 U. S., bk. 22, L. ed., 556], that "a mere carrying forward a new or more extended application of the original thought, a change only in form, proportions or degree, the substitution of equivalents doing substantially the same thing in the same way by substantially the same means, with better results, is not such invention as will sustain a patent." So in *Penn. R. R. Co.* v. *Truck Co.*, 110 U. S., 490 [Bk. 28, L. ed., 222], *Mr. Justice* Gray, delivering the opinion of the court, said: "The application of an old process or machine to a similar or analogous subject, with no change in the manner of application and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated." These authorities are pertinent. See also, *Vinton* v. *Hamilton*, 104 U. S. 485 [Bk. 26. L. ed., 807]; *Blake* v *San Francisco*, 113 U. S., 679 [Bk. 28, L. ed , 1070].

If, therefore, there is any patentable novelty in the O'Haire contrivance, it is in the placing of the rock shaft inside the bar to which the hand straps are attached. But the plaintiff's counsel, in order to bring the device used by the defendant within the monopoly of the O'Haire patent, insist that this is no part of the patented contrivance, and the testimony shows that the defendant does not use it.

We are of opinion, therefore, that, construing the patent of O'Haire, in view of the state of the art at the date of its issue, as we are compelled to do, in order to leave any ground whatever on which it can be sustained, the defendant does not infringe.

We have next to consider the patent granted to the plaintiff, dated March 30, 1875, "for an improvement in signaling devices for street cars."

The specification thus states the object of the contrivance described in the patent:

"The prevalence of street cars managed by the driver, without the aid of a conductor, makes it necessary that every possible facility should be provided for him as well as the passengers.

"The ordinary street car has a signal bell located at each end, with a bell strap attached thereto, which runs centrally alone the ridge or highest part of the ceiling. This strap, as thus located, is inaccessible to many passengers.

"My improvement is intended to remedy this trouble, and consists in a new combination and arrangement with a street car of bells or gongs and of the cords or straps which operate them, whereby passengers can, without rising from their seats, signal to the driver. This is of primary importance to invalids, ladies and children, and that more especially when the car is crowded."

The device covered by the patent consists of the placing of two bells, attached to the rafters of the bonnet or hood of the driver's platform, one at each corner of the front end of the car. To the hammer of each bell is attached one end of a bell cord, the other end of which is attached to the inner side of the rear wall of the car, the cords being led along the lower margin of the ceiling, one on each side the car, from which bell pulls or hand straps are suspended at intervals within easy reach of the seated passengers so that they, without rising from their seats can ring the bell.

The claim was as follows: "In a street car two bell cords, each provided with a system of pull straps, and arranged in such manner as to pass along the lower margin of the roof on the opposite sides of the car and connect directly with a signal bell or gong attached to the outside of the driver's end of the car, substantially as and for the purposes set forth."

We are of opinion that there is no patentable invention described in this patent. Bell straps or cords running from one end of an omnibus or street car to the other, under the middle of the ceiling, were well known and in common use years before the application of Stephenson for his patent. The fact that they were so placed and used is mentioned in the specification. The evidence also establishes the fact, that before the year 1870 it was a common practice to attach pendant bell pulls or hand straps to the central cord so as to bring it within easier reach of the passengers. The evidence shows that many of the cars in which such hand straps or bell pulls were used were built and sold in New York. The use of such pendant hand straps long before the application of Stephenson for the patent now under consideration is conclusively proven

It is also shown by the evidence that as early as the year 1861 a bell cord or strap running along the sides of the cars above the heads of the passengers was publicly used on street cars in Boston and Philadelphia, and the same arrangement of the cord or strap was shown in the patent of Charles Carr, issued July 5, 1870. When, therefore, the patent of Stephenson for his improvement in signaling devices for street cars was applied for in March, 1875, the only advance in the art which his specification showed was the applying to the cords running along the sides of the cars of the bell pulls or hand straps which had before then been attached to the cord running over the middle of the aisle. This, in our judgment, did not require the least degree of ingenuity, and cannot be called invention. [illegible] v. *Greenwood*, 11 How., 248; *Stimpson* v. *Woodman*, 10 Wall., 117 [77 U. S., bk. [illegible] L. ed., [illegible]]; *Atlantic Works* v. *Brady*, 107 U. S., 192 [Bk. 27, L. ed., 438]; *Slawson* v. *R. R.* [illegible] U. S., 649 [Bk. 27, L. ed., 576]; *King* v. [illegible] 100 U. S., 99 [Bk. 27, L. ed., 870]; *Phillips* v. *Detroit*, 111 U. S., 604 [Bk. 28, L. ed., 532]. The patent, therefore, by which the plaintiff seeks to embrace in his monopoly such an arrangement of the signal cords and hand straps in a street car is void.

The third patent, which the plaintiff avers is infringed by the defendant, is for the improvement in street cars granted to John Stephenson the appellant, September 7, 1875, on an application dated August 7, 1874. It is thus described in the specification:

"In running street cars it has been found to be a serious source of trouble to have the driver continually turning around to ascertain when it is necessary to stop to permit passengers to enter or leave the car, as such constantly takes away his attention from his horses, and that frequently when it is most required.

"To obviate this trouble is the object of my present improvement. My invention for this purpose consists in combining a mirror with the front hood of the car, it being so arranged in connection therewith and with an opening in the front end of the car as to give to the driver a clear view of the inside of the car and through the entrance door of the latter, and that without the necessity of his having to turn around for such purposes, thereby enabling him, without withdrawing his attention from the horses, to see when it is necessary to stop, either to receive a passenger or to allow one to get out.

"This mirror is set at a small angle to a horizontal plane, so that its upper edge will protect [illegible] beyond its lower edge, it being [illegible] at such angle as will enable it, through the opening F in the front end of the car, to give the best view of the interior of the car, and through the glass windows of the entrance door A."

The claim was as follows: "The combination of a hoodlet E provided with a mirror C, with an opening, or an opening covered by a transparent medium F, in the front end of a street car, substantially as and for the purposes set forth."

A combination is patentable only when the several elements of which it is composed produce by their joint action a new and useful result, or an old result in a cheaper or otherwise more advantageous way.

The elements of which the combinati[illegible] scribed in this patent is composed are a[illegible] and well known. They were a mirror, the [illegible] of a street car over the driver's platform, [illegible] glass panel in the front end of the car ove[illegible] door. We are of opinion that the alleged [illegible] bination of these three elements, as describ[illegible] this patent, is not patentable. There is, in [illegible] no combination, but a mere aggregation o[illegible] arate devices, each of which performs the [illegible] tion for which, when used separately, it [illegible] adapted, and does not contribute to any ne[illegible] sult the product of their joint use. The [illegible] attained is merely the reflection of an obj[illegible] a mirror. The hood and the glass panel i[illegible] end of the car do not change in any degre[illegible] function of the mirror. It is used as a m[illegible] only. The function of the hood is not cha[illegible] by the mirror or glass panel, or both. I[illegible] hood only on which, as in the wall of a [illegible] the mirror is hung. The use of a glass in[illegible] of a wooden panel in the front end of th[illegible] simply removes an opaque obstacle betwee[illegible] mirror and the object to be reflected by it. [illegible] ther one of the three elements of the al[illegible] combination performs any new office or im[illegible] any new power to the others, and, comb[illegible] they do not produce any new result or an[illegible] result more cheaply or otherwise more a[illegible] tageously. There is, therefore, no pater[illegible] combination.

This conclusion is illustrated and comfi[illegible] by the following cases: *Hailes* v. *Van Wo*[illegible] 20 Wall., 353 [87 U. S., bk. 22, L. ed., [illegible] *Reckendorfer* v. *Faber*, 92 U. S., 347 [Bk. [illegible] ed. 719]; *Pickering* v. *McCullough*, 104 U. S. [Bk. 26, L. ed., 749].

It results from the views we have expresse[illegible] the decree of the Circuit Court dismissing t[illegible] was right. It is, therefore, affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court.

Cited—*Post*, 524.

WALTER BOHALL, *Plff. in Err.*,

v.

D. N. DILLA.

(See S. C., Reporter's ed., 47-51.)

Trusts. 1. What will charge holder of pat[illegible] lands as trustee. 2. Preemption laws—[illegible] dence to be continuous and personal—wh[illegible] cuses absence.

1. To charge the holder of the legal title t[illegible] under the patent as trustee of another, the cla[illegible] must show himself entitled to it, and its refu[illegible] him in consequence of errors in the rulings [illegible] Land Department upon the law applicable [illegible] facts found. It is not sufficient to show that [illegible] may have been error in adjudging the title [illegible] patentee.

2. The preemption laws require a residenc[illegible] continuous and personal. The settler may [illegible] cused for temporary absences caused by well [illegible] ed apprehensions of violence, sickness, the pr[illegible] of an epidemic, judicial compulsion, engagem[illegible] the military or naval service, and other like c[illegible]

[No. 194.]

Submitted Mar. 10, 1885, Decided Mar. 23, [illegible]

NOTE.—*Preemption rights.* See United St[illegible] Fitzgerald, 40 U. S. (15 Pet.), 407, *note.*

IN ERROR to the Supreme Court of the State of California.

[48] The history and facts appear in the

Statement of the case by *Mr. Justice* **Field:**

This case comes before us from the Supreme Court of California. The plaintiff in the court below, the defendant in error here, is the holder of a patent of the United States for certain lands situated in Humboldt County, in that State, issued to him under the preemption laws upon proof of settlement and improvement, and the present action is to recover their possession. In his complaint he alleges his ownership in fee of the premises on a day designated, the entry thereon of the defendant without license, and the subsequent withholding of them; also that the value of the annual rents and profits of the premises is $800, for which sum and the restitution of the premises he prays judgment.

The answer of the defendant denies the several allegations of the complaint, and sets up in a special count, by way of a cross complaint, various matters, which, as he insists, constitute in equity a good defense to the action and entitle him to a decree; that he has an equitable right to the premises; that the plaintiff holds the title in trust for him; and that the plaintiff should be required to convey the same to him.

The matters set up as grounds for equitable relief are the previous settlement upon the premises and their improvement by the defendant, and certain proceedings taken by him to acquire the title under the preemption laws, which were disregarded and held insufficient by the Land Department of the Government, but which he contends establish his right to the patents.

It appears from the record and findings of the court that in October, 1862, the defendant purchased from his brother William, then in occupation of the land, the possessory right of the latter to the premises and his improvements thereon, received a deed from him, and immediately thereafter went into possession which was held until March 23, 1865; that on that date, in consideration of $600 partly paid in cash, and partly payable in installments, the defendant contracted to convey the premises and improvements to the plaintiff Dilla, who thereupon was put into possession and continued in possession until the 5th of May, 1868; that he was then [49] evicted under a judgment obtained by the defendant upon the contract of purchase, and the latter was restored to the possession. In July, 1869, the defendant removed to Arcata, about twenty miles distant, and remained there until October, 1871, when his family went back to the land, followed by himself in December. In April, 1872, he moved to Mattole, about eighty miles distant, and there remained until August, 1874, when he again returned. In October following he again moved to Arcata and did not return until March, 1875.

The land was surveyed in 1873, and the plat thereof filed in the Land Office in October of that year. On the 3d of that month the defendant Bohall filed his declaratory statement, alleging settlement on October 22, 1862, and claiming the land. On the 26th of December following, the plaintiff Dilla filed his declaratory statement, alleging settlement under the preemption laws on the 25th of March, 1865, and claiming the land. A contest thus arose in the local land office between these parties as to which was entitled to the land under the preemption laws. The register and receiver of the land office differed in their judgment, the receiver holding that the land should be awarded to Dilla, and the register that it should go to Bohall. The contest was thereupon transferred to the General Land Office at Washington, and the Commissioner sustained the claim of Dilla, holding that, from the time of his settlement in 1865 until ejected in 1868, he had fully complied with the law; that his absence since then was compulsory, as he was unable to make a residence on the land without being in contempt of the court under whose judgment he was evicted; that his non-residence was for that reason excusable, and should not be allowed to work against him. But as to Bohall, the Commissioner held that his residence on the land had not been continuous since his settlement, but had been interrupted by residence elsewhere for several periods; and that the occupation of tenants during such periods did not satisfy the provisions of the preemption laws, which required the continuous personal residence of the preemptor; and therefore his claim was rejected. The decision of the commissioner was affirmed on appeal by the acting Secretary of the Interior. It is upon this ruling, charged to be erroneous, that the defendant relies to maintain his claim for equitable relief. The local state court, upon these facts and others not material to the case, adjudged that the defendant was entitled to the decree prayed; but the Supreme Court of the State held otherwise and reversed the judgment; and, as there was no finding as to the value of the rents and profits of the premises, ordered a new trial if the plaintiff so elected. Upon the filing of the *remittitur* in the lower court, the plaintiff waived his privilege of a new trial, and the court thereupon, on the pleadings and previous findings, gave judgment for the plaintiff, which was affirmed by the Supreme Court of the State; and this judgment is brought here for review.

Messrs. **W. W. Cope** and *S. M. Buck*, for plaintiff in error.

Mr. **Walter Van Dyke**, for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

The system of pleading in civil cases in the courts of California permits an equitable defense to be set up in a special count, by way of cross complaint, in the answer to an action for the possession of lands. The cross complaint is in the nature of a bill in equity, and must contain its material allegations, disclosing a case which, if established, would entitle the defendant to a decree enjoining the further prosecution of the action, or directing that the title be conveyed to him. This equitable defense is therefore to be first considered, for, according to its disposition will the necessity exist for further proceedings in the action at law, in which the legal title of the parties will alone control. *Quinby* v. *Conlan*, 104 U. S., 420 [Bk. 26, L. ed., 800]; *Estrada* v. *Murphy*, 19 Cal., 248, 273; *Arguello* v *Edinger*, 10 Id., 150.

We do not think the claim of the defendant to the equitable relief he seeks can be sustained on the grounds stated in his answer or cross

[illegible] To charge the holder of the legal [illegible] to land under a patent of the United States, [illegible] a trustee of another, and to compel him to [illegible] the title, the claimant must present such [illegible] as will show that he himself was entitled [illegible] the patent from the Government, and that, in [illegible] of erroneous rulings of the officers [illegible] Land Department upon the law appli[illegible] to the facts found, it was refused to [illegible] It is not sufficient to show that there [illegible] have been error in adjudging the title [illegible] the patentee. It must appear that by the [illegible] properly administered the title should [illegible] award to the claimant. *Smelt*[illegible] *Kemp*, 104 U. S., 636, 647 [Bk. [illegible] 875, 879]; *Boggs* v. *Merced Min*[illegible] 14 Cal., 279, 363. It is therefore [illegible] for the decision of this case what [illegible] may be upon the conclusions [illegible] as to the possession of the [illegible] It is plain that the defendant, [illegible] did not bring himself within the pro[illegible] of the preemption laws. Those laws [illegible] for the benefit of persons mak[illegible] a settlement upon the public lands, fol[illegible] residence and improvement and the [illegible] of a dwelling thereon. This implies [illegible] both continuous and personal. [illegible] continuous residence was shown on [illegible] of Bohall. He was placed in pos[illegible] of the premises under the judgment [illegible] state court in May, 1868; and it was [illegible] to prove that he occupied them [illegible] after filing his declaratory [illegible] It was shown, however, that [illegible] elsewhere from July, 1869, to [illegible] 1871, and from April, 1872, [illegible] August, 1874. Though he claimed the land [illegible] years he and his family resided else[illegible] during four of them, and no sufficient [illegible] for such residence was offered. It is only [illegible] circumstances that residence away [illegible] the land is permissible. The settler may [illegible] for temporary absences caused by [illegible] founded apprehensions of violence, by sick[illegible] by the presence of an epidemic, by judi[illegible] compulsion, or by engagement in the mil[illegible] or naval service. Except in such and like [illegible] the requirement of a continuous residence [illegible] of the settler is imperative.

The alleged fraud of Dilla in obtaining pos[illegible] under the alleged contract, if any such [illegible] existed, could have had no effect upon [illegible] defendant's residence after his restoration to [illegible] in May, 1868.

[illegible] could not maintain his equitable de[illegible] the plaintiff was entitled to judgment up[illegible] the legal title as shown by his patent.

Judgment affirmed.

True copy. Test.

[illegible] H. McKenney, Clerk, Sup. Court, U. S.

[illegible] U. S., [illegible]; 116 U. S., [illegible]

[illegible] AND NASHVILLE RAILROAD COMPANY, *Plf. in Err.*,

v.

CHARLES W IDE.

([illegible] S. C., Reporter's ed., [illegible])

[illegible] of [illegible]—joint action against several defendants—separate defenses.

[illegible] of section 2 of the Act of March [illegible]

3, 1875, refers only to suits where exists a separate and distinct cause of action, on which a separate and distinct suit might be maintained. It has no application to cases in which the defendants are sued jointly and as joint contractors.

2. A separate controversy is not introduced into the case by separate defenses to the same cause of action, although they may present different questions for determination.

3. A defendant cannot make an action several which a plaintiff has elected to make joint.

[No. 856.]

Submitted Dec. 22, 1884. Decided Mar. 23, 1885.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Mr. **John L. Cadwalader,** for plaintiff in error.

Mr. **Austin G. Fox,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error for the review of an order of the Circuit Court remanding a case which had been removed from the Supreme Court of the State of New York under the Act of March 3, 1875, ch. 137, 18 Stat. at L., 470. The suit was brought by Ide, the defendant in error, a citizen of New York, against the Louisville and Nashville Railroad Company, a Kentucky corporation; the Lake Shore and Michigan Southern Railroad Company, and the Cleveland, Columbus and Cincinnati Railroad Company, Ohio corporations; the New York Central and Hudson River Railroad Company, a New York corporation, and the Boston and Albany Railroad Company, the Boston and Maine Railroad Company, and the Nashua and Worcester Railroad Company, Massachusetts corporations. The complaint alleged, in substance, that the defendants, being all common carriers, associated themselves together under the name of the "White Line Central Transit Company," for the transportation jointly of goods from places on or near the Mississippi River to places on or near the Atlantic coast, and among others from Columbus, Mississippi, to Dover and Manchester, New Hampshire; that while so associated together the defendants received at Columbus, Mississippi, from certain persons doing business there, several lots of cotton which, in consideration of certain freight to be paid, they agreed to transport and deliver to the Cocheco Manufacturing Company at Dover, and the [53
Amoskeag Manufacturing Company at Manchester, New Hampshire; that bills of lading were issued by the defendants whereby they acknowledged the receipt of the cotton to be transported over their line and delivered to the respective consignees thereof; that the defendants have failed to deliver the cotton, and that the plaintiff is the assignee of all claims against them on that account.

The Louisville and Nashville and the New York Central and Hudson River Companies were served with process and appeared in the State Court. The Louisville and Nashville Company answered the complaint. In the answer it admitted the corporate existence of the sev-

NOTE.—*Removal of causes under Act of 1875; citizenship.* See Del., etc., Co. v. Meyer, 100 U. S., XXV., 593, *note.*

eral defendants, and that they were each and all common carriers. It denied that the defendants had associated themselves together for the transportation of goods jointly, or that they held themselves out as common carriers engaged jointly in the business of such transportation; but it alleged that a number of corporations, among which were the defendants, entered into an agreement to carry on a fast freight line between cities in the eastern and western parts of the country, and fixing uniform rates of transportation and regulating the necessary incidents to such business, which business was to be done under the name of the "Central Transit Company," afterwards familiarly known as the "White Line," and called in the complaint the "White Line Central Transit Company." It then set out the provisions of the agreement between the several corporations for carrying on the line, showing the way in which the business was to be done and the earnings and expenses divided, "and that each company should pay for any damage or loss occurring on its road, and if such damage could not be located it should be prorated between the companies forming the route over which the property would have passed to its destination, in the same ratios as the freight moneys." It then averred "that when goods were delivered to any one of the said companies to be transported by said fast freight line, bills of lading therefor were to be issued in the name of The Central Transit Company, 'White Line,' by an agent of such Transit Company, who, in his representative capacity, acted separately for each, and was [54] not authorized to act for such companies jointly; and that in all such bills of lading so issued it was expressly stipulated and agreed that in case of any loss, detriment or damage done to or sustained by the property therein receipted for, that company should alone be held answerable therefor in whose actual custody the same might be at the time of the happening thereof." It then denied that the cotton sued for was ever delivered to the line, or to either of the companies composing the same, for transportation, and averred that if any bills of lading were ever issued it was done by a person who had no authority for that purpose, either from the Louisville and Nashville Company or any of the other defendants. It also averred that no loss had happened to the property while in its actual custody, and that Ide, who brought the suit, was not the real party in interest therein, but that the alleged assignment to him was without consideration, and made simply to vest the right of action in the plaintiff, who was a citizen of New York, and that the real parties in interest were the Cocheco Company and the Amoskeag Company.

It also appears from the statements in the petition for removal, that the New York Central and Hudson River Company filed a separate answer in the State Court, but that answer has not been copied into the transcript. The Louisville and Nashville Company on filing its answer presented to the State Court a petition for the removal of the suit to the Circuit Court of the United States for the Southern District of New York, which was the proper district, on the ground "that there is in said suit a controversy which is wholly between citizens of different States, namely: a controversy between the plaintiff, a citizen of the State of New York, and the defendant, the Louisville and Nashville Railroad Company, your petitioner, a citizen of the State of Kentucky, which can be fully determined as between them without the presence of any of the other persons or bodies corporate made parties to said suit." The Supreme Court of the State accepted the petition and ordered the removal of the suit, but the circuit court when the case got there, remanded it. This writ of error was brought for a reversal of the last order.

The petition for removal was filed under the last clause of section 2 of the Act of 1875, which is as follows:

"And when in any suit * * * there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the Circuit Court of the United States for the proper district."

As we have already said at this Term in *Ayres* v. *Wiswall*, 112 U. S., 192 [Bk. 28, L. ed., 695] "the rule is now well established that this clause in the section refers only to suits where there exists a 'separate and distinct cause of action on which a separate and distinct suit might have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other. To say the least the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more States on one side and citizens of different States on the other, which can be fully determined without the presence of the other parties to the suit, as it has been begun.'" *Hyde* v. *Ruble*, 10 U. S., 407 [Bk. 26, L. ed., 823]; *Fraser* v. *Jennison*, 106 U. S., 191 [Bk. 27, L. ed., 131].

In the present case all the defendants are sued jointly and as joint contractors. There is more than one contract set out in the complaint, and there is therefore more than one cause of action embraced in the suit; but all the contracts are alleged to be joint and binding on all the defendants, jointly and in the same right. There is no pretense of a separate cause of action in favor of the plaintiff and against the Louisville and Nashville Company alone. The answer of the company treats the several causes of action alike and makes the same defense to all. For the purposes of the present inquiry the case stands as it would if the complaint contained but a single cause of action. The claim of right to a removal is based entirely on the fact that the Louisville and Nashville Company, the petitioning defendant, has presented a separate defense to the joint action by filing a separate answer tendering separate issues for trial. This it has been frequently decided, is not enough to introduce a separate controversy into the suit within the meaning of the statute. *Hyde* v. *Ruble*, *supra*; *Ayres* v. *Wiswall*, *supra*. Separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. *Smith* v. *Rines*, 2 Sum., 348. A sepa

[illegible] defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings. Here, it is certain [illegible] contracts, entered into by all the defendants for the transportation of property. On the one side of the controversy upon that cause of action is the plaintiff, and on the other all the defendants. The separate defenses of the defendants relate only to their respective interests in the [illegible] controversy. The controversy is the case, and the case is not divisible.

It is said, however, that by the New York Code of Civil Procedure, section 1204, "judgment may be given for or against one or more plaintiffs, and for or against one or more defendants," and under this it has been held that when several are sued upon a joint contract, and it appears that only a portion are bound, the plaintiff may recover against those who are primarily liable. The same rule undoubtedly prevails in many other States, but this does not make a joint contract several, nor divide a joint [illegible] into separate parts. It may expedite judicial proceedings and save costs, but it does not change the form of the controversy, that is to say the case. The plaintiff can still sue to recover from all, though he may be able to succeed only as to a part.

The order remanding the case is affirmed.

Mr. Justice **Blatchford** took no part in the decision of this case.

Dissenting: Mr. Justice **Harlan.**

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[illegible]—114 U. S., 88, 62; 115 U. S., 42, 61, 259.

N. D. PUTNAM ET AL., *Plffs. in Err.*,

v.

GEORGE E. INGRAHAM.

(See S. C., Reporter's ed., 57-60.)

Removal of causes—joint action against several defendants—separate defenses.

1. The act clause of section 2 of the Act of March 3, 1875, has no application to cases in which the defendants are sued jointly and as joint contractors. The preceding case of *The Louisville and Nashville R. R. Co.* v. *Ide*, ante, 65, affirmed.

2. A separate controversy is not introduced into the case by separate defenses to the same cause of action.

3. The fact that one of the defendants is in default is unimportant.

[No. 1246.]

Submitted Mar. 2, 1885. Decided Mar. 23, 1885.

IN ERROR to the Circuit Court of the United States for the District of Connecticut.

The history and facts of the case appear in the opinion of the court. See, also, the preceding case of *L. & N. R. R. Co.* v. *Ide.*

Mr. **Herbert R. Dickson,** *Wager Swayne, Lewis E. Stanton* and *Edward W. Bell,* for plaintiffs in error.

Mr. **Charles E. Perkins,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error for the review of an order of the Circuit Court remanding a suit to a State Court. The suit was brought in the Superior Court of the County of Hartford, Connecticut, by George E. Ingraham, the defendant in error, a citizen of Connecticut, against N. D. Putnam and Henry Earle, citizens of New York, and W. G. Morgan, a citizen of Connecticut, as partners in business under the name of Putnam, Earle & Co., to recover a balance claimed to be due from the partnership on an account for money lent, paid out and expended, and upon a note of $5,000, made by W. G. Morgan to the order of Putnam, Earle & Co. and by the firm indorsed to Ingraham. The complaint contained simply the common counts, but a bill of particulars subsequently filed disclosed the true nature of the claim to be the note, and an account for the purchase and sale of stocks beginning August 17, 1883, and ending February 29, 1884.

The defendants, Putnam and Earle, filed a separate answer, which contained: 1. A general denial of all the allegations in the complaint; 2. An averment as to the account, that the alleged loans were all made to the defendant Morgan for his individual and private use, and not to the firm; 3. An averment as to the note, that it was given for money loaned to W. G. Morgan alone for his individual use, and not to the firm, [58] and that it was indorsed by Morgan in the name of the firm by collusion between him and Ingraham, and with intent to defraud Putnam and Earle; and, 4. A statement that the partnership of Putnam, Earle & Co. was not formed until January 2, 1884, and that all the transactions in the bill of particulars before that date took place, if at all, between the plaintiff and William G. Morgan, who, during the years 1882 and 1883, was only the agent of Putnam and Earle and not a partner with them, and that as to none of the items in the bill dated in the year 1883 were they under any joint liability with Morgan as partners.

Morgan has never answered the complaint, and as to him the case stands on default. After filing their answer the defendants Putnam and Earle, presented a petition to the Superior Court for the removal of the suit to the Circuit Court of the United States for the District of Connecticut. The material part of this petition, aside from a statement of the citizenship of the parties, is as follows:

"And your petitioners further say, that in the suit above mentioned there is a controversy which is wholly between citizens of different States, and which can be fully determined between them, to wit: a controversy between the present petitioners, N. D. Putnam and Henry Earle, and the said George E. Ingraham and William G. Morgan, as by the pleadings in said cause will more fully appear."

Upon the presentation of this petition the Superior Court declined to enter an order for the removal of the cause. Thereupon the petitioners entered a copy of the record in the Circuit

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Note—Removal of causes under Act of 1875: citizenship: See Mayer v. Delaware, etc., Co., 100 U. S., [illegible] 2, 3, 4, 5, 6, 7, 8.

Court of the United States. This being done, the plaintiff Ingraham moved that court to remand the suit, and the motion was granted. To reverse an order to that effect, this writ of error was brought.

[59]

We are unable to distinguish this case materially from that of *The Louisville and Nashville R. R. Co.* v. *Ide* [*ante*, 63], just decided. The suit is brought against all the defendants jointly to recover upon what are alleged to be their joint promises and undertakings. The defendants, who are not citizens of Connecticut, have filed a separate answer in which they deny their liability altogether, and claim besides, that if liable at all on part of the account sued for, it is not jointly with the defendant Morgan. This is their separate defense to the joint suit which Ingraham has elected to bring against them and Morgan upon what he claims to be the joint contracts of all the defendants.

In Connecticut, as in New York, "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants," and in addition to this the court may, in Connecticut, "determine the ultimate rights of the parties on each side as between themselves, and grant to the defendant any affirmative relief he may be entitled to." But this, as we have said in the case just decided, does not make a joint contract several, nor divide a joint suit into separate parts. The suit is still one and indivisible for the purposes of removal.

The fact that Morgan has not answered out is in default is unimportant. The suit is still on joint causes of action, and the plaintiff, if he sustains the allegations of his complaint at the trial, will be entitled to a joint judgment against all the defendants. The default places the parties in no different position with reference to a removal than they would occupy if Morgan had answered and set up an entirely different defense from that of the other defendants. A separate controversy is not introduced into the case by separate defenses to the same cause of action.

As the petitioning defendants have asked no affirmative relief either against the plaintiff or their co-defendant, no question can arise under the rule of practice in Connecticut which allows the court to determine the ultimate rights of the parties on each side as between themselves. In the present case, the only controversy is as to the right of the plaintiff to recover against the defendants.

[60]

The order to remand is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—115 U. S., 61, 259.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY ET AL., *Appts.*,

v.

WILLIAM C. WILSON.

(See S. C., Reporter's ed., 60-62.)

Removal of causes—action against a citizen of the same State and one of another State, not removable—parties.

An action brought in a State Court against an incorporated company of that State and a citizen of another State to compel the transfer of stock, which has been purchased at a judicial sale as the property of such citizen by the plaintiff, on the books of the company, is not removable into the Federal Courts. The company is a necessary party although the citizen of the other State raises a separate issue as to the validity of the proceedings under which said sale was had.

[No. 1194.]

Submitted Mar. 2, 1885. Decided Mar. 23, 1885.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The history and facts of the case appear in the opinion of the court.

Mr. **James O. Broadhead,** for appellants.

Mr. **James S. Botsford,** for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal from an order of the Circuit Court of the United States remanding a suit to the Circuit Court of the City of St. Louis, Missouri, from which it had been removed upon a petition filed under the Act of March 3, 1875, ch. 137, 18 Stat. at L., 470. The suit was in equity and brought by William C. Wilson, the appellee, a citizen of Missouri, against the St. Louis and San Francisco Railway Company, a Missouri Corporation, and Jesse Seligman and James Seligman, citizens of New York, to compel the Company to transfer to Wilson on its books certain shares of its capital stock standing in the name of the Seligmans, and to issue to him certificates therefor. The petition states that Wilson purchased the stock at a sale under an execution issued upon a judgment in his favor and against the Seligmans, and that on the 19th of December, 1883, he exhibited to the Company his certificate of purchase and demanded that the Company cause his name "to be entered on the stock books of said Corporation as the owner of said shares of said capital stock, * * * and further duly notified said Corporation to pay to him all dividends that might thereafter be declared and payable to and on said stock;" but that the Company refused so to do. The prayer is for a transfer of the stock, the cancellation of the certificates to the Seligmans, the issue of new certificates and payment of dividends to Wilson, and an injunction prohibiting the Seligmans from acting as stockholders.

The Company and the Seligmans filed separate answers, but setting up substantially the same defense, to wit: that the stock, though standing in the names of the Seligmans, did not in fact belong to them when the execution was levied, or when the sale to Wilson was made, because they had long before that time sold and transferred their certificates to other parties for value, who were the real holders and owners of the stock, though not transferred to them on the books. The Seligmans in their answer deny the validity of the judgment against them, for the reason that it was rendered in a suit to which they were not parties.

The petition for removal was presented by

NOTE.—*Removal of causes under Act of 1875; citizenship.* See Meyer v. Delaware, etc., Co., 100 U. S., bk. 25, 593, *note.*

the Seligmans alone, and, after stating the citizenship of the parties, proceeds as follows: "That there is in said suit a controversy wholly between citizens of different States, which can be fully determined as between them without the presence of the defendant, the St. Louis and San Francisco Railroad. That there is in said suit a separate controversy wholly between said plaintiff and your petitioners, citizens of different States as aforesaid, which can be fully determined as between them, and your petitioners are actually interested in such controversy. That the controversy in said suit between plaintiff and your petitioners, as made by the pleadings, is wholly distinct and separate from that between the plaintiff and the St. Louis and San Francisco Railway Company."

Upon this petition the State Court removed the suit, but the Circuit Court of the United States remanded it. To reverse this order of the United States Court the appeal was taken.

There is but one controversy in this case, and that is as to the duty of the Railroad Company to transfer to Wilson the stock standing in the name of the Seligmans on its books and to issue new certificates therefor. Upon the one side of that controversy is the plaintiff, a citizen of Missouri, and on the other the Railroad Company, a Missouri corporation. The sole purpose of the suit is to establish the duty and enforce its performance. This cannot be done without the presence of the Company, for it is upon the Company itself that the decree must operate. The Seligmans are made parties only in aid of the principal relief which is asked. As the stock stands in their names on the books, the Company may well claim a judicial finding in the same which shall bind them, if upon the final hearing a transfer is ordered. The suit, therefore, is in truth and in form against both the Company and the Seligmans on a single cause of action, and cannot be removed unless the separate answer of the Seligmans introduces a separate controversy. This we have held in *Louisville & Nashville R. R. Co.* v. *Ide* [*ante*, 68], just decided, is not necessarily the effect of separate [illegible] under separate defenses to the same action. No relief whatever can be granted unless it is found to be the duty of the Company to transfer the stock, and as to that controversy the Company is an indispensable party. *R. R.* v. *Mills*, 113 U. S., 249 [Bk. 28, L. ed., 949]; *Wagner* v. *Life Assoc.*, 112 U. S., 717 [Bk. 28, L. ed. [illegible]].

The order remanding the cause is affirmed.

[illegible] copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[illegible] U. S., [illegible].

JAMES SARGENT, *Appt.*,

v.

HALL SAFE AND LOCK COMPANY ET AL.

(See S. C., Reporter's ed., 63-86.)

Patent law—letters patent No. 186369, for improvements in time locks—construction—when against counter.

1. In letters patent No. 186369, granted to James Sargent January 16, 1877, for improvements in time locks, the combination lock forming a member of the combinations claimed by the two claims of the patent, is one which has a bolt or bearing that turns on an axis or revolves, as distinguished from a sliding bolt, and those claims are not infringed by a structure in which the combination lock has not a turning or revolving bolt.

2. Claim 2 of the patent requires that the tumblers of the combination lock and its spindle shall be free to rotate while the bolt work is held in its locked position, by the bolt or bearing of the combination lock.

3. In patents for combinations of mechanism, limitations and provisos imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor, and in favor of the public, and looked upon as in the nature of disclaimers.

[No. 178.]

Argued Jan. 21, 26, 27, 1885. Decided Mar. 30, 1885.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The history and facts of the case appear in the opinion of the court.

Messrs. **Edmund Wetmore, George Ticknor Curtis** and *S. A. Bowman*, for appellant.

Messrs. **Edward N. Dickerson** and **William C. Cochran**, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in March, 1877, in the Circuit Court of the United States for the Southern District of Ohio, by James Sargent, the appellant, against the Hall Safe and Lock Company and others, the appellees, for the infringement of letters patent No. 186369, granted to Sargent January 16, 1877, for improvements in time locks. It was afterwards consolidated, as of November, 1879, with another suit in equity, brought in July, 1876, in the same court, by the same plaintiff against the same defendants, for the infringement of reissued letters patent No. 6787, granted to Sargent December 7, 1875, for improvements in time locks, on the surrender of original letters patent No. 121782, granted to Stephen W. Hollen, December 12, 1871. The Circuit Court heard the case on pleadings and proofs and dismissed the bill. The plaintiff has appealed, but no claim is made in this court to recover on the Hollen reissue. [64]

The specification and claims of No. 186369 are as follows:

"Be it known that I, James Sargent, of Rochester in the County of Monroe and State of New York, have invented certain new and useful improvements in locks for safe and vault doors, of which the following is a specification:

This invention relates to certain improvements in locks for safe and vault doors, its object being to construct a time movement in such a manner as to have it guard, and operate in conjunction with, a combination lock, so as to render said combination lock, when locked, inoperative and incapable of being unlocked until the arrival of the appointed hour, at which time the time mechanism will liberate or cease its guarding action on the combination lock, and admit of said lock being operated and unlocked by the person having knowledge of the combination upon which said lock is set, so as to

Fig. 1.

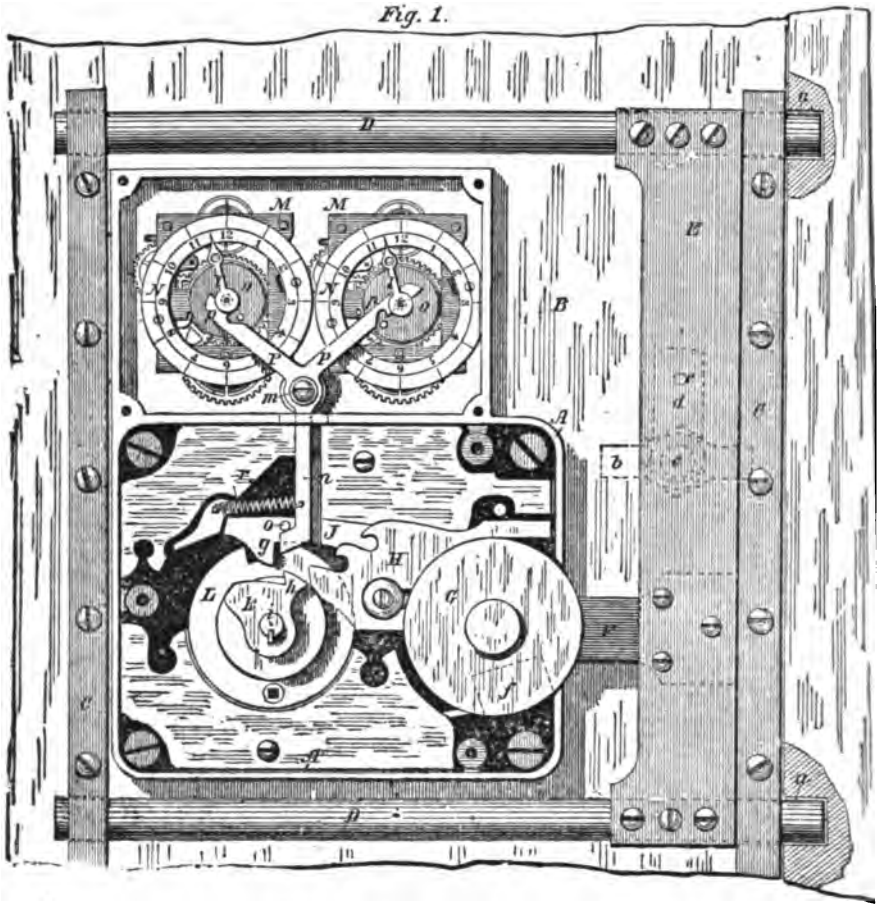
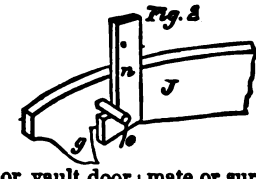


Fig. 2



enable the bolt work of the safe or vault door to be retracted and the door opened.

My invention consists in combining a time mechanism with a combination lock, and adapting the same to operate in connection with the bolt work of a safe or vault door, the time mechanism being constructed to act in conjunction with, and guard, dog, or render inoperative, the aforesaid combination lock, when locked, the said combination lock having a bolt or bearing specially constructed and arranged, so, that, when in one position, it will rest upon or receive the pressure of the bolt work of the door when the latter is thrown out and the lock locked, and thus prevent the retraction of the bolt work.

This arrangement retains the bolt work in a locked condition during the hours appointed for it to remain locked, and prevents the lock from being unlocked by anyone having legitimate or surreptitious knowledge of the co nation upon which the lock is set, until th rival of the appointed hour, when the t mechanism will cease its dogging or guar action upon said combination lock, and a of said lock being operated by those in po sion of the combination, so as to enable t to place the bolt or bearing of the lock in position as to enable the retraction of the work, whereby the safe or vault door ca opened.

The invention further consists in a ce combination, substantially as hereinafte forth, that is to say, a union consisting combination lock, a time movement and a lever or connection, adapted to be placed a safe or vault door, to operate in conjun with the bolt work thereon, said yoke lev connection being constructed and located in respect to the combination lock as to rend

[illegible] of the same absolutely impossible [illegible] locked, and so remain locked until the ar[illegible] of the appointed or predeterminate time, [illegible] which time the said yoke lever or connection, [illegible] the action of the time movement, is [illegible] to cease its guarding or dogging action [illegible] the combination lock, at which time, or [illegible] after during the time the time mech[illegible] has ceased its dogging or guarding ac[illegible] the said lock can be unlocked by the per[illegible] [illegible] of the proper combination up[illegible] the lock is set; the peculiarity and nov[illegible] of this union being, that, when the said [illegible] lock, with its time mechanism, is [illegible] upon a safe or vault door, to operate [illegible] with the bolt work thereon, and [illegible] the tumblers or combination wheels [illegible] lock, and the spindle of the same, to[illegible] with its usual indicator, are all left free [illegible] moved or rotated without exerting any [illegible] action or strain whatever upon the [illegible] composing the combination lock, or [illegible] mechanism composing the time [illegible]

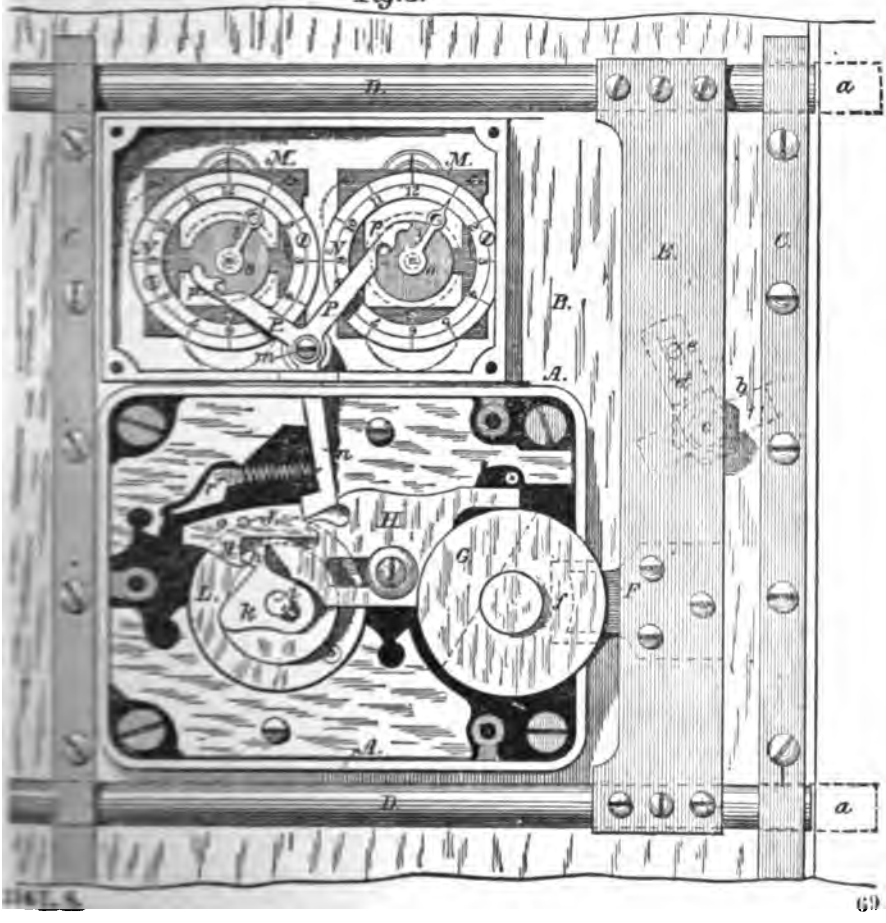
[illegible] the drawings, figure 1 represents a por[illegible] of a safe or vault door, illustrating therein [illegible] work and a combined time mechanism [illegible] combination lock, with covers removed, the [illegible] being thrown out into the jamb of the door, and the combination lock locked and guarded by the time movement. Fig. 2 is a detail view, illustrating a yoke lever or connection adapted to connect with the dog, angle bar, or fence of the combination lock. Fig. 3 represents a portion of a safe or vault door, having thereon a bolt work, and a combined time mechanism and combination lock, the combination lock being unlocked and the bolt work retracted. [66]

Referring to the drawings, the letter A designates the case of a combination lock, the lock-works of which may be of any of the well known forms now in use, provided the same is supplied with a lock bolt or a bearing, constructed and arranged so as to connect with or receive the pressure of the bolt work located on a safe or vault door, when said lock bolt or bearing and the bolt work are placed in a position for locking the door. [67]

The combination lock illustrated in the drawings is one known as "Sargent's Automatic Bank Lock," upon which letters patent were granted August 28, 1866, reissued January 2, 1872.

Said combination lock is shown as applied upon a safe or vault door, B, upon which is arranged a bolt-work, consisting of the usual bolt supporting bars, C, bolts, D, carrying bar, E, having a tongue piece, F, said carrying bar serv- [68]

Fig. 3.



ing as a medium for projecting or retracting the bolts into and out of the sockets, *a*, constructed in the jamb of the safe or vault, for the purpose of locking or unlocking the door, as shown in Figs. 1 and 3.

The bolt work has the requisite projecting or retracting motion imparted to it from the outside of the door, when opened or closed, through the medium of the usual knob, *b*, and the spindle, *c*, which spindle passes through the door, and connects with the carrying bar by any suitable fastening, such as a slot, *d*, pin, *e*, and suitable fastening nut.

The lock bolt or bearing of the combination lock may be of a circular, segmental, or other desired form, provided said lock bolt is arranged and adjusted so as to turn upon a suitable axis or bearing, and is so constructed that, in one position, it will prevent the retraction of the bolt-work, so as to retain the safe or vault door locked, while, in another position, it will admit of the bolt work being retracted for the purpose of allowing the safe or vault door to be opened.

In the present example, the lock bolt is shown as provided with an offset or recess, *f*, which offset or recess is brought in or out of coincidence with the tongue piece on the carrying bar, to admit of the bolt work being projected or retracted through the medium of a sliding bar, H, which carries a dog, fence, or angle bar, J, having a hook, *g*, which engages with the bit, *h*, of the cam, K, secured upon the dial spindle, *i*, which spindle passes through the safe or vault door, in the usual manner, and serves to operate the series of tumblers or combination wheels, L.

The sliding bar H is connected with the lock-bolt or bearing in any suitable manner, its object being to impart motion to said lock bolt or bearing, to secure the objects above specified.

The said lock-bolt or bearing, it will be perceived, is located in its casing, so as to rest closely in the rear of the tongue piece or connection secured upon the carrying bar, and is isolated, so to speak, from the tumblers or combination wheels and the other main working parts of the lock, and, therefore, any strain which is brought to bear upon it by the heavy [69] bolt-work will be expended upon the bolt or bearing and its axis or bearing, and not upon the tumblers or combination wheels.

It will be seen that, to unlock the combination lock, the hook of the dog, angle bar, or fence, J, will drop into the notches or slots of the tumblers or combination wheels, when the notches are brought into juxtaposition by the operator who has possession of the combination upon which the lock is set, at which time the bit, *h*, of the cam K, will also engage with the hook, *g*, of the said dog, angle bar, or fence, when, by moving the dial spindle, the lock bolt or bearing can be moved or rotated so as to admit of the tongue piece or connection, with the carrying bar and bolt work, being moved back or retracted, as in Fig. 3 of the drawing, and the safe or vault door opened; but, when said combination lock is locked, the hook of the dog, angle bar, or fence, J, is elevated, due to the combination wheels being disarranged, as in Fig. 1 of the drawings, and then no action can be had upon the connecting bar, dog angle bar or fence, or upon the lock-bolt or bearing, by turning of the dial spindle, and hence the tongue piece or connection on the carrying bar of the bolt work rests upon, or connects with, the lock bolt or bearing, and the bolt work is securely retained in a locked condition.

With such combination lock, a one of substantially the same construction and operation, constructed to be applied for use upon a safe or vault door, to operate in connection with the ponderous or great bolt work thereon, is combined a time mechanism, the works of which may be of any of the improved or desired kinds, since its action is to measure time correctly, the object being that, during the interval that the combination lock is locked and the time movement wound up, the same, through a suitable connection made between it and said combination lock, will guard the said lock, and prevent its being unlocked, even by a cashier or other person in possession of the combination upon which the said combination lock is set.

In the present example, a duplex or double time movement is illustrated, such being preferable to a single time movement, as a safeguard against stopping.

Each of the time movements, which are designated by the letters M M, which may consist of a chronometer or clock movement, is supplied with a pointer or hand, attached to a spindle, *l*, in such a manner as to be capable of being moved backward to set any elected number on the dials *N*, said dials being spaced off, or marked with a scale of hours and divisions, from one upward to any desired number, according to the mechanism of the chronometer or clock. With each of the dials are combined adjusting disks or arms O, or some equivalent mechanical device, each of which carries a stud, or pin or projection, which acts upon a yoke or lever, which connects with and guards the combination lock the number of hours or time for which it is designated said lock is to remain locked, and thus controls the action of its lock bolt or bearing while the same is in a locked condition.

The yoke lever or connection is designated by the letter P, and it is pivoted or loosely fixed on its support or axis, as at *m*, or otherwise arranged so as to operate in conjunction with the moving or revolving disks or arms O, the object being, that the yoke lever or connection and the disks can be adjusted with respect to each other, so as to connect with the dog or fence or other working part of the lock, and thus control the movement of the lock bolt or bearing, and hence the locking and unlocking of the combination lock.

One end of the extension of the yoke lever or connection, in the present example, has a suitable hook, *n*, that engages with a pin, *o*, on the dog, angle bar or fence, J, by striking under, in which case it holds said dog, angle bar or fence elevated out of contact with the tumblers or combination wheels and the cam of the dial spindle. The arms of said yoke lever or connection connect with, or rest upon, the axis or spindle of the adjusting disks or arms; and the arrangement of the studs, pins or projections on said disks or arms is such that, when the indicators have reached the proper number on the dials, said studs, pins or projections will have acted upon the yoke lever or connection, and moved it sufficient to withdraw the cam ho

from beneath the pin *o*, and thus allow the dog, angle bar or fence to fall, ready to engage with the tumblers or combination wheels and the lock bolt or bearing, at which time the combination lock can be operated by the person in possession of the combination, as the time movement has ceased its guarding or dogging action.

Notches, *p p*, should be formed in the yoke lever or connection, to allow the studs, pins or projections to fall therein, when the disks or arms and the indicators have reached the designated number, thus serving as stops for the adjusting disks or arms, and prevent the same from moving on, beyond the prearranged hour without the yoke lever or connection upon the studs or projections; for, if some such provision were not made, the combination lock could not be opened until the disks or arms, with the indicators, came around again to said previously designated hour; at least, there might be danger of such occurring.

The double time pieces are employed, as hereinbefore stated, so as to insure the releasing of the combination lock in case one of the time works should stop or fail to come to proper position. A spring *r*, or an equivalent, such as a weight, should be connected with the lower end of the yoke lever or connection, to produce the necessary reaction to bring the hook of the yoke lever or connection under the pin on the dog, angle bar or fence.

Thus it will be seen, from the foregoing, that the bolt work of the safe or vault door connects with, or rests upon, the bolt or bearing of the combination lock, and that the yoke lever or connection of the time movement connects with the dog, angle bar or fence of said combination lock, rendering the said combination lock inoperative when locked, that is to say, and this lever or connection has the effect of locking or guarding the combination lock during the time it is locked, and preventing its being unlocked until the arrival of the hour previously designated by the time movement; and, should pressure be exerted upon the great or ponderous bolt work of the door, when locked, it will be received and arrested and retained by the bolt or bearing of the combination lock, and will not be transmitted to the tumblers or combination wheels of the combination lock, or to the time movement, or to the yoke lever or connection.

In lieu of the lever connecting with the dog or fence, it may be made to connect or operate on the lock itself, and thus secure the result mentioned recited.

The time mechanism may be in the same case containing the works of the combination lock; or it may be in an apartment connected with the case of the combination lock, or in a case separate and distinct from the case containing the combination lock.

The advantages of this invention over common time locks is that, when the time mechanism ceases the lock mechanism, that is, ceases its locking or guarding action, it does not admit of the unlocking of the bolt work of the door, but simply leaves the combination lock in the condition that it can be unlocked by the person in possession of the proper combination upon which said lock is set, thus securing the advantage of a combination lock for use during the day with a time mechanism for guarding and protecting said lock during the night.

This improvement is of the utmost importance; for, during the hours when the time mechanism is set, no one, not even the officers of a bank or other institution, can open the combination lock; and, when said time mechanism is not set or adjusted, no one, except the holder of the combination upon which the lock is set, can open it. No one who has the combination, whether obtained surreptitiously or otherwise, can open the lock when the time movement is set, for the simple reason that no connection can be made between the tumbler or combination wheels, the dog, angle bar or fence, the spindle and the lock bolt or bearing.

Further: Another feature of the utmost importance present in the combination of parts brought together is, that the connection between the time movement and the combination lock is such that, when the time movement is set, the parts adjusted, and the safe doors closed, the combination lock will be rendered inoperative until a predeterminate hour, during which interval of time the unlocking action of the combination lock will be suspended by the time movement, while the tumblers or combination wheels of the aforesaid combination lock are left free to rotate, if power is exerted upon the dial spindle for the purpose of twisting said [73]
spindle out of place or impairing the lock mechanism, and, by such, the working parts of the combination lock cannot be injured or rendered useless for future action.

I have made a special claim, in a separate application for letters patent, for the combination of a time movement and a lock with a lever adapted to be connected with the dog of said lock, to hold it from falling into the slots or notches of the combination wheels except when released by the time movement. So, therefore, in this application, such special construction and arrangement of parts is not specially claimed.

Having thus described my invention, what I claim and desire to secure by letters patent is.

1. The combination, substantially as hereinbefore set forth, of a time mechanism and a combination lock with the bolt work of a safe or vault door, the time mechanism being constructed to act in conjunction with, and render inoperative, the combination lock when locked, said lock having its bolt or bearing constructed to receive the pressure of the series of bolts constituting the bolt work of the door, when locked, and prevent the unlocking of said bolt work until the arrival of a certain predeterminate hour.

2. The combination, substantially as hereinbefore set forth, of a combination lock, and the series of bolts constituting the bolt work of a safe or vault door, with a time movement and a yoke or lever connection, said lever being constructed and located to render the bolt or bearing of the combination lock inoperative when locked, the tumblers of the combination lock and its spindle being free to rotate while the bolt work is held in its locked position by the bolt or bearing of the combination lock."

An analysis of this specification, to ascertain (in view of the state of the art and of the history of the application for the patent as it passed through the Patent Office) what is the proper construction of the claims allowed, will conduce to a solution of the questions involved. The object of the invention is stated to be to have a time movement guard, and operate in

conjunction with, a combination lock, to prevent the action of the combination lock until a time previously appointed by the setting [74] of the time movement shall have arrived, in the ordinary running of the time movement, at which time, and not before, the combination lock will come into action, when operated in the usual way, as if there were no time movement. In other words, by the setting of the time movement, the connection between the combination lock and its lock bolt or bearing is interrupted, so as to destroy the capacity of the combination lock to unlock the bolt work, until the time fixed by the setting of the time movement shall, by the ordinary running of the time movement, have arrived, when the connection between the combination lock and its lock bolt or bearing is automatically restored, through the action of the time mechanism. The combination lock is to remain with its organization unchanged, but the time mechanism is to alternately interrupt and restore its connection with its lock bolt or bearing, and the action of the bolt work.

There are two parts to the invention, represented by the two claims. Both of them are claims to combinations of mechanism. The first claim is a claim to a combination, substantially as set forth in the descriptive part of the specification, of three elements: (1) a time mechanism; (2) a combination lock; (3) the bolt work of a safe or vault door. But, as the claim says that the time mechanism is to be constructed to act in conjunction with, and render inoperative, the combination lock, when locked, it follows that the expression "time mechanism" includes the means of connection between the time movement and the parts on which the combination lock operates. Otherwise, there could be no operative co-action of the three elements named in the claim. The expressions "time mechanism" and "time movement" are carefully used in the specification and claims, as having different meanings, the former including the latter and its means of acting in conjunction with the combination lock. There is a limitation in the first claim, to the effect that the combination lock is to have its bolt or bearing constructed to receive the pressure of the bolt work, when the lock is locked, and prevent the unlocking of the bolt work till the predetermined time shall have arrived.

The second claim is a claim to a combination, substantially as set forth in the descriptive part of the specification, of four elements: [75] (1) a combination lock; (2) the bolt work of a safe or vault door; (3) a time movement; (4) a yoke or lever connection, constructed and located to render the bolt or bearing of the combination lock inoperative when the lock is locked. In the second claim, the time mechanism of the first claim is broken up into a time movement and a yoke or lever connection. There is a limitation in the second claim, to the effect that the tumblers of the combination lock and its spindle are free to rotate during the time the bolt work is held in its locked position by the bolt or bearing of the combination lock. This freedom of rotation is referred to in the specification as being peculiar and novel, and consisting in the fact that, while the combination lock and the bolt work are locked, the tumblers or combination wheels of the combination lock, and its spindle, are free to rotate without exerting any unlocking action or strain on the mechanism composing the combination lock, or the delicate mechanism composing the time movement.

It is also to be noted, that the specification states that the lock bolt or bearing of the combination lock may be of a circular, segmental or other desired form, "provided said lock bolt is arranged and adjusted so as to turn upon a suitable axis or bearing," and is so constructed as, in one position, to prevent the retraction of the bolt work, and, in another position, to permit it. The kind of combination lock referred to is indicated by the one illustrated in the drawings, and which the specification states to be the one of Sargent's patent No. 57574, granted August 28, 1866, and reissued as No. 4696, January 2, 1872. No. 4696 states that such combination lock has no sliding lock bolt, but has combined with its working parts a bolt turning on a pivot or bearing, and so isolated or removed from contact with the combination wheels, as to receive any pressure applied through the bolt work of the door, and cut off the communication between such bolt work and the wheels or fence lever of the combination lock; and that such bolt turning on a pivot or bearing, instead of the sliding bolt theretofore in use, is an important feature. The first claim of No. 4696 is in these words: "In a combination lock for safe or vault doors, a bolt I, which turns on a pivot or bearing, when said bolt I is used in a lock having no ordinary sliding lock bolt, and in connection with the separate bolt work of the door, and so arranged as to receive the pressure of the said bolt work, without transmitting it to the wheels or other equivalent works of the lock."

The history of the application of Sargent for No. 186369, so far as it is important to the present case, is this: On June 11, 1873, having his reissued patent No. 4696, for his combination lock, in the form shown in the drawings of No. 186369, he made application for a patent for combining a time movement with the lock works of a combination lock. The drawing showed the combination lock of No. 4696; and the specification set forth the invention to be so combining a time movement with the lock works as to prevent the lock from being unlocked by the release of the time movement, and to require it to be unlocked by being set on the combination after such release. There was a time movement, consisting of two clocks, and a lever to hold up the dog or angle bar of the lock, until released by the arrival of the predetermined hour. No bolt work was shown or described. There was no idea of patenting any combination of which the bolt work formed a part. The specification had two claims: 1. "In a combination lock, I claim the combination with the lock works and with a time movement that controls the same, of a connection, H, or equivalent, so arranged that when the time movement releases the lock works, the latter still remain locked, substantially as specified. 2. I claim in combination with a time movement, and a lock, the lever H, or equivalent, connected directly with the dog C, to hold it elevated from the wheels, substantially as specified." The specification stated that Sargent did not "claim broadly the combination of a time movement

[illegible] lock," that is, a time movement or clock [illegible] to prevent the unlocking of a lock [illegible] the arrival of a predetermined time in the [illegible] of the clock.

The first claim of the application was rejected June 12, 1873, by a reference to patent No. [illegible] granted to S. W. Hollen, December 12, [illegible]. Nothing was said as to the second claim. [illegible] then disclaimed Hollen's arrangement, [illegible] the combination of "a clock movement with an ordinary key lock, by means of a [illegible] that, when the clock work releases the [illegible] the lock remains locked;" and altered [illegible] so as to read thus: "1. In a combination [illegible] the series of wheels of which are set [illegible] and operated by a spindle, I claim [illegible] with the lock works, and with [illegible] time-movement that controls the same, [illegible] H, whereby, when the time [illegible] releases the lock works, the latter [illegible] locked, substantially as and for the [illegible] specified. 2. I claim, in combination [illegible] movement and a lock, the lever H, [illegible] arranged so as to be connected [illegible] substantially as described."

[illegible] claim was again rejected, June 23, [illegible] a reference to Newton's Journal of [illegible] Rutherford's patent of 1831), as describ[illegible] application of a double time movement [illegible] a lock, bar or other fastening," [illegible] the American patent of Holbrook, of [illegible] a double time movement. The [illegible] referring to the Hollen pa[illegible] that Hollen "applies the movement [illegible] lock, which has to be operated by [illegible] the time movement releases it. To [illegible] time movement in one lock is con[illegible] the same and the same thing with doub[illegible] any other. To grant Hollen a patent [illegible] this time movement to a tumbler [illegible] to issue other patents for using [illegible] locks, is simply to nullify Hol[illegible] Sargent is entitled to a limited [illegible] his way or adaptation, but nothing [illegible] This last observation meant that the [illegible] would be allowed, but not the first. [illegible] of this ruling was, that it was not a [illegible] invention or combination to unite a [illegible] with a combination lock in[illegible] with a tumbler lock, each of which re[illegible] to be unlocked after its release, or to [illegible] in connection with one lock after [illegible] in connection with another; [illegible] special arrangement of a lever con[illegible] the time movement and the dog [illegible] patented.

[illegible] were then substituted by Sar[illegible] "1. I claim, in combination [illegible] lock having a spindle and [illegible] wheels, and with two or more sep[illegible] movements, a single lever, or equiv[illegible] H, connecting the lock and [illegible] movements; the whole so arranged that [illegible] released either by a simultaneous [illegible] of the time movements, or by one of them [illegible] and the lock still remains [illegible] when so released, as specified. 2. I [illegible] combination with a time movement [illegible] the lever H, or equivalent, connect[illegible] the dog C, to hold it from falling into [illegible] of the combination wheels, [illegible] released from the clock work, as [illegible]."

The first claim was again rejected, July 5, 1873, on the ground that the change in it did not take the case out of the references; and, on the 28th of July, 1873, Sargent appealed to the board of three examiners in chief. The decision of the board sustaining the decision of the examiner was rendered October 7, 1873. It refers to the English patent of Rutherford, of 1831, and says: "The patent of Rutherford describes an ordinary key lock, to which the time movement is so connected that it may be set for a given hour, before which it cannot be unlocked, but may be at any time thereafter. Rutherford also foresaw that one time movement might stop, and suggested two. Rutherford, as the references show, is not the only one who has thought of thus connecting a time movement to a lock. It happens, however, that the locks shown in the references are all key locks, while applicant's is a combination lock, and it is upon this that the claim is founded. While it is undoubtedly true that the combination lock is the better, there does not appear to be, in any true sense, any new combination in what applicant claims. It may be said that he has substituted, in the Rutherford combination (for example), one well known element for another, and that the result, namely: the security against unlocking before a given hour, is exactly the same in both cases. And it must be remembered that this is the whole end and scope of the combination claimed, not to prevent breakage, or picking, or bursting with gunpowder, but simply unlocking before the hour appointed. It is true that the lock connected to the time movement in the manner shown is rendered secure against [79] unlocking by unauthorized persons who pick up the combination, when the dog rests on the periphery of the cams; but it appears clear that this results from the peculiar mode of application, and is covered by the second claim. Whatever the advantage, then, arising from the substitution for the key lock, so far as has been pointed out to us, it results from the superiority of the former over the latter, and not from the combination. Nor, so far as we see, has any invention been exercised. The time movement was originally invented to prevent locks from being prematurely unlocked, and, when once the combination had been invented, it is obvious that it was as applicable to one form of locks as to another; and, to grant a patent for the union of the time movement with every old form of lock, or with every new form which might appear, would manifestly place unjust restrictions on the original invention and defeat the very purpose of the law. We understand only the first claim to be rejected."

These observations are true, as the record in this case shows, and it also shows many patents in which, prior to 1873, one clock or two clocks were employed to relieve, at a predetermined time, the bolts of a door from a dog obstructing their retraction, so that the door could be opened when that time had arrived, but not before.

Nothing more was done with this application till March 18, 1875, when Sargent presented a new specification and claims, making prominent the feature of the free rotation of the tumblers of the combination lock, through the medium of the lock spindle, during the suspension, by the time movement, of the unlocking action

of the combination lock, and changing the claims to read thus: "1. The combination of a time movement with a combination lock and a lever constructed and located to render inoperative such combination lock until a predeterminate hour, the tumblers of the combination lock being free to rotate through the medium of the lock spindle, while the unlocking action of the combination lock is suspended by the time movement. 2. I claim, in combination with a time movement and a lock, the lever H, or equivalent, connected with the dog C, to [80] hold it from falling into the slots or notches of the combination wheels, except when released by the clock work, substantially as described." On the 24th of March, 1875, the first claim was again rejected by references to the Hollen patent of December, 1871, and the Rutherford patent of 1831. The letter of rejection said: "Hollen shows the combination of a time movement and a lock, with a lever constructed and located to render inoperative such lock until a predeterminate hour, the tumblers of the lock being free to rotate through the medium of a key, while the unlocking action of the lock is suspended by the lever. Rutherford shows (figures 1, 2, 3, 4 and 5, sheet 2) the combination of a time movement and a lock, with a lever arranged to engage with the bolt of a lock and render inoperative such lock until a predeterminate hour. To merely substitute the ordinary combination lock, such as shown, for example, in the patent permutation lock of James Sargent, August 28, 1866, for the lock shown in either of the above references, is not regarded as a patentable difference. * * * The second claim is not objected to. The first claim is again refused."

This application was not further prosecuted. On the 12th of July, 1875, Sargent addressed a letter to the Patent Office, entitled in the case, in which he said: "So many amendments and actions having been made in the above entitled case, I desire to withdraw and abandon it, for the purpose of filing a new application. I, James Sargent, have this day filed said application for the invention, and request that the model of the case above named be applied as a model in the application filed to day. I intend and request that this application be a substitute application for the one so withdrawn."

Up to this time no bolt work had been shown or described. The object of the new application was to introduce bolt work as an element in the device. The drawings were the same as those in No. 186369, showing bolt work, with the time movements and the combination lock. Bolt work was added to the former model. The specification contained three claims, as follows: "1. The combination, substantially as hereinbefore set forth, of a time mechanism and a combination lock with the bolt work of a safe or vault door, the time mechanism being constructed to act in conjunction with and render [81] inoperative the combination lock when locked, said lock having its bolt or bearing arranged to rest upon and receive the pressure of the bolt work of the door when locked, and prevent the unlocking of said bolt work until the arrival of a certain predeterminate time. 2. The combination, substantially as hereinbefore set forth, of a combination lock and the bolt work of a safe or vault door, with a time movement and a lever connection, said lever being construct and located to render the bolt or bearing of t combination lock inoperative when locked, t tumblers of the combination lock and its sp dle being free to rotate while the bolt work the door rests upon the bolt or bearing of t combination lock. 3. In combination with time movement and a lock, a lever, or its equ alent, adapted to be connected with the dog said lock, to hold it from falling into the sl or notches of the combinatin wheels, exce when released by the time movement, subst tially as described."

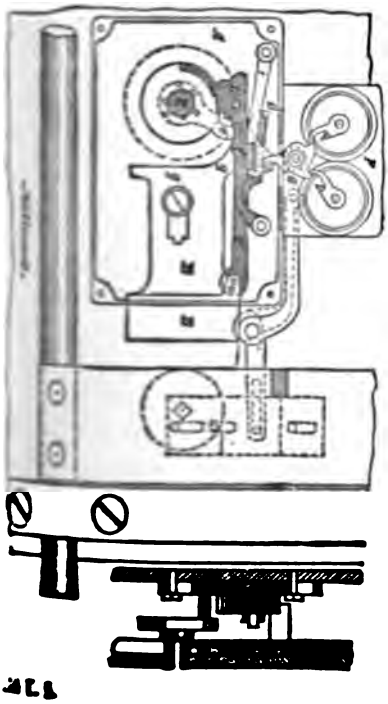
On the 31st of July, 1875, claims 1 and 3 w rejected by references to the patent of Holle of December, 1871, and that of Rutherford 1831; and a time lock arranged in connecti with the bolt work of a door, in the time lo of Little, patented in January, 1874, was ferred to. Those claims were again reject September 6, 1875, in a letter which said: "T employment of locks of various kinds for sec ing the bolt work of a door is too common a well known to require further references. ther Hollen's or Rutherford's lock can be plied to the bolt work of a door without t least change being made to adapt it thereto. T mere substitution of one well known kind locks for another kind equally well known been decided again and again as not a pate able difference."

On December 3, 1875, an interference w declared between claims 1 and 2 and four otl applications; and between claim 3 and four otl applications. On February 12, 1876, the int ference as to claims 1 and 2 was dissolved, a they were again rejected. A further amei ment of the specification was made Februa 15, 1876, and claims 1 and 2 were altered so to read as follows: "1. The combination, s stantially as hereinbefore set forth, of a ti mechanism and a combination lock with bolt work of a safe or vault door, the ti mechanism being constructed to act in conju tion with and render inoperative the combi tion lock when locked, said lock having its b or bearing constructed to receive the press of the series of bolts constituting the bolt w of the door when locked, and preventing unlocking of said bolt work until the arriva a certain predeterminate time. 2. The com nation, substantially as hereinbefore set fo of a combination lock and the series of b constituting the bolt work of a safe or v door, with a time movement and a lever c nection, said lever being constructed and lo ed to render the bolt or bearing of the combi tion lock inoperative when locked, the tumb of the combination lock and its spindle be free to rotate while the bolt work is held in locked position by the bolt or bearing of the c bination lock." The claims were not allow but a new interference as to them was decla March 8, 1876, with the same four applicati the subject matter being: "The combinatio a time mechanism and a combination lock w the bolt work of a door."

On the 11th of January, 1877, the appl tion was amended by withdrawing claims 1 2. Two days before this, and on Januar 1877, Sargent had filed the application on w No. 186369 was granted. The special const tion and arrangement of parts, a claim for wh

[illegible] the specification of that patent states, was made in a separate application, was covered by the claim of patent No. 198157, granted to Sargent December 11, 1877, in pursuance of the application of July 12, 1875, that claim being as follows: "In combination with a time movement and a lock, a yoke lever or equivalent, adapted to be connected with the dog, fence or other bar of said lock, to hold it from falling in the slots or notches of the combination wheels except when released by the time movement, substantially as described." The present case does not involve any infringement of No. 198157.

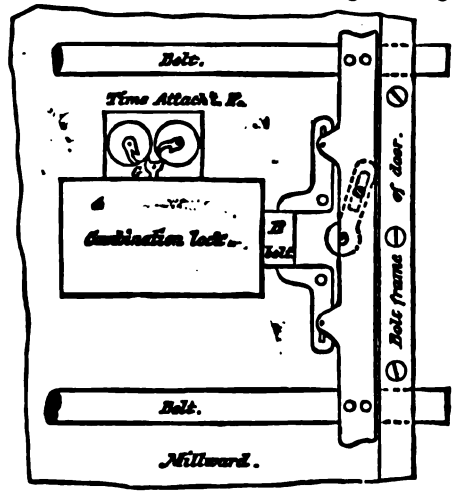
As before remarked, the specification of No. 186369, the patent here sued on, contains the following statement: "The lock bolt or bearer of the combination lock may be of a circular, semicircular or other desired form, provided that such bolt is arranged and adjusted so as to turn upon a suitable axis or bearing, and is so constructed that, in one position, it will prevent the retraction of the bolt work so as to retain the safe or vault door locked, while, in another position, it will admit of the bolt work being retracted, for the purpose of allowing the safe or vault door to be opened." This clause had not appeared in any of the specifications from and including that filed June 11, 1873, until it was inserted in the one filed January 9, 1877, on which the patent No. 186369 was granted. It is a limitation without which it must be assumed, in view of the numerous prior rejections, the claims allowed would not have been granted. The same clause was inserted, May [illegible], in the specification of the application of [illegible] 2, 1875, as it remained after claims 1 and [illegible] were withdrawn, January 11, 1877, as that clause appears in the specification of [illegible], as issued December 11, 1877.



The defendants' lock, which it is alleged infringes the two claims of No. 186369, is of the construction shown by the following drawing, made by the plaintiff's witness Millward:

In that drawing A is the case of the lock; B, the bolt; C, the dog, pivoted in the bolt at *c*, and engaging, when held up by the time mechanism, behind a fixed stump, D; E, the arbor of the lock, the hook, *e*, of which engages with the hook, *f*, of the dog, and throws the bolt B back, when the dog is released by the time mechanism. The same hook, *e*, by running on the surface, *g*, throws the bolt B out, to lock the door. F is the time attachment, which has a lever, G, the arm of which, extending through the case of the lock, has the hook H at its lower end, which holds up the pivoted arm I, and through it the dog C. [84]

Another form of the bolt work of the defendants' lock is shown by the following drawing:



It is contended for the defendants, that each of the combinations covered by the two claims of No. 186369 must be limited to the particular devices described in the specification and shown in the drawings, and to their mode of operation, both claims being limited by the words "substantially as hereinbefore set forth;" and that, under this construction, the defendants do not infringe.

The second claim imposes on the combination claimed in it the limitation, that the tumblers of the combination lock and its spindle shall be free to rotate, while the bolt work is held in its locked position by the bolt or bearing of the combination lock. This is enforced by the language of the specification, which, in stating in what the invention consists, states that "the peculiarity and novelty" of the union or combination, consisting of a combination lock, a time movement, and a yoke or lever connection, is that "when the said combination lock, with its time mechanism, is arranged upon a safe or vault door, to operate in conjunction with the bolt work thereon, and all locked, the tumblers or combination wheels of said lock, and the spindle of the same, together with its usual indicator, are all left free to be moved or rotated without exerting any unlocking action or strain whatever upon the mechanism composing the [85]

combination lock, or the delicate mechanism composing the time movement." Again, the specification says: "Another feature of the utmost importance present in the combination of parts brought together is, that the connection between the time movement and the combination lock is such that, when the time movement is set, the parts adjusted, and the safe doors closed, the combination lock will be rendered inoperative until a predeterminate hour, during which interval of time the unlocking action of the combination lock will be suspended by the time movement, while the tumblers or combination wheels of the aforesaid combination lock are left free to rotate, if power is exerted upon the dial spindle for the purpose of twisting said spindle out of place, or impairing the lock mechanism, and, by such, the working parts of the combination lock cannot be injured or rendered useless for future action." This feature, thus declared to be peculiar and novel, of the free rotation of the tumblers, is not shown to exist in the defendants' lock. The plaintiff's expert, Mr. E. S. Renwick, testifies that this peculiarity is not found in the defendants' lock, and that, for that reason, that lock does not embody the combination of claim 2 of No. 186369.

As to claim 1, it is limited, by the language of the specification, to a combination lock having a bolt or bearing which turns on an axis or revolves. The defendants' lock has a sliding bolt. It was not new, at the time of Sargent's [86] invention, to apply a time movement to dog the sliding bolt of a lock; and it is plain that he limited himself to a rotating bolt. The specification makes it as necessary that the combination lock should have a turning or revolving bolt or bearing as that such bolt or bearing should have the quality of receiving the pressure of the bolt work, when locked. This turning or revolving feature of the bolt or bearing is made, by the specification, as necessary to the combination lock of claim 2 as to that of claim 1.

In patents for combinations of mechanism, limitations and provisos, imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor, and in favor of the public, and looked upon as in the nature of disclaimers. As was said in *Fay* v. *Cordesman*, 109 U. S., 408, 420 [bk. 27, L. ed., 979, 984]: "The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim, and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted device is supplied by an equivalent device or instrumentality. *Water-Meter Co.* v. *Desper*, 101 U. S., 332 [bk. 25, L. ed., 1024]; *Gage* v. *Herring*, 107 U. S., 640 [bk. 27., L. ed., 601]."

These considerations lead to the conclusion that *the decree of the Circuit Court was correct and must be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—116 U. S., 249.

EDWARD G. THOMPSON ET AL., *Appts.*,
v.
ELIZABETH E. BOISSELIER ET AL.

SAME, *Appts.*,
v.
SAME.

McNAB & HARLAN MANUFACTURING COMPANY ET AL., *Appts.*,
v.
EDWARD G. THOMPSON ET AL.

JOHN EATON ET AL., *Appts.*,
v.
SAME.

(See S. C., Reporter's ed., 1-14.)

Patent law—patentability—letters patent No. 21734, and reissued letters patent No. 978, for "improvements in water closets"—state of the art.

*1. The third claim of reissued letters patent No. 978, granted to William S. Carr, June 12, 1860, for "improvements in water closets" (the original patent having been granted to him August 5, 1856, and, as reissued, extended, July 23, 1870, for 7 years from August 5, 1870), namely: "In a valve for water closets, a cup leather for controlling the motion of said valve in closing gradually, substantially as specified, said cup leather moving freely in one direction, and closing against the containing cylinder in the other direction, and the leakage of water in said cylinder allowing the movement of said cup leather, as set forth," construed, and the operation of the device explained.

2. The state of the art, as to prior devices, and the construction and operation of the defendants' device, set forth.

3. In view of the state of the art: *Held*, that, for the purpose of securing the free passage of water in one direction, and preventing its escape in the other direction otherwise than gradually, the defendants had used nothing which they did not have a right to use, and had not appropriated any patentable invention which Carr had a right to cover, as against the defendants' structure, by the third claim of his reissue.

4. All that Carr did, if anything, was to add his form of orifice to the valve and cup leather of an existing pump plunger.

5. The third claim of the Carr reissue involves, as an element in it, the means of leakage set forth.

6. The only point of invention, if it could be dignified by that name, was the special means of leakage shown by Carr, but which the defendants did not use.

7. To be patentable, a thing must not only be new

*Head notes by *Mr. Justice* BLATCHFORD.

NOTE.—*What constitutes a patentable invention.* See a review of the authorities *per* Clifford, J., in Dunbar v. Meyers, 94 U. S. 187, bk. 24, L. ed., 34, 35; also Rubber Tip Pencil Co. v. Howard, 87 U. S., 498, bk. 22, L. ed., 410; Reckendorfer v. Faber, 92 U. S., 347, bk. 23, L. ed., 719. See briefs of counsel in two last named cases as reported in this edition.

and useful, but must amount to an invention or discovery.

Recent decisions of this court on the subject of what constitutes a patentable invention cited and applied.

Under them, claim three of the Carr reissue must, in view of the state of the art, either be held not to involve a patentable invention, or, if it does, not to have been infringed.

The first claim of letters patent No. 21734, granted to Frederick H. Bartholomew, October 12, 1858, for an "improved water closet," and extended, October 2, 1872, for 7 years from October 12, 1872, namely: "The use of a drip box or leak chamber, arranged above the closet, and below and around the supply cock, substantially as described," must, in view of the state of the art, be limited to a drip box arranged above or on top of the closet, and is not infringed by a structure in which the drip box is set on the side of the trunk, near the top, but below it, and not on top of it.

[Nos. 189, 190, 196, 197.]

Argued Mar. 10, 1885. Decided Mar 30, 1885.

APPEALS from the Circuit Court of the United States for the Eastern District of Missouri (189, 190).

APPEALS from the Circuit Court of the United States for the Southern District of New York (196, 197).

The history and facts of the case appear in the opinion of the court.

Mr. **Edmund Wetmore, G. G. Frelinghuysen** and **E. G. Thompson,** for complainants.

Mr. **Llewellyn Deane, Samuel S. Boyd** and **H. A. Sharpless,** for defendants.

Mr. Justice **Blatchford** delivered the opinion of the court:

These are four suits in equity. The first one was brought in February, 1877, in the Circuit Court of the United States for the Eastern District of Missouri, by Charles F. Blake, as trustee of William S. Carr and Frederick H. Bartholomew, against Elizabeth E. Boisselier and Louis C. Cupferle, for the infringement of reissued letters patent No. 978, granted to William S. Carr, June 12, 1860, for "improvements in water closets," the original patent having been granted to him August 5, 1856, and, as reissued, extended, July 23, 1870, for 7 years from August 5, 1870.

The second suit was brought in February, 1879, in the same court, by Charles F. Blake, as trustee of Sarah Bartholomew, against the same defendants, for the infringement of letters patent No. 21734, granted to Frederick H. Bartholomew, October 12, 1858, for an "improved water closet," and extended, October 2, 1872, for 7 years from October 12, 1872.

The third and fourth suits were brought in [illegible], in the Circuit Court of the United States for the Southern District of New York, by Charles F. Blake, as trustee, etc., and William S. Carr and Sarah M. Bartholomew—one against the McNab and Harlan Manufacturing Company and John Harlan, and the other against John Eaton and others—each for the infringement of the said Carr patent, as reissued and extended, and of the said Bartholomew patent as extended.

In each of the two suits in Missouri a decree was made in May, 1880, adjudging that the patent sued on was not good and valid in law, and dismissing the bill. In each of the two suits in New York, a decision was made in February, 1882, 19 Blatchf. C. C., 73, adjudging that the two patents were good and valid in law, and that the third claim of the Carr reissue, and the first claim of the Bartholomew patent, had been infringed, and awarding an account of profits and damages; and in January, 1882, a final decree was made in one suit for $1,200 damages and $118.74 costs, and in the other for $415 damages and $101.24 costs. The plaintiffs in interest in each of the Missouri suits, and the defendants in each of the New York suits, have appealed to this court. The questions are the same in all of the suits and arise on the same proofs.

The third claim of the Carr reissue is the only claim of that patent which is alleged to have been infringed. So much of the specification of that reissue as relates to that claim is as follows: [4]

"Fig. 1 is an elevation of my closet as in place for use; fig. 2 is a plan of the cock and part of the plan of said closet; and fig. 3 is a vertical section of my cock made use of in letting the water into and shutting the same off from said closet. Similar marks of reference indicate the same parts in all the figures. The [5]

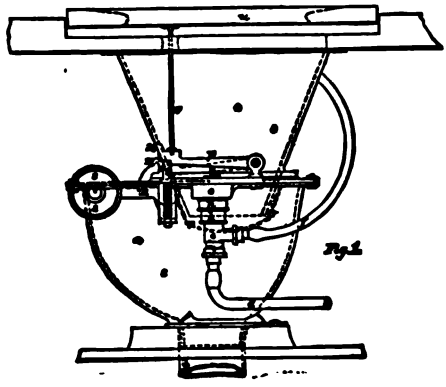


Fig. 1.

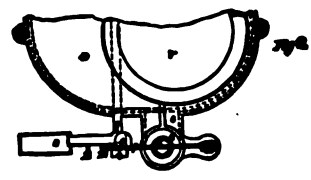


Fig. 2.

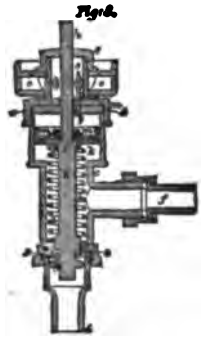


Fig. 3.

nature of my said invention consists in a peculiar construction of cock, which is opened by the motion of the seat of the water closet, and allows but little water to run into the pan of

the closet until the weight is removed from the seat, when the cock, gradually closing of itself, allows the water to run for a limited and regulated time, sufficient to wash out the basin. * * * In the drawing, *a* is the trunk on the upper end of the soil pipe *b*, fitted with the pan *r*, on the shaft or spindle *q*, and *c* is the basin setting on to the trunk *a*. These parts, thus far, are to be of any usual or desired character; *d* is a pipe supplying water from any suitable head, and said pipe is attached to the coupling 1, that screws on to the body *e* of the cock, and *f* is a pipe and coupling passing water (when admitted as hereafter detailed) to the basin *c*, where it is to be fitted with the deflector, as usual. The cock *e*, that supplies water to the basin, is constructed with a stem *h*, passing nearly or quite air tight through the leather washer 4, beneath the cap *n*, and the lower end of said stem
[6] *h* is formed with a valve *g*, and with a cylindrical part 3, fitting water tight, or nearly so; the opening of the washer 2, between the coupling 1 of the pipe *d* and cock *e*, and the sides of this cylinder 3, are formed with notches, or a groove *x*. It will now be seen that, if the stem *h* be pressed down by the weight of the person acting on the seat *u*, rod *v*, and lever *p*, or by any other suitable means, the valve *g* will be forced away from the washer 2, and allow a dash of water to pass through the notch *x* sufficient to fill up the parts of the cock, and then that the cylinder 3, descending and filling the opening in the washer 2, will prevent, or nearly so, the passage of any more water into the closet; *i* is a spring around the stem *h*, which acts in aid of the pressure of the water on the valve *g*, to close the same, as soon as the force which opened the said valve is removed, but, if this alone was used, the concussion would be so great as to tend to break the parts, besides which sufficient water would not be supplied to the water closet to cleanse the same. I therefore make use of the following means, which cause said valve *g* to close slowly and in a regulated amount of time, thereby allowing the desired quantity of water to dash past the washer 2, at the time the notches or openings *x* are moving past the same. The upper part of the cock *e* is formed as a cylinder *k*, in which is a disk *l*, attached to the stem *h*, and a cup leather *m*, above the same; *n* is a cap of the cylinder *k*, which is formed with a short tube 8, passing up through a hollow projection 0, from the side of the trunk *a*, and secured thereto by a nut 6. At the time the valve *g* is pressed down, as before stated, the water dashes momentarily on to the cock and fills the same, passing the cup leather *m*, and filling the cylinder *k*, and, upon the pressure on the stem *h* being removed, the cup-leather expands by the slight rise of the stem, and would retain the valve *g* open were the cylinder *k* water tight, and, therefore, the closing of said valve will be regulated according to the extent of leakage provided in said chamber *k*, and for this purpose the leakage at the washer 4, around the stem *h*, may in some cases be sufficient; but I propose to use a screw 9, entered through the cap *n*, with a head next the washer 4, and part of one side of the screw filed away,
[7] so as to adjust the amount of leakage and regulate the time during which the water will run into the closet. * * * I am also aware that a given amount of water leakage has been used to prevent a sudden motion in cocks, balances meters, and a variety of other instruments therefore I do not claim the same, but I am no aware that a cup leather has ever before been s fitted and applied with a valve as to allow th water to pass the said cup leather freely in th chamber in which it moves, and then act, whe the power is relieved from the valve, upon th water in said chamber and gradually allow th valve to close."

The third claim of the Carr reissue is as fol lows: "Third. I claim, in a valve for wate closets, a cup leather for controlling the motio of said valve in closing gradually, substantiall as specified, said cup leather moving freely i one direction, and closing against the contain ing cylinder in the other direction, and th leakage of water in said cylinder allowing th movement of said cup leather as set forth."

In the Carr apparatus, the valve is combine with a containing cylinder and a cup leather, i such manner that the valve is caused to clos slowly, because the action of the cup leather a a tight packing prevents the passage of wate while the valve is closing; and the valve ca open rapidly, because, as it opens, the cu leather does not act as a packing, but permit the passage of water outside of it. In the co taining cylinder there is a piston which has o it centrally a cup leather, and is provided wit a small aperture which permits the gradual es cape of water from it. When the cylinder i filled with water the valve is held to its seat b a spiral spring. When the valve stem is de pressed, the valve opens rapidly, because th cup leather permits the water to pass freely ou side of it. When the force which depressed th valve stem is removed the spring acts to shu the valve, but it shuts slowly, because the cu leather acts as a tight packing, being forced ou ward against the inner wall of the cylinder b the pressure of the water. Therefore, the wa ter escapes slowly from the cylinder throug the small aperture, and the valve cannot mov faster, in shutting, than it is allowed to move b the escape of the water through the sma aperture.

The apparatus alleged to infringe the two pa tents is the same in all of the suits. It has brass casting, and is thus described by the plain iff's expert: "This brass casting of the defend ants has at its lower part a cavity, whose wall partially bound the variable chamber. Th cavity is a cup-shaped piece of brass, screwe to the bottom of the casting. A cylindric brass plunger enters this cavity, and the uppe end of it is formed into a valve. This bras plunger is packed to the top of the cavity by cup leather, which is secured between the u per part of the brass cup and an internal flang on the brass casting. The stem of the plunge and valve is surrounded by a coiled brass spring which always tends to lift the plunger and shu the valve. The plunger has, also, a small nic or groove cut in its periphery, and extendin from the top to the bottom of the plunger. Whe this contrivance is ready for operation, all part of the cavity in the brass casting, including th variable chamber, are filled with water, and th valve is held on its seat by the spiral spring, th plunger then being in its highest position. Whe it is desired to open the valve, force is applie to depress the valve stem; this force compresse

[illegible] the plunger, and opens the [illegible] quickly, owing to the fact that the water [illegible] rapidly from the variable chamber, [illegible] being due to the operation of [illegible] leather, which now ceases to hug the [illegible] and acts as a valve, permitting the water [illegible] freely from the variable chamber. [illegible] which was applied to depress [illegible] and open the valve is removed, then [illegible] strives to shut the valve and elevate [illegible] and, as soon as it commences to [illegible] the plunger, the pressure of water causes [illegible] leather to hug the plunger tightly, so [illegible] to act as a valve, and becomes a [illegible] packing. As soon as this occurs, water [illegible] enter the chamber through the small [illegible] in the periphery of the plunger, and the [illegible] shut no faster than this small flow of [illegible] permits it to shut."

[illegible] shown by the evidence that cup leathers [illegible] used in the central valves of the [illegible] of pumps, the cup leather contracting [illegible] down stroke and allowing the water to [illegible] by, and spreading out on the up stroke and [illegible] the water; and that it was not new to [illegible] a variable chamber to effect, by the [illegible] escape of water from it, the slow and [illegible] closing of a valve.

[illegible] Hulme's English patent No. 8971, [illegible] 1841, is shown a device for "keeping a valve open for any required length of [illegible] for the supply of water to the basins of water-closets generally." The specification says: "[illegible] the length of time that the valve [illegible] kept open for the flow of water from [illegible] to the basin of the closet, after the [illegible] valve has closed, the barrel A A is furnished with the openings N N, communicating [illegible] the under to the upper side of the bucket [illegible] and fitted with a cock O. Now, by turning [illegible] cock O in such a position that the water [illegible] through the cock O will be diminished, [illegible] will be required for the bucket to [illegible] the contents of the barrel, and *vice versa*. The bucket D does not have a cup leather, [illegible] a central valve E to allow the water to [illegible]

[illegible] defendants have substantially the Hulme [illegible], using a cup leather centrally, instead of the Hulme central valve. A central [illegible] being old, and a cup leather being old, and [illegible] valve and a cup leather combined being old, and a plunger with a central valve and [illegible] of regulating the escape of the water [illegible] being old, and the device for the [illegible] of the water, used by the defendants, being [illegible] as in Hulme, it must be held that, [illegible] purpose of securing the free passage of [illegible] in one direction and preventing its escape [illegible] other direction otherwise than gradually, [illegible] have used nothing which they [illegible] a right to use, and have not appropriated any patentable invention which Carr had [illegible] against the defendants' structure [illegible] the third claim of his reissue. If Carr [illegible] the defendants' form of structure [illegible] made his own, he would not, in view [illegible] of the art, have made anything having [illegible] novelty in it; and, therefore, what [illegible] in claim three of his reissue has [illegible] feature which the defendants' [illegible] infringes. The action of the [illegible] water in Carr's structure and in the defendants' to admit the free passage of the water while the valve is moving in one direction, [10] and to prevent such passage while the valve is moving in the other direction, is due to the flexibility of the leather, and to the pressure of the water on its different sides alternately, and to its position with reference to the wall of the chamber, and is the same as in the old central valve of a pump plunger which was furnished with a cup leather. The effect resulting from allowing the water, which cannot return through the passage by which it entered, to escape by a small orifice and gradually, and thus cause a gradual movement in a valve attached to the central stem, is due to the small orifice. All that Carr did, if anything, was to add his form of orifice to the valve and cup leather of the pump plunger. But the idea of having openings extending from one side to the other of a bucket, and thus regulating the closing of a water valve by the slow escape of the water from the upper side of the bucket, through such openings, was fully exhibited in the apparatus of Hulme.

Claim 3 of Carr's reissue speaks of the cup-leather as "moving freely in one direction and closing against the containing cylinder in the other direction." This action existed in the cup-leather of the old pump plunger. The claim also says: "the leakage of water in said cylinder allowing the movement of said cup leather, as set forth." This means, that the greater or less extent of the leakage allows a faster or slower movement of the cup leather, and a faster or slower closing of the valve. The claim involves, therefore, as an element in it, the means of leakage set forth. It says that the use of the cup leather is "for controlling the motion of said valve in closing gradually, substantially as specified." But it is the gradual escape of the water through the small orifice which controls the motion of the valve. The cup leather does not control such motion. The only action of the cup leather is the same which it had in the old pump plunger—to hold up a column of water and act as a packing to prevent the return passage of the water. In this condition of things, it would seem that the only point of invention, if it could be dignified by that name, was the special means of leakage shown by Carr, of having a screw through the cap, with part [11] of the screw filed away; and which is not used by the defendants, who use the same means of leakage as Hulme did.

The provision of the Constitution (Art. 1, sec. 8, subd. 8), is, that the Congress shall have power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The beneficiary must be an inventor and he must have made a discovery. The statute has always carried out this idea. Under the Act of July 4, 1836, 5 Stat. at L., 119, sec. 6, in force when these patents were granted, the patentee was required to be a person who had "discovered or invented" a "new and useful art, machine, manufacture or composition of matter," or a "new and useful improvement in any art, machine, manufacture or composition of matter." In the Act of July 8, 1870, 16 Stat. at L., 201, sec. 24, the patentee was required to be a person who had "invented or discovered any new and use-

ful art, machine, manufacture or composition of matter, or any new and useful improvement thereof;" and that language is reproduced in section 4886 of the Revised Statutes. So, it is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must, under the Constitution and the statute, amount to an invention or discovery.

To refer only to some more recent cases, adjudged since these suits were decided below, this principle was applied in *Vinton* v. *Hamilton*, 104 U. S., 485 [Bk. 26, L. ed., 807], where, a cupola furnace being old, and a cinder notch being old, and the use of a cinder notch to draw off cinders from a blast furnace being old, and the cinder notch, in drawing off the cinder from a cupola furnace, performing the same function as in the blast furnace, it was held that the application of the cinder notch to the cupola furnace would occur to any practical man, and that there was nothing patentable in such application.

In *Hall* v. *McNeale*, 107 U. S., 90 [Bk. 27, L. ed., 367], a cored conical bolt, in a safe, with a screw thread on it, having existed before, and also a solid conical bolt, it was held to be no invention to add the screw thread to the solid conical bolt.

[12] In *Atlantic Works* v. *Brady*, Id., 192, 200 [Bk. 27, L. ed., 438, 441], it was said, that it is not the object of the patent laws to grant a monopoly for every trifling device which would naturally and spontaneously occur to any skilled mechanic or operator, in the ordinary progress of manufactures; and this doctrine was applied in *Slawson* v. *R. R. Co.*, Id., 649 [Bk. 27, L. ed., 576]; in *King* v. *Gallun*, 109 Id., 99 [Bk. 27, L. ed., 870]; in *Tack Co.* v. *Mfg. Co.*, Id., 117 [Bk. 27, L. ed., 877]; in *Estey* v. *Burdett*, Id., 633 [Bk. 27, L. ed., 1058]; in *Bussey* v. *Mfg. Co.*, 110 Id., 181 [Bk. 28, L. ed., 95]; in *R. R. Co.* v. *Truck Co.*, Id., 490 [Bk. 28, L. ed., 222]; in *Phillips* v. *Detroit*, 111 Id., 604 [Bk. 28, L. ed., 532]; in *Morris* v. *McMillin*, 112 Id., 244 [Bk. 28, L. ed., 702]; and in *Hollister* v. *Mfg. Co.*, 113 Id., 59 [Bk. 28, L. ed., 901].

In the case last cited the thing claimed was new, in the sense that it had not been anticipated by any previous invention, and it was shown to have superior utility, yet it was held not to be such an improvement as was entitled to be regarded, in the patent law, as an invention. The claim was: "A stamp, the body of which is made of paper or other material, and having a removable slip of metal or other material, displaying thereon a serial number, or other specific identifying mark, corresponding with a similar mark upon the stub, and so attached that the removal of such slip must mutilate or destroy the stamp." The part designed to become a stub when the stamp proper was separated therefrom, and displaying a serial number, was well known; and so was the constituent part of the stamp proper designed to be permanently attached to a barrel. The third element, namely: a constituent part of the stamp proper displaying the same identifying serial number as the stub, which part, after the stamp proper had been affixed to the barrel, bore such relation to the permanent part, that it could be removed therefrom so as to retain its own integrity, but to mutilate, and thereby cancel t stamp, by its removal, was not new, so far the contents of such constituent part were ide tical with those on the stub. But the questi turned on that feature of the third eleme whereby a removable part of the stamp prop the contents of which identified the stamp wi the stub after the stamp had been attache could be so removed as to retain its own int rity, but mutilate, and thereby cancel, the star by its removal. This was held not to be a p tentable invention; and "not to spring fr that intuitive faculty of the mind put forth the search for new results, or new metho creating what had not before existed, or bri ing to light what lay hidden from vision;" to be only "the display of the expected skill the calling," and involving "only the exerc of the ordinary faculties of reasoning upon materials supplied by a special knowledge, a the facility of manipulation which results fr its habitual and intelligent practice;" and to "in no sense the creative work of that inve ive faculty which it is the purpose of the C stitution and patent laws to encourage and ward."

On these principles claim 3 of the Carr reis must, in view of the state of the art, either held not to involve a patentable invention, if it does, not to have been infringed.

The specification of the Bartholomew pat says: "The nature of my invention consist providing for water closets a cistern, or dri leak chamber, arranged upon the top of or c the trunk of a closet, and placing a supply c within or above said drip box or cistern, so t any waste or leak or drip from the cock s be conducted into the trunk, so as to insure keeping of the floor dry. * * * Fig. 1 prospective view of a pan closet, showing drip box arranged upon the top plate of closet, and the cock for supplying water to same secured to the closet within the drip b * * * The general form of the closet is s as is in common use. Upon the cover, cast a box, inclosure or cistern, E, about inch high (more or less), and broad enoug admit of placing the 'A' cock (I use a v cock) within the cistern, and (where it is p ticable) so as also to receive the drip that escape from the joint at the arm of the b called the 'putty joint.' I screw the cock the cover of the closet, and make a hole wi the drip box, or in the bottom of the cock admit the leak to fall into the trunk, P, and on to the floor." The first claim of the pat which is the only one alleged to have bee fringed, reads thus: "First. I claim the u a drip box or leak chamber, arranged abov closet, and below and around the supply c substantially as described."

The defendants' structure has a trunk, a supply cock, and a drip box arranged below around the supply cock, but the drip box is on the side of the trunk, near the top, bu low it, and not on top of it. The drip goe to the drip box, and thence into the trunk the soil pipe. The following devices are sh to have been old: A drip-cup or drip bo pipe to convey away drippings, in machin from a drip box arranged in connection wi cock; a drip cup applied to the valve of a ter-closet, the leakage from the valve fallin

[illegible], and thence finding its way, through a [illegible] into the inside of the trunk; a valve on the floor at the foot of the trunk; a valve attached to the trunk and below its top; a valve [illegible] top; a valve with a drip pan conducting the drip into the soil pipe at the foot of the trunk, a valve on top of the trunk, and a pro[illegible], by means of a hollow arm, to conduct the drip into the trunk. In view of this state of the art, the claim must be limited, as defined by its language and that of the specification, to a drip box "arranged upon the top of or over the trunk"—"arranged upon the top plate"—"upon the cover"—"arranged above the trunk." The limitation imposed by the patent must be presumed to have been made with good reason, and, even if there was anything patentable in the claim as it reads, it cannot, in view of the state of the art, be extended to cover any structure except one which has a drip box arranged above or on top of the closet, and, therefore, has not been infringed.

From these considerations it results that *the decrees in the Missouri suits must be affirmed; and those in the New York suits must be reversed, with directions to dismiss the bills, with costs.*

[illegible] copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

J. ADDISON HAYES, *Plf. in Err.*,

v.

MAYOR AND ALDERMEN of the CITY OF HOLLY SPRINGS.

(See S. C., Reporter's ed., 120-127.)

Constitutional law—Act of Legislature of Mississippi of March 16, 1872, not sufficient to validate unauthorized issue of bonds by the City of Holly Springs.

The Constitution of Mississippi, adopted December 1, 1869, provided as follows (art. 12, [illegible]): "The Legislature shall not authorize any county, city or town, to become a stockholder in, or to lend its credit to, any company, association or corporation, unless two thirds of the qualified voters of such county, city or town, at a special election, or regular election, to be held [illegible], assent thereto." A city in that State subscribed for stock in a railroad corporation after what was called a "special election" was held, but neither the election nor the subscription was authorized by any Act of the Legislature. Afterwards, the Legislature passed an Act providing "That all subscriptions to the capital stock of the corporation, made by any city or town in this State, which were made in violation of the Constitution of this State, are hereby legalized, ratified and confirmed." Thereafter the city issued bonds [illegible] for its subscription. In a suit [illegible] by a *bona fide* holder of coupons cut from the bonds, to recover their amount, *Held*:

(1) The intention of the Legislature to confirm and ratify the subscription could not be ascertained with certainty from the language of the Act;

(2) The bonds were void, for want of power to issue them, notwithstanding any recitals on their face, or any acts *in pais*, claimed to operate by way of estoppel.

[No. 200.]

Argued Mar. 17, 1885. Decided Mar. 30, 1885.

IN ERROR to the District Court of the United States for the Northern District of Mississippi.

The history and facts of the case appear in the opinion of the court.

Messrs. **H. T. Ellett** and *B. M. Estes*, for plaintiff in error.

Messrs. **Ed. M. Watson**, *W. S. Featherston* and *Van H. Manning*, for defendants in error.

[121.]

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit at law brought by J. Addison Hayes, in the District Court of the United States for the Northern District of Mississippi, against the Mayor and Aldermen of the City of Holly Springs, to recover the sum of $8,560, as due on 568 coupons, cut from 43 bonds, for the payment of $16,250, purporting to be issued by the City of Holly Springs, in the State of Mississippi, the bonds and coupons being owned by the plaintiff. Each bond is in the following form:

"State of Mississippi, City of Holly Springs.

Bond. Issued in payment of stock of the Selma, Marion and Memphis Railroad Co.

No. ———, $———. Fifteen years.

Know all men by these presents, that the City of Holly Springs, Marshall County, in the State of Mississippi, acknowledges itself indebted and firmly bound to the Selma, Marion and Memphis Railroad Company, in the sum of ——— dollars, which sum the City of Holly Springs promises to pay to the Selma, Marion and Memphis Railroad Company, or bearer, at the Holly Springs Savings and Insurance Company, Holly Springs, Mississippi, on the first day of January, A. D. one thousand eight hundred and eighty-seven, together with the interest thereon from the first day of January, A. D. one thousand eight hundred and seventy-two, at the rate of eight per cent per annum, which interest shall be payable semi-annually, on the presentation and delivery of the attached interest coupons, at the office of the said Holly Springs Savings and Insurance Company.

[122]

This bond is issued under and in pursuance to an order of the Board of Mayor and Aldermen of the City of Holly Springs, Marshall County, State of Mississippi, made under authority of the Constitution of the State of Mississippi and the laws of the Legislature of the State of Mississippi, and authorized by a vote of the people of the said City of Holly Springs, at a special election held for the purpose.

[Corporate seal.] In testimony whereof, the said City of Holly Springs has executed this bond by the mayor of said city, under the order of said city's Board of Mayor and Aldermen, signing his name thereto, and by the treasurer of said city, under the order thereof, attesting the same, and affixing thereto the said seal of the said City of Holly Springs.

[illegible] *of unauthorized acts by municipalities—[illegible] validation.* See Brown v. Mayor, 63 [illegible]; Burroughs on Public Securities, 278; [illegible] v. District of Columbia, 97 U. S., 687, [illegible] v. Baldwin, 111 U. S., 1, [illegible] v. Cooke, 107 U. S. 549, bk. [illegible] Supervisors v. Brown, 112 [illegible], 704; Bissell v. Jeffersonville, [illegible] How.), 287, bk. 16, 664; Thompson [illegible] (3 Wall.), 327, bk. 18, 177; [illegible] v. Morgan, 74 U. S. (7 Wall.), 619 bk. [illegible]

[illegible] *on municipal bonds—effect of.* See [illegible] v. Hackett, 68 U. S. (1 Wall.), 80, [illegible] supra.

This done at the City of Holly Springs, Marshall County, State of Mississippi, this first day of January, A. D. 1872.

Henry A. Cooper,
Mayor of the City of Holly Springs.
Lewis Beehler,
Treasurer of the City of Holly Springs."

The questions in the case arise on a demurrer to the declaration, the facts alleged in which are as follows: The defendant is a municipal corporation created by the Legislature of the State of Mississippi. By the Constitution of Mississippi, adopted December 1, 1869, and still in force, it is provided as follows, by article 12, section 14: "The Legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to, any company, association or corporation, unless two thirds of the qualified voters of such county, city or town, at a special election, or regular election, to be held therein, shall assent thereto." In the fall of 1871 the inhabitants of the City of Holly Springs were desirous that the city should subscribe for stock in the Selma, Marion and Memphis Railroad Company, whose road was to be constructed through or near the city. The Mayor and Aldermen, in conformity to the wishes of the inhabitants, on the ——— day of ———, 1871, ordered a special election to be held, in pursuance of the Constitution, on the 30th day [123] of December, 1871, to ascertain whether two thirds of the qualified voters of the city would assent to a subscription by it to $75,000 of the capital stock of said company, and to issue the bonds of the city in payment of the subscription, "having to run" to the 1st of January, 1887, and bearing interest at 8 per cent per annum, payable semi-annually. Due notice was given of the election, and it was held on the 30th of December, 1871, under the direction and supervision of the Mayor and Aldermen; and, at the election, largely more than two thirds of all the qualified voters of the city voted in favor of the subscription and the issuing of the bonds, and assented thereto, and thereby authorized and directed the Mayor and Aldermen to make the subscription, and to issue and deliver the bonds. After the election, to wit: on the 1st of January, 1872, the defendant, in pursuance of the vote, subscribed for $75,000 of the capital stock of the company, and agreed and undertook to issue its bonds in payment thereof as soon as the same could be prepared, and received the regular and proper certificates therefor, which it still holds and has never surrendered or offered to surrender. By an Act of the Legislature of Mississippi, approved March 16, 1872 (Laws of 1872, chap. 75, p. 313), entitled "An Act to Facilitate the Construction of the Selma, Marion and Memphis Railroad," it was provided (§ 4): "that all subscriptions to the capital stock of the said Selma, Marion and Memphis Railroad Company, made by any county, city or town in this State, which were not made in violation of the Constitution of this State, are hereby legalized, ratified and confirmed." By another Act of that Legislature, approved April 19, 1872 (Laws of 1872, ch. 102, p. 120), it was provided (§ 1): "that any county through which any railroad will pass, incorporated city or town along the line of any railroad, or contiguous thereto, may subscribe to the capital stock of said company in any sum;" and (§ 2): "that no such subscription shall be made until the question has been submitted to the legal voters of such county or counties, city or cities, incorporated town or towns, in which the subscription is proposed to be made;" and (§ 3): that if it shall appear that two thirds of the legal voters of such county, city or town have voted for subscription, the subscription shall be made and bonds not having more than twenty years to run to maturity be issued to the company therefor. On the 26th of April, 1872, the defendant, in payment of the subscription, executed and delivered to the company its coupon bonds, under its corporate seal, to the amount of $75,000, bearing date January 1, 1872, and payable January 1, 1887, with interest at the rate of 8 per cent per annum, payable semi-annually, and in the form before set forth, with coupons for the semi-annual interest attached, of the following form:

"City of Holly Springs,
Marshall County, Mississippi,
January 1, 1872.

$—— The City of Holly Springs acknowledges to owe the sum of ——— dollars, payable to bearer on the first day of ———, 18—, at the office of the Holly Springs Saving and Insurance Company, Holly Springs, Mississippi, for six months' interest on bond No. (No. of bond).

Lewis Beehler,
Treasurer of the City of Holly Springs."

After the issuing and delivery of the bonds to the company, the defendant, for several years continued to levy and collect taxes for the payment of the interest accruing on the bonds, and took up the coupons as they fell due, and voted the stock so subscribed, in the election of directors of the company, and in all stockholders' meetings of the company. On the 1st of January, 1875, the plaintiff became the *bona fide* holder for value, in due course of trade, and without any notice or knowledge of any illegality in the bonds, or want of power to issue them, of 43 of the bonds, and is the owner of 568 of the coupons, identifying sufficiently the bonds and coupons.

The demurrer sets forth, as causes of demurrer, that the declaration does not show that there was any power to order the election, or to hold it, or to subscribe for the stock, or to issue the bonds and coupons.

The court sustained the demurrer, and judgment was given for the defendant. The plaintiff has brought a writ of error.

It is not claimed that there was any statute in existence which authorized at the time the action of the Mayor and Aldermen of the city in ordering what is called the "special election" to be held, or which authorized at the time the holding of any election, general or special, on the question of a subscription to the stock of the company. Under the provision of the Constitution of Mississippi before cited, it is clear that the authority of the Legislature is necessary to enable the county, city or town to become a stockholder in, or lend its credit to a corporation. The Act of March 16, 1872, relied on as the validating Act, was passed after the so called election took place, and after the making of the subscription, but before the issuing of the bonds.

It is contended for the plaintiff in error, that the Constitution contemplated that the v

[illegible] be taken in advance of the granting by the Legislature of authority to subscribe. But, however that may be, it is manifest, we think, that the provision of the Constitution confers no authority to subscribe for stock. The Legislature must authorize the subscription, either by a statute, passed in advance, providing for an election, and for obtaining the assent of the required two thirds of the qualified voters, to be followed by a subscription; or by a proper statute of distinct ratification and authorization, passed after there has been such assent of two thirds of the qualified voters, at an election, as the Constitution requires. The provision is inhibitory on the Legislature, and not permissive or enabling to the city.

Whether the voting which the declaration [illegible] took place was the holding of such an election as the Constitution contemplated (for the assent is to be given at an election to be held, and not otherwise), is a question not necessary to be [illegible]. Because we are of opinion that the Act relied on as a validating or ratifying Act has no such effect. It provides: "That all subscriptions to the capital stock of the" company in question, "made by any county, city or town in this State, which were not made in violation of the Constitution of this State, are hereby legalized, ratified and confirmed." It is urged, that the qualifying words "which were not made in violation of the Constitution of this State" were unnecessary, because the Legislature could not make valid any act done in violation of the Constitution; and it is sought to have the provision construed as if it read that all subscriptions, made after such a voting as took place in this case, are legalized, ratified and confirmed. But this assumes that the Legislature regarded such voting as being the holding of such a special election as the Constitution requires. If the Legislature had distinctly in words, designated and identified such voting and adopted it as being such an election and as evidencing the assent required by the Constitution, it might be held that there was an intention manifested to ratify this particular voting and assent and subscription, still leaving it even to be determined whether, on the whole, the Constitution had been complied with, and the Legislature had, in fact and in law, authorized the subscription. Such a designation and identification of a voting at an election, described as resulting in an approval by the constitutional two thirds of the qualified voters, [illegible] by an authority to Grenada County, [illegible] to be based on such approval, to subscribe for stock in the Vicksburg and Nashville Railroad Company, is found in the Act of the Legislature of Mississippi, approved January 27, [illegible] Laws 1872, chap. 71, p. 290, § 4), seven [illegible] before the Act in question was approved. [illegible] the Act involved in *Grenada Co.* v. *Brown* [illegible] 112 U. S., 261 [Bk. 28, L. ed., 704], [illegible] this court held that it was a valid confirmatory Act. But no such view can be taken of the Act in this case. The intention of the Legislature to confirm and ratify the subscription in question cannot be ascertained, with certainty, from the language of the Act, which is too [illegible] to form the basis of so important an authority as that sought to be deduced from it. [illegible] *State* v. *Stoll*, 17 Wall., 425, 436 [illegible] L. ed., 650, 655], if the Legislature intended to do what is claimed, "it was bound to do it openly, intelligibly, and in language not to be misunderstood," and "as a doubtful or obscure declaration would not be justifiable, so it is not to be imputed."

Even a *bona fide* holder of a municipal bond is bound to show legislative authority in the issuing body to create the bond. Recitals on the face of the bond or Acts *in pais*, operating by way of estoppel, may cure irregularities in the execution of a statutory power, but they cannot create it. If, as in the present case, legislative authority was wanting, the bond has no validity.

The general Act of April 19, 1872, is referred to in the declaration. But it does not avail in this case; for, although the bonds were issued after its passage, the subscription took place before, and the Act applies only to future elections and subscriptions and authorizes only bonds bearing interest at 7 per cent per annum.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk. Sup. Court, U. S.

DANIEL CHAPMAN, *Appt.*,

v.

JOSEPH W. BREWER, Assignee of BENJAMIN C. HOYT, a Bankrupt.

(See S. C., Reporter's ed., 158-173.)

Bankruptcy—assignment relates back to commencement of proceedings—prior levy under attachment issued by state court—sale enjoined.

*1. Where, under the Bankruptcy Act of March 2, 1867, a proceeding in involuntary bankruptcy was commenced in the District Court of the United States for the Western District of Michigan, before an attachment on land of the debtor, issued by a State Court of Michigan, was levied on the land, the assignment in bankruptcy, though made after the attachment, related back and vested title to the land in the assignee as of the commencement of the proceeding; and, where the attachment was levied within four months before the commencement of the proceeding, it was dissolved by the making of the assignment.

2. The proceeding in this case was held to have been commenced before the attachment was levied.

3. The District Court which made the adjudication having had jurisdiction of the subject matter, and the bankrupt having voluntarily appeared, and the adjudication having been correct in form, it is conclusive of the fact decreed, and cannot be attacked collaterally in a suit brought by the assignee against a person claiming an adverse interest in property of the bankrupt.

4. The assignment in bankruptcy was made after a levy on the land under an execution on a judgment obtained in a suit in a State Court of Michigan, brought after the proceeding in bankruptcy was commenced: *Held*, that the assignee, being in possession of the land, could maintain a suit in equity in the Circuit Court of the United States for the Western District of Michigan, to remove the cloud on his title, and that that court could, under the exception in section 720 of the Revised Statutes, restrain by injunction a sale under the levy and a further levy.

[No. 206.]

Submitted Mar. 19, 1885. Decided Mar. 30, 1885.

APPEAL from the Circuit Court of the United States for the Western District of Michigan.

* Head notes by *Mr. Justice* BLATCHFORD.

The history and facts of the case appear in opinion of the court.

Mr. **H. F. Severens,** for appellant:

An action to remove a cloud cannot be sustained when it is apparent that the facts set up in the pleadings, if true, would not legally affect the title of the complainant. Nor will a bill be sustained when the matters relied upon as the basis for removing the cloud are of record and not *in pais.*

Farnham v. *Campbell*, 34 N. Y., 480; *Marsh* v. *Brooklyn*, 59 N. Y., 280; *Ward* v. *Dewey*, 16 N. Y., 519.

The general doctrine is well settled that the Federal Courts have no authority, in cases not within their appellate jurisdiction, to issue injunctions to judgments in state courts, or in any manner to interfere with their jurisdiction or proceedings.

Story, Const., §§ 375, 376; *Driggs* v. *Wolcott*, 4 Cranch, 179; *Hagan* v. *Lucas*, 10 Pet. 400; *Peck* v. *Jenness*, 7 How., 624; *Williams* v. *Benedict*, 8 How., 107; *Peale* v. *Phipps*, 14 How., 368; *Pulliam* v. *Osborne*, 17 How., 471 (58 U. S., bk. 15, L. ed., 154); *Taylor* v. *Carryl*, 20 How., 583 (61 U. S., bk. 15, L. ed., 1028); *Freeman* v. *Howe*, 24 How., 450 (65 U. S., bk. 16, L. ed., 749); *Buck* v. *Colbath*, 3 Wall., 334 (70 U. S., bk. 18, L. ed., 257); *Johnson* v. *Bishop*, 8 N. B. Reg., 533.

The Circuit Court it seems sustained the issuing of the writ of injunction under that section of the Bankrupt Act which provides that the Circuit Courts shall have concurrent jurisdiction with the District Courts "of all suits at law and in equity brought by an assignee in bankruptcy against any person claiming an adverse interest * * * touching any property or rights of the bankrupt transferable to or vested in such assignee."

Upon this point the court erred, and the order of the Circuit Court of the United States in this case, perpetually enjoining the sheriff of Berrien County from enforcing the execution issued by the state court of that county, finds no warrant in the Act referred to, and is opposed to the current of recognized authority.

Peck v. *Jenness* (*supra*); *Marshall* v. *Knox*, 16 Wall., 551 (88 U. S., bk. 21, L. ed., 481); *Doe* v. *Childress*, 21 Wall., 642 (88 U. S., bk. 22, L. ed., 549); *Eyster* v. *Gaff*, 91 U. S., 521 (Bk. 23, L. ed., 403); *Burbank* v. *Bigelow*, 92 U. S., 179 (Bk. 23, L. ed., 542); *Norton* v. *Switzer*, 93 U. S., 355 (Bk. 23, L. ed., 903); *Jerome* v. *McCarter*, 94 U. S., 734 (Bk. 24, L. ed., 136); *Davis* v. *Friedlander*, 104 U. S., 570 (Bk. 26, L. ed., 818); *Thatcher* v. *Rockwell*, 105 U. S., 467 (Bk. 26, L. ed., 949); *Johnson* v. *Bishop*, 8 N. B. Reg., 533.

If the assignee wishes to contest these matters he should have made himself a party to the proceedings in the state court.

Bankrupt Act, § 14; *Peck* v. *Jenness* (*supra*); *Doe* v. *Childress* (*supra*); *Eyster* v. *Gaff* (*supra*); *Hill* v. *Harding*, 107 U. S., 631 (Bk. 27, L. ed., 493).

The bill is not framed to present or contest the substantial question as to the defendant's lien. It ignores altogether the attachment, and is not therefore adapted to make a contest on its validity under the bankrupt law. The allegations and the proof are not harmonious.

In substance and legal effect the adjudication in bankruptcy must be construed to have reference to the last petition and not to the former, under which nothing was done.

The caption of the order was no part of it.

Jackson v. *Ashton*, 8 Pet., 148.

This would make a variance from the bill and would make the initiation of the proceedings subsequent to the attachment of the plaintiff, and present a question not competent to be litigated on such pleading as the complainant's bill.

Morse v. *Palmer*, 13 Mich., 367; *Piatt* v. *Vattier*, 9 Pet., 405; *Boone* v. *Chiles*, 10 Pet., 177; Story, Eq. Pl., § 23.

Messrs. **John W. Stone** and *J. Kleinhaus* for appellee:

The suit being authorized the court as an incident to its jurisdiction could grant the injunction.

The aim and policy of the statute cannot be effectually carried out in any other way.

In re Christy, 3 How., 292; *In re Mallory*, Sawy., 88; *In re Oil Co.*, 6 Blatchf., 521; *Marlson* v. *Heaney*, 1 Dill., 497; *Pennington* v. *Lonenstein*, 1 Bk. Reg., 570; *Pennington* v. *Sale*, Bk. Reg., 572; *Jones* v. *Leach*, 1 Bk. Reg., 59 *U. S.* v. *Bancroft*, 6 Benedict, 392; *In re Clari* 9 Blatchf., 372.

The bankruptcy court having first acquire jurisdiction over the bankrupt's assets, the could not be levied on by process from the sta court.

Hagan v. *Lucas*, 10 Pet., 400; *Peck* v. *Jennes* 7 How., 612; *Taylor* v. *Carryl*, 20 How., 583 (U. S., bk. 15, L. ed., 1028); *Freeman* v. *Hou* 24 How., 450 (65 U. S., bk. 16, L. ed., 749 *Covell* v. *Heyman*, 111 U. S., 176 (Bk. 28, ed., 390).

Mr. Justice **Blatchford** delivered the opi ion of the court:

On the 10th of October, 1873, John Whitt sey, a creditor of Benjamin C. Hoyt and Eno C. Hoyt, copartners under the name of B. Hoyt & Son, filed a petition in bankruptcy, the District Court of the United States for t Western District of Michigan, praying that t said two persons, "partners as aforesaid," mig be declared bankrupts. The petition contain the prescribed allegations, and set forth, as t demand of the petitioner, a promissory n made by the partnership, in its firm name, his order. It alleged as one act of bankrupt that the firm had "fraudulently stopped pa ment" of its commercial paper "within a pe od of fourteen days," omitting to add "and r resumed payment within said period." It leged, as a second act of bankruptcy, that t firm had "suspended and not resumed pa ment" of its commercial paper "within a pe od of fourteen days."

Before anything was done on this petition cept to file it, and on the 12th of January, 18 Daniel Chapman procured to be issued by Circuit Court of the County of Berrien, in State of Michigan, an attachment against lands and personal property of the said perso as such copartners, for the sum of $4,895.44, a suit brought by him, in that court, agai them, to recover a money demand, which tachment the sheriff, on that day, levied on tain real estate in that county. Enoch C. H died on the 25th of February, 1874.

On the 5th of March, 1874, a petition, indorsed "Amended petition," was filed by Whitney in the bankruptcy court, containing the same averments as the first petition, with the addition of the words so omitted in the first petition. In the body of the petition there was no mention of its being an amended petition, nor did it allude to the first petition, or to the death of Enoch C. Hoyt and its prayer was the same as that of the first petition. It was verified March 3, 1874.

On the 14th of April, 1874, an order was made in the suit in the State Court, entering the default of Benjamin C. Hoyt, for want of an appearance, on proof of personal service on him of the attachment and of the filing of the declaration; and, on the 16th of April, 1874, an order was made, on affidavit, suggesting the death of Enoch C. Hoyt since the issuing of the attachment, and ordering that the action proceed against the surviving defendant, Benjamin C. Hoyt.

On the 3d of May, 1874, an order was made by the bankruptcy court, stated in it to be made on the appearance and consent of "solicitors for the alleged bankrupts," reciting that it had been shown that Enoch C. Hoyt had "departed this life since the commencement of the proceeding in said matter," and ordering that all proceedings should stand against Benjamin C. Hoyt, survivor of himself and Enoch C. Hoyt, and that they might be prosecuted against him with the effect as if Enoch C. Hoyt had not died, and that the individual property of Enoch C. Hoyt be surrendered by the marshal to his proper representatives. On the same day, Benjamin C. Hoyt filed a denial of bankruptcy, signed by his attorneys, as follows: "And now the said Benjamin C. Hoyt appears and denies that he has committed the act of bankruptcy set forth in said petition, and avers that he should not be declared bankrupt for any cause in said petition alleged, and he demands that the same be inquired of by a jury."

On the 8th of May, 1874, in the suit in the State Court, a judgment was rendered in favor of the plaintiff, against Benjamin C. Hoyt, for $[illegible] 15, and costs; and, on the same day, an execution was issued thereon, under which, on that day, the sheriff levied on the same real estate which he had levied on under the attachment.

On the 1st of June, 1874, an adjudication was made by the bankruptcy court, in these words:

Adjudication of Bankruptcy on Creditor's Petition.

Western District of Michigan, *ss:*

In the District Court of the United States for the Western District of Michigan. In Bankruptcy.

In the matter of Benjamin C. Hoyt, against whom a petition in bankruptcy was filed on the 10th day of October, A. D. 1873. At Grand Rapids, in said District, on the first day of June, A. D. 1874. Before Hon. Solomon L. Withey, district judge.

This matter came on to be heard at Grand Rapids in said court, and the respondent having withdrawn his denial and demand for a jury and having, by his attorneys, Hughes, O'Brien & Smiley, consented thereto.

And thereupon, and upon consideration of the proofs in said matter, it was found that the facts set forth in said petition were true, and it is therefore adjudged, that Benjamin C. Hoyt became bankrupt, within the true intent and meaning of the Act entitled 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States,' approved March 2, 1867, before the filing of the said petition, and he is therefore declared and adjudged a bankrupt accordingly. And it is further ordered that the said bankrupt shall, within five days after this order, make and deliver, or transmit by mail, postpaid, to the marshal, as messenger, a schedule of his creditors, and inventory of his estate, in the form and verified in the manner required of the petitioning debtor by the said Act.

Witness the Hon. Solomon L. Withey, judge of the said District Court, and the seal thereof, at Grand Rapids, in said district, on the 1st day of June, A. D. 1874.

[SEAL.] Isaac H. Parrish,
Clerk of District Court for said District."

In the certificate made by the clerk of the District Court of the United States for the Western District of Michigan, certifying the copies of the bankruptcy papers, he certifies: "that the foregoing is a true copy of the petition for adjudication filed October 10, 1873, copy of amended petition, order continuing proceedings, denial of bankruptcy by B. C. Hoyt, and adjudication of bankruptcy, on file in the proceedings of said court in said entitled matter." This is mentioned because, in the adjudication, the petition is referred to as filed October 19, 1873. [162]

On the 16th of December, 1873, an *alias* execution was issued in the suit in the State Court, which the sheriff, on that day, levied on real estate in Berrien County other than that before levied on by him.

On the 1st of October, 1874, the register in bankruptcy executed to Joseph W. Brewer an assignment in these words:

"In the District Court of the United States for the Western District of Michigan. In Bankruptcy.

In the matter of Benjamin C. Hoyt, Bankrupt.

Western District of Michigan, *ss:*

Know all men by these presents that Joseph W. Brewer, of the Village of St. Joseph, in the County of Berrien, and State of Michigan, in said district, has been duly appointed assignee in said matter: Now, therefore, I, J. Davidson Burns, register in bankruptcy in said district, by virtue of the authority vested in me by the 14th section of an Act of Congress entitled 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States,' approved March 2, 1867, do hereby convey and assign to the said Joseph W. Brewer, assignee as aforesaid, all the estate, real and personal, of the said Benjamin C. Hoyt, bankrupt aforesaid, including all the property of whatever kind, of which he was possessed, or in which he was interested or entitled to have, on the tenth day of October, A. D. 1873, with all his deeds, books and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said Act; to have and to hold all the foregoing premises to the said Joseph W. Brewer and his heirs forever, in trust, nevertheless, for the use and purposes, with the powers, and subject to the conditions and limitations, set forth in said Act.

[163] In witness thereof, I, the said register, have hereunto set my hand and caused the seal of said court to be affixed, this first day of October, A. D. 1874. J. Davidson Burns,

[SEAL.] *Register in Bankruptcy.*"

On the 27th of January, 1876, Brewer filed a bill in equity, in the Circuit Court of the United States for the Western District of Michigan, against Chapman (the judgment creditor), and the sheriff who had levied under the first execution, and the deputy sheriff who had levied under the second execution, setting forth the filing of the first petition in bankruptcy, and its contents; averring "that the usual order to show cause was thereupon made by said District Court, and a certified copy thereof duly served on said Benjamin C. and Enoch C. Hoyt, who subsequently, and in due time, appeared in said bankruptcy matter;" and alleging the death of Enoch C. Hoyt, the making of the order of March 2, 1874, the adjudication of bankruptcy, the appointment of, and assignment to, the assignee, the facts in regard to Chapman's judgment, executions and levies, and threats by the officers to sell the real estate levied on. The bill makes no mention of the amended petition in bankruptcy or of the attachment. It states that the executions are outstanding; that the real estate so levied on was the separate property of Benjamin C. Hoyt at the date of filing the petition; that the plaintiff, as assignee, is the owner, and in possession, of all of it, except certain specified lots; and that said levies constitute a cloud on his title, and embarrass and hinder him in disposing of the property, and notices of the levies have been recorded in the office of the register of deeds of the county. The prayer of the bill is, that the levies be decreed void as against the plaintiff, as assignee, and the defendants be decreed to release to the plaintiff, as assignee, all their right and title and interest, acquired under the levies, in and to the real estate he is so in possession of, and, on their failure to do so, the decree be ordered to have the effect of said release, and he have leave to record the same in the office of said register of deeds, and the defendants be enjoined from selling or interfering with the real estate the plaintiff is so in possession of. The bill also prays for such other and further relief as shall be equitable and just.

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The answer denies the validity of the petition set forth in the bill, and denies that Benjamin C. Hoyt was adjudicated a bankrupt on the footing of that petition, or on any petition of which he had notice, and denies the validity of the adjudication. It sets up the attachment levy, and admits the existence of most of the material facts alleged in the bill, and that the property was the separate property of Benjamin C. Hoyt, but denies that the plaintiff is entitled to any equitable relief. A replication was filed and proofs were taken, establishing the facts above set forth, and that Brewer had acted as assignee since October 3, 1874, and had had the management and custody and possession of the property, and paid taxes on it, since October 10, 1874, and that it was worth about $10,000.

The Circuit Court made a decree, on April 15, 1880, adjudging that Benjamin C. Hoyt, "at the date of the filing of the petition in bankruptcy against him, namely: on the 10th day of October, 1873, was the owner in fee of the" lands described in the bill as those of which th plaintiff was in possession; that the plaintiff suc ceeded to the interest which said Hoyt had i those lands on the 10th of October, 1873, an was and is the owner in fee and in the actus possession of them; that each of said executio levies was and is a cloud on the title of th plaintiff, as assignee, to said lands, and was an is void as against him; that the defendants exe cute to the plaintiff a release of their interest i said lands under said levies, and, on their fai ure to do so, the decree should have all the forc and effect of such release, and might be record ed in the office of the register of deeds of sai county; and that an injunction issue restrai ing the defendants from selling, disposing o or interfering with said lands, under said levie and from making any new or further levies o any of said lands, under said judgment. A injunction to that effect was issued and serve January 3, 1881. Chapman has appealed t this court.

The principal question considered by the Ci cuit Court, as appears from its opinion, accon panying the record, was, whether the judgme and levies in the suit in the State Court bein prior to the appointment of the assignee in banl ruptcy, although that suit was not begun till af er the first petition in bankruptcy was filed, t Circuit Court had authority to enjoin a sale the lands on the executions.

The appellant takes the points, that nothin appears to have been done under the first pe tion in bankruptcy; that no order appears have been made, or notice given, thereon; th the second petition was a new petition, and do not profess to be, and was not, an amend petition, and was not filed under any order a thorizing it as an amendment; and that the a judication recites the date of filing of the pe tion as October 19, instead of October 10. T questions presented here by the appellant ar (1) Whether the alleged cloud on the plaintif title was a proper ground for equitable jurisdi tion; (2) Whether the Circuit Court had a thority to interfere with the proceedings of t State Court; (3) Whether the assignee shou not have made himself a party to the proce ings in the State Court, or have interven therein; (4) Whether the bill and the proof c respond, and whether the bill is adapted to c test the validity of such lien as arose by virt of the attachment.

All the bankruptcy proceedings, except t appointment of the assignee, and the assig ment to him, and all the proceedings in the s in the State Court, except the issuing and le of the second execution, took place before t enactment of the Revised Statutes, on the 2 of June, 1874. The Revised Statutes purp to re-enact the statutes in force on December 1873. At the latter date none of the proce ings in bankruptcy had taken place save filing of the first petition, and the State Co proceedings had not been begun.

The Bankruptcy Act in force on Decembe 1873, was the Act of March 2, 1867, chap. 1 14 Stat. at L., 517, the 14th section of wh provided that the assignment to an assignee bankruptcy "shall relate back to the commen ment of said proceedings in bankruptcy, a thereupon, by operation of law, the title to such property and estate, both real and pers

[illegible] shall vest in said assignee, although the same [illegible] then attached on *mesne* process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings." The provision of section 5044 of the Revised Statutes is, that the assignment "shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on *mesne* process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings." Under these provisions, if the bankruptcy proceedings were commenced October 19, 1873, they were begun before the State Court attachment was made, and the assignment, when made, related back to October 19, 1873, and vested title in the assignee as of that date, and overreached and defeated all liens under the attachment. *Bank* v. *Sherman*, 101 U. S., 403 (Bk. 25, L. ed., 866]; *Conner* v. *Long*, 104 Id., 228 [Bk. 26, L. ed., 723]. If the bankruptcy proceedings were not begun till March 3, 1874, the attachment, having been made within four months next preceding that date, was dissolved by the making of the assignment, and the title of the assignee vested as of March 3, 1874, which was before any execution levy. In this view it would not be necessary to notice any of the objections made as to the first petition, or as to the second petition regarded as an amended petition, were it not that the bill is founded on the first petition.

The date of October 19 in the adjudication must be regarded as a clerical or typographical error. The proper date is stated in the bill and admitted in the answer, and is stated in the court's certificate and in the bankruptcy assignment, and in a stipulation signed by the solicitors. Enoch C. Hoyt died February 25, 1874, before the second petition was filed, and the order made by the bankruptcy court, May 2, 1874, states that he had died "since the commencement of the proceeding in said matter;" and it was that fact, in connection, probably, with the fact that no order to show cause had been served on Enoch C. Hoyt, which made it necessary for that order to direct the marshal to surrender to the representatives of Enoch C. Hoyt all his individual property.

It is also objected by the defendant that the petition was filed against the firm, and that the record does not show that the petitioner filed any proof of his claim, or any proof of bankruptcy.

By § 36 of the Act of 1867 (§ 5121 of the Revised Statutes), where two persons, partners in trade, should be adjudged bankrupt, not only was the property of the firm to be taken and administered, but also the separate estate of each partner. When Enoch C. Hoyt died, the partnership estate vested in the survivor, and the proceedings were, by consent of attorneys then appearing for the survivor, ordered to stand against him as survivor and to proceed against him as survivor. He appeared by attorney and consented to an adjudication. By § 43 of the Act of 1867 (§ 5026 of the Revised Statutes), the appearance and consent of the latter were made a waiver of other notice. The adjudication states that, on consideration of the proofs, it was found that the facts set forth in the petition were true. It was not necessary to show in this case what the proofs were. If the District Court had jurisdiction of the subject matter, and the bankrupt voluntarily appeared, and the adjudication was correct in form, it is conclusive of the fact decreed, and can be impeached only by a direct proceeding in a competent court, and can no more be attacked collaterally in a suit like the present than any other judgment. *Michaels* v. *Post*, 21 Wall., 398 [88 U. S., bk. 22, L. ed., 520].

The adjudication and the assignment embraced the individual property of Benjamin C. Hoyt; and it is alleged in the bill, and admitted in the answer, that the property levied on by the defendants was his individual property.

These views cover all the objections made to the bankruptcy proceedings, and it must be held that the adjudication was regular and valid, and refers to, and was made on, the first petition, as amended by the second, and on a proceeding commenced when the first petition was filed.

It is objected that the bill makes no mention of the attachment. But the answer sets up the attachment and the levy thereunder. The question as to whether a priority of right was acquired thereby was raised by the pleadings, and the decree makes no reference to the attachment, but annuls the execution levies.

By § 2 of the Act of 1867, the Circuit Court of the District has jurisdiction of all suits in equity brought by an assignee in bankruptcy against any person claiming an adverse interest touching any property of the bankrupt transferable to or vested in the assignee. This provision is re-enacted in § 4979 of the Revised Statutes. By § 720 of the Revised Statutes it is provided, that "the writ of injunction shall not be granted by any court of the United States, to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." It is contended for the appellant (1) that a suit in equity will not lie for the relief granted; (2) that, at all events, there was no power to award the injunction. [170]

That the defendant claimed an adverse interest touching the property is clear. The question is, whether the plaintiff can have relief in equity. He was in possession of the land, and, as he says, of the only building there was on it. By statutory provisions in Michigan, commencing with § 29 of the Act of April 23, 1838 (Code of 1838, p. 358), followed by § 1 of the Act of March 28, 1840 (No. 76, p. 127), and the Revised Statutes of 1846 (title 21, chap. 90, § 36, p. 360), and now in force as § 6626 of Howell's Statutes: "Any person having the actual possession, and legal or equitable title to lands, may institute a suit in chancery against any other person setting up a claim thereto in opposition to the title claimed by the complainant, and, if the complainant shall establish his title to such lands, the defendant shall be decreed to release to the complainant all claim thereto." If there should be a sale on the executions, there would be a sheriff's deed; and, by another statute of the State such deed is made *prima facie* evidence of the regularity of the sale. Act of February 19, 1867, No. 20, § 2, now in force as § 5678 of Howell's Statutes. It is held by

the Supreme Court of Michigan that the statute first cited covers a claim to a lien on land, and that a lien which may result in a sale and a deed constitutes such a cloud that equity will afford relief. *Scofield* v. *City of Lansing*, 17 Mich., 437, 447, 448. Especially will this be done, if the lien is not void on its face, as the lien here is not, but is a cloud on the plaintiff's title. Therefore, the plaintiff could obtain, under the Michigan statute, and in a court of Michigan, the relief he has had. In such a case, a Circuit Court of the United States, having otherwise jurisdiction in the case, will, as a general rule, administer the same relief in equity which the State Courts can grant. *Clark* v. *Smith*, 13 Pet., 195, 203; *Case of Broderick's Will* 21 Wall., 503, 519, 520 [88 U. S., bk. 22, L. ed., 599, 605]; *Van Norden* v. *Morton*, 99 U. S., 378, 380 [Bk. 25, L. ed., 453, 454]; *Cummings* v. *Nat. Bk.*, 101 Id., 153, 157 [Bk. 25, L. ed., 903, 904]; *Holland* v. *Challen*, 110 U. S., 15 [Bk. 28, L. ed., 52]; *Reynolds* v. *Crawfordsville Bk.*, 112 Id., 405 [Bk. 28, L. ed., 733]. It has general power given to it, irrespective of citizenship, to grant equitable relief, in a suit in equity by an assignee in bankruptcy against any person who claims an adverse interest touching the assigned property.

[171]

We are not disposed, however, to rest the case upon jurisdiction arising from the Michigan statute. We hold that, under the equity jurisdiction conferred by the bankruptcy Act, the Circuit Court had authority to remove this cloud on the plaintiff's title. It was the duty of the assignee to remove it, and to obtain a title which would enable him to sell the land for the benefit of the estate. The claim of the defendants, under the levies, is one which ought not to be enforced. It has no validity as against the rights of the plaintiff; it throws a cloud on his title; he is in possession, and cannot sue at law; and the papers supporting the defendants' claim are not void on their face. Story's Eq. Juris., §§ 700, 705; 3 Pomeroy's Eq. Juris., §§ 1398, 1399, and cases cited; *Pettit* v. *Shepherd*, 5 Paige, 493; *Carroll* v. *Safford*, 3 How., 463; *Ward* v. *Dewey*, 16 N. Y., 519; *Mustian* v. *Jones*, 30 Ga., 951; *Martin* v. *Graves*, 5 Allen, 601; *Stout* v. *Cook*, 37 Ill., 283; *Clouston* v. *Shearer*, 99 Mass., 209; *Sullivan* v. *Finnegan*, 101 Mass., 447; *Anderson* v. *Talbot*, 1 Heisk., 407; *Marsh* v. *Brooklyn*, 59 N. Y., 280; *O'Hare* v. *Downing*, 130 Mass., 16, 19. In *Pettit* v. *Shepherd*, it was held that a court of chancery might interpose to prevent the giving of a conveyance, under pretense of right, which would operate as a cloud upon the title to real estate. In *O'Hare* v. *Downing* it is said, that "a court of chancery will restrain by injunction a threatened levy of execution upon real estate which is not legally subject to such a levy, and thus prevent a cloud upon the title, without compelling the owner of the land to wait until the levy has been completed, and then admit himself to be disseised, in order to maintain a writ of entry." Much more will it prevent a sale after a levy.

[172]

But it is contended that the Circuit Court had no authority to award or issue the injunction. The jurisdiction of that court in this case is conferred by the "law relating to proceedings in bankruptcy;" and we think the injunction was authorized by that law. The court of bankruptcy was authorized by § 40 of the Act of 1867 (§ 5024 of the Revised Statutes), where a petition in involuntary bankruptcy was filed, t restrain all persons, by injunction, from inte fering with the debtor's property. The juri diction of suits in equity, given to the Circu Court by § 2 of the Act of 1867 (§ 4979 of th Revised Statutes), was given to it concurrentl with the District Courts. It must be held th Congress, in authorizing a suit in equity, in case like the present, has, in order to make th other relief granted completely effective, a thorized an injunction, as necessarily incident and consequent, to prevent further proceedin under the levies already made and new levi under the judgment. But for the supposed i hibitory force of § 720, a court of equity, granting, on the merits, the other relief he granted, would necessarily have power to awar the injunction. We think the Circuit Court w authorized to award it here, within the exce tion in § 720.

It is urged, that the plaintiff should hav made himself a party to the proceedings in th State Court, and have contested the matter there under the authority given to him by § 14 of th Act of 1867 (§ 5047 of the Revised Statutes), t defend suits pending against the bankrupt the time of the adjudication. As the assigr ment in bankruptcy was not made until Octob 1, 1874, and the judgment and the levy unde the first execution were in May, 1874, we do nc think the assignee was called upon to take an steps in the State Court, after the assignmen to obtain relief. He was entitled to pursue th remedy he did.

The cases of *Krippendorf* v. *Hyde*, 110 U. S 276 [Bk. 28, L. ed., 145], and *Covell* v. *Heyman* 111 Id., 176 [Bk. 28, L. ed., 390], are relied o by the appellant to show that the decree in th case was erroneous. The view urged is that, b virtue of the levy by the sheriff, the State Cou acquired custody, control and jurisdiction the property, which could not be disturbed b the Circuit Court. But the doctrine of tho cases has no application in favor of the appe lant, in a case like the present. In the first ca it was held, that, after property had been a tached by a marshal of the United States, c *mesne* process from a Circuit Court of the Uni ed States, a third person, claiming its owne ship, could, without reference to citizenshi come into the Circuit Court for redress, by a cillary proceedings. In the second case, it w held, in pursuance of the decision in *Freeman* v. *Howe*, 24 How., 450 [65 U. S., bk. 16, L. ed 749], that possession of property by a marsh of the United States, under a writ of executi from a Circuit Court of the United States, cou not be disturbed by virtue of a writ of replev from a State Court, issued by a third perso *E converso*, as was held in *Taylor* v. *Carryl*, How., 583 [61 U. S., bk. 15, L. ed., 1028], pro erty seized by a sheriff, under process of tachment from a State Court, cannot be tak from the sheriff by initial admiralty process suing from a District Court of the United Stat But those were none of them cases where, u der the bankruptcy Act, an assignee in ban ruptcy claimed a paramount title, and resort to regular judicial proceedings to first vaca and declare void the adverse title, and sweep away, and then have such final process in gard to the subject matter of the title as shou be necessary to make the decree effective. An

[illegible] v. *Hyman*, the court, speaking by *Mr.* [illegible] after explaining the point of [illegible] in *Freeman* v. *Howe*, says: "The [illegible] principle protects the possession of property [illegible] held by process issuing from [illegible] against any disturbance under [illegible] of the Courts of the United States, excepting of course, those cases wherein the latter [illegible] jurisdiction for the purpose of enforcing the supremacy of the Constitution and [illegible] of the United States." This exception includes the present case. The bankruptcy proceeding dissolved the state attachment, and the bankruptcy Act conferred on the assignee a [illegible] title, which he was empowered by the Act to enforce, by proper equitable remedies in the circuit court, against the adverse [illegible] by virtue of the suit in the state [illegible].

Decree affirmed.

[illegible] Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[illegible] U. S., 351.

[illegible]

[illegible] *of* JAMES S. WILSON.

([illegible] U. S., Reporter's ed., 417–429.)

[illegible] — *infamous crime under the* [illegible] *Amendment*—§ *1022, R. S.*—habeas [illegible]—*when prisoner entitled to discharge.*

[illegible] cannot discharge on *habeas corpus* a [illegible] imprisoned under the sentence of a Circuit [illegible] Court in a criminal case, unless the sentence [illegible] the jurisdiction of that court, or there [illegible] authority to hold the prisoner under the [illegible].

[illegible] provision of Rev. Stat. § 1022, authorizing [illegible] to be prosecuted either by indictment [illegible] information, does not preclude the prosecution by information of such other offenses as [illegible] enumerated consistently with the Constitution and laws of the United States.

[illegible] of a general conviction and sentence upon two counts, one of which is good, a misuse of the verdict as upon the other count only, [illegible] the inquiry whether the convict had [illegible] why sentence should not be pronounced [illegible], is no ground for discharging him on [illegible].

[illegible] of a judgment of a District Court, [illegible] a person convicted in one State, to imprisonment in a prison in another State, the omission [illegible] that there was no suitable prison in the State in which he was convicted, and that the Attorney-General had designated the prison in the [illegible] State as a suitable place of imprisonment, is [illegible] for discharging the prisoner on *habeas corpus*.

[illegible] copy of the record of a sentence to [illegible] is sufficient to authorize the detention of the prisoner, without any warrant or mittimus.

[illegible] sentenced to imprisonment for an infamous crime, without having been presented or indicted by a grand jury, as required by the Fifth Amendment of the Constitution, is entitled to be discharged on habeas corpus.

[illegible] punishable by imprisonment for a term [illegible] at hard labor is an infamous crime, within the meaning of the *Fifth Amendment* of the Constitution, that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

[No. 4 Orig.]

[illegible] *Dec. 16, 1884. Decided Mar. 30, 1885.*

[illegible] for a writ of *habeas corpus.*

The history and facts of the case appear in the opinion of the court.

[illegible] by *Mr. Justice* GRAY.

Messrs. **Alfred Russell** and **Nath'l Wilson,** for petitioner.

Mr. **Wm. A. Maury,** *Asst. Atty-Gen., contra:*

There is no definition of the word "infamous" to be found in the statutes, although by the law of several of the States, the word "felony" includes every offense punishable by death, or imprisonment in the state prison. This definition does not obtain in federal jurisprudence, inasmuch as many of the most trifling misdemeanors are punishable by imprisonment in the state prison.

Revised Statutes, § 721, adopting the laws of the several States, applies only to civil cases. It has been repeatedly held that the fact that an offense may or must be punishable by imprisonment in a penitentiary does not make it in law infamous. *U. S.* v. *Reid*, 12 How. 361; *U. S.* v. *Maxwell*, 3 Dill. 275; *U. S.* v. *Coppersmith*, 4 Fed. Rep. 198; *U.S.* v. *Wynn*, 9 Fed. Rep. 886; *U. S.* v. *Block*, 4 Sawy. 211.

The question whether the utterance of forged paper is a felony was exhaustively discussed by *Judge* Hammond in *U. S.* v. *Coppersmith*, *supra*, and the conclusion reached that it was a mere cheat or misdemeanor. See also, *Fox* v. *State*, 5 How. 410. It would naturally follow that it was triable by information, and such was the opinion of *Judges* Blatchford and Benedict in *U. S.* v. *Yates*, 6 Fed. Rep. 861, and of *Judge* Wheeler in *U. S.* v. *Field*, 16 Fed. Rep. 778.

In *U. S.* v. *Wynn*, 9 Fed. Rep. 886, *Judge* Treat took a still more advanced position, and held that no crime is infamous within the meaning of the Constitution, unless expressly made infamous or declared a felony by an Act of Congress. An information for stealing from the mail was here sustained. But see *U. S.* v. *Block*, 4 Sawy. 411; *U. S.* v. *Cultus Joe*, 15 Int. Rev. Rec. 57.

Mr. Justice **Gray** delivered the opinion of the court:

This is a petition for a writ of *habeas corpus*, presented to this court by a man confined in the House of Correction at Detroit in the State of Michigan, under a sentence to be imprisoned there for fifteen years at hard labor, passed by the District Court of the United States for the Eastern District of Arkansas, upon an information filed by the District Attorney for that district. [418]

The record of the conviction and sentence, a copy of which was annexed to the petition, showed the following case:

The information, which was filed by leave of the court, contained two counts: the first count upon Rev. Stat. § 5430, for unlawfully having in possession, with intent to sell, an obligation engraved and printed after the similitude of securities issued under authority of the United States, to wit: of an interest-bearing coupon bond of the United States; and the second count upon § 5431, for passing, with intent to defraud, a counterfeited interest-bearing coupon bond of the United States; and each count alleging that the bond was in the words and figures of a copy attached to the indictment and made part thereof. That copy was of an instrument purporting to be a bond of the United States Silver Mining Company of Denver City, Colorado,

having printed at its head the words "THE UNITED STATES" in large and conspicuous capitals, followed on a lower line by the words "SILVER MINING COMPANY OF DENVER CITY, COLORADO" in much smaller and less distinct type, and bearing the signatures of "R. E. Hullson, Pres't," and "J. H. Mayson, Sec'y," and otherwise numbered and lettered very much like a genuine bond of the United States.

[419] The defendant filed a general demurrer to the information, which was overruled by the court; and he then pleaded not guilty, and was tried by a jury, who returned a general verdict of guilty; and he moved for a new trial, for insufficiency of the evidence to support the verdict.

The rest of the record, a certified copy of which was the only paper delivered to the keeper of the house of correction, stated that the defendant was brought to the bar in the custody of the marshal, and his motion for a new trial overruled; "and the said defendant, being now inquired of by the court if he have aught to say why the judgment and sentence of the court should not now be pronounced against him upon the verdict and finding of the jury in this case, finding him guilty of passing a counterfeit United States bond, and saying nothing further than he hath already said; and, the court being now well advised in the premises, it is therefore considered, ordered, adjudged and sentenced that said defendant, James S. Wilson, do pay to the United States a fine of $5,000 for said offense and all the costs of this proceeding, and that the United States have execution therefor, and that he be imprisoned for and during the term of fifteen years at hard labor in the House of Correction at Detroit, Michigan; and that the said marshal of this district convey the said prisoner to the house of correction aforesaid and deliver him to the custody of the keeper thereof; and that the clerk of this court make out for said marshal two copies of this judgment and sentence, duly certified under the seal of this court, one of which the said marshal shall deliver to the keeper of said house of correction, and the other return and file in this court, with the receipt of said keeper thereon."

The offense described in Rev. Stat. § 5430 is punishable by a fine of not more than $5,000, or by imprisonment at hard labor not more than fifteen years, or by both; and the offense described in § 5431 is punishable by a like fine and imprisonment.

The petitioner alleged in his petition, and contended in argument, that his imprisonment was illegal upon the following grounds:

First. That in excess of the power of the
[420] court, and in violation of the Fifth Amendment of the Constitution, he had been held to answer for an infamous crime, and punished by a fine of $5,000 and imprisonment for the term of fifteen years at hard labor, without presentment or indictment by a grand jury.

Second. That he was held, under a judgment void, and in excess of the power of the court, upon an information for a crime which was not committed, against the provisions of chapter 7 of the title, Crimes, in the Revised Statutes, in which cases informations were expressly authorized, and to which they were impliedly restricted, by § 1022 of those statutes.

Third. That the judgment was void and in excess of the power of the court, because conviction and the sentence were for differ offenses; the conviction being for having possession a bond of a mining company in similitude of a United States bond, and the s tence being for passing a counterfeit Uni States bond.

Fourth. That he was held by the keepe the Detroit House of Correction without thority of law, because the order of the co for his imprisonment did not show that the co had determined two questions of fact wh were made by Rev. Stat. §§ 5541, 5546, co tions precedent to the exercise of its powe sentence to a prison outside the State of Ark sas, namely: 1st, that there was no suit prison in that State; and 2d, that the Attorn General had designated the Detroit House Correction as a suitable penitentiary in anot State.

Fifth. That the keeper had no warrant *mittimus* authorizing him to hold the prison as required by Rev. Stat. § 1028.

It is well settled by a series of decisions this court, having no jurisdiction of crim cases by writ of error or appeal, cannot charge on *habeas corpus* a person impriso under the sentence of a circuit or district co in a criminal case, unless the sentence exce the jurisdiction of that court, or there is no thority to hold him under the sentence. *parte Watkins*, 3 Pet., 193, and 7 Pet., 568; *parte Lange*, 18 Wall., 163 [85 U. S., bk. 21 ed. 872]; *Ex parte Parks*, 93 U. S. 18 [bk. L. ed. 787]; *Ex parte Siebold*, 100 U. S. 371 25, L. ed. 717]; *Ex parte Curtis*, 106 U. S. [bk. 27, L. ed. 232]; *Ex parte Carll*, 106 U 521 [bk. 27, L. ed. 288]; *Ex parte Yarbro* 110 U. S. 651 [bk. 28, L. ed. 274]; *Ex p Crouch*, 112 U. S. 178 [bk. 28, L. ed. 690]; *parte Bigelow*, 113 U.S. 328 [bk. 28, L. ed. 10

None of the grounds on which the petiti relies, except the first, require extended cussion.

The provision of Rev. Stat. § 1022, der from the Civil Rights Act of May 31, 1870, c 114, § 8 [16 Stat. at L. 142], authorizing ce offenses to be prosecuted either by indictm or by information, does not preclude the p cution by information of other offenses of su grade as may be so prosecuted consistently the Constitution and laws of the United St

The objection of variance between the viction and the sentence is not sustained b record. The first count is for unlawfully ing in possession, with intent to sell, an ob tion engraved and printed after the simili of securities issued under authority of the ed States, and the copy annexed and refe to in that count is of such an obligation. the verdict and the sentence are general, therefore valid if one count is good. *Sayd U. S.*, 112 U. S., 216 [bk. 28, L. ed., 697]. misrecital of the verdict, in the statemen the intermediate inquiry whether the pris had aught to say why sentence should no pronounced against him, is no more tha irregularity or error, not affecting the juri tion of the court.

The omission of the record to state as i *parte Karstendick*, 93 U. S. 396 [bk. 23, L 889], that there was no suitable penite within the State, and that the Attorney-Ge

[illegible] designated the House of Correction at Detroit as a suitable place of imprisonment outside the State, is even less material.

The certified copy of the record of the sentence to imprisonment in the Detroit House of Correction, if valid upon its face, is sufficient to authorize the keeper to hold the prisoner, without any warrant or *mittimus*. *People* v. [illegible], 1 Hill (N. Y.) 154.

But if the crime of which the petitioner was [illegible] was an infamous crime, within the meaning of the Fifth Amendment of the Constitution, no court of the United States had jurisdiction to try or punish him, except upon presentment or indictment by a grand jury.

We are therefore necessarily brought to the determination of the question whether the crime of having in possession, with intent to [illegible], an obligation engraved and printed after the similitude of a public security of the United States punishable by fine of not more than $[illegible], or by imprisonment at hard labor not more than fifteen years, or by both, is an infamous crime, within the meaning of this Amendment of the Constitution.

The first provision of this Amendment, which is all that relates to this subject, is in these words: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

The scope and effect of this, as of many other provisions of the Constitution, are best ascertained by bearing in mind what the law was before.

Mr. William Eden (afterwards *Lord* Auckland) in his Principles of Penal Law, which passed through three editions in England and at least one in Ireland within six years before the Declaration of Independence, observed, "There are two kinds of infamy; the one founded in the opinion of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent." Eden's Principles of Penal Law, ch. 7, § 5.

At that time it was already established law, that the infamy which disqualified a convict to be a witness depended upon the character of his crime, and not upon the nature of his punishment. *Pendock* v. *Mackinder*, Willes, 665; [illegible] Ev. 143, 2 Hawk., chap. 46, § 102; *The King* v. *Priddle*, 1 Leach, 4th ed. 442. The disqualification to testify appears to have been limited to those adjudged guilty of treason, [illegible], forgery, and crimes injuriously affecting by falsehood and fraud the administration of justice, such as perjury, subornation of perjury, suppression of testimony by bribery, [illegible] to accuse one of crime, or to procure the absence of a witness; and not to have been extended to cases of private cheats, such as the [illegible] of goods by false pretenses, or the [illegible] of counterfeit coin or forged securities. [illegible] Ev., § 373; *Utley* v. *Merrick*, 11 Met., [illegible]; *Fox* v. *Ohio*, 5 How, 410, 433, 434.

But the object and the very terms of the provision in the Fifth Amendment show that incompetency to be a witness is not the only [illegible] of its application.

Whether a convict shall be permitted to testify is not governed by a regard to his rights or to his protection, but by the consideration whether the law deems his testimony worthy of credit upon the trial of the rights of others. But whether a man shall be put upon his trial for crime without a presentment or indictment by a grand jury of his fellow citizens depends upon the consequences to himself if he shall be found guilty.

By the law of England, informations by the Attorney-General, without the intervention of a grand jury, were not allowed for capital crimes, nor for any felony, by which was understood any offense which at common law occasioned a total forfeiture of the offender's lands, or goods, or both. 4 Bl. Com., 94, 95, 310. The question whether the prosecution must be by indictment, or might be by information, thus depended upon the consequences to the convict himself. The Fifth Amendment, declaring in what cases a grand jury should be necessary and in effect affirming the rule of the common law upon the same subject, substituting only for capital crimes or felonies, "a capital or otherwise infamous crime," manifestly had in view that rule of the common law, rather than the rule on the very different question of the competency of witnesses.

The leading word "capital" describing the crime by its punishment only, the associated words "or otherwise infamous crime" must, by an elementary rule of construction, include crimes subject to any infamous punishment, even if they should be held to include also [424] crimes infamous in their nature, independently of the punishment affixed to them.

A reference to the history of the proposal and adoption of this provision of the Constitution confirms this conclusion. It had its origin in one of the Amendments, in the nature of a Bill of Rights, recommended by the Convention by which the State of Massachusetts in 1788 ratified the original Constitution, and as so recommended was in this form: "No person shall be tried for any crime, by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces." Journal Massachusetts Convention 1788 (ed. 1856), 80, 84, 87; 2 Elliot's Debates, 177. As introduced by Mr. Madison in 1789 at the first session of the House of Representatives of the United States, it stood thus: "In all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary." Being referred to a committee, of which Mr. Madison was a member, it was reported back in substantially the same form, in which it was afterwards approved by Congress and ratified by the States. 1 Annals of Congress, 435, 760.

Mr. Dane, one of the most learned lawyers of his time, and who as a member of the Continental Congress took a principal part in framing the Ordinance of 1787 for the government of the Northwest Territory, assumes it as unquestionable that, by virtue of the amendment of the Constitution, informations "cannot be used where either capital or infamous punishment is inflicted." 7 Dane Abr., 280. *Judge* Cooley has expressed a similar opinion. Cooley, Constitutional Law, 291.

The only mention of informations in the first Crimes Act of the United States is in the clause providing that no person "shall be prosecuted, tried or punished for an offense, not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offense, or incurring the fine or forfeiture." Act of April 30, 1790, chap. 9, § 32; 1 Stat. at L., 119.

[425] For very many years afterwards, informations were principally, if not exclusively, used for the recovery of fines and forfeitures, such as those imposed by the revenue and embargo laws. Acts of July 31, 1789, chap. 5, § 27, 1 Stat. at L., 43; March 26, 1804, chap. 40, § 3, and March 1, 1809, chap. 24, § 18, 2 Stat. at L., 290, 532; *U. S.* v. *Hill*, 1 Brock., 156, 158; *U. S.* v. *Mann*, 1 Gall., 3, 177; *Walsh* v. *U. S.*, 3 Woodb. & Min., 341. *Mr. Justice* Story, writing in 1833, said: "This process is rarely recurred to in America, and it has never yet been formally put into operation by any positive authority of Congress, under the National Government, in mere cases of misdemeanor, though common enough in civil prosecutions for penalties and forfeitures." Story, Const., § 1780.

The informations which passed without objection in *U. S.* v. *Isham*, 17 Wall., 496 [84 U. S., bk. 21, L. ed., 728], and *U. S.* v. *Buzzo*, 18 Wall., 125 [85 U. S., bk. 21, L. ed., 812], were for violations of the stamp laws, punishable by fine only. And the offense which *Mr. Justice* Field and *Judge* Sawyer held in *U. S.* v. *Waller*, 1 Sawy., 701, might be prosecuted by information, is there described as "an offense not capital or otherwise infamous," and, as appears by the statement of *Judge* Deady in *U. S.* v. *Block*, 4 Sawy., 211, 213, was the introduction of distilled spirits into Alaska, punishable only by fine of not more than $500 or imprisonment not more than six months. Act of July 27, 1868, chap. 273, § 4; 15 Stat. at L., 241.

Within the last fifteen years, prosecutions by information have greatly increased, and the general current of opinion in the Circuit and District Courts has been towards sustaining them for any crime a conviction of which would not at common law have disqualified the convict to be a witness. *U. S.* v. *Shepard*, 1 Abb. U. S., 431; *U. S.* v. *Maxwell*, 3 Dill., 275; *U. S.* v. *Block* [*supra*]; *U. S.* v. *Miller*, 3 Hughes, 553; *U. S.* v. *Baugh*, 4 Hughes, 501; *U. S.* v. *Yates*, 6 Fed. Rep., 861; *U. S.* v. *Field*, 21 Blatchf., 330; *Re Wilson*, 18 Fed. Rep., 33.

But, for the reasons above stated, having regard to the object and the terms of the first pro-

[426] vision of the Fifth Amendment, as well as to the history of its proposal and adoption, and to the early understanding and practice under it, this court is of opinion that the competency of the defendant, if convicted, to be a witness in another case is not the true test; and that no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may be imposed by the court.

The question is, whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not b put upon his trial, except on the accusation c a grand jury.

Nor can we accede to the proposition whic has been sometimes maintained, that no crim is infamous, within the meaning of the Fift Amendment, that has not been so declared b Congress. See *U. S.* v. *Wynn*, 3 McCrary, 26 and 11 Fed. Rep., 57; *U. S.* v. *Petit*, 11 Fed Rep., 58; *U. S.* v. *Cross*, 1 McArthur, 149. Th purpose of the Amendment was to limit the pow ers of the Legislature, as well as of the pros cuting officers of the United States. We ar not indeed disposed to deny that a crime, to th conviction and punishment of which Congre has superadded a disqualification to hold offic is thereby made infamous. *U. S.* v. *Waddel* 112 U. S., 76, 82 [Bk. 28, L. ed., 673]. But th Constitution protecting every one from bein prosecuted, without the intervention of a gran jury, for any crime which is subject by law t an infamous punishment, no declaration of Co gress is needed to secure, or competent to d feat, the constitutional safeguard.

The remaining question to be considered whether imprisonment at hard labor for a ter of years is an infamous punishment.

Infamous punishments cannot be limited those punishments which are cruel or unusua because, by the Seventh Amendment of th Constitution, "cruel and unusual punishments are wholly forbidden, and cannot therefore b lawfully inflicted even in cases of convictio upon indictments duly presented by a gran jury.

By the first Crimes Act of the United State forgery of public securities, or knowingly u tering forged public securities with intent to d fraud, as well as treason, murder, piracy, m tiny, robbery, or rescue of a person convicte of a capital crime, was punishable with deat most other offenses were punished by fine an imprisonment; whipping was part of the pu ishment of stealing or falsifying records, frau ulently acknowledging bail, larceny of goods, receiving stolen goods; disqualification to hol office was part of the punishment of briber and those convicted of perjury or subornatio of perjury, besides being fined and imprisone were to stand in the pillory for one hour, an rendered incapable of testifying in any court the United States. Act of April 30, 1790, cha 9; 1 Stat. at L., 112-117; *Mr. Justice* Wilson charge to the Grand Jury in 1791, 3 Wils. Work 380, 381.

By that Act no provision was made for in prisonment at hard labor. But the punishme of both fine and imprisonment at hard lab was prescribed by later statutes, as, for instanc by the Act of April 21, 1806, chap. 49, for cou terfeiting coin, or uttering or importing cou terfeit coin; and by the Act of March 5, 182 chap. 65, for perjury, subornation of perjur forgery and counterfeiting, uttering forged s curities or counterfeit money, and other gra crimes. 2 Stat. at L., 404; 4 Stat. at L., 11 Since the punishments of whipping and of stan ing in the pillory were abolished by the Act February 28, 1839, chap. 36, § 5, 5 Stat. at L 322, imprisonment at hard labor has been su stituted for nearly all other ignominious pu ishments not capital. And by the Act of Marc 3, 1825, chap. 65, § 15, re-enacted in Rev. Sta

[illegible] sentence of imprisonment at hard [illegible] may be ordered to be executed in a state [illegible] or penitentiary. 4 Stat. at L., 118.

[illegible] punishments shall be considered as in[illegible] may be affected by the changes of pub[illegible] from one age to another. In former [illegible], being put in the stocks was not consid[illegible] infamous. And by the first [illegible] Act of the United States, whipping [illegible] with moderate fines and short terms [illegible] in limiting the criminal juris[illegible] of the District Courts to cases "where [illegible] punishment than whipping, not ex[illegible] thirty stripes, a fine not exceeding one [illegible] dollars, or a term of imprisonment not [illegible] six months, is to be inflicted." Act [illegible] 24, 1789, chap. 20, § 9; 1 Stat. at [illegible] But at the present day either stocks or [illegible] might be thought an infamous pun[illegible].

[illegible] more than a century, imprisonment at [illegible] in the state prison or penitentiary or [illegible] institution has been considered an [illegible] punishment in England and America. [illegible] the punishments "that consist prin[illegible] in their ignominy," *Sir* William Black[illegible] "hard labor, in the house of cor[illegible] or otherwise," as well as whipping, the [illegible] the stocks. 4 Bl. Com., 377. And [illegible], while treating it as doubtful whether [illegible] in the stocks or in the house of cor[illegible] infamous, says: "Punishments clear[illegible] death, gallows, pillory, brand[illegible], confinement to hard labor, and [illegible]." 1 Dane, Abr., 569, 570.

[illegible] view has been forcibly expressed [illegible] *Justice* Shaw. Speaking of imprison[illegible] in the state prison, which by the statutes [illegible] was required to be at hard [illegible] said: "Whether we consider the [illegible] 'infamous punishment' in their popular [illegible], or as they are understood by the Con[illegible] and laws, a sentence to the state pris[illegible] for any term of time, must be considered as [illegible] within them. The convict is placed in [illegible] place of punishment, common to the [illegible] state, subject to solitary imprisonment, [illegible] his hair cropped, to be clothed in con[illegible] prison dress, subjected to hard labor [illegible] jury, to hard fare, coarse and meager [illegible] and to severe discipline. Some of these [illegible] in the house of correction is subject [illegible] the house of correction, under that and [illegible] names of workhouse and bridewell, [illegible] the same character of infamy attached [illegible]. Besides, the state prison, for any term [illegible], is now by law substituted for all the [illegible] punishments formerly in use; and, [illegible] is infamous, then there is now no in[illegible] punishment other than capital." *Jones* [illegible], 6 Gray, 349, 349. In the same case, [illegible] Justice Merrick, while dissenting from the [illegible] of the court upon the question whether un[illegible] the words "the law of the land" in the Con[illegible] of Massachusetts an indictment by a [illegible] jury was essential to a prosecution for a [illegible] punishable by imprisonment in the state [illegible], and taking a position upon that ques[illegible] more consistent with the recent judgment [illegible] the court in *Hurtado* v. *People of California*, [illegible] U. S. [illegible] [bk. 28, L. ed., 232], yet con[illegible] with the other judges in holding that such imprisonment at hard labor was an infamous punishment. 8 Gray, 370–372.

Imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, "involuntary servitude for crime," spoken of in the provision of the Ordinance of 1787, and of the Thirteenth Amendment of the Constitution, by which all other slavery was abolished.

Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the Fifth Amendment of the Constitution; and that the District Court, in holding the petitioner to answer for such a crime, and sentencing him to such imprisonment, without indictment or presentment by a grand jury, exceeded its jurisdiction, and he is therefore entitled to be discharged.

Writ of habeas corpus *to issue.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 430; 115 U. S., 499.

UNITED STATES, *Plff.*, [429]

v.

WILLIAM G. PETIT, *alias* WM. GEORGE.

(See S. C., Reporter's ed., 429–430.)

Infamous crime—imprisonment without indictment, etc.—habeas corpus.

1. A person sentenced to imprisonment for an infamous crime, without having been presented or indicted by a grand jury, as required by the Fifth Amendment of the Constitution, is entitled to be discharged on *habeas corpus.*

2. A crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the provision of the Fifth Amendment of the Constitution, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on the presentment or indictment of a grand jury.

[No. 237.]

Submitted Apr. 7, 1885. Decided Apr. 13, 1885.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Eastern District of Missouri.

This case arose upon an information against Petit, brought under the Revised Statutes, section 5457, for the crime of passing a counterfeit half dollar, which offense is punishable by a fine of not more than $5,000, and imprisonment at hard labor not more than ten years.

The defendant having pleaded to the jurisdiction, the Circuit Judge and the District Judge were opposed in opinion upon the questions "(1) whether the United States could pro- [430] ceed by information, instead of indictment, to try a defendant charged, under section 5457 of the Revised Statutes, with the violation thereof; (2) whether the offenses declared in said section are infamous crimes, to be prosecuted solely through indictment, pursuant to Article V. of the amendments to the Constitution of the United States;" whereupon these questions were certified to this court.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for the United States.

No counsel appeared for the defendant.

[430] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

The first question certified in this case is answered in the negative, and the second in the affirmative, on the authority of *Ex parte Wilson*, decided at the present Term [*ante*, 89].

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[218] G. DE ROSSET LAMAR, EXR. of GAZAWAY B. LAMAR, Deceased, *Appt.*,

v.

MARY J. C. MICOU, Admrx. of MARTHA M. SIMS, Deceased.

(See S. C., Reporter's ed., 218-223.)

Domicil of infants—guardian appointed in another State—what law governs acts of—judicial notice by Federal Courts of state laws.

*1. A guardian, appointed in a State which is not the domicil of the ward, should not, in accounting in the State of his appointment for his investment of the ward's property, be held, unless in obedience to express statute, to a narrower range of securities than is allowed by the law of the State of the ward's domicil.

2. Infants having a domicil in one State, who after the death of both their parents take up their residence at the home of their paternal grandmother and next of kin in another State, acquire her domicil.

3. The courts of the United States take judicial notice of the law of any State of the Union, whether depending on statutes or on judicial opinions.

4. Lamar v. Micou, bk. 28, confirmed.

[No. 61.]

Petition filed Jan. 20, 1885. Decided Mar. 30, 1885.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

On petition for a rehearing.

For the history and facts of the case, see the opinion of the court and the report of the opinion upon first hearing, 112 U. S., 452. L. ed., bk. 28, 751.

Messrs. S. P. Nash and *Geo. C. Holt*, for appellee, filed a brief in support of the petition.

Messrs. **Edward N. Dickerson** and **Chas. C. Beaman, Jr.**, for appellant, opposed.

[219] *Mr. Justice* **Gray** delivered the opinion of the court:

This is a petition for a rehearing of an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, upon a bill filed against the executor of a guardian by the administratrix of his ward.

Gazaway B. Lamar was appointed in 1855, by a surrogate's court in New York, guardian of the person and property of Martha M. Sims. The bill alleged that at the time of the appointment the ward resided in New York. The answer alleged that at that time she was temporarily residing there, and was then, as well as in 1861, a citizen of Alabama. The hearing on the merits of the case was had in the Circuit Court upon the pleadings, and upon certain facts stated by the defendant and admitted by the plaintiff, which, so far as they affected the domicil of the ward, were as follows:

William W. Sims, the ward's father, died at Savannah, in the State of Georgia in 1850, leaving two infant daughters, and a widow, who in 1853 married a citizen of New York, and thenceforth resided with him in that State until 1856, when they removed to Connecticut, and resided there until her death in 1859. The two infants lived with their mother and stepfather in New York (where Lamar was appointed in 1855 guardian of both infants) and in Connecticut, from her second marriage until her death, and then went to Georgia, and thenceforth resided with their father's mother and her daughter and only living child, their aunt, at first in Georgia and afterwards in Alabama.

Upon those facts, this court assumed the domicil of William W. Sims to have been in Georgia; and held that the domicil of his children continued to be in that State throughout their residence with their mother and her second husband in New York and Connecticut, and until their return to Georgia upon the death of their mother in 1859, and was thereafter in Georgia or Alabama; that whether the guardian's domicil was in Georgia or in New York, he should not, in accounting for his investments, be held to a narrower range of securities than was allowed by the law of the ward's domicil; and that many of his investments were justified by the law of Georgia or of Alabama; and therefore reversed the decree of the Circuit Court which had held him to account according to the law of New York for the manner in which he had invested the property. 112 U. S. 45[illegible] [bk. 28, L. ed. 751].

The questions so passed upon, though hardly touched by either counsel at the first argument, arose upon the facts admitted, were vital to the determination of the rights of the parties, and could not be overlooked by this court. The importance and comparative novelty of some of the questions induced the court to invite the submission of a full brief in support of the petition for a rehearing. But, upon careful consideration of the petition and brief, the court has seen no ground for changing its opinion, and has not thought it necessary to add anything beyond what has been suggested by examination of the authorities cited for the petitioner.

In *Pritchard* v. *Norton*, 106 U. S., 124 [bk. 27, L. ed. 104], the point decided was that the validity and effect of a bond, executed in New York, to indemnify the obligee therein against his liability upon an appeal bond executed by him in a suit in Louisiana, was to be governed by the law of Louisiana. The decision was based upon the fundamental rule, or, in the words of *Chief Justice* Marshall, the "principle of universal law"—"that in every forum a contract is governed by the law with a view to which it was made." *Wayman* v. *Southard*, 1[illegible]

*Head notes by *Mr. Justice* GRAY.

NOTE.—*Evidence—U. S. Courts take judicial notice of state laws.* M'Niel v. Holbrook, 37 U. S. (12 Pet.), 84, bk. 9, 1009, *note.*

[illegible] 1, 48. And reference was made to two [illegible] English cases of high authority, in which [illegible] of that rule, the effect of a contract [illegible] and of a bottomry bond given [illegible] master, was held to be governed, not [illegible] law of the place where the contract was [illegible] nor by that of the place where it was [illegible] performed, nor yet by the law of the [illegible] which the suit was brought, but by [illegible] law of the country to which the ship be[illegible]. *Lloyd* v. *Guibert*, 6 B. & S., 100; *S.* [illegible] R. 1 Q. B. 115; *The Gaetano & Maria*, 7 [illegible] 137.

[illegible] *Lloyd* v. *Guibert*, *Mr. Justice* Willes, de[illegible] the judgment of the Court of Exchequer [illegible] said that when "disputes arise, not [illegible] the terms of the contract, but as to their [illegible] to unforeseen questions, which [illegible] accidentally or accidentally in the course [illegible] performance, and which the contract does [illegible] in terms, yet which are within the [illegible] of the relation established thereby," "it [illegible] to consider by what general law [illegible] intended that the transaction should [illegible], or rather to what general law it is [illegible] presume that they have submitted them[illegible] the matter." 6 B. & S., 130; L. R. 1 [illegible] 137. And in *The Gaetano & Maria*, *Lord* [illegible] Brett, with whom *Lord* Coleridge and [illegible] Justice Cotton concurred, pointed out [illegible] the matter before the court was, "not the [illegible] of the construction of a contract, but [illegible] what authority arises out of the fact of a [illegible] having been entered into." 7 P. Div., [illegible]

[illegible] question in what securities a guardian [illegible] invest is not one of mere con[illegible] of the contract expressed in the guard[illegible] or implied by his acceptance of the [illegible], but rather of what is, "within [illegible] of the relation established thereby,' [illegible] what authority arises out of the fact of a [illegible] having been entered into." And the [illegible] of Lamar's bond do not point to the [illegible] of New York only, but impose a general [illegible] to "discharge the duty of a guardian [illegible] and minor according to law," as well as [illegible] accounts of the property and of his [illegible] to any court having cognizance [illegible] 12 U. S., 455 [bk. 28, L. ed., 751]. [illegible] view heretofore expressed by this court [illegible] the domicil of the guardian is immaterial, [illegible] that, as a general rule, the management [illegible] of the ward's property are to [illegible] by the law of the domicil of the [illegible] although, so far as the remedy is con[illegible], the accounting must conform to the [illegible] of the place in which the liability of the [illegible] is sought to be enforced, accords with [illegible] of Bar, as well as the passage [illegible] by the petitioner, as in that referred to [illegible] the former opinion; and the only decision [illegible] Scotch court brought to our notice tends [illegible] the same direction, although the Scotch [illegible] treat the question as an open one. [illegible] Law, §§ 87, 106; (Gillespie's [illegible] 357, 389, 426, 445 *note*; *Lamb* v. [illegible] 1890, 20 Scotch Ct. of Sess. Cas. [illegible]. Fraser on Parent & Child, 609. [illegible] of *Preston* v. *Melville*, 8 Cl. & F., [illegible] *Blackwood* v. *Queen*, 8 App. Cas., 82, [illegible] the petitioner, relate only to the place in [illegible] personal property of a deceased person is to be administered, or is subject to probate duty.

The petitioner, while admitting that the statement in the former opinion that the domicil of the father was in Georgia was a natural inference from the facts stated in the record, and that it is probable that the wards never acquired a domicil in any northern State, has now offered affidavits tending to show that the father's domicil, at the time of his death and for six years before, was not in Georgia, but in Florida; and has referred to statutes and decisions in Florida as showing that the law of that State in the matter of investments did not differ from the law of New York. Florida Stat., November 20, 1828, § 35; Thompson's Dig. 207, 208; *Moore* v. *Hamilton*, 4 Fla. 112, and *Moore* v. *Felkel*, 7 Fla., 44.

But if, against all precedent, this new evidence could be admitted after argument and decision in this court, it would afford no ground for arriving at a different conclusion upon the merits of the case.

If the domicil of the father was in Florida at the time of his death in 1850, then, according to the principles stated in the former opinion, the domicil of his children continued to be in that State until the death of their mother in Connecticut in 1859. In that view of the case, the question would be whether they afterwards acquired a domicil in Georgia by taking up their residence there with their paternal grandmother. Although some books speak only of the father, or, in the case of his death, the mother, as guardian by nature, 1 Bl. Com. 461; 2 Kent, Com. 219, it is clear that the grandfather or grandmother, when the next of kin, is such a guardian. Hargrave, *note* 66 to Co. Lit. 88 *b*; Reeve Dom. Rel., 315. See also, *Darden* v. *Wyatt*, 15 Ga., 414. In the present case, the infants, when their mother died and they went to the home of their paternal grandmother, were under ten years of age; the grandmother, who appears to have been their only surviving grandparent and their next of kin, and whose only living child an unmarried daughter, resided with her, was the head of the family; and upon the facts agreed it is evident that the removal of the infants after the death of both parents to the home of their grandmother in Georgia was with Lamar's consent. Under these circumstances, there can be no doubt that by taking up their residence with her they acquired her domicil in that State in 1859, if their domicil was not already there. And there being no evidence that any of Lamar's investments had diminished in value before that time, it is immaterial whether the previous domicil of the wards was in Florida or in Georgia, inasmuch as the propriety of his investments was thereafter to be governed by the law of Georgia.

[223]

The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof. *Owings* v. *Hull*, 9 Pet., 607; *Pennington* v. *Gibson*, 16 How., 65; *Drawbridge Co.* v. *Shepherd*, 20 How., 227 [61 U. S., bk. 15, L. ed. 896]. And nothing has now been adduced tending to show that, as applied to the facts admitted by the parties, either the law of Georgia or the law of New York was other than we have held it to be.

The question whether, as matter of fact,

Lamar acted with due care and prudence in making his investments, was argued at the former hearing, and no reason is shown for reopening that question.

Rehearing denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—116 U. S., 6.

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[87] ELECTRIC RAILROAD SIGNAL COMPANY, Composed of FRANK L POPE, STEPHEN C. HENDRICKSON and JAMES D. LINCOLN, Surviving Partners, *Appt.*,

v.

HALL RAILWAY SIGNAL COMPANY.

(See S. C., Reporter's ed., 87-103.)

Patent law—combination—what constitutes infringement of—electric railroad signals.

1. To constitute identity of invention, and therefore infringement, not only must the result obtained be the same, but in case the means used for its attainment is a combination of known elements, the elements combined in both cases must be the same, and combined in the same way, so that each element shall perform the same function; provided, however, that the differences alleged are not merely colorable, according to the rule forbidding the use of known equivalents.

2. In letters patent No. 140536, for an improvement in Circuits for Electric Railroad Signals, insulated sections of the rails, as circuit closers, constitute an essential element in the combination described, and said patent is not infringed by the use of a separate instrument used as a circuit closer placed near the track and depressed by the wheels of passing trains.

3. A patent of a combination to operate signals at many stations along the line of a railroad, with one battery by a metallic circuit, divisible into a number of subsidiary circuits, of unequal size and resistance, and requiring the equalization of the resistances by means of independent and additional devices, is not infringed by a combination for the same purpose which avoids the necessity of subsequent rectification by an original adjustment of equal resistances, and uses the earth as the return part of the circuit.

[No 141.]

Argued Jan. 6, 7, 1885. Decided Mar. 30, 1885.

APPEAL from the Circuit Court of the United States for the District of Connecticut.

The history and facts of the case appear in the opinion of the court.

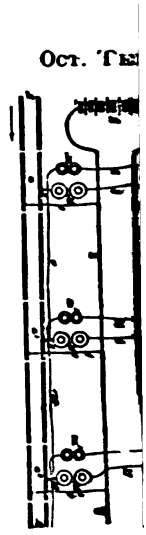
Messrs. **Chas. E. Perkins, Geo. E. Perkins** and **F. Chamberlain,** for appellants.

Mr. **Simeon E. Baldwin,** for appellee.

[87] *Mr. Justice* **Matthews** delivered the opinion of the court:

This is a bill in equity for an injunction to restrain the alleged infringement of letters patent No. 140536 for an improvement in Circuits for Electric Railroad Signals, issued July 1, 1873, to Frank L. Pope, of whom the appellants, who were complainants below, are as-
[88] signees. On final hearing the bill was dismissed by a decree now brought here for review by this appeal.

The drawing which accompanies and illustrates the patent is as follows:



The following is the substantial part of the specification, together with the claims:

"My invention consists in a peculiar arrangement of electric circuits, in combination with a battery, and with two or more circuit closers operated by moving trains or otherwise, whereby a series of two or more visual or audible signals, situated at intervals along the line of a railroad, may be operated by currents of electricity derived from a single battery, thereby obviating the inconvenience and expense of employing, as heretofore, one or more separate batteries situated at or near each signal for the purpose of actuating the same.

In the accompanying drawing, A A rep sents a portion of the track of a railroad. intervals of, say a mile, more or less, secti of said track, a, a^1, a^2, are electrically insula from the remainder in a manner well und stood, and therefore requiring no detailed scription. B is a galvanic battery, of any su able construction, and placed in any conveni location near the line of the railroad. Two wi or other conductors, C and Z, are attached to positive and negative poles, respectively, of battery B, and extended to any required tance in a direction parallel or nearly so to line of the railroad. The conductors C an may be placed on poles and should be suita insulated from each other and from the ear The conductors C and Z are virtually prolon tions of the positive and negative poles of battery B. Each of the insulated sections track, a, a^1, a^2, etc., is placed at some point or near which it is desired to erect a signal, a any required number of these may be emplo to meet the requirements of any particular ca M, M^1 and M^2 are the electro magnets, wh actuate or display the respective signals. T said signals may be of any suitable constructi and should be provided with some suita means of retaining them in position or acti after the circuit through the magnets M, or M^2 has been interrupted. m, m^1, and m^2 magnets so arranged as to release, reverse, stop the action of said signals, which ha previously been brought into action by magnets M, M^1, and M^2.

The operation of the apparatus is as f ows: Suppose a train moving along the tra A A from left to right in a direction indica by the arrow. Upon reaching the point a, wheels and axles of the train will form electrical connection between the opposite sulated rails, and a circuit will be formed tween the conductor C and the conductor traversing wires 1 and 2 magnet M, and w 3, and the signal attached to M will con quently be displayed. Upon the arrival of train at a^1 the same operation will be repe ed, and another connection formed betwee and Z, traversing the wires 4 and 5, magn M^1, and wire 6, while at the same time a p tion of the current will traverse the bran wire 7, magnet m, and wire 8. Thus the sig attached to M^1 will be actuated, and simulta

[illegible] the action of the magnet m will release or [illegible] the action of the first mentioned signal. [illegible] reaching the point a^2 the closing of the [illegible] by the train will, in like manner, cause [illegible] signal attached to M^2 to be displayed and [illegible] last displayed by M^1 to be withdrawn. [illegible] manner any required number of such [illegible] may be operated by means of a single [illegible]

[illegible] respective resistances of the several cir[illegible] should be so adjusted that they will be as [illegible] possible equal to each other, as a much [illegible] perfect action of the apparatus will be se[illegible] thereby.

[illegible] a railroad having a double track two sepa[illegible] series of signals, one series for each track, [illegible] be connected with the conductors C and Z [illegible] single battery, if required. If preferable [illegible] may be also operated by means of separate [illegible] and separate conductors.

[illegible] where it is required to operate a large [illegible] of signals, extending along the road [illegible] distance of many miles, the two con[illegible] C and Z may be extended the entire dis[illegible] and a number of batteries attached at [illegible] intervals, may, for instance, from five [illegible] miles apart. The several batteries should [illegible] placed with their positive poles in con[illegible] with the wire C, and their negative [illegible] connection with the wire Z, when they [illegible] virtually form one large battery, and the [illegible] of operation will remain the same as [illegible] hereinbefore described.

[illegible] not desire to confine myself to the use of [illegible] particular form of visual or audible signals, [illegible] the particular devices herein described [illegible] the electric circuit at points from [illegible] a signal is to be operated. Instead of [illegible] being closed automatically by the [illegible] it may be closed by a signalman by [illegible] of a key or switch, or otherwise.

[illegible] as my invention:

[illegible] battery B, in combination with the [illegible] and negative conductors C and Z, two [illegible] electro-magnets, M, M^1, M^2, for actu[illegible] or reversing to be actuated visual or audible [illegible] and two or more circuit closers, a, a^1, a^2, [illegible] at intervals along the line of a railroad, [illegible] and for the purpose specified.

[illegible] battery B, in combination with the [illegible] and negative conductors C and Z, two [illegible] electro-magnets, m, m^1, m^2, for releas[illegible] or reversing visual or audible signals, and [illegible] or more circuit closers, a^1, a^2, placed at in[illegible] along the line of a railroad, substantially [illegible] and for the purpose specified.

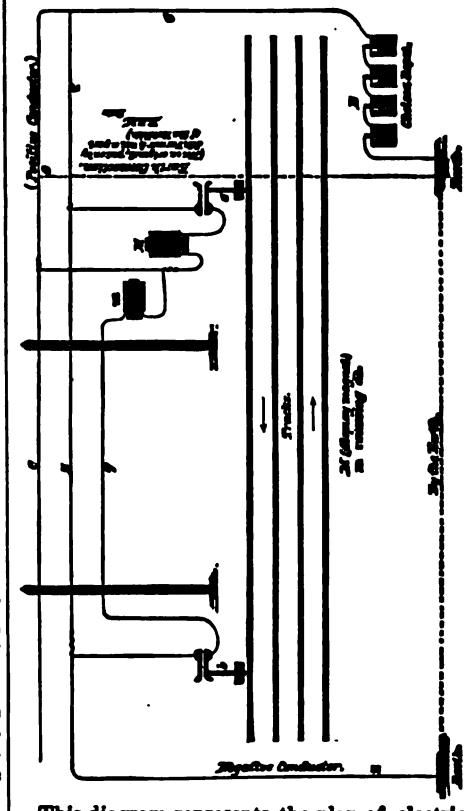
[illegible] combination of the battery B, con[illegible] C and Z, circuit closer a, and electro-[illegible] M, for actuating a visual or audible [illegible] with the circuit closer a^1, wires 5, 7, and [illegible] electro magnet m, for reversing, releas[illegible] or stopping said signal, substantially as [illegible]

[illegible] several defenses set up in the answer, [illegible] relied on were first, that Thomas [illegible] Hall, and not Pope, the patentee, was the [illegible] of the improvement claimed; and, [illegible] that the devices used by the defendants [illegible] not an infringement of the patent.

[illegible] below was based on the first of [illegible] defenses alone, the Circuit Court finding [illegible] Hall was entitled in law to priority of in[illegible] but we have not found it necessary to discuss the questions of fact and law embraced in this issue, as we have concluded to dispose of the case upon the ground that the defendants did not, by the devices used by them, infringe the patent of the complainants.

These devices are illustrated by a drawing, of which the following is a copy: [92]

Exhibit C.



This diagram represents the plan of electric railroad signals, placed and put in practical operation, by the defendants, on the line of the Eastern Railroad near Boston, prior to the bringing of this suit. In comparing it with the drawing annexed to the patent, it is to be remembered that the latter represents a series of double signals in succession on the line of a railroad track, divided into blocks, while Exhibit C represents but one pair of such signals in one such block. To make it correspond with the other, as a representation, it should be imagined as being repeated in several successive blocks, constituting portions of one circuit, closed at fixed points by circuit closers for that purpose. [93]

Mr. Pope, the patentee, drew this diagram and, as a witness on behalf of the complainants, explains it in comparison with the plan described in the patent, with a view to establish their identity. He says:

"I have made a diagram which exhibits the apparatus which I examined, or so much of it as is material to this case, which I annex, and is marked exhibit C.

A battery of perhaps one hundred cells is placed in the station building at Chelsea. One

pole of this battery—I think the negative pole—is connected to the earth.

A conductor is attached to the other or positive pole of the battery, consisting of an insulated wire extending along parallel with the track upon poles. This wire which I examined extended toward Boston, the end remote from Chelsea being disconnected, or, as it is termed, open. A second conductor, consisting of another similar wire insulated and attached to the same poles, was arranged parallel to the first one. The second wire was open at Chelsea and connected with the earth at its remote end.

The first mentioned wire I have shown in the diagram, and marked 'positive conductor;' the second wire is marked 'negative conductor.' At a short distance from the station a semaphoric signal is placed, consisting of a red disk balanced upon a lever. This was placed in the cupola of a small building at the side of the track. An electro-magnet was arranged with [94] its armature attached to said lever, so that when brought into action the red disk on the other end of the lever would be moved into a position to render it visible through an opening in the cupola. A latch or detent was placed in a position to fasten the lever after the action of the magnet had ceased, and thus continue the exhibition of the signal. A circuit closer was placed upon the track at a point near the signal, which consisted of a lever so placed as to be depressed by the wheels of a passing train, which movement caused the circuit to be closed by pressing two springs together. When the circuit was thus closed by a passing train a connection was formed between the positive and negative conductors, and the electric current, in passing from one to the other, passed through and operated the magnet by which the signal was displayed. At a point perhaps a mile distant, another signal was arranged in precisely the same manner, in connection with a second circuit closer and the same positive and negative conductors. An additional circuit closer, placed upon the track in the vicinity of this last named signal, was arranged to form a connection from the positive to the negative conductor by the way of a third wire running upon the poles back to the signal first mentioned, where it passed through and operated a second magnet, which lifted the latch or detent and allowed the disk to return to a position concealing it from view. I examined two of these signals and saw many others along the line of road.

I find in this arrangement thus described the combination claimed in the first claim of said patent, consisting of a battery in combination with positive and negative conductors, two or more electro-magnets for operating visual signals and two or more circuit closers placed at intervals along the line of the railroad; also the combination claimed in the second claim of the patent, consisting of a battery in combination with positive and negative conductors, two or more electro-magnets for reversing visual signals, and two or more circuit closers placed at intervals along the line of the railway. I also find the combination claimed in the third claim, of a battery, positive and negative conductors, a circuit closer, and electro-magnet for actuating a signal, with a second circuit closer, wires, and a magnet for reversing said signal."

Mr. Moses G. Farmer, an expert witness o behalf of the complainants, makes the sam comparison, with the result, according to hi opinion, of establishing that the defendar system is essentially the invention described i the patent.

On the other hand Prof. Henry Morton, a expert witness on behalf of the defendant points out two particulars in which the pla as practiced by the defendants and shown i Exhibit C differs from that of the Pope pater so materially that they cannot be considere substantially the same.

The first of these is that, in the patent, insu lated sections of the railroad track, used, whe covered by a locomotive or cars, as a circu closer, are made essential to the combinatior claimed, while they are dispensed with in th Hall system, other and independent circu closers being employed.

The second is thus described by Prof. Mo ton in his testimony:

"I also find a difference between the pla described in the patent and that shown in E hibit C in another regard: in the plan of th patent the conductors C and Z are connecte respectively with the positive and negative pol of the battery, or, as the patent itself state 'are virtually prolongations of the positive an negative poles of the battery.'

In the plan shown in Exhibit C, howeve the conductor C, or positive conductor only, connected with the battery, the other conduc or Z, or, as it is called, negative conductor, ha ing no connection with the battery. In cons quence of this difference of arrangement, the system of the patent, the positive conduct C carries the positive current in one directic away from the battery; and the other, or neg tive conductor Z, brings the positive current the opposite direction, or back to the batter and thereby involves the production of circui of different resistance for each station. In th system represented in Exhibit C, on the oth hand, both the conductors C and Z serve carry the positive current in the same dire tion away from the battery, and should ther fore properly be both called positive condu tors. As a result of this arrangement the cu rent always passes through the same or equal c cuits no matter at which station the connectic is made, simply changing from one to the oth of these equal parallel wires at the station whe the contact is effected.

It is for this reason that in this system equalization of resistance, in the sense involv in the description of the patent, is required."

It is upon these two points that the questi of infringement depends.

In considering them it is important to be in mind that the patent is for a combinati merely, in which all the elements were know and open to public use. No one of them claimed to be the invention of the patent He does not claim them himself as separ inventions. It is simply a new combination old and well-known devices, for the acco plishment of a new and useful result, that claimed to be the invention secured by t patent. And the well-settled principles of l heretofore applied to the construction of pate for combinations merely, must apply and g ern in the present case.

[illegible] of the patented combination was [illegible] accomplishment of a particular result, that [illegible] work electric signals on what was known [illegible] block system, by means of circuits, [illegible] by a single battery instead of many. [illegible] result or idea is not monopolized by [illegible] patent. The thing patented is the particu[illegible] means devised by the inventor by which [illegible] result is attained, leaving it open to any [illegible] inventor to accomplish the same result by [illegible] means. To constitute identity of inven[illegible], and therefore infringement, not only must [illegible] result attained be the same, but in case the [illegible] means used for its attainment is a combination [illegible] elements, the elements combined in [illegible] must be the same, and combined [illegible] way, so that each element shall per[illegible] the same function, provided, however, [illegible] differences alleged are not merely col[illegible] according to the rule forbidding the use [illegible] equivalents.

[illegible] question we have to consider upon [illegible] as to infringement is, whether insu[illegible] sections of the rails, as circuit closers, con[illegible] an essential element in the combinations [illegible] in the patent. And that question we [illegible] to answer in the affirmative.

[illegible] insulated sections of track are shown [illegible] on the drawing which accompa[illegible] specification, and in its descriptive part [illegible] referred to as parts of the arrang[illegible]. It says: "At intervals of, say a mile, [illegible] sections of the said track, a, a^1, a^2, [illegible] insulated from the remainder in [illegible] well understood, and therefore re[illegible] no detailed description." And again: [illegible] of the insulated sections of track, a, a^1, [illegible] is placed at some point at or near which [illegible] to erect a signal, and any required [illegible] of these may be employed to meet the [illegible] of any particular case." And in [illegible] the operation of the apparatus, it [illegible] says: "Upon reaching the point a, the [illegible] and axles of the train will form an [illegible] connection between the opposite in[illegible] rails," etc. "Upon reaching the point a^2, [illegible] of the circuit by the train will in like [illegible] cause the signal attached to M^2 to be [illegible], and the signal last displayed by M^1 [illegible] withdrawn." It is true that the patentee [illegible] says, in the specification: "I do not de[illegible] myself to the use of any partic[illegible] form of visual or audible signals, nor to the [illegible] devices herein described for closing [illegible] circuit at points from which a signal [illegible]," but that he does not thereby [illegible] any intention of dispensing with insu[illegible] sections of the tract, as a necessary part [illegible] of forming and closing the circuit, [illegible] from what immediately follows: "Instead of the circuit being closed automatically [illegible] itself, it may be closed by a signal[illegible] means of a key, or switch, or other[illegible]." This language evidently implies that the [illegible] sections of the track are constant fac[illegible] in the plan, the only alternatives proposed [illegible] not to a substitute for them, [illegible] to another mode of using them in [illegible] the circuit. So in each of the three [illegible] the circuit closers a, a^1, a^2, or one or [illegible] of them, are expressly named as part of [illegible] claimed as the invention of the [illegible]. The use of insulated sections of the railroad track thus repeatedly appears in every part of the specifications as an unchangeable and characteristic feature of the invention, and there is nothing in the state of the art at that date, as disclosed in the evidence, to show that the patentee would have been justified in applying, [98] or that, if he had applied, an application would have been sanctioned by a grant of a patent for a combination as large and undefined as that now claimed by implication and construction, so as to cover every form of a circuit-closer then known or thereafter invented. For that employed by the defendants as part of the Hall system was not only not known and in use at the date of the patent, but was a device invented by Hall himself or one by Snow, for which the latter obtained a patent dated October 21, 1873. It dispenses altogether with the use of insulated sections of the track, and employs instead a separate instrument placed near the track, and worked by means of a lever connected with the track, so that the wheels of locomotives and cars passing on the track depress the outer end, the lever being raised again and held up after the train has passed by means of a spring which holds it in place.

Upon this point, the case seems to fall clearly within the rule declared in *Prouty* v. *Ruggles*, 16 Pet., 336; *Silsby* v. *Foote*, 14 How., 217; *McCormick* v. *Talcott*, 20 How., 402 [61 U. S., bk. 15, L. ed. 930]; *Vance* v. *Campbell*, 1 Black, 427 [66 U. S., bk. 17, L. ed. 168]; *Eames* v. *Godfrey*, 1 Wall., 78 [68 U. S., bk. 17, L. ed. 547]; *Dunbar* v. *Meyers*, 94 U. S. 187 [Bk. 24, L. ed. 84]; *Fuller* v. *Yentzer*, 94 U. S. 288 [Bk. 24, L. ed. 103]; *Imhaeuser* v. *Buerk*, 101 U. S., 647 [Bk. 25, L. ed. 945]; *Gage* v. *Herring*, 107 U. S., 640 [Bk. 27, L. ed. 601]; *Seymour* v. *Osborne*, 11 Wall., 516 [78 U. S., bk. 20, L. ed. 33]; *Gould* v. *Rees*, 15 Wall., 194 [82 U. S., bk. 21, L. ed. 41]; *Gill* v. *Wells*, 22 Wall., 1 [89 U. S., bk. 22, L. ed. 699]; *McMurray* v. *Mallory*, 111 U. S., 97 [Bk. 28, L. ed. 365]; *Fay* v. *Cordesman*, 109 U. S., 408 [Bk. 27, L. ed. 979].

On the second branch of the issue as to infringement, we think the case is quite as clearly for the defendants. In the patent, the entire circuit, operated by the single battery, and which is closed at intermediate points for the purpose of displaying and concealing the signals, is described as formed by means of two wires or other conductors, C and Z, attached to the positive and negative poles of the battery, extended to any required distance in a direction parallel, or nearly so, to the line of the railroad. These wires may be placed on poles, it is said, and should be suitably insulated from each other and from the earth, and they are declared to be virtually prolongations of the positive and negative [99] poles of the battery. Throughout the two conductors are designated as metallic, and insulated from the earth, and they are embraced under that description in each of the claims. On the other hand, the defendants' plan does not include a metalic circuit, composed of two conductors, as thus described, but uses a circuit composed in part of the earth itself. The material difference in the principle or mode of operation of the two plans, as distinguished in this particular, is indicated by Prof. Morton in the extract from his testimony already quoted. It will become more apparent on further explanation.

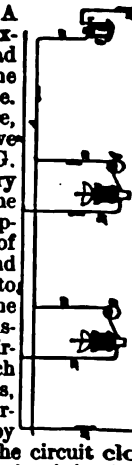
The object proposed by the plan of the pa-

tent is, to operate with one battery instead of several, along the line of a railroad, an electric circuit of considerable length, divisible into a number of subsidiary circuits, for the display of signals at many stations, by means of circuit closers operated automatically by passing trains, in definite and predetermined succession. It is obvious that the battery must have sufficient power, being placed at one end of the entire circuit, to operate efficiently at the other extremity. The force necessary for that purpose would be much greater than would be needed for the subsidiary circuits, all of which, it will be observed, are different in length; and this difference of force in the battery might be so great, owing to the required length of the whole circuit, as, when expended upon a shorter intermediate circuit, to destroy its capacity for working the signals by overheating. It becomes, therefore, a matter of importance, in some way, to equalize the resistance of these varying circuits. The patent itself contemplates this necessity, and undertakes to make provision for it. It is said in the specification that "the respective resistances of the several circuits should be so adjusted that they will be as nearly as possible equal to each other, as a much more perfect action of the apparatus will be secured thereby." The specification does not point out any particular methods for that purpose, but it is stated in the evidence of experts that such means were well known at the time and in common use; such as by varying the dimensions of the wire on the magnets, or the introduction of resistance coils into the nearer circuits. These devices would be independent of the apparatus [100] described in the patent, and would have to be adjusted to the peculiar situation of each line of signals in practical use.

In the Hall system, as used by the defendants, no such necessity exists. According to that plan, there is no necessity of equalizing the resistance of the several sub-circuits, for they are all exactly equal by their construction, as the electric fluid in working the signal at any point, when a sub-circuit has been formed by a circuit closer, nevertheless traverses the whole extent of the large circuit, and returns by means of the connections formed by the earth to the battery. So that, in effect, the Hall plan forms its apparatus, counting the connection through the earth, as though it were a continuous wire, as it might be, by means of three lines of conductors, of which two are combined by connecting wires with the magnets which operate the signals, at points where the circuit is closed for that purpose, carrying the positive electricity throughout the whole distance to the extreme point of the entire circuit, and then returning it by the third line, which is the connection by means of the earth. And, inasmuch as a wire might be used for this purpose, instead of the earth, it would then show three metallic conductors; and Mr. Farmer, the complainant's expert, is quite right in saying, as he does, that the equalization of the resistances in the several sub-circuits, accomplished in the plan of Hall, "is due to the arrangement of the wires wholly, and not at all to the fact that the earth is used as a portion of the conductor."

This arrangement is altogether unlike that of the patent. It introduces into the plan of the defendants new elements, a new combination, and a new result. The two wire conducto are not the same, for, in the patent, one co ducts positive electricity, the other retur the current and completes the circuit, while, the other, both the metallic conductors car the current forward while the earth returns and in this mode the *desideratum* is obtained securing equality of resistance by making the circuits equal in size.

The device cannot be regarded as a substitu or an equivalent for anything contained in t complainants' patent. It is of itself an ind pendent invention, and, as such, forms the sc subject of a patent granted to Hall and Sno July 13, 1875. To explain more satisfactori the mode of its operation, so as to show that differs substantially from the arrangement the complainants, the descriptive parts of t Hall and Snow patent and the attached dra ings are here given:



"In the drawing, the letters A B designate two wires which extend along the line of a railroad track, or in other words form the line wires of a telegraph line. The wire A connects by a wire, 10, with one—say, the positive—pole of a galvanic battery, G. and the other pole of this battery connects by a wire, 11, with the ground. The battery G is supposed to be situated at one end of the line, and at the opposite end of said line the wire B is made to connect by a wire, 12, with the ground. Along the line are distributed a series of keys or circuit closers, C D, each of which is connected with the line wires, A B, the connection of the circuit closer C being effected by wires 13 and 14, and that of the circuit clos D by wires 15 and 16. If the circuit is clos through the circuit closer C, the current pass from the battery through wire 10, line wire wire 13, circuit closer C, wire 14, line wire and wire 12 to the ground, and through t ground and wire 11 back to the battery. If t circuit is closed through the circuit closer the current from the battery passes throu wires 10, A, 15, circuit closer D, wires 16, and 12 to the ground, and through the grou and wire 11 back to the battery.

"From these two examples it will be seen t whenever the circuit is closed along the line t electric current has to traverse the whole circu and consequently the resistance is the same all cases."

It thus clearly appears that the difference this particular between the invention claim by the complainants and the alleged infrin ment is a difference in the arrangement of t parts and in the principle of the combinatic with different elements performing differe functions; and that the difference is somethi more than the mere substitution of a connecti by means of the earth for one of the conducti wires. The case is, therefore, clearly dist guishable from that of *Electric Tel. Co.* v. *Br* 10 C. B., 838, cited and relied on by counsel the appellants as in point, where the substi tion of the earth for a wire as a conductor,

[illegible] difference, was held, under the [illegible] patent laws, not to be sufficient to de[illegible] identity between the two competing [illegible] which constituted in that case the in[illegible] alleged, although the patent itself [illegible] for metallic conductors. Were that [illegible] difference between the two plans under [illegible] in the present case, there might [illegible] in view of our own patent laws, [illegible] the patentee had not made a wholly [illegible] circuit a necessary part of his combi[illegible] determined by considerations which [illegible] thought it necessary to bring into [illegible] bearing upon that point. For, as we [illegible] the difference on which we ground [illegible] that the defendants are shown [illegible] infringed the complainants' patent, [illegible] particular, is, not merely that they have [illegible] earth for the return of the current that [illegible] the circuit, instead of a metallic con[illegible] that they have arranged their con[illegible] reference to the battery, the magnets, [illegible] and the earth, upon such a system, [illegible] such relations and connections, that, [illegible] their signals by a single battery the [illegible] equalized as to resistance; while [illegible] the plaintiffs the circuits are of un[illegible] and resistance, requiring for success[illegible] the equalization of the resist[illegible] created by means of independent and [illegible] devices. One plan proceeds upon the [illegible] equal circuits, to be afterwards equal[illegible] the other adopts and embodies the idea of [illegible] the necessity of subsequent rectifi[illegible] by an original adjustment of equal resist[illegible] The difference is inherent in the two [illegible] and is substantial.

[illegible] the ground that, in the two points men[illegible] the defendants' system of signaling is [illegible] not to be an infringement of that de[illegible] in the patent of the appellants, *the de[illegible] of the Circuit Court dismissing the bill is* [illegible]

[illegible] copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

FIRST NATIONAL BANK of XENIA, OHIO, *Plf. in Err.*,
v.
DANIEL M. STEWART AND MARTHA A. McMILLAN, Admrs. of the Estate of DANIEL McMILLAN, Deceased.

(See S. C., Reporter's ed., 224-233.)

Business—declarations of an officer or agent of corporation as—insolvency of debtor as, of [illegible]—authority of cashier of bank—[illegible] of debtor's stock and application of proceeds by creditor.

1. The declarations made by an officer or agent of corporation in response to timely inquiries, proper addressed to him and relating to matters under his charge, in respect to which he is authorized in the usual course of business to give information, may be given in evidence against the corporation.

2. It is within the scope of the general authority of a cashier to receive offers for the securities of the bank and to state whether or not the bank owned securities which a customer wanted to buy. His statement to a person who was in treaty to purchase, that the bank was not the owner of a certain security in his manual possession as cashier, was clearly within the line of his duty, and was binding on the bank.

3. A letter, written upon the paper of a bank by its cashier and appearing with reasonable certainty to have referred to its business, is admissible in evidence against the bank.

4. Proof of the insolvency of a debtor is no more competent to show non-payment, than proof of his solvency is competent to show the payment of his debts.

5. A creditor having possession of the property of his debtor as agent, trustee or bailee, cannot, without legal process or the consent of the debtor, dispose of the property and apply the proceeds upon the debt.

6. A bank, having in its possession shares of its own stock which belong to one who is indebted to it, cannot sell such stock and apply the proceeds to the payment of the debt.

[No. 1251.]

Submitted Mar. 9, 1885. Decided Mar. 30, 1885.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:** [225]

The defendants in error were the plaintiffs in the Circuit Court. They alleged in their petition that the plaintiff in error, The First National Bank of Xenia, Ohio, being in possession of thirty shares of its own capital stock belonging to their intestate, Daniel McMillan, on October 24, 1876, sold them for $4,200 in cash, and unlawfully appropriated the proceeds of the sale to its own use. They therefore demanded judgment against the Bank for $4,200, with interest from October 24, 1876.

The defendant answered that McMillan, the intestate, in April, 1876, was owing it, upon a debt previously contracted, a sum greater than the value of the stock, and, being so indebted, delivered to it the certificates of stock as collateral security therefor, and that on October 24, 1876, the debt being still unsatisfied, the defendant sold the stock at its market value and applied the proceeds as a credit on the debt, leaving a balance due and unpaid.

The plaintiffs replying denied that their intestate delivered the certificates of stock to the Bank as collateral security for such debt, and denied the right of the Bank to receive the certificates as collateral security, or to sell the stock or apply its proceeds to the payment of the debt.

Upon this issue the jury returned a verdict for the plaintiffs, and assessed their damages at $6,035.50 upon which the court rendered the judgment which the present writ of error brings under review.

Mr. **John Little,** for plaintiff in error:

The declarations of McClure were incompetent, being the mere declarations of an agent concerning a past transaction.

Wharton's Ev., § 415 and *note* 6; Morse, Bkg., ed. of 1870, pp. 179, 180; 37 Me. 519; 2 Hill, 445; 10 Vesey, 128; 52 Me., 531; *Anderson* v. *R. R. Co.*, 54 N. Y., 334; 1 Greenl. Ev., § 118; *Luby* v. *R. R. Co*, 17 N. Y., 131; *First Baptist Church* v. *B. F. Ins. Co.*, 28 N. Y., 153; *Packet Co.* v. *Clough*, 20 Wall., 540 (87 U. S., bk. 22, L. ed. 408); *Burnside* v. *R. Co.*, 47 N. H., 554; *C. C. & C. R. R. Co.* v. *Mara*, 26 Ohio St., 185.

Note.—Powers and duties of cashier of bank. See [illegible] v. Watertown Bank, 105 U. S., 217, [illegible]

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a few days prior to his de
to the Bank the amount c
by Hyde, who had deposi
the Bank for collection, and t
McMillan's death, Hyde, af
ure of the payment of the no
the Bank its certificate of dep
ount due thereon, and the no
ertificate of stock pledged for its p
was surrendered by Hyde to the Ban
obtained possession of the cert

Thereupon the defendants in error offered
the following questions and answ
in the deposition of Hyde:

Q. What conversation did you have wi
McClure subsequent to this (subsequent to lea
said note for collection) with reference
certificate (20 shares)?

A. He told me he had full power to transfer
at any time on the books and apply it to t
payment of the note.

Q. What was said to you by McClure at t
time of the payment of the note, in reference
this certificate of 20 shares?

A. I desired to purchase it, but there was a
understanding that I should hold the certifica
of deposit until an administrator was appointe
when an arrangement might be made for i
purchase.

* * * * * * * *

Q. What statement did McClure make to yo
at the time of the payment of the note, as t
who was making payment?

A. He said the payment was made fro
money which was sent there by McMillan. H
told me the money was left there the Wedne
day previous.

Q. Was any statement made to you by Mc
Clure, with reference to this certificate of stoc
after McMillan's death, in reference to Mrs
McMillan; if so, what?

A. He told me after McMillan's death tha
she preferred to keep the stock.

* * * * * * * *

Q. How long after the talk on Wednesda
after McMillan's death till the other talk i
which McClure told you Mrs. McMillan wishe
to keep the stock?

A. Two months, I presume.

Q. Where did the latter take place?

A. In the Bank; they all took place there."

The ruling of the court in allowing the
questions and answers to be read to the jury
notwithstanding the objection of the plaintif
in error, is now assigned for error. Its conten
tion is, that it furnished the money to pay Mc
Millan's note for $2,600, held by Hyde, fo
which the certificate for twenty shares wa
pledged, and that it thereby, on the delivery o
the certificate to it by Hyde, became entitled t
the possession thereof as security for the note
The defendants in error insist that the money t
take up the note held by Hyde was paid by the
intestate, McMillan.

The plaintiff in error complains that upo
this issue the statements of McClure its cashier
made several days after the alleged payment o
the note by McMillan, were admitted to show
such payment, and insists that this was error
on the ground that the declarations of an agen
concerning a past transaction cannot be give
in evidence to bind his principal.

the opinion

was found by the
The judg-
affirmed unless the
committed
of the plaintiff in
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relates to the
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of the plaintiff in

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states that on the trial
offered testimony tend-
estate, Daniel McMil-
the owner of thirty
of the Bank standing
books, represented by
twenty and the other
the day just mentioned
the payment, six months
order of F. A. McClure, of
attached the certificate for
this note as security for its
the medium of the payee,
was the cashier of the plaintiff
was discounted by one James
and that the remaining ten shares
with the plaintiff in error, and
safe keeping, and not for any
that on Monday morning, Oc-
McMillan died, and that on the
of that day, McClure, the cashier,
heard of the death of McMillan, sold
shares of stock to E. H. Munger for
and credited that amount to McMillan
the books of the Bank.

The bill of exceptions further stated that the defendants in error introduced evidence tend-

The rule upon this subject has been thus laid down by this court:

"Whatever an agent does or says in reference to the business in which he is at the time employed and within the scope of his authority is law or said by the principal, and may be proved as if the evidence applied personally to the principal." *American Fur Co.* v. *U. S.* 2 Pet. 358.

It is because the declaration of an agent is a part of the act and part of the *res gesta* that it is admissible, and whenever what he did is admitted in evidence, then it is competent to prove what he said about the act while he was doing it. *Bank* v. *Bk. of Columbia*, 5 Wheat., 336; *Grant's Champagne*, 3 Wall., 114 [70 U. S., 18 L. ed. 116]; *Cooley* v. *Norton*, 4 Cush. 93; *Jenney* v. *Stewart*, 6 Watts, 487; *Garth* v. *Howard*, 8 Bing., 451.

Applying these principles, we think the testimony objected to was properly admitted. The transactions of McClure were made, so the record states, at the time that he paid Hyde the amount of the note. They were, therefore, part of the transaction. For Hyde, being the holder of the certificate of stock as collateral security for the note, was entitled to know by whom the payment of the note was made, so as to decide whether to return the certificate to McMillan or turn it over to the Bank, or, if it was left with the Bank, in what capacity the Bank took it, whether for its own security or as agent for McMillan. The declarations of McClure were made to Hyde in explanation of the payment of the money to him, and were, therefore, admissible as part of the act of payment.

The declarations of McClure in reference to the purchase by Hyde of the twenty shares of stock were made at the same time, and as they were offered as tending to show by whom the money to pay the McMillan note was furnished, they were also a part of the transaction, and on the ground admissible.

The plaintiff in error contends that a conversation which took place two months after the payment of the note, between McClure and Hyde, in reference to the purchase by the latter of the twenty shares of stock, was wrongly received in evidence.

But it plainly appears from the record that the second conversation was part of a treaty between McClure and Hyde, commenced on the Saturday after McMillan's death, when the McMillan note was paid for the purchase of the twenty shares of stock by Hyde. It was offered to show by the declarations of its cashier that the Bank did not when the declarations were made claim any general or special property in the stock, but in effect admitted it to be the property of the estate of McMillan.

The declarations made by an officer or agent of a corporation, in response to timely inquiries, properly addressed to him and relating to matters under his charge, in respect to which he is authorized in the usual course of business to give information, may be given in evidence against the corporation. *Bk.* v. *Field*, 2 Hill, 445; *Brigham* v. *Adriatic Mills*, 116 Mass., 177; *Howe* v. *R. R. Co.*, 6 Gray, 450; Abb. Tr. Ev. 44.

As cashier, McClure had charge of all the money, securities and valuable papers of the Bank. *Field* v. *Bk.*, 3 Mason, 505; *Bk* v. *Stewart*, 37 Me., 519. It was his duty to surrender securities pledged for the loans of the Bank, upon payment of the loans. *Fleckner* v. *U. S. Bk.*, 8 Wheat., 360. And, although he might not be authorized to dispose of the securities of the Bank without the order of the directors, yet it was within the scope of his general authority as cashier to receive offers for their purchase, and to state whether or not the Bank owned securities which a customer wanted to buy. This naturally fell within his duty as the executive officer of the Bank and the custodian of its assets. His statement to a person who was in treaty to purchase, that the Bank was not the owner of a certain security in his manual possession as cashier, was clearly within the line of his duty, and was, therefore, binding on the Bank. We think there was no error in admitting in evidence the declarations of McClure.

The bill of exceptions further states that the plaintiffs below offered in evidence the following letter:

"A. Hirling, *Prest.* F. A. McClure, *Cash.* [230]
Capital, $120,000.
(Cut of Bank Building)
First National Bank,
Xenia, O., Oct. 16th, 1876.

D. McMillan, Esq.

Dear Sir:

Mr. Mc's letter of 14th to hand, and in reply I enclose the Marshall note canceled. I have the ctf. in my possession, and have some prospect for raising some money on same. Will write again soon; nothing new; all well.

Yours truly, F. A. McClure."

The court allowed the letter to go to the jury in spite of the objection of the plaintiff in error. The defendants in error insisted that the letter was admissible because there was evidence, introduced by the plaintiff in error, tending to prove that in August preceding McMillan's death one Marshall held a note against him, "secured by ten shares of said stock, and that McMillan procured the surrender of the stock, giving mortgage security in lieu thereof, he desiring to use said stock in bank."

The plaintiff in error assigns for error the admission of the letter in evidence, on the ground that it was but a fragment of a correspondence; that there was nothing to show that it was written for the Bank; and that it was only a letter from McClure, and not from him as cashier.

But there is nothing in the record to indicate that there were any other letters that had passed between the parties. The face of the letter shows that it had reference to the Marshal note, and very probably to the ten shares of stock which had been pledged by McMillan as security therefor, and of which he had procured the surrender so that he might use it in Bank. The letter was written upon the paper of the Bank and by the person shown to be its cashier, and it appears with reasonable certainty to have referred to the business of the Bank. The court was therefore right in not excluding it from the jury.

It further appears by the bill of exceptions that the plaintiff in error offered evidence to prove that, for more than a year previous to [231] his death, McMillan had been "hopelessly insolvent," and had experienced "great difficulty

in procuring means to meet his interest obligations." The defendants in error objected to this evidence, it was ruled out, and the plaintiff in error now assigns its exclusion as error.

The purpose of the evidence was to prove that McMillan had not furnished the money to pay his note for $2,600 held by Hyde. The evidence offered was inadmissible because too remote and conjectural. The law requires an open and visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. *U. S.* v. *Ross*, 92 U. S., 281 [bk. 23, L. ed. 707]; *Carter* v. *Pryke*, 1 Peake, 95; *Hollingham* v. *Head*, 4 C. B. (N. S.), 888; *Jackson* v. *Smith*, 7 Cow., 717; *Baird* v. *Gillett*, 47 N. Y., 186; *Thompson* v. *Bowie*, 4 Wall., 463 [71 U. S. bk. 18, L. ed. 423]. In the case last cited, where the issue was whether certain promissory notes dated on a particular day were given for money lost at play, testimony was offered to prove that the party giving the notes was on the day of their date intoxicated, and that when intoxicated he had a propensity to game. It was held that the evidence was properly excluded.

The evidence offered in the present case was too weak and vague to contribute to an intelligent decision by the jury of the question in issue, namely: whether McMillan had paid his note. It is common for both solvent and insolvent men to pay some of their debts and to leave some unpaid. Proof of the insolvency of a debtor is no more competent to show nonpayment, than proof of his solvency is competent to show the payment of his debts. These two kinds of proof stand on the same footing. The latter kind has been held to be incompetent. *Hilton* v. *Scarborough*, 5 Gray, 422. The insolvency and pecuniary embarrassment of a person may be shown as evidence that he has not paid all his debts; but they do not tend to show that he has not paid a particular debt. We think the evidence of the insolvency of McMillan was properly excluded.

It further appeared that the plaintiff in error, having given evidence tending to show that it had not received from McMillan the money to pay his note for $2,600 held by Hyde, but that it had paid the note out of its own funds, called as a witness one William McGirvey, who, having testified that during the whole of the year 1876 he was teller of the defendant Bank, and that its books showed no payment of his note by McMillan, was asked by counsel for the plaintiff in error the following question:

[232]

"Had you any information, from any source, of any money being received at the Bank, on or about the Wednesday preceding McMillan's death, from McMillan?" Having put the question, counsel for the plaintiff in error stated that they expected the witness to answer it in the negative.

The court excluded the question, and its action is assigned for error.

The inadmissibility of both the question and the answer, had the answer been given, is obvious. The question called for the information which from any source might be in the possession of the witness, and not for his knowledge. An answer detailing the hearsay statements of others, whether verbal or in writing, made at any time or place, would have been responsive. The objection to the question was well taken, and the court was right in excluding it.

Upon the authorities already cited a negative answer to the question would have been too vague and conjectural to be admitted as evidence. It did not appear but that many payments of money might have been made to the Bank without the knowledge of the witness. It was not shown what his duties were, whether to receive or pay out money; it was not shown that he was in the Bank on or about the Wednesday when the payment by McMillan was alleged to have been made; it was not shown that if the payment had been made by draft or certificate of deposit sent to the Bank in a letter, it would have passed through his hands. On the simple statement that he was teller, and engaged in the discharge of his duties as such during the year 1876, we think that his answer that he had no information of any payment made by McMillan does not rise to the dignity of evidence, and was properly excluded.

The plaintiff in error contends, lastly, that upon the pleadings and notwithstanding the verdict it was entitled to judgment. The ground of this contention is, that as it was admitted in the pleadings that McMillan was indebted to the Bank at the time of his death more than the value of his stock, and as the stock was in the possession of the Bank, indorsed by McMillan in blank, the law would make the application of its value to the payment of the indebtedness.

The assignment of error is based on section 5328 of the Revised Statutes of Ohio, of 1880 which provides that "when upon the statements in the pleadings one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party."

No motion for judgment, notwithstanding the verdict, appears to have been made in the Circuit Court. If this court could now consider this assignment of error, we think it does not furnish a ground for the reversal of the judgment.

It was settled by the verdict of that jury that the plaintiff in error did not hold the stock of McMillan as security for his indebtedness. The contention of the plaintiff in error, therefore, comes to this, that a creditor, who has possession of the property of his debtor, as his agent, or trustee, or bailee, may without reducing his debt to judgment, and without the process or order of any court, and without the consent and against the will of the debtor, sell or otherwise dispose of the property and apply its proceeds to the payment of his debt. We do not think the law gives a creditor any such right.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM S. THOMSON *et al.*, Trading as THOMSON, LANGDON & Co., *Appts.*,

v.

GEORGE H. WOOSTER.

(See S. C., Reporter's ed., 104-120.)

Patent law—damages for infringement—practice—decree pro confesso—*general nature and effect of—review of authorities—status of defendant on reference under decree* pro confesso.

1. A decree *pro confesso*, under the rules and practice of this court, is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to make it. It is made (or should be made) by the court, according to what appears to be decreed upon the statements of the bill, assumed to be true.

2. Where a decree is taken *pro confesso*, the allegations of the bill cannot be questioned in subsequent proceedings in the court below or upon appeal. Anything in the allegations themselves tending to show that the decree is erroneous is assignable for error; but facts not found in the allegations of the bill are inadmissible to affect the decree.

3. Evidence questioning the validity of the patent is inadmissible in proceedings before a master, or on appeal, after a decree has been taken *pro confesso* on a bill for infringement and an account.

4. The fact that the reissue, in this case, was applied for and granted fourteen years after the date of the original patent, would, undoubtedly, had the case been defended and the validity of the reissued patent controverted, been strongly presumptive of unreasonable delay; but it might possibly have been explained, and the court could not say as a matter of law, and certainly the master could not say that it was unsusceptible of explanation.

5. Affidavits presented to the master, or the court upon the grounds of applications to reopen the decree, cannot be considered by this court on appeal.

6. Where the defendant has used the complainant's patented machine he will be held accountable for the profits realized thereby, although it appears that the product was an article of merchandise and the use of a less sum than said profits as allowed by the master.

[No. 112.]

Argued Dec. 1, 2, 1884. Decided Mar. 30, 1885.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Mr. J. C. Clayton and A. Q. Keasbey, for appellants.

The defense of lack of invention or non-patentability has been considered in this court, although not raised in the court below, by either pleading or argument.

Grant v. Piper, 91 U. S., 87 (bk. 23, L. ed. 254); Stevens v. R. R. Co., 107 U. S., 649 (bk. 27, L. ed. 576).

The decree was merely a decree by default, not a consent decree. It was not a consent decree. As it was held in Pacific R. R. Co. v. Ketchum, 101 U. S. 289 (bk. 25, L. ed. 982), that even a consent decree could be appealed from.

"There can be no doubt that anything appearing upon the record, which would have been ground for a motion in arrest of judgment, is ground for reversal upon a writ of error."

Stacum v. *Pomery*, 6 Cranch, 221; *McAllister* v. *Kuhn*, 96 U. S., 87 (bk. 24, L. ed. 615).

The reissue is invalid for unreasonable delay.

Miller v. *Brass Co.*, 104 U. S., 350 (bk. 26, L. ed. 783); *James* v. *Campbell*, 104 U. S., 356 (bk. 26, L. ed. 786); *Bantz* v. *Frantz*, 105 U. S., 160 (bk. 26, L. ed. 1013); *Mfg. Co.* v. *Stamping Co.*, 111 U. S., 319 (bk. 28, L. ed. 442).

All of these cases were decided after the appeal in this cause. They establish a new rule of law, requiring reasonable diligence, and clearly show the complainant's reissue, granted fourteen years and two months after date of original patent, is void as to these defendants.

The bill substantially avers that the original patent was valid and operative.

The statutes providing for a grant of a reissue expressly prescribe "invalidity" or "inoperativeness" as conditions precedent to the grant of a reissue.

Both these conditions precedent were lacking, and therefore the reissue is invalid.

Walker v. *Patents*, §§ 221-224; *Whitely* v. *Swayne*, 4 Fish., 123; *Wicks* v. *Stevens*, 2 Ban. & Ard., 318; *Giant Powder Co.* v. *Powder Co.*, 6 Sawy., 508; *Flower* v. *Rayner*, 5 Fed. Rep., 793; *Searle* v. *Bouton*, 12 Fed. Rep., 626.

The complainant must affirmatively show distinct profits due to the thing patented; if he fail he cannot recover anything as damages.

Mowry v. *Whitney*, 14 Wall., 620 (81 U. S., bk. 20, L. ed. 860); *Mfg. Co.* v. *Cowing*, 105 U. S., 253 (bk. 26, L. ed. 987); *Schillinger* v. *Gunther*, 15 Blatchf., 303; *Burdell* v. *Denig*, 92 U. S., 716 (bk. 23, L. ed. 764); *Mfg. Co.* v. *Cowing*, 12 Blatchf., 243; *S. C.*, 14 Blatchf., 315; *Black* v. *Munson*, 14 Blatchf., 265.

Mr. **Frederic H. Betts**, for appellee:

No alleged erroneous rulings of the court below can be considered, unless perhaps those plainly apparent upon its face.

Kane v. *Wittick*, 8 Wend., 219; *Sands* v. *Hildreth*, 12 Johns., 493; *Henry* v. *Cuyler*, 17 Johns., 469; *Colden* v. *Knickerbacker*, 2 Cow., 31; *R. R. Co.* v. *Ketchum*, 101 U. S., 289 (bk. 25, L. ed. 982).

Nor will an appeal from a decree founded on bill taken *pro confesso* ordinarily lie.

Murphy v. *Ins. Co.*, 25 Wend., 249; *Hart* v. *Strong*, 15 Vt., 377.

No allegation can here be heard against the validity of the complainant's reissued patent.

The original patent may have been valid or operative in part, and yet sufficiently "inoperative" to require reissue.

Wilson v. *Coon*, 18 Blatchf., 536; *Hartshorn* v. *Eagle Co.*, 18 Fed. Rep., 90; *Giant Co.* v. *Safety Co.*, 19 Fed. Rep., 509; *Gold & Stock Co.* v. *Wiley*, 17 Fed. Rep., 234.

The rule followed in calculating the savings and profits has had the full approval of this court.

Mowry v. *Whitney*, 14 Wall., 620 (81 U. S., bk. 20, L. ed. 860); *R. R. Co.* v. *Turrill* (*Cawood Patent*), 94 U.S., 709 (bk. 24, L. ed. 243); *Mers* v. *Conover*, 11 Off. Gaz. 1111; *Black* v. *Thorne*, 111 U. S., 122 (bk. 28, L. ed. 372).

Mr. Justice **Bradley** delivered the opinion of the court:

The appellee in this case, who was com- [104]

Patent—damages for infringement. See Stevens, 107 U. S. (1 How.), 567, bk. 13, 534, 576.

plainant below, filed his bill against the appellants, complaining that they infringed certain letters patent for an improved folding guide for sewing machines, granted to one Alexander Douglass, of which the complainant was the assignee. The patent was dated October 5, 1858, was extended for seven years in 1872, and was reissued in December, 1872. [105] The suit was brought on the reissued patent, a copy of which was annexed to the bill, which contained allegations that the invention patented had gone into extensive use, not only on the part of the complainant, but by his licensees; and that many suits had been brought and sustained against infringers. The bill further alleged that the defendants, from the time when the patent was reissued down to the commencement of the suit, wrongfully and without license, made, sold and used, or caused to be made, sold and used, one or more folding guides, each and all containing the said improvement secured to the complainant by the said reissued letters patent, and that the defendants derived great gain and profits from such use, but to what amount the complainant was ignorant, and prayed a disclosure thereof, and an account of profits, and damages, and a perpetual injunction.

The bill of complaint was accompanied with affidavits verifying the principal facts and certain decrees or judgments obtained on the patent against other parties, and Douglass' original application for the patent, made in April, 1856, a copy of which was annexed to the affidavits. These affidavits and documents were exhibited for the purpose of obtaining a preliminary injunction, which was granted on notice.

The defendants appeared to the suit by their solicitor, May 3, 1879, but neglected to file any answer, or to make any defense to the bill, and a rule that the bill be taken *pro confesso* was entered in regular course June 10, 1879. Thereupon, on the 2d of August, 1879, after due notice and hearing, the court made a decree to the following effect, viz.. 1st. That the letters patent sued on were good and valid in law; 2d. That Douglass was the first and original inventor of the invention described and claimed therein; 3d. That the defendants had infringed the same by making, using and vending to others to be used, without right or license, certain folding guides substantially as described in said letters patent; 4th. That the complainant recover of the defendants the profits which they had derived by reason of such infringement by any [106] manufacture, use, or sale, and any and all damages which the complainant had sustained thereby; and it was referred to a master to take and state an account of said profits, and to assess said damages, with directions to the defendants to produce their books and papers and submit to an oral examination if required. It was also decreed that a perpetual injunction issue to restrain the defendants from making, using or vending any folding guides made as theretofore used by them, containing any of the inventions described and claimed in the patent, and from infringing the patent in any way.

Under this decree the parties went before the master, and the examination was commenced in October, 1879, in the presence of counsel for both parties, and was continued from time to time until November 3, 1880, when arguments were heard upon the matter, and the case w submitted. On November 12 the report w prepared and submitted to the inspection counsel. On the 18th, motion was made by t defendants' counsel, bef r: the master, to op the proofs and for leave to introduce newly d covered evidence. This motion was support by affidavits, but was overruled by the mast and his report was filed December 10, 1880, which it was found and stated that the defe ants had used at various times, from Janu 18, 1877, to the commencement of the su twenty-seven folding guides infringing t complainant's patent, and had folded 1,217,8 yards of goods by their use, and that duri that period there was no means known or us or open to the public to use, for folding su goods in the same, or substantially the sa manner, other than folding them by hand, a that the saving in cost to the defendants using the folding guides was three cents each piece of six yards, making the amount profit which the complainant was entitled recover, $6,089.35; and that during the sa period the complainant depended upon lice fees for his compensation for the use of t patented device, and that the amount of su fees constituted his loss or damage for the u authorized use of his invention; and that, cording to the established fees, the defenda would have been liable to pay for the use of t folding guides used by them during the ye 1877, 1878 and 1879 (the period covered by t infringement), the sum of $1,350, which w the amount of the complainant's damages. T evidence taken by the master was filed with report.

By a supplemental report, filed at the sa time, the master stated the fact of the appli tion made to him to open the proofs on t ground of surprise and newly discovered e dence (as before stated), and that after heari said application upon the affidavits present which were appended to the report, he was u able to discover any just ground therefor.

The defendants did not object to this su plemental report, but on the 10th of Janua 1881, they filed exceptions to the principal port, substantially as follows:

1. That instead of the double guide or fol claimed in the complainant's patent being t only means for folding cloth or strips on ea edge during the period of the infringement (o er than that of folding by hand), the mas should have found that such strips could ha been folded by means of a single guide or fo er, and that the use of such guides was kno and open to the public long before 1877, a that such guides were not embraced in the co plainant's patent.

2. That the amount of profits found by t master was erroneous, because it appeared t folded strips such as those used by the defe ants were an article of merchandise, cut a folded by different parties at a charge of cents for 144 yards.

3. That the profits should not have be found greater than the saving made by the u of the double guide as compared with the u of a single guide, or greater than the amou for which the strips could have been cut a folded by persons doing such business.

4. That the damages found were erroneo

Other exceptions were subsequently filed, but were overruled for being filed out of time.

Before the argument of the exceptions the defendants gave notice of a motion to the court to refer the cause back to the master to take further testimony in reference to the question of profits and damages chargeable against them under the order of reference. In support of this motion further affidavits were presented.

The exceptions to the report and the application to refer the cause back to the master were argued together. The court denied the motion to refer the cause back, overruled the exceptions to the report, and made a decree in favor of the complainant, for the profits, but disallowed the damages. That decree is now brought here by appeal.

The appellants have assigned fourteen reasons or grounds for reversing the decree. The first nine relate to the taking of the account before the master and his report thereon; the last five relate to the validity of the letters patent in which the suit was brought. It will be convenient to consider the last reasons first.

The bill, as we have seen, was taken *pro confesso* and a decree *pro confesso* was regularly entered up, declaring that the letters patent were valid, that Douglass was the original inventor of the invention therein described and claimed that the defendants were infringing the patent; and that they must account to the complainant for the profits made by them by such infringement and for the damages he had sustained thereby; and it was referred to a master to take and state an account of such profits and to ascertain said damages.

The defendants are concluded by that decree, as far at least as it is supported by the allegations of the bill, taking the same to be true. Being carefully based on these allegations, and not extending beyond them, it cannot now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill itself. A confession of facts properly pleaded dispenses with proof of those facts, and is as effective for the purposes of the suit as if the facts were proved; and a decree *pro confesso* regards the statements of the bill as confessed.

By the early practice of the Civil Law, failure to appear at the day to which the cause was [illegible] was deemed a confession of the action, but in later times this rule was changed, so that the plaintiff, notwithstanding the contumacy of the defendant, only obtained judgment in accordance with the truth of the case as established by an *ex parte* examination. Keller, [illegible] Rom. § 69. The original practice of the English Court of Chancery was in accordance with the later Roman law. *Hawkins* v. *Crook*, [illegible] Wms. 556. But for at least two centuries [illegible] have been taken *pro confesso* for contumacy. *Ibid.* *Chief Baron* Gilbert says: "Where a man appears by his clerk in court, and after lies in prison, and is brought up [illegible] to court by *habeas corpus*, and has the bill read to him, and refuses to answer, such [illegible] refusal in court does amount to the confession of the whole bill. Secondly, when a [illegible] appears and departs without answering, and the whole process of the court has been awarded against him after his appearance and departure, to the sequestration; there also the bill is taken *pro confesso*, because it is presumed to be true when he has appeared and departs in despite of the court and withstands all its process without answering." Forum Romanum, 86. *Lord* Hardwicke likened a decree *pro confesso* to a judgment by *nil dicit* at common law, and to judgment for plaintiff on demurrer to the defendant's plea. *Davis* v. *Davis*, 2 Atk. 21. It was said in *Hawkins* v. *Crook* (*qua supra*), and quoted in 2 Eq. Cas. Abr., 179, that "the method in equity of taking a bill *pro confesso* is consonant to the rule and practice of the courts at law, where, if the defendant makes default by *nil dicit*, judgment is immediately given in debt, or in all cases where the thing demanded is certain; but where the matter sued for consists in damages, a judgment interlocutory is given; after which a writ of inquiry goes to ascertain the damages, and then the judgment follows." The strict analogy of this proceeding in actions of law to a general decree *pro confesso* in equity in favor of the complainant, with a reference to a master to take a necessary account, or to assess unliquidated damages, is obvious and striking. [111]

A carefully prepared history of the practice and effect of taking bills *pro confesso* is given in *Williams* v. *Corwin*, Hopk. Ch., 471, by Hoffman, master, in a report made to *Chancellor* Sanford, of New York, in which the conclusion come to (and adopted by the Chancellor), as to the effect of taking a bill *pro confesso*, was that "when the allegations of a bill are distinct and positive, and the bill is taken as confessed, such allegations are taken as true without proofs," and a decree will be made accordingly; but "where the allegations of a bill are indefinite, or the demand of the complainant is in its nature uncertain, the certainty requisite to a proper decree must be afforded by proofs. The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of details, the obligation to furnish proofs rests on the complainant."

We may properly say, therefore, that to take a bill *pro confesso* is to order it to stand as if its statements were confessed to be true; and that a decree *pro confesso* is a decree based on such statements, assumed to be true (1 Smith's Ch. Pr., 158), and such a decree is as binding and conclusive as any decree rendered in the most solemn manner. "It cannot be impeached collaterally, but only upon a bill of review, or [a bill] to set it aside for fraud." 1 Dan. Ch. Pr., 696, 1st ed.; *Ogilvie* v. *Hearne*, 18 Ves., 463.* [112]

Such being the general nature and effect of an order taking a bill *pro confesso*, and of a decree *pro confesso* regularly made thereon, we

*Reference is made to the 1st edition of Daniell (pub. 1837), as being, with the 2d edition of Smith's Practice (published the same year), the most authoritative work on English Chancery Practice in use in March, 1842, when our Equity Rules were adopted. Supplemented by the General Orders made by *Lords* Cottenham and Langdale in August, 1841 (many of which were closely copied in our own Rules), they exhibit that "present practice of the High Court of Chancery in England," which by our 90th Rule was adopted as the standard of equity practice in cases where the Rules prescribed by this court, or by the Circuit Court, do

are prepared to understand the full force of our rules of practice on the subject. Those rules, of course, are to govern so far as they apply; but the effect and meaning of the terms which they employ are necessarily to be sought in the books of authority to which we have referred.

By our rules a decree *pro confesso* may be had if the defendant, on being served with process, fails to appear within the time required; or if, having appeared, he fails to plead, demur or answer to the bill within the time limited for that purpose; or if he fails to answer after a former plea, demurrer or answer is overruled or declared insufficient. The 12th Rule in Equity prescribes the time when the subpœna shall be made returnable, and directs that "at the bottom of the subpœna shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*." The 18th Rule requires the defendant to file his plea, demurrer or answer, unless he gets an enlargement of the time, on the rule day next [113] succeeding that of entering his appearance; and in default thereof the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, etc. And the 19th Rule declares that the decree rendered upon a bill taken *pro confesso* shall be deemed absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant.

It is thus seen that by our practice, a decree *pro confesso* is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but that it is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true. This gives it the greater solemnity, and accords with the English practice, as well as that of New York. *Chancellor* Kent, quoting *Lord* Eldon, says: "Where the bill is thus taken *pro confesso*, and the cause is set down for hearing, the course (says *Lord* Eldon, in *Geary* v. *Sheridan*, 8 Ves. 192) is for the court to hear the pleadings, and itself to pronounce the decree, and not to permit the plaintiff to take, at his own discretion, such a decree as he could abide by, as in the case of default by the defendan at the hearing." *Rose* v. *Woodruff*, 4 Johns Ch. 547, 548. Our rules do not require th cause to be set down for hearing at a regula term, but, after the entry of the order to tak the bill *pro confesso*, the 18th Rule declares tha thereupon the cause shall be proceeded in *e parte*, and *the matter of the bill may be decree by the court* at any time after the expiration o thirty days from the entry of such order, if i can be done without answer, *and is proper to b decreed*. This language shows that the matte of the bill ought at least to be opened and ex plained to the court when the decree is applie for, so that the court may see that the decre is a proper one. The binding character of th decree, as declared in Rule 19, renders it prope that this degree of precaution should be taken

We have been more particular in examinin this subject because of the attempt made by th defendants, on this appeal, to overthrow the de cree by matters outside of the bill, which wa regularly taken *pro confesso*. From the autho ities cited, and the express language of our ow Rules in Equity, it seems clear that the defenc ants, after the entry of the decree *pro confess* and whilst it stood unrevoked, were absolutel barred and precluded from alleging anythin in derogation of, or in opposition to, the sai decree, and that they are equally barred an precluded from questioning its correctness he on appeal, unless on the face of the bill it ap pears manifest that it was erroneous and in properly granted. The attempt, on the hea ing before the master, to show that the reissue patent was for a different invention from th described in the original patent, or to sho that there was such unreasonable delay in ap plying for it as to render it void under the r cent decisions of this court, was entirely ina missible because repugnant to the decree. Th defendants could not be allowed to question th validity of the patent which the decree had d clared valid. The fact that the reissue was ap plied for and granted fourteen years after th date of the original patent would, undoubtedl had the cause been defended and the validity the reissued patent been controverted, have bec strongly presumptive of unreasonable dela but it might possibly have been explained, an the court could not say as matter of law, an certainly, under the decree of the court, th master could not say, that it was unsusceptib of explanation. And on this appeal it is surel irregular to question the allegations of the bil If anything appears in those allegations ther selves going to show that the decree was err neous, of course it is assignable for error; b any attempt to introduce facts not embraced those allegations, for the purpose of counte vailing the decree, is manifestly improper. Th introduction of the original patent, pending th appeal, was clearly irregular.

The appellants have called attention to o matter in the allegations of the bill on whic they rely for the purpose of showing that, matter of law, the reissued patent must be voi It is stated in their 10th assignment of error, follows:

"10th. For that, on the face of the bill ar the patent, the reissued patent in suit was ill gally granted, and therefore void, and the cou should have so held; and this court is no

not apply. The 2d edition of Mr. Daniell's work, published by Mr. Headlam in 1846, was much modified by the extensive changes introduced by the English Orders of May 8th, 1845; and the 3d edition, by the still more radical changes introduced by the Orders of April, 1850, the Statute of 15 and 16 Vict. chap. 86, and the General Orders afterwards made under the authority of that statute. Of course, the subsequent editions of Daniell are still further removed from the standard adopted by this court in 1842; but as they contain a view of the later decisions bearing upon so much of the old system as remains, they have, on that account, a value of their own, provided one is not misled by the new portions.

[illegible] to be held, because the bill avers that during the fourteen years of the original term of the patent the validity of said letters patent was established in numerous suits in the Circuit Courts of the United States, and that all persons [illegible] took licenses and paid therefor, as well as many others not sued, thereby averring, in substance, that the original letters patent was valid and operative.

Therefore, appellants ask this court to hold that the original letters patent having been valid and operative, as averred by complainant, for over fourteen years, no reissue thereafter could be legally obtained, because invalidity or inoperativeness are conditions precedent to the grant of a reissue."

The answer to this assignment is obvious. The suits brought on the original patent may have been for infringements committed against particular parts of the invention, or modes of using it and putting it into operation, as to which the specification was clear, full and sufficient, whilst, at the same time, there may have been certain other parts of the invention, or modes of using it and putting it into operation, as to which the specification was defective or insufficient, and which were not noticed until the application for reissue was made; or, in the original patent the patentee may have claimed more than he had a right to claim as new—a mistake which might be corrected at any time. At all events, the court cannot say, as mere matter of law, that this might not have been the case.

We think that the objection to the decree going to the validity of the patent and the whole cause of action cannot be sustained.

We are then brought to the proceedings in taking the account. The errors assigned on that part of the case are based on the exceptions made to the master's report, which have already been noticed. They resolve themselves into two principal grounds of objection: *First*, that the master allowed the complainant all the profits made by the defendants by the use of a patented machine in folding cloths and [illegible] as compared with doing the same thing by hand, whereas he should only have allowed as profits of using the complainant's patented machine as compared with a single folder, which the defendants allege was open to the public before their infringement commenced. Secondly that the master, in allowing profits, took no account of the fact that folded strips, such as those used by the defendants, were an article of merchandise, cut and folded by different parties at a charge of only 25 cents for 144 yards, or about one sixth of a cent per yard, whereas the defendants were charged with a profit of one half of a cent per yard.

As to the first of these objections, it is to be observed, first, that no evidence was produced before the master to show that, during the period of the infringement, there was open to the public the use of any machine for folding a single edge, which was adapted to the work done by the defendants. The only evidence offered for that purpose was the letters patent granted to A. P. Chapin, February 19, 1856, and the letters patent granted to J. S. McCurdy, dated February 28, 1856. No evidence was introduced to show that the folding guides described in those patents were adapted to the folding of strips for corsets, which was the work required by the defendants, and for which they used the complainant's invention. On the contrary, it was proved by the positive testimony of the complainant (and not contradicted), that the Chapin device could not be used for folding strips of materials on one or both edges for use upon corsets," for reasons fully detailed in the testimony; and that "the McCurdy device is a binder calculated and adapted to fold selvage-edged goods, such as ribbon and braid, and will fold the strip passing through it in the center only," "and cannot be used for folding raw-edged strips of cloth, either on one or both edges." [117] The complainant also testified that there was no other way known to him (and he testified that he had large experience on the subject) to do work like that done by the defendants, except by hand, or in the use of another patent owned by him, namely, the Robjohn patent, dated April 19, 1864 (which was produced in evidence), which consisted of a folding guide, folding one edge in combination with a device for pressing said fold to an edge, and then passing said folded strip through a narrower folder, folding the other edge, and pressing said fold by a pressing device. No evidence was adduced by the defendants to contradict this testimony.

It is proper to remark here that the affidavits presented to the master, and those afterwards presented to the court, as grounds of the respective applications to reopen the proofs, cannot be looked into on this hearing. They form no part of the evidence taken before the master on the reference; and no error is assigned (even if error could be assigned) to the refusal of the court to refer the case back to the master for the purpose of taking further testimony.

The second objection to the report is, that the master, in estimating the profits chargeable to the defendants, did not take into account the fact that folded strips, such as those used by the defendants, were an article of merchandise, cut and folded by different parties at a charge of only 25 cents for 144 yards. To this objection it may be observed, that the evidence before the master did not show by what process such folded strips were made, nor whether they were not really made by infringing the complainant's patent. As the proof stood before the master, they must have been made by the use of the complainant's machine, for there was no other known machine by which they could have been made at any such cost. And if made by the use of complainant's machine, the inference must be that the persons making them were infringing the complainant's patent, for they are not named in the list of those to whom the complainant had granted licenses, which list was presented before the master at the defendants' request. If made by such infringement they can hardly be set up against the complainant to reduce the amount of profits [118] made by the defendants. There is something singular about this part of the case. If folded strips, suitable for the defendants' purpose, could have been procured in the market by them at such a low price as is pretended, why did they not procure them in that way after being enjoined against using the complainant's machine, instead of making them by the disadvantageous method of using a single folder and

[illegible] [illegible] [illegible] [

[illegible] that equity should give the government a remedy if those proofs are founded in [illegible] and perjury.

[No. 895.]

[illegible] Jan. 7, 1885. *Decided Mar. 30, 1885.*

[illegible] from the Circuit Court of the United States for the District of California.

The history and facts of the case appear in the opinion of the court.

Mr. S. F. Phillips, *Solicitor-Gen.*, for appellant.

Mr. L. D. Latimer, for appellee:

The decision of the officers of the land department upon the facts whether the preemptor, Minor, had settled upon and inhabited and improved the land, was a judicial decision upon the testimony before them and is conclusive and final as between the United States and him.

[illegible] v. *Van Brunt*, 19 Wall., 652 (86 U. S. [illegible] L. ed. 222); *Shepley* v. *Cowen*, 91 U. S. 340 [illegible] L. ed. 427; see also, *Marques* v. *Frisbie*, [illegible] 476 (bk. 25, L. ed. 801); *Moore* v. [illegible] 96 U. S., 533 (bk. 24, L. ed. 850), [illegible] v. *Conlan*, 104 U. S., 425 (bk. 26, L. ed., [illegible] v. *Perry*, 6 Sawy., 79; *Vance* v. [illegible] 101 U. S., 519 (bk. 25, L. ed. 931.)

The particular acts of fraud charged in the [illegible] not such as will authorize a court of [illegible] to set aside or disturb the judgment and [illegible] of the land officers.

[illegible] v. *Flint*, 4 Sawy., 42; *U. S.* v. *Throckmorton*, [illegible] U. S. 61 (bk. 25, L. ed. 93); *Smelt*[illegible] v. *Kemp*, 104 U. S., 640 (bk. 26, L. ed. [illegible] v. *Burbank* (*supra*).

[illegible] of equity have no jurisdiction of matters of forfeiture, unless specially conferred by [illegible] *Simms* v. *Cady*, 2 Curt., 200. Section [illegible] of the Revised Statutes does not confer it. The bill comes too late and the claim is stale. [illegible] Pound, 367, *note;* 2 Dan. Ch. Pr., 1585; [illegible] v. *Brown*, 99 Mass., 213; *Plymouth* v. [illegible] Allen, 438; *Badger* v. *Badger*, 2 Wall., [illegible] bk. 17, L. ed. 838); *Stearns* v. [illegible] Haw., 819; 1 Story, Eq. Jur., § 64 *a;* 2 [illegible] Eq. Jur., § 1521 *a.*

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court for the District of California, dismissing the bill of the United States on demurrer.

The object of the bill was to set aside and [illegible] a patent issued by the United States to Minor on January 5, 1876, for the northwest quarter of section 18, township 6, north range [illegible] of the Humboldt Meridian. The bill as [illegible] filed made in substance the following [illegible]

[illegible] and Minor, on the 23d day of October, [illegible] filed the declaratory statement in the [illegible] necessary to give him a right of preemption to the land, alleging that he had made [illegible] on it March 20th of that year; and [illegible] 1875, he made the usual affidavit [illegible] had so settled on the land in March of [illegible] year, that he had improved it, [illegible] on it, and continued to reside on [illegible] the time of said settlement, and had [illegible] about one acre of it. He also made [illegible] as the law required, that he had not so settled upon and improved the land with any agreement or contract with any person by which the title he might acquire would inure to the benefit of the latter. He also made oath that he was not the owner of 320 acres of land in any State or Territory in the United States. These affidavits being received by the register and receiver as true, he paid the money necessary to perfect his right, received of them the usual certificate called a patent certificate, on which there was issued to him at the General Land Office in due time the patent which is now assailed. [235]

The bill then charges that all these statements, made under oath before the land officers, were false and fraudulent. That defendant had never made the settlement, nor cultivation, nor improvements mentioned; that he had never resided on the land, but during all the time had lived and had his home in a village about twelve miles distant; and that he had not made these proofs of settlement to appropriate the land to his own use, but with intent to sell the same to some person unknown to the plaintiff.

It is also charged that defendant produced, in corroboration of his own statement, the affidavit of a witness, one Joseph Ohuitt, who testified to the settlement, improvement and residence of defendant, all of which was false and fraudulent. It is then alleged that by these false affidavits the land officers, supposing them to be true, were deceived and misled into allowing said preemption claim and issuing said patent, to the great injury of the United States.

A demurrer to this bill having been sustained, plaintiff was allowed to file an amendment, by which it is set out that one Richard Spence entered upon the west half of the quarter section in question on the first day of April, 1872, with the intention of preempting the same as soon as the lands were surveyed and open to preemption, and that on the 22d day of October, 1874, the approved plat of said surveys was duly filed in the land office at Humboldt, and on the 3d day of December thereafter Spence made his declaratory statement for the west half of that quarter section and the west half of the southwest quarter of the same section. It is further alleged that Spence, having complied with the terms authorizing his preemption by actual residence, improvement and cultivation, and having commuted his preemption right for a homestead right, and perfected his cultivation and improvement by a five years' residence, and paid the fees of the officers, made application on the 5th day of April, 1880, for his patent, to which he was legally entitled; but it was found that Minor's patent covered half his claim, to wit: the west half of the northwest quarter of the section. [236]

The title having passed from the United States to Minor for the entire quarter section, no patent could be issued to Spence, who was and still is equitably entitled to a part of it.

To this bill, as amended, the Circuit Court again sustained a demurrer and dismissed it, and from that decree this appeal is taken.

The Circuit and District Judges have certified a division of opinion on eight propositions of law, which they believe to arise out of this demurrer, as follows:

I. Whether the frauds and perjury alleged in the bill as the equitable grounds for vacating

the patent in question are frauds extrinsic and collateral to the matter tried and determined in the land office upon which the patent issued and constitute such frauds as entitle the complainant to relief in a court of equity.

II. Whether perjury and false testimony in a proceeding before the land office, such as alleged in the said amended bill, by means of which a patent to a portion of the public land is fraudulently and wrongfully secured, is such a fraud as will require a court of equity to vacate the patent on that ground alone.

III. Whether the decision and determination of the questions involved, on false and perjured testimony, as set forth in the said amended bill, and the issue of a patent thereon, are not conclusive as against the United States on a bill filed to vacate the patent so issued.

IV. When the United States files a bill to vacate a patent on the ground that it was fraudulently obtained upon false testimony, as alleged in said amended bill, whether it is necessary to offer in the bill to return the purchase money paid for the land by the patentee.

V. Whether a court of equity will enforce the penalties and forfeitures imposed by section 2262 of the Revised Statutes of the United States, for obtaining a patent to land upon false affidavits.

[237] VI. Whether the remedy at law provided by said section and an indictment for perjury are not the only remedies for the wrong alleged in the amended bill.

VII. The bill of complaint having been originally filed in this case on June 19, 1883, more than seven years and five months after the issue of the patent, whether the claim to vacate the patent on the ground of fraud is stale, and whether the bill ought to be dismissed on that ground.

VIII. Whether the demurrer to the said amended bill should be sustained.

[238] As regards the last of these questions, it does not present any such well defined point of law as can be certified to this court for an answer. It merely presents the whole case without showing a distinct point in regard to which the judges were opposed in opinion. *U. S.* v. *Waddell*, 112 U. S., 76 [bk. 28, L. ed. 673]. But, as it must be answered by the action of the court in affirming or reversing the decree, this is immaterial.

With regard to the fourth, fifth and sixth questions, we have no difficulty in holding that neither the provisions of section 2262 of the Revised Statutes, nor the liability to indictment, nor the actual indictment and conviction of the defrauding party for perjury in such case as this, in any manner supersedes or debars the United States of the remedy by bill in chancery to vacate the patent obtained by such fraudulent practices. On the contrary, the provision of the section above mentioned, that the person who makes the false oath in the premises shall forfeit any money he may have paid for the land answers in the negative the fourth question, namely: is the United States bound to offer in the bill, in a case like this, to return the purchase money? The statute declares it is forfeited, and though the party may lose the land, he also loses his money as a penalty of his perjury.

The seventh question, with regard to laches in bringing the suit, we answer by saying, th in the present case there is no such laches show as will justify the court in dismissing the bil Waiving for the present the general prop sition that time does not run against the Go ernment, from the effect of which we see n escape in the short period of seven years and half, it is pretty clear on the face of the bill, th the first discovery of the fraud was made whe Spence, on applying for his patent under th homestead law, made it known that he had bee residing on, improving and cultivating a pa of the land included in Minor's patent durin the time Minor swore he was doing the sam thing. Of course lapse of time as a defense a suit for relief for these frauds did not begin run until the fraud was discovered.

The first three questions may be considere together. If an individual or a corporation ha been induced to part with the title to land, any other property, by such a fraud as that s out in this bill, there would seem to be no di ficulty in recovering it back by appropriate j dicial proceedings. If it was a sale and co veyance of land induced by fraudulent misre resentation of facts which had no existence, which the grantor relied and had a right rely, and which were essential elements of th consideration, there would be no hesitation a court of equity giving relief; and where th title remained in the possession of the fraud lent grantee, the court would surely annul th whole transaction, and require a reconveyan of the land to the grantor. The case present to us by the bill is one of unmitigated fra and imposition, consummated by means of re resentations on which alone the sale was mad every one of which was false. The law a the rules governing these preemption sales quired in every instance the settlement and re dence for a given time on the land, the actu cultivation of a part of it, and building a hou on it. It required that the claimant should this with a purpose of acquiring real own ship for himself and not for another, nor wi a purpose to sell to another.

In the case as presented by this bill none these things were done, though the land office were made to believe they were done by t false representation of the defendant. It w a case where all the requirements of the la were set at naught, evaded and defied by o stupendous falsehood, which included all t requirements on which the right to secure t land rested. There can be no question of t fraud and its misleading effect on the office of the Government, and, in a transaction tween individuals, it makes a clear case for lief.

Is there anything in the circumstance th these misrepresentations were supported by p jury, that the defendant made oath to his fal hoods and procured a false affidavit of a witn to corroborate himself, which should deprive t injured party of relief? It would seem rath to add to the force of the reasons for such lief that fraud and falsehood were re-enforc by perjury.

Is there any reason to be found in the re tion of the Government to such a case as th which will deprive it of the same right to lief as an individual would have? On the co trary, there are reasons why the Government

[illegible] case of cases should not be held to the same diligence in guarding against fraud as a [illegible] owner of real estate. The Government [illegible] millions and millions of acres of land, [illegible] are by law open to preemption, homestead and public and private sale. The right [illegible] to these lands are to be obtained [illegible] Government only in accordance with [illegible] of law. For the more convenient [illegible] of the sale of these lands, and the [illegible] by individuals of the inchoate [illegible] preemption and homestead, and their [illegible] in the issuing of a title, called a [illegible] there is established in each land district [illegible] which are two officers, and no more, [illegible] register and receiver. These districts [illegible] include twenty thousand square miles or [illegible] all parts of which the lands of the Government subject to sale, preemption and homestead are found. These officers do not, they [illegible] visit these lands. They have maps [illegible] the location of the government lands [illegible] subdivision into townships, sections [illegible] parts of sections, and when a person desires to acquire a claim to any of them, he goes [illegible] them and makes the necessary statements, affidavits and claims, of all which they [illegible] memoranda and copies, which are forwarded to the General Land Office at Washington.

[illegible] the truth of these statements they are [illegible] to rely on the oaths of the parties [illegible] claims, and such *ex parte* affidavits as [illegible] may produce.

[illegible] cases out of ten, perhaps in a much [illegible] percentage, the proceedings are wholly [illegible]. In the absence of any contesting [illegible] for a right to purchase or secure the [illegible] the party applying has it all his own way. [illegible] makes his own statement, sworn to before [illegible] officers, and he produces affidavits. If [illegible] affidavits meet the requirements of the [illegible] the claimant succeeds, and what is required [illegible] well known that it is reduced to a formula. It is not possible for the officers of the government, except in a few rare instances, to know anything of the truth or falsehood of the statements. In the cases where there is [illegible] contesting claimant there is no adversary [illegible] whatever. The United States is [illegible] it opposes no resistance to the establishment of the claim, and makes no issue on the statement of the claimant.

[illegible], therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason [illegible] the United States, as the owner of land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land in which a like fraud has been practiced.

[illegible] suit brought by the United States against [illegible] to set aside a patent for land on the ground of fraud in procuring its issue, this [illegible] "It may be admitted, as stated by [illegible], that if, upon any state of facts, the [illegible] might have been lawfully issued, the [illegible] will presume, as against collateral attack, [illegible] facts existed; but that presumption [illegible] place in a suit by the United States directly attacking the patent and seeking its cancellation for fraud in the conduct of those officers. *Moffat* v. *U. S.*, 112 U. S., 24 [bk. 28, L. ed. 623].

The principle is equally applicable when those officers, though wholly innocent, were imposed upon and deceived by the fraud and false swearing of the party to whom the patent was issued.

The learned judge whose opinion prevailed in the Circuit Court and is found in the record, has been misled by confounding the present case with that of *U. S.* v. *Throckmorton*, 98 U. S. 61 [bk. 25, L. ed. 93], and *Vance* v. *Burbank*, 101 U. S. 514 [bk. 25, L. ed. 929], and thus applying principles to this which do not belong to it.

In *Throckmorton's Case*, it is true, a part of the relief sought was to set aside a patent for land issued by the United States. But the patent was issued on the confirmation of a Mexican grant after proceedings prescribed by the Act of Congress on that subject. These proceedings were judicial. They commenced before a board of commissioners. There were pleadings and parties, and the claimant was plaintiff, and the United States was the defendant. Both parties were represented by counsel, the United States having in all such cases her regular District Attorney to represent her. [242] Witnesses were examined in the usual way, by depositions, subject to cross-examinations, and not by *ex parte* affidavits. From this tribunal there was a right of appeal to the District Court, and from that court to the Supreme Court of the United States by either party. There was nothing wanting to make such a proceeding, in the highest sense, a judicial one, and to give to its final judgment or decree all the respect, the verity, the conclusiveness, which belong to such a final decree between the parties. The patent could only issue on this final decree of confirmation of the Spanish or Mexican grant, and was, in effect, but the execution of that decree.

It was to such a case as this that the ruling in *Throckmorton's Case* was applied. The court said in that case, which was a bill to set aside the decree of confirmation: "The genuineness and validity of the concession from Micheltorena, produced by complainant, was the single question pending before the board of commissioners and the District Court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of those tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and litigation endless about the single question of the validity of this document."

It needs no other remarks than those we have already made, as to the nature of the proceeding before the land officers, to show how inappropriate this language is to such a proceeding. Here no one question was in issue. No issue at all was taken. No adversary proceeding was had. No contest was made. The officers.

acting on such evidence as the claimant presented, were bound by it and by the law, to issue a patent. They had no means of controverting its truth, and the Government had no attorney to inquire into it. Surely the doctrine applicable to the conclusive character of the [243] solemn judgments of courts, with full jurisdiction over the parties and the subject-matter, made after appearance, pleadings and contest by parties on both sides, cannot be properly applied to the proceedings in the land office in such cases.

So, also, as regards the case of *Vance* v. *Burbank* [*supra*], the language of the court in regard to the conclusiveness of the decision of the land office must be considered with reference to the case before it. That was not a case by the grantor, the United States, to set aside the patent, but by a party, or the heirs of a party, who had contested the right of the grantee before all the officers of the Land Department up to the Secretary of the Interior, and been defeated, and where the whole question depended on disputed facts, the evidence of which was submitted by the contestants to those officers. In such a case, where there was full hearing, rehearing, and issues made and tried, the observation of the court, "that the decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute," is well founded.

It has been often said by this court that the land officers are a special tribunal of a *quasi* judicial character, and their decision on the facts before them is conclusive. And we are not now controverting the principle that where a contest between individuals, for the right to a patent for public lands, has been brought before these officers, and both parties have been represented and had a fair hearing, *those parties* are concluded as to all the facts thus in issue by the decision of the officers.

But in proceedings like the present, wholly *ex parte*, no contest, no adversary proceedings, no reason to suspect fraud, but where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for [244] value. We have steadily held that, though in the absence of fraud the facts were concluded by the action of the Land Department, a misconstruction of the law, by which alone the successful party obtained a patent, might be corrected in equity; much more when there was fraud and imposition.

If, by the case as made by the bill, Spence's claim had covered all the land patented to Minor, it would present the question, whether the United States could bring this suit for Spence's benefit. The Government, in that case, would certainly have no interest in the land when recovered, as it must go to Spence without any further compensation. And it may become a grave question, in some future case of this character, how far the officers of the Government can be permitted, when it has no interest in the property or in the subject of the litigation, to use its name to set aside its own patent, for which it has received full compensation, for the benefit of a rival claimant. The question, however, does not arise here, for half the lan covered by the patent would revert to th United States if it was vacated, and, as betwee the United States and Minor it was one tran action evidenced by one muniment of title, th question does not arise; certainly not on d murrer to this bill.

The result of these considerations is, that th first and second questions are answered in th affirmative; the third, fourth, sixth and se enth in the negative; and the fifth is immat rial.

The decree of the Circuit Court is reverse and the case remanded for further proceedin not inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.

FARMINGTON VILLAGE, *Plff. in Err.*,
v.
EBEN F. PILLSBURY.

(See S. C., Reporter's ed. 138-146.)

Jurisdiction; collusive assignment of coupons confer—construction of the Act of 1875—t law prior to 1875.

1. Under the Act of March 3, 1875, the holders promissory notes or of foreign or domestic bills exchange, who are citizens of a State in which t decisions of the courts have been adverse to the interests, cannot, by collusive transfers to citize of other States, create a case apparently cognizab in the Courts of the United States, and have it pro ecuted by their assignees in those tribunals for the benefit.

2. The holders of interest coupons on municip bonds transferred them, to the amount of $7,922, the defendant in error, the consideration being note for $500 and an agreement to pay over the ba ance of fifty per cent of the net amount when co lected. *Held*, that a suit on said coupons brougl in the Circuit Court of the United States, should dismissed for want of jurisdiction, the case bein within the Act of 1875.

[No. 199.]

Argued Mar. 16, 17, 1885. Decided Mar. 30, 188

IN ERROR to the Circuit Court of the Unit States for the District of Maine.

This action was brought in the court belo by the defendant in error to recover the amou alleged to be due on certain interest coupons bonds issued by the defendant.

A jury having been waived, the trial by t court resulted in a division in opinion betwe the judges. The opinion of the presiding jud being in favor of the plaintiff, judgment w rendered for him for $10,408.35, with cost whereupon, the defendant sued out this wr of error.

The facts of the case are stated by the cou

Messrs. **William L. Putnam** and *Th H. Haskell*, for plaintiff in error.

Messrs. **Charles F. Libby** and *T. B. Re* for defendant in error.

Mr. Chief Justice **Waite** delivered the op ion of the court:

This was a suit upon coupons for semi-a

NOTE.—*Jurisdiction of Circuit Courts of the Unit States—suits upon municipal bonds and coupon Act of 1875.* The principal cases in the Supre Court on this point are cited in the opinion in t above case of Farmington v. Pillsbury. See a *note* to McDonald v. Smalley, 26 U. S. (1 Pet.), 620, 7, 287.

[illegible] interest on the bonds of the Farmington Village Corporation, and among the defenses [illegible] was one to the effect that the plaintiff was not a *bona fide* holder of the coupons in [illegible] but that they were placed in his hands [illegible] for the purpose of bringing a suit in the [illegible] Court of the United States. The case was tried by the court without the intervention of a jury and comes here with a special finding of facts, and a certificate of division of [illegible] between the judges holding the court [illegible] certain questions arising at the trial. Among the questions certified was this: "Whether the plaintiff can maintain an action [illegible] upon the coupons declared upon, [illegible] instruments to which they were attached not being assigned to him, but having [illegible] to, and always held by, citizens of [illegible]."

The facts applicable to this question, which [illegible] the special findings, are these:

The bonds from which the coupons were cut were issued by Farmington Village under a [illegible] passed by the Legislature of [illegible] authorizing the village corporation to [illegible] money to aid in the extension of the road [illegible] Androscoggin Railroad Company to some [illegible] within or near the limits of the Village. The bonds were issued by the assessors and [illegible] of the Village to a committee of [illegible] who were authorized to sell and dispose of them for the purpose mentioned in the [illegible]. Before the committee received any of [illegible] bonds from the assessors and treasurer, and [illegible] July 1, 1870, which was the date of the [illegible] James Burnham and eleven others, all [illegible] owners of property subject to taxation [illegible] taxpayers in the Village Corporation, filed [illegible] a bill in equity in the Supreme Judicial Court [illegible] State of Maine, in Franklin County, [illegible] the railroad company, the assessors and [illegible], and committee of the Village, to enjoin them from issuing the bonds, on the [illegible] of a want of authority of law for that [illegible]. This suit was entered at the July [illegible] of the court, and held under advisement until the 3d of August, 1872, when it was dismissed without prejudice. After [illegible] the 13th of August, 1872, other taxpayers filed another bill of the same general [illegible] against the same defendants and the [illegible] Corporation to obtain substantially the same relief. To this bill the Village Corporation [illegible] an answer and the railroad company a [illegible] answer. The case was heard by the [illegible] at the July Term, 1873, and kept under advisement until August 27, 1878, when a decree was rendered sustaining the bill and granting the injunction prayed for. The opinion of [illegible] is reported in 70 Me., 515, and is to [illegible] that the statute authorizing the Village [illegible] to aid the extension of the railroad was unconstitutional and void. This opinion was concurred in by only four of the eight [illegible] composing the court at the time of the [illegible]. One judge who sat in the cause died [illegible] opinion was in his hands for examination, and his death made the four judges a majority of the court at the time of the decree.

Notwithstanding the pendency of the original suit, the bonds were put out and, with the [illegible] of a few only, were bought by citizens of Farmington and members of the Village Corporation. The coupons in suit were collected from various holders of the bonds, all residents of Farmington and citizens of the State of Maine, about May, 1880, and transferred to the plaintiff, a citizen of Massachusetts, separate from the bonds. The plaintiff gave his note and agreement for these coupons to the agent of the holders who had taken them to dispose of, as follows:

"$500. Boston, *May* 5, 1880.

For value received I promise to pay to P. Dyer five hundred dollars in two years with interest. E. F. Pillsbury."

"Boston, *May* 5, 1880.

Whereas, I have this day bought of P. Dyer, of Farmington, coupons of the Farmington Village Corporation to the amount of $7,922, and given him my note for the same; as a further consideration for said coupons, I agree that, if I succeed in collecting the full amount of said coupons, I will pay him fifty per cent of the net amount collected above said five hundred dollars, and pay him as soon as I collect the money from said corporation.

E. F. Pillsbury."

This suit was begun July 1, 1880. [141]

By the original Judiciary Act of September 24, 1789, chap. 20, 1 Stat. at L., 73, it was provided (§ 11) that no District or Circuit Court should "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." The same Act provided (§ 12) for the removal of suits from a State Court to the Circuit Court by a defendant, and he was required to file his petition for such a removal at the time of entering his appearance in the State Court.

By the Act of March 3, 1875, chap. 137, § 1, 18 Stat. at L., 470, § 11 of the Act of 1789 was [142] changed so as to provide that the Circuit and District Courts should not have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. By the same Act, sections 2 and 3, removals could be effected by either party, when the necessary citizenship existed, if a petition was filed therefor, in the State Court, before or at the term at which the cause could be first tried, and before the trial thereof. This last Act also contained this provision (§ 5): "If, in any suit commenced in a Circuit Court or removed from a State Court * * * it shall appear to the satisfaction of the Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the State Court from which it was removed, as justice may require, and shall make

such order as to costs as shall be just, but the order of the Circuit Court, dismissing or remanding said cause to the State Court, shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

Under the Act of 1789, the jurisdiction of the Courts of the United States, in suits by assignees of choses in action, was confined within narrow limits, and there was comparatively little danger of collusion to create a case of that character cognizable by those courts, because, if the owner of the claim could sue in his own name, there would ordinarily be no motive for transferring it to another to bring the action. In that Act promissory notes and inland bills of exchange, the form of negotiable securities most used in the transaction of ordinary business by citizens of the United States, were included in the prohibition of suits by assignees.

[143] The subject of colorable transfers to create a case for the jurisdiction of the Courts of the United States was presented for the most part in suits for the recovery of real property, when a conveyance had been made by a citizen of the State in which the suit must be brought to a citizen of another State. At a very early day it was held in this class of cases that the citizenship of the parties could not be put in issue on the merits, but that it must be brought forward at an earlier stage in the proceedings by a plea in abatement, in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such a plea to the jurisdiction. *De Wolf* v. *Rabaud*, 1 Pet., 498; *Evans* v. *Gee*, 11 Pet., 83; *Sims* v. *Hundly*, 6 How., 1; *Smith* v. *Kernochen*, 7 How., 216; *Jones* v. *League*, 18 How., 81 [59 U. S., bk. 15, L. ed. 264]; *De Sobry* v. *Nicholson*, 3 Wall., 423 [70 U. S., bk. 18, L. ed. 264]. And upon the question of transfer it was uniformly held that, if the transaction was real and actually conveyed to the assignee or grantee all the title and interest of the assignor or grantor in the thing assigned or granted, it was a matter of no importance that the assignee or the grantee could sue in the Courts of the United States when his assignor or grantor could not. A suit by such an assignee or grantee would present, in reality, a controversy between the plaintiff on the record and the defendants. *McDonald* v. *Smalley*, 1 Pet., 620; *Smith* v. *Kernochen*, *supra*; *Barney* v. *Baltimore*, 6 Wall., 288 [73 U. S., bk. 18, L. ed. 827]. But it was equally well settled that if the transfer was fictitious, the assignor or grantor continuing to be the real party in interest, and the plaintiff on record but a nominal or colorable party, his name being used only for the purpose of jurisdiction, the suit would be essentially a controversy between the assignor or grantor and the defendant, notwithstanding the formal assignment or conveyance, and that the jurisdiction of the court would be determined by their citizenship rather than that of the nominal plaintiff. *Maxwell* v. *Levy*, 2 Dall., 381; *S. C.* 4 Dall., 330, decided by *Mr. Justice* Iredell and Peters, *J.*, in the Pennsylvania Circuit in 1797. *Smith* v. *Kernochen*, *supra*; *Barney* v. *Baltimore*, *supra*.

Such was the condition of the law when the [144] Act of 1875 was passed, which allowed suits to be brought by the assignees of promissory notes negotiable by the law merchant, as well as of foreign and domestic bills of exchange, if the necessary citizenship of the parties ex isted. This opened wide the door for fraud upon the jurisdiction of the court by collusiv transfers, so as to make colorable parties an create cases cognizable by the Courts of th United States. To protect the courts as wel as parties against such frauds upon their juris diction, it was made the duty of a court, at an time when it satisfactorily appeared that a sui did not "really and substantially involve a dis pute or controversy" properly within its juris diction, or that the parties "had been impro erly or collusively made or joined * * * fo the purpose of creating a case cognizable" un der that Act, "to proceed no further therein, but to dismiss the suit or remand it to the Stat Court from which it had been removed. This as was said in *Williams* v. *Nottawa*, 104 U. S. 211 [bk. 26, L. ed. 720], "imposed the duty o the court, on its own motion, without waitin for the parties, to stop all further proceedin and dismiss the suit the moment a fraud on i jurisdiction was discovered." The old rul established by the decisions, which required a objections to the citizenship of the parties, un less shown on the face of the record to be take by plea in abatement before pleading to th merits, was changed, and the courts were give full authority to protect themselves against th false pretenses of apparent parties. This is salutary provision which ought not to be ne lected. It was intended to promote the en of justice, and is equivalent to an express enac ment by Congress that the Circuit Courts sha not have jurisdiction of suits which do n really and substantially involve a dispute controversy of which they have cognizanc nor of suits in which the parties have been in properly or collusively made or joined for t purpose of creating a case cognizable under t Act It does not, any more than did the A of 1789, prevent the courts from taking juri diction of suits by an assignee when the assig ment is not fictitious, and actually conveys a the interest of the assignor in the thing assigne so that the suit when begun involves really an substantially a dispute or controversy in fav of the assignee for himself and on his own a count against the defendant; but it does positive language provide that, if the assig ment is collusive and for the purpose of enablin the assignee to sue in the Courts of the Unit States for the benefit of the assignor, when t assignor himself could not bring the action, t court shall not proceed in the case. In this r spect it goes further than the rulings of t courts under the Act of 1789. Under its pr visions the holders of promissory notes or foreign or domestic bills of exchange, who a citizens of a State in which the decisions of t courts have been adverse to their interests, ca not by collusive transfers to citizens of oth States create a case apparently cognizable the Courts of the United States, and have prosecuted by their assignees in those tribuna for their benefit, in the hope of securing an a judication in that jurisdiction more favorab to their interests. The Courts of the Unit States were not created under the Constituti for any such purpose. Except in certain spe fied cases they have no jurisdiction of contr versies between citizens of the same State.

We are clearly of opinion that this case fa

[illegible] the prohibitions of the statute. The [illegible] which the coupons now in suit were [illegible] were all bought as early as 1871 or [illegible] citizens of the State of Maine, who held [illegible] the bonds themselves when this suit [illegible]. Their purchases were made while [illegible] pending in the courts of the State to [illegible] validity of the bonds. On the 27th of [illegible], the highest court of the State [illegible] effect that the bonds were inopera[illegible], for want of constitutional power [illegible] Village Corporation to issue them. Almost [illegible] after this decision these coupons, to [illegible] of $7,922, were collected from va[illegible] holders of bonds, all residents of the Vil[illegible] of Farmington and citizens of Maine, and [illegible], separate from the bonds, to the [illegible] plaintiff, a citizen of Massachusetts, [illegible] arrangement by which the plaintiff [illegible] the agent of the holders of the coupons [illegible] promissory note for $500, [illegible] two years from date, with interest, [illegible] "as a further consideration for said [illegible]" that if he succeeded in collecting the [illegible] thereof he would pay the agent, [illegible] the money was got from the corpora[illegible] per cent of the net amount collected [illegible] $500. This suit, begun July 1, 1880, [illegible] of the plaintiff, is the result of that [illegible]. It is a suit for the benefit of the [illegible] of the bonds. They are to receive from [illegible] one half of the net proceeds of the [illegible] they have created by their transfer of the [illegible] gathered together for that purpose. [illegible] their own in reality, though they [illegible] that the plaintiff may retain one [illegible] what he collects for the use of his name [illegible] trouble in collecting. It is true the [illegible] is called a purchase in the papers [illegible] executed, and that the plaintiff gave [illegible] for $500, but the time for payment was [illegible] for two years, when it was, no doubt, [illegible] the result of the suit would be known. [illegible] money was paid, and as the note was not [illegible], it is clear the parties intended to [illegible] the control of the whole matter in their [illegible] hands, so that if the plaintiff failed to re[illegible] the money he could be released from his [illegible] to pay. In the language of *Mr. Justice* [illegible] speaking for the court in *Detroit* v. *Dean*, [illegible] 341 [bk. 27, L. ed. 302], applied to [illegible] of this case, the transfer of the coupons [illegible] "A mere contrivance, a pretense, the re[illegible] of a collusive arrangement to create" in [illegible] of this plaintiff "a fictitious ground of [illegible] jurisdiction," so as to get a re-examina[illegible] jurisdiction of the question decided [illegible] to the owners of the coupons by the [illegible] judicial tribunal of the State. *Hawes* [illegible], 104 U. S., 459 [bk. 26, L. ed. 832], [illegible] v. *Manning*, 106 U. S., 586 [bk. 27, L. [illegible]; *Barnards Township* v. *Stebbins*, 109 U. [illegible] [bk. 27, L. ed. 956].

We therefore say, in answer to the first [illegible] certified, that the plaintiff cannot [illegible] the action in the Circuit Court upon [illegible] declared upon.

The judgment of the Circuit Court is conse[illegible], and the cause remanded, with [illegible] to dismiss the suit for want of juris[illegible] and without prejudice.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

B. W. MOWER, *Plff. in Err.*,
v.
NATHAN FLETCHER. [127]

B. W. MOWER, *Plff. in Err.*,
v.
NATHAN FLETCHER AND JOHN D. BICKNELL.

(See S. C. Reporter's ed., 127, 128.)

Judgments—when final.

A judgment is final for purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered.

[Nos. 372, 373.]

Submitted Mar. 23, 1885. Decided Mar. 30, 1885.

IN ERROR to the Supreme Court of the State of California.

The case is sufficiently stated by the court.

On motion to dismiss.

Messrs. **J. K. Redington** and **M. D. Brainerd**, for defendants in error, in support of motions.

Mr. **W. J. Johnston**, for plaintiff in error, *contra*.

Mr. Chief Justice **Waite** delivered the opinion of the court:

These motions are made on the ground that the judgments for the review of which the writs of error were sued out are not final judgments. [128] The judgment in each case is that the judgment of the state district court "Be, and the same is hereby reversed with costs, with directions to the Superior Court of Los Angeles County to enter judgment upon the findings for the plaintiff as prayed for in his complaint."

That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3 [bk. 27, L. ed. 73], and the numerous cases there cited. The judgments in these cases are of that character. The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court, which has been rendered, into execution. Nothing is left to the judicial discretion of the court below. The cases relied on in support of the motions to dismiss were all judgments or decrees of reversal, with leave for further proceedings in the inferior court. Such judgments are not final, because something yet remains to be done to complete the litigation.

The motion in each of the cases is overruled.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NOTE.—*Appeal and error; what is a final decree or judgment for purpose of.* See Gibbons v. Ogden, 19 U. S. (6 Wheat.), 448, bk. 5, 302, *note*.

[133] DETROIT CITY RAILWAY COMPANY,
Plff. in Errr.,
v.
JACOB GUTHARD.

(See S. C., Reporter's ed., 133-137.)

Jurisdiction—review of the judgments of state courts—federal question.

1. The jurisdiction of this court for the review of a judgment of the highest court of a State depends on the decision by that court, of one or more of the questions specified in § 709, R. S., and in the way there mentioned.
2. To give this court jurisdiction it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case.

[No. 928.]

Submitted Mar. 2, 1885. Decided Mar. 30, 1885.

IN ERROR to the Supreme Court of the State of Michigan.

On motion to dismiss.

The history and facts of the case appear in the opinion of the court. See, also, 51 Mich., 180.

Mr. **Henry M. Duffield** for defendant in error in support of motion.

Messrs. **Geo. F. Edmunds,** *John C. Donnelly* and *F. A. Baker,* for plaintiff in error, *contra.*

[134] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This is a motion to dismiss a writ of error to the Supreme Court of Michigan on the ground that the record does not show that any federal question is involved. The case is this:

The Detroit City Railway Company was organized in May, 1863, under a general law of Michigan to provide for the construction of train railways, passed February 13, 1855, to operate a street railway in Detroit. Article 15, § 1, of the Constitution of the State, which went into effect January 1, 1851, is as follows:

"Corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed."

Sections 22 and 31 of the law under which the Railway Company was incorporated are as follows:

"Section 22. Each and every railway company formed under this Act shall pay to the Treasurer of the State of Michigan an annual tax at the rate of one half of one per cent on the whole amount of capital paid in upon the capital stock of said company, which said tax shall be estimated upon the last preceding report of said company, and shall be paid to the said treasurer on the first Monday of July in each year, and shall be in lieu of all other taxes upon all the property of said company."

"Section 31. The Legislature may at any time alter, amend, or repeal this Act; but such alteration, amendment or repeal shall not operate as an alteration or amendment of the corporate rights of companies formed under it, unless specially named in the Act so altering or amending this Act, nor shall the dissolution of any such company take away or impair any remedy given for or against said corporation, its stockholders or officers or any liability which shall have been previously incurred."

Section 22 of this Act was repealed March 13, 1882. In the repealing Act the Detroit City Railway Company was not specially named.

On the 14th of March, 1882, a general tax law was enacted. This law provided that all property within the jurisdiction of the State not expressly exempt should be subject to taxation and that all corporate property, except when some other provision is made by law, should be assessed to the corporation as to a natural person in the name of the corporation.

Under the authority of this last law, the City of Detroit assessed a tax on the property of the Railway Company, and Guthard, the receiver of taxes for the city, on failure of the Company to comply with his demand for payment, in the regular course of his proceeding for the collection, levied upon sixty-one horses to sell at public auction and make the money. The Company thereupon brought an action of replevin for the recovery of the horses. Upon the trial of this action the only question in dispute was as to the validity of the tax. The Supreme Court of the State, on writ of error, decided that the tax was valid, and gave judgment accordingly. To reverse that judgment this writ of error was brought.

The rule which governs our jurisdiction in this class of cases is thus stated by *Mr. Justice* Miller for the court in *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 143 [68 U. S., bk. 17, L. ed. 576]: "The court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." In *Crowell* v. *Randell*, 10 Pet., 398, one of the propositions "established, after a careful review of the cases, was, "that it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the State Court in the case." And, at the last term, in *Choutea* v. *Gibson*, 111 U. S., 200 [bk. 28, L. ed. 400], it was said: "From the beginning it has been held that, to give us jurisdiction in this class of cases, it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the State for decision, but that it was decided or that its decision was necessary to the judgment or decree rendered in the case." *Murdoch* v. *Memphis*, 20 Wall., 590, 636 [87 U. S., bk. 22, L. ed. 429, 444].

The reason of this rule is obvious. Our jurisdiction for the review of a judgment of the highest court of a State depends on the decision by that court of one or more of the questions specified in section 709 of the Revised Statutes and in the way there mentioned. If there has been no such decision in the suit, there can be no re-examination of the judgment here. It is what was actually decided that we are to con-

NOTE.—*Jurisdiction—review of federal questions arising in state courts.* See Matthews v. Zane, 8 U. S. (4 Cranch), 382, bk. 2, 654, *note;* Martin v. Hunter, 14 U. S. (1 Wheat.), 304, bk. 4, 97, *note;* Williams v. Norris, 25 U. S. (12 Wheat.), 117, bk. 6, 571, *note.*

[illegible] not what might have been decided; and [illegible] jurisdiction must appear affirmatively [illegible] the face of the record before we can proceed, [illegible] must show either in express terms or [illegible] implication, not only the question, but [illegible] decision. It is not enough to find by searching [illegible] judgment that the requisite question [illegible] have been raised and presented for decision. It must appear that it was actually [illegible] and actually decided. *Brown* v. *Colorado*, [illegible] U. S., 97 [bk. 27, L. ed. 133].

[illegible] remains only to apply this well established [illegible] the facts as they appear in this record. The claim now is that, under the operation of [illegible] 22 and 31 of the incorporating Act, the [illegible] entered into a contract with this corporation not to subject it to taxation otherwise than [illegible] the way provided in section 22, unless it did [illegible] by a statute in which the Company should be [illegible] named. The record certainly does [illegible] show that any such claim was made in the [illegible] Courts, or that such a question was [illegible] or presented for decision, or that it was [illegible]. Nothing of the kind appears, either [illegible] the pleadings or the findings of fact on which [illegible] the case was heard in the Supreme Court. The apparent question presented for decision [illegible] whether the State had changed the mode of [illegible] by what was done, not whether it was [illegible] by the Constitution of the United [illegible] from doing so without specifying that the [illegible] of section 22, and the provisions of the [illegible] law of 1882, were to operate on this [illegible] Company, and referring to it by [illegible]. No judge, in deciding the case as it [illegible] up on the record, would be likely to suppose that, if he gave judgment for the receiver [illegible], he would deny the Company any "right, title, privilege or immunity specially set up or claimed" under the Constitution of the United States. It is true that such a [illegible] might have been set up and claimed, and [illegible] court below had certified in proper form [illegible] it was, and that it was denied, we could [illegible] jurisdiction. The court has, however, not only not made such a certificate, but it [illegible] expressly refused to do so upon application [illegible] made for that purpose. All this appears affirmatively in the motion papers.

We are referred to the opinion of the court [illegible], which is found in the transcript, as [illegible] a decision of the federal question involved. The Constitution of Michigan requires that the opinion of the Supreme Court [illegible] be in writing, signed by the judges concurring therein, and filed by the clerk. From [illegible] opinion in this case it appears that the point [illegible], and on which the judgment rested, [illegible] that the term "corporate rights" as used [illegible] 31 did not include incidental privileges and immunities, such as a special standard of taxation. No reference whatever is [illegible] any question of charter contract.

In the whole we are satisfied we have no [illegible] in the case, and *the motion to dis*[illegible] is granted.

[illegible] copy. Test:

[illegible] H. McKenney, Clerk, Sup. Court, U. S.

[illegible] U. S., [illegible]; [illegible] U. S., [illegible].

BENJAMIN BUTTERWORTH, Commissioner of Patents, *Appt.*,

v.

SAMUEL HILL *et al.*

(See S. C., Reporter's ed., 128-133.)

Jurisdiction—commissioner of patents—where liable to suit—service of process—waiver of objection to jurisdiction.

1. Section 739, R. S., providing that no civil suit shall be brought before the Circuit or District Courts of the United States against an inhabitant of the United States, by any original process, in any other district than that in which he is an inhabitant, or in which he may be found at the time of serving the writ, applies to suits brought under § 4915, concerning the issue of patents.

2. The Commissioner of Patents being by law located in the Patent Office, his official residence is at Washington.

3. The written acceptance at Washington by the Commissioner of Patents of the service of a subpœna, issued by a district court situated elsewhere, "to have the same effect as if duly served by a proper officer," merely admits the service with the same effect it would have if made by an officer in the District of Columbia. No appearance is thereby entered in the cause.

4. A letter written by the Commissioner at Washington acknowledging the receipt of the bill, returning the subpœna, "service accepted," and stating that he declines to appear, does not amount to a waiver of the objection to the jurisdiction.

[No. 1044.]

Argued Mar. 9, 1885. Decided Mar. 30, 1885, nunc pro tunc *as of Mar. 9, 1885.*

APPEAL from the Circuit Court of the United States for the District of Vermont.

The history and facts of the case appear in the opinion of the court.

Messrs. **S. F. Phillips,** *Solicitor-Gen.*, and *F. T. Brown*, for appellant.

Messrs. **Wm. Edgar Simonds** and *Kittredge Haskins*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal from a decree on a bill in equity filed in the Circuit Court of the United States for the District of Vermont against the Commissioner of Patents, under section 4915 of the Revised Statutes. That section is as follows:

"Section 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

On filing of the bill, a subpœna was issued

commanding the "Commissioner of Patents of the United States of America" to appear before the court in Vermont and answer. On the 18th of October, 1883, the Commissioner made the following indorsement on the writ:

"Washington, D. C., October 18th, 1883.

I hereby accept service of the within subpœna, to have the same effect as if duly served on me by a proper officer, and I do hereby acknowledge the receipt of a copy thereof.

E. M. Marble,
Com'r of Patents.

(Office of Com'r of Patents. Received Oct. 18, 1883.)"

And afterwards, and on said 23d day of October, A. D. 1883, a letter from the Commissioner of Patents was filed, which said letter is in the words and figures following:

"Department of the Interior,
United States Patent Office,
Washington, D. C., October 18, 1883.

Sir: I am in receipt of your letter of the 16th instant, enclosing copy of a bill of complaint entitled Hill & Prentice et al. *v.* The Commissioner of Patents of the United States of America, in the United States Circuit Court for the District of Vermont, praying that said court [131] direct the Commissioner of Patents to issue a patent to the assignees of Hill & Prentice for the invention disclosed and claimed in their application filed in this office March 30, 1880, for an improvement in milk coolers; also a subpœna to appear and answer to said bill on the 5th proximo and a certified copy of said subpœna. I herewith return the subpœna, service accepted, and have to inform you that I shall not appear in defense in said bill.

Very respectfully,
E. M. Marble, *Commissioner.*

Mr. W. E. Simonds, *Hartford, Conn.*"

No other service of process was made on the Commissioner, and he made no other appearance in the cause than such as may be implied from his acceptance of service and his letter as above. In due course of proceeding a decree was entered adjudging that "Samuel Hill and Benjamin B. Prentice, as inventors, and the Vermont Machine Company, as assignee of said inventors, are entitled to have issued to them letters patent * * * as prayed for in the petition and bill of complaint." No one was made defendant to the bill except the Commissioner of Patents, and Hill, Prentice and the Machine Company, the complainants, were all citizens of Vermont. Benjamin Butterworth, the Commissioner of Patents, took this appeal, and the only question presented under it for our consideration is whether the Circuit Court of the District of Vermont had jurisdiction so as to bind the Commissioner by the decree which was rendered.

It is contended that the Supreme Court of the District of Columbia has exclusive jurisdiction of suits against the Commissioner brought under this section of the Revised Statutes. In the view we take of this case, however, that question need not be decided. By section 739 of the Revised Statutes, as well as by the Act of March 3, 1875, chap. 137, § 1, 18 Stat. at L., 470, it is provided in substance that, with some exceptions which do not apply to this case, "No civil suit shall be brought before either of said courts (the Circuit or District Courts of the United States) against an inhabitant of th United States, by any original process, in an other district than that of which he is an i habitant, or in which he may be found at th time of serving the writ." We entertain n doubt that this statute applies to suits brougl under section 4915. The applicant is to hav his remedy under that section by bill in equit and by the *adjudication* "of the court havin cognizance thereof, on notice to adverse parti and other due proceedings had." A bill in equit implies a suit in equity, with process and pa ties. The prayer for process is one of the con ponent parts of the structure of a bill, and i purpose is to compel the defendant to appe and abide the determination of the court on th subject matter of the proceeding. Story's E Pl. § 44.

The bill in this case was filed against the Con missioner alone, and it does not appear that h was an inhabitant of the district of Vermon The Patent Office is in the Department of th Interior (Rev. Stat., § 475), which is one of th Executive Departments of the Government the seat of government in the District of Co umbia. Rev. Stat., § 437. The Commission of Patents is by law located in the Patent Offic Rev. Stat., § 476. His official residence therefore at Washington, in the District Columbia.

The subpœna in this case was delivered him in the District of Columbia, and his accep ance of service was made there. That is a parent from the face of his indorsement ar the letter which was written afterwards, ar filed in the cause, undoubtedly as proof of delivery of a copy of the bill which the law r quired should be served on him. Both the i dorsement and the letter purport to have be written at Washington, and the letter in th Patent Office. Unless, therefore, the acceptan of service as indorsed on the writ is to be treat as a voluntary appearance by the Commission in the court in Vermont, without objection the jurisdiction, the case stands as it would the process had been actually served on him the District of Columbia by some compete officer. The Circuit Court was of opinion th by his acceptance of service the Commission waived all objection to the jurisdiction and co sented to be sued away from the seat of gover ment and from his residence. In this we thi there was error. The fair meaning of the i dorsement on the writ is that the Commission admits the service with the same effect it wou have if made by an officer in the District of C lumbia. No appearance is thereby entered the cause. Service of the subpœna in the D trict is acknowledged, but nothing more. the letter which followed the indorsement service, both counsel and the court were i formed that the Commissioner declined to a pear. The parties proceeded, therefore, at th own risk and without the consent of the c fendant to the jurisdiction of the court. Su being the case, we are of opinion that the cou was without jurisdiction and had no authori to enter the decree which has been appeal from. The Act of Congress exempts a defer ant from suit in any district of which he is n an inhabitant, or in which he is not found the time of the service of the writ. It is an e emption which he may waive, but unless waiv

[illegible] and not answer and will not be bound by [illegible] which may be done against him in [illegible]. What is here said of course does [illegible] apply to cases where the suit is brought [illegible] service is made under sections 736, 737, [illegible] of the Revised Statutes.

[illegible] considering any of the other ques[illegible] which have been presented in the argu[illegible], or which might be suggested under the [illegible] *the decree of the Circuit Court* [illegible] *the cause, with instructions to dis*[illegible] *without prejudice for want of juris*[illegible].

[illegible] Test:

[illegible] H. McKenney, Clerk, Sup. Court, U. S.

[illegible]SAPEAKE AND OHIO RAILWAY COMPANY, *Ptff. in Err.*,

v.

[illegible] MILLER, Auditor of the STATE OF WEST VIRGINIA.

([illegible] Reporter's ed., 176–189.)

[illegible] *law—impairing obligation of con*[illegible]*—exemption of property of*, [illegible], *a personal privilege which does* [illegible] *purchaser—rights of corporations* [illegible] *determined.*

[illegible] from taxation of the property of [illegible] and Ohio Railroad Company, granted [illegible] the Legislature of West Virginia, of [illegible] incorporating said company, was a [illegible] to the corporation, which did not [illegible] purchaser of the property under fore[illegible].

[illegible] Act of the Legislature of West Virginia, [illegible] amended February 20, 1877, re[illegible] under trust deeds and mortgages [illegible] of the property of railroad or [illegible] improvement companies, provides [illegible] such sale and conveyance, the old [illegible] be dissolved, and that the purchaser [illegible] corporation and shall succeed "to all [illegible] rights and privileges * * * as [illegible] had * * * by the first com[illegible] such sale." Under this Act the new [illegible] any exemption or immunity from [illegible] belonged to the old company; the [illegible] all grants of corporate powers, [illegible] franchises and immunities sub[illegible] existing at the time of its creation. [illegible] from taxation is not a franchise. [illegible], bk. 24, affirmed.

[illegible]—*franchises—power to mort*[illegible] *from taxation.* See M. & L. R. R. [illegible], 123 U. S., 608, bk. 28, 837, *note.*

[illegible] can be made in favor of the ex[illegible] power to delegate or mortgage those [illegible] which do not pertain to the use of par[illegible] property. A grant of authority to a rail[illegible] company to mortgage its property and fran[illegible] only to such franchises as per[illegible] of the railroad; it would not enable [illegible] to mortgage the franchise of being [illegible] taxation in connection with its tan[illegible] property. Meeuwets on Corporations, § 924, [illegible] the above case of Chesapeake [illegible] v. Miller.

[illegible] Mayor v. Norwich, etc., R. R. Co., [illegible] Mayor v. Johnson, 53 Ala., 237; Coe [illegible] R. R. Co., 10 Ohio St., 372; Eldridge [illegible], Bank of Middlebury v. Edger[illegible] Cook v. Detroit, etc., R. R. Co., 43 [illegible] Pierce v. Emery, 32 N. H., 484, cited by [illegible] to power of corporations to transfer [illegible].

[illegible] from taxation, not implied. Tucker v. [illegible] U. S. (22 Wall.), bk. 22, 805, *note.*

4. The rights of a corporation are determined by the law in force when it came into being.

[No. 203.]

Argued Mar. 18, 19, 1885. Decided Apr. 6, 1885.

IN ERROR to the Supreme Court of Appeals of the State of West Virginia.

The bill in this case was filed in the Circuit Court of Ohio County, West Virginia, by the plaintiff in error, for an injunction to restrain the collection of certain taxes alleged to be illegal. The court found for the complainant and entered a decree in accordance with the prayer of the bill.

This decree having been reversed, on appeal, by the court below, the complainant sued out this writ of error.

The facts are stated in the opinion.

Messrs. **Geo. F. Edmunds, Willliam J. Robertson,** *William H. Hogeman* and *James H. Ferguson,* for plaintiff in error.

Mr. **Cornelius C. Watts,** *Atty-Gen. of West Virginia,* for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court: [177]

This writ of error brings into review a final decree of the Supreme Court of Appeals of the State of West Virginia dismissing the bill of complaint filed by the plaintiff in error, the error assigned being that that court gave effect to a statute of the State alleged to be void, on the ground that it impaired the obligation of a contract between the plaintiff in error and the State of West Virginia.

The statute thus drawn in question is an Act of the Legislature of West Virginia, passed March 7, 1879, subjecting the property of the plaintiff in error in that State to taxation.

The contract alleged to be thus broken by the State is one of exemption from taxation, contained in the 7th section of an Act of the Legislature of West Virginia, passed March 1, 1866, entitled "An Act to Incorporate the Covington and Ohio Railroad Company," and is in the following words:

"7. The rate of charge by said company for passengers and freight transported on the main line and branches of said railroad shall never exceed the highest allowed by law to other railroads in the State, and no discrimination shall be made in such charges against any connecting railroad or canal company chartered by the State, and no taxation upon the property of the said company shall be imposed by the State until the profits of said company shall amount to ten per cent on the capital of the company." [178]

The plaintiff in error, complainant below, alleging that it was entitled to the benefit of this exemption by way of contract with the State, and that no profits had been made by it upon its capital, prayed for an injunction to restrain the appellee, the auditor of West Virginia, from proceeding under the Act of March 7, 1879, to assess and collect any tax upon its property within the State.

The plaintiff in error became a party to the contract contained in the Act of March 1, 1866, to incorporate the Covington and Ohio Railroad Company, in the following manner: This Act was similar in its terms to one passed about the same date by the General Assembly of the State of Virginia. Both had in view the com-

pletion of a railroad from Covington, in Virginia, to some point on the Ohio River, the construction of which had been undertaken by the State of Virginia as a public work by its own means, but which was suspended, after an expenditure of several millions of dollars, in consequence of the breaking out of the civil war in 1861. A portion of it was within the territory that became West Virginia, and thenceforward that part of the work fell within the jurisdiction and ownership of the new State. To provide for its completion was the object of the Act of March 1, 1866, to incorporate the Covington and Ohio Railroad Company. That Act did not, by its terms, create a corporation, but authorized a future organization under it. It ceded to the company, when constituted and certified as thereinafter provided, "all the rights, interest and privileges, of whatsoever kind, in and to the Covington and Ohio Railroad and appurtenances thereunto belonging, now the property of the State of West Virginia, upon condition that it shall within six months after its incorporation, as provided in the 10th section of the Act, commence, and within six years complete, equip and operate a railroad," etc., as therein described; and a failure to comply with this condition operated to forfeit the title to the road, which should then revert to the State.

The Act also appointed commissioners on the part of the State to act in conjunction with [179] others appointed by the State of Virginia, whose duty it was to offer the benefits of the charter "for the acceptance of capitalists, so as to secure the speediest and best construction, equipment and operation of said railroad." "To this end," it added, "they are empowered to make a contract with any parties who shall give the best terms and the most satisfactory assurances of capacity and responsibility, and to introduce into said contract any additional stipulations for the benefit of the State and in furtherance of the purposes herein declared and not inconsistent with this Act, which contract shall be, to all intents and purposes, as much a part of this charter as if the same had been herein included at the time of the passage of this Act." The certificate of these commissioners of the due execution of such a contract, and the organization of the company, should operate to confer upon said company all the benefits of this charter, subject only to the provisions of the Code of Virginia for the government of internal improvement companies, so far as not inconsistent with that Act.

On February 26, 1867, the Legislature of West Virginia passed an Act to provide for the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio River, which authorized the consolidation of the Covington and Ohio Railroad Company, when organized under the Act of March 1, 1866, with one or more of several other railroad companies, including the West Virginia Central Railway Company; the consolidated company to be known as the Chesapeake and Ohio Railroad Company, and to be vested with "All the rights, privileges, franchises and property which may have been vested in either company prior to the Act of consolidation." It was also thereby provided that the Virginia Central Railroad Company and the West Virginia Central Railway Company, or either them, "may contract with the Covington a Ohio Railroad Commissioners for the constru tion of the railroad from Covington to the Oh River, and in the event such contract be mad the said Virginia Central Railroad Compan or the West Virginia Central Railway Co pany, shall be known as the Chesapeake a Ohio Railroad Company, and shall be entitl to all the benefits of the charter of the Covin ton and Ohio Railroad, and to all the righ interests and privileges which by this Act a conferred upon the Chesapeake and Ohio Ra road Company when organized."

Accordingly, on August 31, 1868, the Co missioners of Virginia and of West Virginia e tered into a contract with the Virginia Centr Railroad Company by which the Chesapea and Ohio Railroad Company was formed a under which it was organized, and the sa was approved, ratified and confirmed by an A of the Legislature of West Virginia, "Confir ing and amending the charter of the Chesapea and Ohio Railroad Company, passed Janua 26, 1870." Among other things, it was the in provided that the Company might borr such sums of money, at a rate of interest n exceeding eight per cent per annum, as mig be necessary, in addition to the funds arisi from stock subscriptions, for the completion the road, and should have power to execute lien on its property and resources to secure t payment of the principal and interest of su loans; and the Chesapeake and Ohio Railro Company was thereby declared to be entitl to all the benefits of the charter of the Covin ton and Ohio Railroad, and to all the righ interests, benefits and privileges, and be subj to all the duties and responsibilities provid and declared in the said contract and in t statutes therein referred to.

In pursuance of these powers, the Chesapea and Ohio Railroad Company completed t contemplated line of railroad and put the sa in operation, not indeed, strictly within t time limited in the charter, but the forfeitu thereby incurred was released by an Act of t Legislature of West Virginia passed Februa 20, 1877.

In the meantime, to raise the funds necessa to complete the construction and equipment the road, a large amount of bonds had been sued by the Company, secured by several dee of trust, the particulars of which are fully out in the bill; and default in the payment interest having occurred, due proceedings the foreclosure and sale of the property e braced in the deeds of trust were prosecuted final decrees in the courts of Virginia and W Virginia; so that, in the latter, all of the railro and other property situate in that State w brought to sale under a decree of the Circ Court of the County of Kanawha, in West V ginia, rendered on December 18, 1877, a were sold and conveyed to the purchasers, w in pursuance of the statute then in force ap cable thereto, became a corporation under t name of the Chesapeake and Ohio Railw Company, the plaintiff in error in these p ceedings.

The statute under which these proceedi took place was an Act of the Legislature West Virginia passed February 18, 1871, rel

ing to sales made under deeds of trust or mortgages by railroads or other internal improvement companies in that State, as amended by an Act passed February 20, 1877, extending its provisions to judicial sales.

It was provided by these Acts that "if a sale be made under a deed of trust or mortgage executed by a railroad or other internal improvement company in this State, on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company, as they were at the time of making the deed of trust or mortgage, but any works which the company may after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the said purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance, or in any writing signed by him or them, and recorded in the recorder's office of any county wherein the property so sold, or any part thereof, is situated, or where said conveyance is recorded. . .

"The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges and perform all such duties as would have been had, or should have been performed by the first company, but for such sale and conveyance save only that the corporation so created shall not be entitled to debts due to the first company, and shall not be liable for any debts of, or claims against, the said first company which may not be expressly assumed in the contract of purchase; and that the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he, or his assigns, may create as many shares of stock therein as he or they may think proper, not exceeding, together, the amount of stock in the first company at the time of the sale, and assign the same in a book kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only that the first meeting of the stockholders shall be held at such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for four successive weeks in a newspaper published in each county in the State where said corporation may do business."

These provisions are copied from the Code of Virginia of 1860, chap. 61, §§ 26, 29 and 31. The circumstance is material to the case, as urged by the plaintiff in error, in view of the provision of the first section of the Act of the Legislature of West Virginia of March 1, 1866, incorporating the Covington and Ohio Railroad Company, which provided for its future organization as a corporation, "according to the provisions of the Code of Virginia, second edition, for the government of incorporated companies." It remains to be added that the Legislature of West Virginia passed an Act on January 8, 1879, to amend section 7 of the Act to incorporate the Covington and Ohio Railroad Company, so as to exempt from it altogether the clause containing the exemption from taxation. Chap. 5, West Va. Acts, 1879.

That the Chesapeake and Ohio Railroad Company, by virtue of its organization as a corporation under the Act of March 1, 1866, became entitled to the exemption from taxation secured by the 7th section of that Act, and that as a matter of contract, is not denied or disputed. Whether the Chesapeake and Ohio Railway Company succeeded to that right and immunity, is the question to be determined.

It is quite clear that, as a contract originally entered into between the State of West Virginia and the stockholders who organized the Chesapeake and Ohio Railroad Company, under the Act of March 1, 1866, it was personal to that Corporation, and intended to benefit those who should be induced to subscribe to its stock. Every circumstance that is referred to for the the purpose of proving its nature as a contract, such as, that the State had already sunk a large amount of money in an incomplete and therefore unprofitable public work, that it was very desirous to induce private capitalists to finish its construction, and to that end was willing to cede to them the property itself, and the franchises of a railroad connected with it; and, by way of further inducement, to exonerate the property in their hands from all burdens of taxation until the investment yielded a profit equal to ten per cent upon the capital invested; also prove that the only persons in contemplation as beneficiaries of these privileges and immunities were those who were willing to risk their money in an enterprise the future success of which could only be regarded as doubtful. The contract was not for the benefit of those who should become creditors of the Company, further than the fact that the property of the Company was itself exempted from the charge of taxation would enhance its credit by securing to mortgage bondholders a lien which could not be subordinated by the State. It was not made with the creditors of the Company, nor was it conferred as a franchise inhering in the property itself, so as to pass by way of incumbrance or assignment to mortgagees or purchasers. The language of the clause which contains the exemption is explicit. It is, that "No taxation upon the property of the said Company shall be imposed by the State until the profits of the said Company shall amount to ten per cent on the capital of the Company." But one company is spoken of, and that is the company to be incorporated under the Act. The property to be exempt is the property of that company and of no other, and while it continues to be the property of that company and no longer. And the exemption is to cease when the profits of that particular company have reached the limit designated, and that limit is measured by a ratable proportion fixed with reference to the capital to be subscribed to form that company and no other. And there are no words of assignability attached, either expressly or by any implication, to this immunity. The reasons for considering such an exemption to be a privilege pertaining to the corporation, and not inhering in the property, and passing to an assignee, were fully stated by *Mr. Justice* Field in delivering the opinion of the court in the case of *Morgan* v. *Louisiana*, 93 U.

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S., 217 [bk. 23, L. ed. 860], and have been uniformly applied to similar cases subsequently. *Wilson* v. *Gaines*, 103 U. S. 417 [bk. 26, L. ed. 401]; *Louisville & Nashville R R. Co.* v. *Palmes*, 109 U. S. 244 [bk. 27, L. ed. 922]; *Memphis & Little Rock R. R. Co.* v. *R. R. Comrs.*, 112 U. S., 609 [bk. 28, L. ed. 837]; *St. Louis, I. M. & S. R. Co.* v. *R. R. Comrs.*, 118 U.S. 465, [bk. 28, L. ed. 1055]. And the circumstances of the case distinguish it from that of *Humphrey* v. *Pegues*, 16 Wall., 244 [83 U. S., bk. 21, L. ed. 826].

There is no claim made that the exemption passed to the trustees in the trust deeds or mortgages given to secure the payment of the bonds of the Company; and none can be made that it passed to the purchasers by the judicial sale made under the decree for foreclosure and sale, by force of the statute declaring what such a sale should pass. The language of the Act upon this subject is, that "such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company, as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed and all other property of which it may be possessed at the time of the sale, other than debts due to it." So far, nothing is said of what rights, privileges, franchises and immunities shall vest in the purchaser in respect to the property, the title to which is thus conveyed. The Act, however, proceeds to say, that "upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved." From this it necessarily follows that all privileges, which by the terms of its charter were personal to it, ceased with its dissolution. But the statute adds: "And the said purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance, or in any writing signed by him or them and recorded in the recorder's office of any county wherein the property, so sold or any part thereof, is situated, or where said conveyance is recorded." Thus is formed a new [185] corporate body, succeeding to the title of the property sold and conveyed to it, but deriving its existence from this law and not from the original Act of incorporation, which constituted the charter of its predecessor, and with such powers, rights, privileges, franchises and immunities only as are conferred upon it by the law which has brought it into being.

These are defined in the next succeeding section. So far as material to the question its language is: "The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges, and perform all such duties as would have been had, or should have been performed by the first company, but for such sale and conveyance," etc.

It is earnestly contended, on behalf of the plaintiff in error, that by virtue of this language, it is entitled to enjoy the property formerly belonging to the Chesapeake and Ohio Railroad Company, its predecessor, precisely as though it had been incorporated under the charter of that company, and therefore with the exemption from taxation which was conceded to that company. But, broad, general and comprehensive as the language is, we cannot, in reference to the subject-matter now i hand, apply it with that force and meaning The words used are, it will be observed, "fran chises, rights and privileges," * * * "a would have been had," * * * "by the firs company, but for such sale," etc. There is n express reference to a grant of any exemptio or immunity; nothing is said in relation to th subject of taxation. The words actually use do not necessarily embrace a grant of such a exemption. As was said, on this point, in *Mor gan* v. *Louisiana*, 93 U. S. 217-223 [bk. 23, L. ed 860, 862]: "Much confusion of thought ha arisen in this case and in similar cases from a taching a vague and undefined meaning to th term 'franchise.' It is often used as synony mous with rights, privileges and immunitie though of a personal and temporary characte so that, if any one of these exists, it is loosel termed a 'franchise,' and is supposed to pas upon a transfer of the franchises of the con pany. But the term must always be consic ered in connection with the corporation or pro erty to which it is alleged to appertain. Th franchises of a railroad corporation are righ or privileges which are essential to the oper tions of the corporation, and without which i road and works would be of little value; suc as the franchise to run cars, to take tolls, to a propriate earth and gravel for the bed of i road, or water for its engines, and the lik They are positive rights or privileges, witho the possession of which the road of the con pany could not be successfully worked. In munity from taxation is not one of them. Th former may be conveyed to a purchaser of th road as a part of the property of the compan the latter is personal and incapable of transf without express statutory direction."

Here, there is no such express statutory d rection. Nor is there an equivalent implicatic by necessary construction. There is nothing the language itself, nor the context, nor the su ject-matter of the legislation, nor the situatic and relation of the parties to be affected, whic indicates that a grant of an exemption from ta ation to a particular railroad corporation, or a class of such, was in the contemplation of th Legislature. The subject-matter of this legisl tion was not the original construction of ra roads, but the operation of railroads alrea constructed. The State was not in the attitu of a contractor, soliciting subscriptions of ca ital, in the formation of companies to unde take the risk of public improvements, for th benefit of the State, with the hazard of loss a perhaps financial ruin to the first promote and offering exemptions from taxation as a co sideration, by way of contract, for the acce ance of its proposals. It was legislating in r erence to enterprises already undertaken, pro cuted and completed by companies original thus incorporated, and who, by reason of i solvency, had been stripped of their proper by creditors and sentenced by the law to d solution; and the purpose of the statute w simply to provide suitable means of incorpor ing the purchasers, to facilitate their use of th property, in operating it for the benefit of th public, as designed from the beginning. The purchasers had not bought the immunity no demanded either from the State or the pri possessor. The contract of the creditors wou

[illegible] not, on failure of payment of the stipulated debt, by subjecting to sale the property [illegible] for its payment, with such rights, [illegible] and privileges only as were necessary for its beneficial use and enjoyment. The [illegible] from taxation, as we have already [illegible] not necessarily included in that description. The debtor corporation, and its creditors combined, could not confer upon the purchaser any rights which were not assignable; [illegible] as no consideration moved to the State for [illegible] of the grant, there is no motive for [illegible] by mere construction and implication, [illegible] the words of the law have failed to express. That certainly is not a reasonable interpretation for which no sufficient reason can be assigned.

We conclude, therefore, that the Act from [illegible] plaintiff in error derives its corporate existence and powers in West Virginia does [illegible] a renewal of the grant by exemption from taxation, which, in the 7th section of the Act of March 1, 1866, applied to the Chesapeake and Ohio Railroad Company.

[illegible] otherwise, so that we should be compelled to hold that the language of the Act of West Virginia of February 18, 1871, as amended by that of February 20, 1877, had the effect of a grant to the plaintiff in error of the exemption of taxation vested by the 7th section of the Act of March 1, 1866 in the Chesapeake and Ohio Railroad Company, nevertheless we are [illegible] compelled also to hold on distinct grounds that the exemption thus conferred did not [illegible] effect as a contract, protected from [illegible] by the Constitution of the United States. [illegible] the supposition now made, it would still [illegible] that all the rights of the plaintiff in error as a Corporation, other than the title to [illegible] property it acquired by the judicial sale, [illegible] their origin in and depended upon the Acts of 1871, 1877, under and by which it was [illegible] a Corporation. It can, in no sense, be [illegible] as the identical corporate body of [illegible] it became the successor, merely discharged by a process of insolvency from further liability for past debts, which is the view [illegible] upon us in argument by counsel for [illegible] in error. The language of the statutes [illegible] contradicts this assumption. The [illegible] in terms is dissolved. The purchasers are as explicitly declared to become a [illegible], and its corporate powers are conferred by reference to those which had been [illegible] to their predecessors. The language of [illegible] the reason involved in its provisions [illegible] the precedents of cases heretofore decided [illegible] forecloses further controversy on [illegible] *Shields* v. *Ohio*, 95 U. S., 319 [bk. [illegible] ed. 337]; *R. R. Co.* v. *Maine*, 96 U. S., 499 [illegible] ed. [illegible]]; *R. R. Co.* v. *Georgia*, 98 U. S., [illegible] L. ed. 185]; *R. R. Co.* v. *Palmes*, [illegible] U. S. 344 [bk. 27, L. ed. 922].

[illegible] being the case, all grants of corporate [illegible], rights, privileges, franchises and immunities are taken subject to existing laws, remaining unrepealed. At the time the plaintiff [illegible] became a Corporation, chap. 53, § 8, of the Code of West Virginia of 1868, which took effect April 1, 1869, was in force, and has never been repealed. It enacted, among other things, as follows: "And the right is hereby reserved to the Legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company." The Constitution of the State of West Virginia of 1863, art. 11, § 5, also provides as follows:

"5. The Legislature shall pass general laws whereby any number of persons associated for mining, manufacturing, insuring, or other purpose useful to the public, excepting banks of circulation and the construction of works of internal improvement, may become a corporation, on complying with the terms and conditions thereby described; and no special Act incorporating or granting peculiar privileges to any joint stock company or association, not having in view the issuing of bills to circulate as money or the construction of some work of internal improvement, shall be passed. No company or association, authorized by this section, shall issue bills to circulate as money. No charter of incorporation shall be granted under such general laws, unless the right be reserved to alter or amend such charter at the pleasure of the Legislature, to be declared by general laws. No Act to incorporate any bank of circulation or internal improvement company, or to confer additional privileges on the same, shall be passed, unless public notice of the intended application for such Act be given under such regulations as shall be prescribed by law." [189]

The incorporation of the plaintiff in error comes within the provisions, both of the Constitution and of the Code of 1868. Its charter is the law of 1871 as amended by that of 1877. Its certificate of incorporation is the conveyance to it, by the name it has chosen, as a purchaser at the judicial sale, or set forth in some writing signed by such purchaser, and recorded as required. It is a charter granted under a general law, which the Constitution declares to be subject to legislative alteration and amendment. The laws subjecting its property to taxation, and which form the subject of the present controversy, are but the exercise of that legislative discretion, which, as it became the law of the contract itself, cannot be complained of as a breach of the contract.

The conclusion is not weakened by the suggestion that the rights of the plaintiff in error originate in the provisions of the Code of Virginia, referred to in the Act of March 1, 1866, incorporating the Covington and Ohio Railroad Company, and of which the Acts of 1871, 1877 are re-enactments. For even then they would not antedate the provision of the Constitution of 1863, nor avoid the effect of the reasoning of this court in case of *St. Louis, I. M. and S. R. Co.* v. *R. R. Comrs.* 118 U. S., 465 [bk. 28, L. ed. 1055]. The rights of the plaintiff in error, as a Corporation, are determined by the law in force when it came into being, although there is no ground on which it can be contended that there was any legislative contract in the Act of March 1, 1866, for the further creation of any corporation in favor of possible purchasers at judicial sales under decrees of foreclosure of deeds of trust or mortgages.

In either view the result is the same, and for the reasons given the decree of the Supreme Court of Appeals of the State of West Virginia is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—114 U. S., 396.

CHARLES R. BISSELL, *Appt.*,

[252] *v.*

SIMON H. FOSS *et al.*

(See S. C. Reporter's ed., 252-262.)

Mining partnerships—bill against copartners to enforce claim for share of benefit of purchase of interest of other copartners.

1. There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner, of his share in the property and business, to a stranger or to one of the associates, without consulting the other.
2. A mining partner or cotenant is not entitled to share in the purchase by his copartner or cotenants of the share of another, in the absence of an express contract that the purchase should be for the benefit of all.
3. It does not lie in the mouth of one who seeks to share in the fruits of a contract, to complain that it was fraudulently procured.

[No. 103.]

Argued Mar. 11, 12, 1885. Decided Apr. 6, 1885.

APPEAL from the Circuit Court of the United States for the District of Colorado.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Woods:**

[253] This was a suit in equity. The facts as they appeared by the pleadings and evidence were as follows: In January, 1878, two miners named Davidson and Van Boxall located a mining claim near Leadville, Colorado, which they called the Winnemuck. In March following they jointly conveyed to the appellant Bissell and to the appellees Foss and Hunter, each a one-fourth interest in the property in consideration of their agreement to furnish money to sink a shaft to the ores on the claim. These parties worked the mine as mining partners until July, 1878, when Davidson and Boxall, with the consent of their associates, sold their one fourth to three persons, Rawlings, Handley and Robertson, called in the record "The Missourians," who with Bissell, Foss and Hunter continued the working of the mine.

Tabor and Reische, who owned and worked a mine adjoining the Winnemuck, on an alleged title not necessary to state, claimed the ore from the Winnemuck mine, and instituted, from time to time, attachment proceedings by which they seized the ore as it was taken from the mine. The associates who were working the Winnemuck mine procured the release of the ore by giving forthcoming bonds, with one Halleck as security, who signed the bonds on condition that the money arising from the sale of the ore should be placed and kept in bank as an indemnity to him until the ownership of the ore could be settled. On this understanding the proceeds of the sale of the ore were deposited in the Miners' Exchange Bank of Leadville.

In August or September, 1878, the owners of the Winnemuck—Bissell, Foss, Hunter, and the Missourians—having received, from the sale of ore, money more than sufficient to indemnify Halleck, with the surplus bought and paid for an interest in the New Discovery Lode. About October 1, 1878, they had on deposit to their credit in the bank $16,000, and Halleck was bound for them to the amount of $12,000.

In the latter part of September the Missourians offered for sale their one-fourth interest i the mines. Bissell and Foss were anxious le the interest of the Missourians should fall int the hands of Tabor and Reische, who migh thereby gain some advantage in their suits the pending. They had a conversation in refe ence to the purchase of the interest of the Mi sourians. They differ in their account of th conversation. It is thus detailed by Bissell:

"Along about the 30th day of September Mr Foss came to my room and stated that the Mi sourians, as we termed them, were wanting t sell their quarter interest in the propert and had offered it for $30,000, and he said tha he thought we had better go in and buy it. said to him that it was all well enough to bu it if they wanted to sell, but that I was conf dent that I could get it at better figures. I said 'I am almost certain, Mr. Foss, that I can bu it for less; let me manage it and I think I ca buy it for $15,000,' and went on to say what would say to them concerning all the troubl and suits in the case. He said, 'Very well, i you can get it for that, so much the better.' I was an agreement and understanding betwee us that if we could get it for $15,000 we wer to take it."

He further stated in reference to the same in terview—

"We sat down there and made figures to se if we could pay for it out of the money belong ing to the company in bank; and the result o our figuring was that we couldn't do it to th full extent; that we could pay a portion of i from that money; and the balance outside, eac of us raise our share."

In answer to the question who were to hav the interests in the quarter to be purchased o the Missourians, he said: "They were to go be tween us three, Trimble and Hunter, Foss an myself. Mr. Trimble and Hunter's were inte ests together; they owned jointly that quarte interest, so I was informed by Mr. Trimble an Mr. Hunter."

Foss gave the following account of his inte views with Bissell in reference to their projec to buy out the Missourians:

"I met Dr. Bissell over Tribe & Jeffrey' store, in Leadville, and we talked the purchas over. I told him that the boys wanted to ge out bad, and I thought they would sell prett reasonable; but that as I was working abou there managing the mine, he could do bette than I could. I said he had mentioned to u one night on the street, $30,000 as a price, bu that we wouldn't agree to for a moment. W wondered how we could do about the mone for the purchase. If we could use the compan money we thought we must use a little, mor than our joint interest. Bissell was to see th boys in regard to it."

In answer to the question "What was sai about the price?" he replied: "We talked th amount; $20,000 was spoken of. He thougl that was too high and more than we shoul give. I thought so, too; but $30,000 was th price fixed by them. That I wouldn't think c for a moment. We figured it over, but I don remember the exact figures, and we conclude that at $15,000 we could pay for it, in case w could draw out the money in the Exchang Bank. Dr. Bissell thought it could be bougl for less than $10,000. There was no prop

[illegible] made for any definite price; but if we [illegible] buy the property we were to buy it together. He was to see what was the best he [illegible] to with it."

He was then asked to state "whether there was up to the time you concluded the trade with Handley, any agreement with Dr. Bissell as to what he should buy that property for [illegible]" to which he replied, "No, sir."

After these conversations between Bissell and Foss, Foss and Hunter, early in October, 1878, [illegible] of the Missourians for $15,000 their [illegible] in the Wisconsinuck and New Discovery [illegible] and in the money of the associates on [illegible] in the Exchange Bank. The purchase was made in the name of Foss; but it was agreed between him and Hunter that Hunter was to have two thirds and Foss one third of the claim. The money to pay for the share was advanced by Hunter, Foss agreeing to repay Hunter the one third. In order to induce the Missourians to sell at $15,000, Hunter [illegible] to them that he was willing to sell his [illegible] to Foss for that sum, and actually made a [illegible] sale and conveyance to Foss at that price.

Bissell was not informed of the negotiations for the sale and purchase while they were going on, and Foss requested Handley, the one of the Missourians with whom he treated for the purchase, not to tell Bissell of the sale.

After the purchase was completed Foss denied the right of Bissell to a one-third share of the interest sold by the Missourians.

Matters thus remained until November 16, 1878, when the Tabor party on the one side, and Foss, Bissell and Hunter on the other, joined in a conveyance of their interests to B. M. Hughes, as trustee, to hold seventy-three out of one hundred equal shares for the Tabor party, and twenty-seven for Bissell, Foss and Hunter; and by agreement the mines were to be worked and the moneys made deposited in the First National Bank of Denver, one of the appellees, and subject to the two parties in the proportions above stated. On April 2, 1879, there was a deposit in the bank to the credit of Foss, Bissell and Hunter, $32,502.58. It was in reference to the division of this fund that this litigation arose.

If there had been no purchase of the interest of the Missourians, Bissell, Foss and Hunter would each have owned three twelfths of this fund. But Bissell, insisting that he was entitled to a one third of the one-fourth interest [illegible] of the Missourians, claimed four twelfths. Foss and Hunter, insisting that Bissell had no interest in the share purchased of the Missourians, contended that he was only entitled to have twelfths of the fund and they [illegible] nine twelfths.

Thereupon Foss and Hunter, on April 26, 1879, brought the present suit in equity against the First National Bank of Denver as the depositary and against Bissell as the adverse claimant, to recover nine twelfths of the fund. The bank answered the bill and at the same time filed a cross-bill in which it alleged that it was merely a stakeholder claiming no interest in the fund, and praying that Foss, Hunter and Bissell might be required to interplead. Bissell answered both the original and cross-bill, claiming four twelfths of the fund.

The sum in dispute between the parties seems to have increased after the filing of the original bill, and before final decree amounted to $36,454.35. This sum, by agreement of the parties, was deposited in the registry of the court, and they stipulated that the decision of the court should settle their rights, not only to the fund claimed in the original bill, but to the whole amount in the registry of the court. [257]

On final hearing the circuit court decreed "that Foss and Hunter were entitled to the $36,454.35 in controversy in the registry of the court, and that it be paid to them." From this decree Bissell appealed.

Messrs. **John F. Dillon,** *L. C. Rockwell* and *H. M. Teller*, for appellant:

"Tenants in common are placed in a confidential relation to each other as to the joint property; and the same duties are imposed as if a joint trust were created by contract between them, or the act of a third person."

Tisdale v. *Tisdale*, 2 Sneed, 597.

Cases are numerous and the doctrine is undisputed that if one of several tenants in common purchase an outstanding title it will inure to the benefit of all.

Lloyd v. *Lynch*, 28 Pa. St., 419; *Jones* v. *Stanton*, 11 Mo., 433; *Weaver* v. *Wibel*, 25 Pa. St., 270; *Picot* v. *Page*, 26 Mo., 398; *VanHorne* v. *Fonda*, 5 Johns. Ch., 406; *Downer* v. *Smith*, 38 Vt., 464; *Halsey* v. *Blood*, 29 Pa. St., 319. See also Freem. Co-Ten. & Par. § 151; *King* v. *Wise*, 43 Cal., 628; *Clark* v. *Cantwell*, 3 Head., 202; *Gibson* v. *Winslow*, 46 Pa. St., 380; *Brittin* v. *Handy*, 10 Ark., 381.

"An agent or trustee undertaking a special business for another, cannot, on the subject of the trust, act for his own benefit to the injury of his principal."

Dodd v. *Wakeman*, 26 N. J. Eq., 484; *Parkist* v. *Alexander*, 1 Johns. Ch., 396; *Condit* v. *Blackwell*, 7 C. E. Green, 486; Story, Eq., § 315.

Under the celebrated classification of fraud by *Lord* Hardwicke in *Chesterfield* v. *Janssen*, 1 Atk., 301; 2 Ves., 125; 1 Lead. Cas., in Eq., 428, this case, aside from the agreement and promise, falls within the third class—fraud presumed from the circumstances and condition of the parties contracting.

In this class of frauds the general rule is that relief will be afforded in equity in all transactions, in the language of *Lord* Kingsdowne (*Smith* v. *Kay*, 7 H. of L. Cas., 750), "in which influence has been acquired and abused; in which confidence has been reposed and betrayed."

See also Bispham's Eq., § 232, p., 292; 1 Pom., Eq. § 155; Story, Eq. Jur., 258, 259, 1265; Perry, Trusts, § 170; *Fox* v. *Macreath*, 1 L. C. in Eq., part 1, 4th Am. ed., 260, 261 *note*; *Keech* v. *Sandford*, 1 L. C. in Eq., part 1, 4th Am. ed., 48, 62-63; *Henricks* v. *Nunn*, 46 Tex., 141; 2 White & Tudor's L. C. in Eq., part 1, 549; *Morey* v. *Herrick*, 18 Pa. St., 123; *Stewart* v. *Brown*, 2 S. & R., 461; *Brown* v. *Dysinger*, 1 Rawle, 408; *Kisler* v. *Kisler*, 2 Watts, 323; *Thompson's Lessee* v. *White*, 1 Dall., 424.

Messrs. **David P. Dyer** and *James O. Broadhead*, for appellees:

The opinion of the court below (4 Fed. Rep., 694) is supported by abundant authority.

Holmes v. *Holmes*, 44 Ill., 168; *Remington* v. *Campbell*, 60 Ill., 516; *Goodwin* v. *Richardson*, 11 Mass., 469; *Wheatley* v. *Calhoun* 12 Leigh, 264; *Livermore* v. *Aldrich*, 5 Cush., 431; *Olcott* v *Bynum*, 17 Wall., 51 (84 U. S., bk. 21, L. ed. 570); 4 Kent, Com., 337.

Mr. **Justice Woods** delivered the opinion of the court:

[257] It is clear that the appellant had no claim to the fund in controversy unless he had some title, legal or equitable, to the property which produced it. But he was not a party to the purchase of the property by Foss and Hunter. The Missourians, who owned the property, never bargained with Bissell to sell him any interest in their share, and never conveyed to him any interest in it. They contracted with Foss and Hunter only. Bissell never paid any part of the purchase money. It was paid exclusively by Foss and Hunter. His title, if he has any, is not based on any contract of purchase made with the Missourians nor on any contract or understanding between him and Hunter. He bases his claim on the conversation and agreement between himself and Foss. This agreement, as stated by Bissell, was that Bissell and Foss should buy out the Missourians, for the benefit of themselves and Hunter, and divide the share equally between the three, and that each should pay one third of the purchase money. According to Bissell's own version the arrangement was based on the expectation that a large part of the purchase money could be paid out of the deposit of the parties in the bank. But the evidence shows that the money which they were at liberty to draw from the bank would pay less than one third of the price at which the purchase was made. Foss testifies that all his individual resources consisted of a small grocery store not paying much, and that he "was just living in the hope of beating Tabor."

Looking at all the testimony it is impossible to reach the conclusion—unless we disregard altogether the evidence of Foss and rely entirely on that of Bissell—that there was any well defined agreement between them to buy out the Missourians at a specified price, or that the two had available resources to make the purchase.

[258] Nothing but an arrangement left at loose ends can be deduced from the evidence. But if the agreement had been clear and definite it could bind neither Foss nor Bissell until Hunter was consulted and agreed to it. If Hunter declined, the matter was at an end and there was no obligation on either Foss or Bissell to purchase for themselves or for themselves and Hunter.

The record shows—and counsel for Bissell contend—that Foss told Hunter about the arrangement in reference to the purchase, between himself and Bissell. There is no proof that Hunter assented to the arrangement made between Foss and Bissell. It is clear that he did not assent, for he made a different arrangement with Foss, by which he was to purchase and pay for two thirds of the share of the Missourians, and Foss the other third, and by which he was to advance all the money to make the purchase, leaving the funds of the associates on deposit in the Miners' Exchange Bank untouched. It is plain, therefore, that the project of Foss and Bissell for the purchase for the joint benefit of themselves and Hunter, of the share of the Missourians fell through. could not be carried out without the assent Hunter, and he did not assent.

To show the fraudulent conduct of Foss a Hunter stress is laid, by counsel for the app lant, on the fact that they deceived the Missou ans by the pretense that Hunter was willing sell and that he did actually sell his one fou to Foss for $15,000, and thus induced them sell at the same price. But as the Missouri were the only persons injured by this strateg if any one was injured, and they do not co plain, we do not see how it concerns the app lant. The device by which Foss and Hun made the purchase at $15,000 did not add to detract from the rights of the appellant. A as he is seeking to get the benefit of the contr thus fraudulently made, as he alleges, it does lie in his mouth to complain of a fraud of whi he is seeking to share the fruits.

Bissell had no ground upon which he co base any contract right to an interest in purchase made by Foss for himself and Hunt He paid no money on the purchase and could not have been compelled to pay a either by the Missourians with whom he h no contract, or by Foss, who, after Hunter h declined to acquiesce in the arrangement tween Bissell and himself, could not have manded of Bissell that he and Foss should b for themselves. And if Foss had actua bought for himself and Bissell he could have compelled the latter to pay his h of the purchase money, for Bissell had ne agreed to such a purchase. The agreem could not bind Foss unless it also bound Biss Bissell, therefore, did not by reason of his agr ment with Foss, acquire any interest in share purchased by Foss and Hunter of Missourians.

But the appellant insists that there wa mutual agreement between Bissell and Foss t if either made the purchase it should be the benefit of all; that this agreement, althou not amounting to a contract which could specifically enforced if it had been made w a stranger, created between parties who s tained to each other the confidential trust re tions which existed between these parties constructive trust which would be enforced equity.

The contention is that these three part were in such relations to each other that one bought a share in the common prope and business it inured in equity to the ben of all, subject to the payment, by each of associates, of his share of the purchase mon The relations from which this result springs stated to be those, first, of joint tenants, a second, of partners; and that, by reason of th relations, Foss and Hunter became trustees themselves and Bissell in purchasing the sh of the Missourians.

It is true that one or two or more tenants common, holding by a common title, can purchase an outstanding title or incumbra upon the joint estate for his own benefit. S a purchase inures to the benefit of all, beca there is an obligation between them result from their joint claim and community of in est, that one of them shall not affect the cl to the prejudice of the others. *Rothwell Dewees*, 2 Black, 613 [67 U. S., bk. 17, L.

[illegible] *Van Horn* v. *Fonda*, 5 Johns. Ch., 388; [illegible] v. *Lynch*, 28 Pa. St., 419; *Downer* v. [illegible], 28 Vt., 464.

But this rule cannot apply to Hunter and Foss. They purchased no outstanding title or [illegible], to the prejudice of the other tenant in common. They did what any tenant in common with entire good faith might do, namely, purchased the interest of some of their co-[illegible] without consulting the others. The title which they purchased of the Missourians was not antagonistic or hostile to the title of Bissell. Their purchase did not in any degree [illegible] to injure or damage his interest. His share was just as valuable after as before the purchase and his rights were the same. In such a [illegible] no trust or confidence is violated.

Nor do we think that the relations of the parties as partners prohibited Foss and Hunter from making the purchase in question for their own benefit to the exclusion of Bissell. The association of Bissell, Foss, Hunter and the Missourians was not an ordinary partnership. It was what is known as a mining partnership, which is a partnership *sub modo* only, and is thus described by *Mr. Justice* Field in *Kahn* v. [illegible] Co., 103 U. S., 641 [bk. 26, L. ed., 266].

"Mining partnerships, as distinct associations with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present." He then quotes a passage from the opinion in *Skillman* v. *Lachman*, [illegible] Cal., [illegible], to the effect that a mining partnership is governed by many of the rules relating to ordinary partnerships, but also by some rules peculiar to itself, one of which is that one person may convey his interest in the mine and business without dissolving the partnership, and then proceeds as follows: "The same doctrine is asserted in numerous other cases, not only in that court but in the courts of England. Associations for working mines are generally composed of a greater number of persons than ordinary trading partnerships; and it was early seen that the continuous working of a mine, which is essential to its successful development, would be impossible, or at least attended with great difficulties, if an association was to be dissolved by the death or bankruptcy of one of its members or of the assignment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was therefore recognized as applicable to the relations to each other of members of a mining association. The *delectus personae*, which is essential to constitute an ordinary partnership, has no place in these mining associations. *Duryea* v. *Burt*, 28 Cal., 569; *Setzer* v. *Putnam*, 30 Cal., 490; *Taylor* v. *Castle*, [illegible] Cal., [illegible]."

This case settles two propositions: First, that the members of a mining association have no right to object to the admission of a stranger into the association who buys the share of one of the associates; and second, that the sale and assignment by one of the associates, of his interest, does not dissolve the mining partnership. It follows from these propositions, that one member of a mining partnership has the right, without consulting his associates, to sell his interest in the partnership to a stranger, and that such a sale injures no right or property of the other associates. Much less does a purchase by one associate, of the share of another, inflict any wrong upon the other members of the partnership. There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner, to a stranger or to one of the associates, of his share in the property and business of the association.

It results as a conclusion from these premises that Bissell has suffered no wrong at the hands of either Hunter or Foss on the ground that they were his tenants in common or partners, by reason of any contract made between the latter in reference to the purchase of the share of the Missourians in their joint enterprise. There has been no violation of any trust and confidence arising from the relations existing between Bissell, Foss and Hunter.

The appellant, it is therefore clear, cannot demand any part of the two-thirds interest purchased by Hunter in the share of the Missourians. If he is entitled to participate in any way in the purchase made by Foss and Hunter it can only be in the one-third interest purchased by Foss. But this demand cannot be based on any contract between Bissell and Foss, for the contract arrangement between them was conditioned upon the consent of Hunter, and Hunter did not consent. It was also an element of the agreement that the money of the associates on deposit in the bank should be sufficient and should be available to pay a large part of the money required for the purchase of the share of the Missourians. But this condition also failed. He was therefore bound by no contract with Bissell to make the purchase. [262]

The only question which remains is, Was Foss bound, when he learned that the arrangement he had made with Bissell for the purchase of the share of the Missourians could not be carried out, to inform Bissell of the fact, and give him a chance to join in the purchase made by him and Hunter? It cannot be denied that under the circumstances there was an obligation on Foss to inform Bissell of the failure of their plan before making another with a third person. But it was not a legal obligation capable of enforcing *in foro externo*, but only a natural obligation to be disposed of *in foro conscientiæ*. Story, Eq. Jur., § 2. It was one of those obligations which was binding on the honor and conscience of the party, but one not the subject of a suit and not to be enforced in a court of either law or equity.

We are of opinion that the decree of the Circuit Court was right. *It is therefore affirmed.*

Mr. Justice **Bradley** and *Mr. Justice* **Matthews** dissented.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[394]

SILAS S. HUNTLEY, *Appt.*,
v.
THOMAS S. HUNTLEY, EXR. of CHARLES C. HUNTLEY, Deceased, ET AL.

(See S. C., Reporter's ed., 394-401.)

Statute of Frauds—executed contract not within—application of indebtedness on purchase by debtor for benefit of creditor.

* C. bought an undivided one-third interest in a stage company, intending that S. should have one half of one third, and, before the purchase, informed S. of such intention. At the time there was an unsettled account between C. and S., in respect of services rendered by S. to C. and of certain business in which they were both interested. After the purchase, C. agreed verbally with S. that S. should have the one sixth at the price S. had paid for it, any amount due by C. to S. to be applied towards payment for the one sixth, the ownership of it by S. to commence at once. Afterwards the four owners of the property, of whom S. and C. were two, executed a paper under seal, in which the interests of the four were defined, S. and C. being stated to be the owners of one third; and all, including C., thereafter recognized S. as owning one sixth, subject, as between S. and C., to the liability of S. to reimburse C. what he had paid for such one sixth: *Held*,

(1) The contract was executed, and S. was put in possession, and the Statute of Frauds (29 Car. II., chap. 3, § 17) did not apply;

(2) S. was entitled to have credit on his purchase of the one sixth, for what C. owed him on the accounts aforesaid; and C. was entitled to recover from S. the residue of what he had paid for the one sixth.

[No. 201.]

Argued Mar. 17, 18, 1885. Decided Apr. 6, 1885.

APPEAL from the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court.

Messrs. **Enoch Totten** and **William F. Mattingly**, for appellant.

Messrs. **J. Hubley Ashton, W. D. Davidge** and *Nath'l Wilson*, for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

For several years prior to June 27, 1874, the [305] appellee Charles C. Huntley was engaged on numerous routes in the West and Northwest in the business of transporting the mails of the United States, and passengers. On some of those routes S. S. Huntley was interested with him, while on others he was his general manager and agent, with unrestricted authority to conduct the business as in his judgment was best for his principal. Among the companies in which C. C. Huntley had an interest were the Northwest Stage Company—engaged in transporting mails and passengers on routes in the State of Oregon and in the Territories of Utah, Idaho and Washington—and the Oregon and California Stage Company, which was engaged in like business on the route from Oraville, California, to Portland, Oregon. In the former company Bradley Barlow and James W. Parker each had an undivided interest of one third, while C. C. Huntley and Adam E. Smith had each an undivided interest of one sixth; in the latter, Barlow, C. C. Huntley, Parker and one Sanderson had each an undivided interest of one fourth.

* Head notes by *Mr. Justice* HARLAN.

On the 27th day of June, 1874, Parker, bill of sale, transferred to C. C. Huntley his terest in the property and assets of both th companies. The consideration paid was $75,0 for which the vendee executed his seve promissory notes to Barlow, who indorsed th to Parker.

On the 22d day of December, 1874, the f lowing instrument of writing was executed the parties thereto:

"Know all men by these presents that wher Bradley Barlow is the owner of one half of stock, property and effects of what was known the Northwest Stage Company, and S. S. and C. Huntley are the owners of one third of said prop ty, and Adam E. Smith is the owner of one sixth said property, and each of the said parties share spectively in the above proportions in all the m routes lately operated by said company, and are share in the future on all those routes in the abo proportions in the ownership, profits, losses and penses appertaining thereto or incident to the taining said mail routes, and it is agreed betwe us that the said Barlow shall have full power a authority to collect the pay on said routes duri the present contract term for the benefit of said parties herein named in the proportions each party hereinbefore stated, and that full pow of attorney in all cases shall be made and delive to the said Barlow to collect all mail pay on routes now owned or hereinafter acquired by aforesaid parties, or either of them, in the territo embraced by the service of the late Northw Stage Company.

"In witness whereof we have hereunto set hands and seals this 22d day of December, A. 1874.

Bradley Barlow,	[Seal.
C. C. Huntley,	[Seal.
S. S. Huntley,	[Seal.
Adam E. Smith.	[Seal.

"In the presence of—
J. L. Sanderson."

Shortly after the execution of that paper, C. Huntley, for $30,000, sold to Barlow half of the interest in the Northwest Sta Company which the former had purchased fr Parker.

The present suit was instituted by S. Huntley on the 14th day of December, 18 against C. C. Huntley, Barlow and Smi The bill alleges, among other things, t plaintiff and defendants were the owners of stock, property and effects of the Northw Stage Company, and that their respective terests are distinctly set forth and agreed up in the beforementioned writing of Decem 22, 1874; that Barlow had purchased Smit interest, and, under the authority given hi had collected all the mail pay earned by t company for its contract term ending June 1878, but had not made a final settlement, respect of such collections, with those int ested with him; that he had also sold t property of the company for $75,000, but h not fully accounted therefor; that C. C. Hu ley denied that plaintiff had any interest in t property or in its proceeds, and, unless strained, would collect and appropriate to own use all the proceeds and profits arisi from the one-third interest which origina stood in the name of C. C. and S. S. Huntl one half of which—that is, one sixth of the tire property—belonged to plaintiff. The pra of the bill was for an ascertainment of amount in Barlow's hands, in respect of said one-sixth interest, and that plaintiff h a decree for such sums as may be justly d him.

C. C. Huntley, in his answer, denies t

[illegible] ever acquired any interest in the pur-[illegible] from Parker, or that the paper of Decem-[illegible] 22, 1874, of the signing of which he had [illegible] recollection, was intended to be anything [illegible] than a declaration or admission of the [illegible] that Barlow was authorized to receive [illegible] money that might become due to the com-[illegible] from time to time. He says: "I did not [illegible] paper writing intend to admit, nor have [illegible] admitted, nor do I now admit, but, on [illegible] contrary, deny that the said plaintiff was, [illegible] or was to be, an equal owner with me in [illegible] and one-third interest in said Northwest [illegible] Company, its property, profits, assets, [illegible], except in the event of the repayment to [illegible] of the said sum of $45,000, so expended in [illegible] purchase of said shares as aforesaid, with [illegible] thereon; and, although no agreement [illegible] that effect was ever entered into, I have al-[illegible] been, and am now, willing that the said [illegible] shall have all the profit that has been [illegible] or derived in respect of one-sixth interest [illegible] Northwest Stage Company, and said [illegible] interest in said Oregon and Califor-[illegible] Stage Company, since the 1st day of July, [illegible] provided there be first repaid to me the [illegible] price of said purchase, to wit: the said [illegible] of $45,000, with interest from June 27, [illegible]."

[illegible] the decree of the court below, in special [illegible] it was adjudged that plaintiff recover of [illegible] Barlow one sixth of the property [illegible] money in his hands, of the Northwest Stage [illegible] and the latter was enjoined from [illegible] to C. C. Huntley any part thereof. The [illegible] was referred to an auditor to ascertain the [illegible] of plaintiff's interest, and to state all [illegible] and necessary accounts. Upon appeal [illegible] general term that decree was reversed [illegible].

While there is some conflict in the testimony [illegible] the circumstances attending the purchase [illegible] C. C. Huntley of Parker's interest in these [illegible], we are of opinion, upon a careful [illegible] of the evidence:

[illegible] That the purchase by C. C. Huntley was [illegible] to an understanding between him and [illegible], that the latter should have one half of [illegible] Parker interest in the Northwest Stage [illegible], and with the purpose on the part of [illegible] Huntley that S. S. Huntley should have [illegible] other half;

[illegible] That before such purchase, S. S. Huntley [illegible] informed by C. C. Huntley of the latter's [illegible] to let him have one half of that in-[illegible];

[illegible] That at the time of such purchase there [illegible] no unsettled account between C. C. Hunt-[illegible] and S. S. Huntley in respect as well of ser-[illegible] rendered by the latter as agent and gene-[illegible] manager for the former, as of mail contracts [illegible] in which they were jointly inter-[illegible], other than those relating to routes not [illegible] by the Northwest Stage Company or [illegible] companies with which Barlow was con-[illegible];

[illegible] That C. C. Huntley, in execution of his [illegible] purposes with reference to S. S. Hunt-[illegible] actually agreed with the latter, while they [illegible] together in the west in the summer or fall [illegible] 1874 after the purchase from Parker, that [illegible] should have one half of the original Parker [illegible] in the two companies—that is, the re-[illegible]

maining one-sixth interest in the Northwest Stage Company, and one eighth interest in the other company—at the price which C. C. Huntley had paid for them; the amount, if any, due to S. S. Huntley, on account of the beforementioned services and contracts, to be applied in payment as far as it would go for the interests so transferred to him;

5. That the ownership of those interests by S. S. Huntley was not to be deferred until a settlement of accounts between him and C. C. Huntley was had, but was to take effect as of July 1, 1874, when the new contract term of those companies commenced; [399]

6. That the writing of December 22, 1874, was executed because of the then contemplated absence of C. C. Huntley in Europe for the benefit of his health, and to show the interest which S. S. Huntley had previously acquired and then, under the agreement with C. C. Huntley, actually had in the property and business of the Northwest Stage Company;

7. That thereafter all parties concerned in the affairs of that company, including C. C. Huntley, recognized and treated S. S. Huntley as the owner of one-sixth interest in its property and assets, subject, however, so far as C. C. Huntley was concerned, to the liability of S. S. Huntley to reimburse him for the amount which that interest had cost.

In behalf of the appellee Huntley it is contended, that the verbal agreement, upon which appellant relies as the foundation for his claim, is void under the 17th section of the Statute of 29 Car. II., chap. 3, which is in force in the District of Columbia, and which provides that "no contract for the sale of any goods, wares and merchandise for the price of ten pounds sterling or upward shall be allowed to be good, except the buyer shall accept part of the goods sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing, of said bargain, be made and signed by the parties, to be charged by such contract, or their agents thereunto lawfully authorized." Kelty's Eng. Stat., 242; Thomp. Dig., 221.

The argument in support of this proposition is that the Northwest Stage Company was a species of partnership with joint stock divided into transferable shares, which could be disposed of by the owner without the consent of his partners; that such shares were substantially like stock in corporations or regular joint stock companies; and that the alleged verbal sale of an interest in that company was void under the foregoing statute, because, as is claimed, the words "goods, wares and merchandise," as therein used, properly embrace not merely palpable personal property having an intrinsic value, but also stock in chartered corporations, shares or interests in joint stock companies, or private partnerships having the incidents of such companies—notes, checks, bonds, and other evidences of value. [400]

Without determining whether this statute governs the rights of the parties, or whether this interpretation of its provisions is sustained by the weight of authority, or whether the writing of December 22, 1874, is not itself a sufficient memorandum in writing of the sale in question, it is enough to say that the contract between

C. C. Huntley and S. S. Huntley was so far executed that the rights and obligations of the parties cannot be affected by the statute. To the extent that it was possible or necessary in respect of property of this character, the vendee was placed in possession of that which he purchased. This is shown by the evidence of several witnesses, and is established by the paper of December 22, 1874, which declares that S. S. and C. C. Huntley are the owners of one third of the stock, property and effects of the Northwest Stage Company, and as such and to that extent are to share in all the mail routes then lately operated by that company, and to share, in the future, in the profits, losses, and expenses appertaining thereto. There is some evidence tending to show that when this paper was executed C. C. Huntley was in poor health, but it falls short of proving that he was incapable, in law, of becoming a party to such an instrument; nor does his answer assert any such incapacity as a ground of defense. Besides, that writing is in accordance with the understanding reached between him and S. S. Huntley prior to its execution.

The decrees, in general and in special term, are, in our judgment, erroneous; the former, because it denied all relief to the plaintiff; and the latter, because it proceeded upon the ground that the evidence showed that S. S. Huntley had fully paid for the interest sold and transferred to him by C. C. Huntley. The case should go to an auditor, to ascertain the amount, if any, fairly and justly due S. S. Huntley from C. C. Huntley at the time of his purchase from C. C. Huntley, such amount to be applied in payment of S. S. Huntley's indebtedness to C. C. Huntley, on account of the purchase from the latter of one half of the Parker interest in [401] the Northwest Stage Company. And if C. C. Huntley was not indebted to S. S. Huntley at that date then the former will be entitled to be reimbursed out of the funds in the hands of Barlow, for all that he paid for the one-sixth part sold to S. S. Huntley, with interest thereon from the time of the purchase from Parker; the balance, if any, to go to S. S. Huntley. Such further decree should be rendered after the report of the auditor as the facts thus disclosed will justify or require.

The decree below is reversed, with directions for such proceedings as will be consistent with this opinion. Reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CITY OF LITCHFIELD, *Appt.*,

v.

[190] GEORGE WILLIAM BALLOU ET AL.

(See S. C. Reporter's ed., 190-195.)

Municipal bond—issue of, in excess of constitutional limit—liability of municipality for purchase money expended upon public works—jurisdiction.

1. Where the Constitution of a State provides that no city, etc., "shall be allowed to become indebted in any manner or for any purpose" beyond a certain per centum of its taxable property, the prohibition is as effectual against the implied as the express promise, and is as binding in equity a law.

2. The holders of the bonds, and agents of city, are *particeps criminis* in the act of viola the constitutional prohibition, and equity wil more raise a resulting trust in favor of the hol than the law will raise an implied *assumpsit* money had and received.

3. The purchasers of bonds issued in exces the constitutional limit have no lien upon pu works upon which the purchase money is all to have been expended if other funds have been expended upon such works.

4. Where the complainant seeks to recover money he let the municipality have he must ole identify it or the fund or other property w represents it in such a manner that it can be claimed and delivered without taking other p erty with it or injuring other persons or interfe with other rights.

5. A decree which does not attempt to restor specific money of the complainant, but which i a sum equal in amount to the bonds and inte being a decree to pay as on an implied cont cannot be sustained.

6. A bill which sets up a cause of action on w there is an adequate remedy at law fails for v of equitable jurisdiction.

[No. 1180.]

Submitted Jan. 9, 1885. Decided Apr. 6, 1

APPEAL from the Circuit Court of United States for the Southern Distri Illinois.

The history and facts of the case appea the opinion of the court.

See also *Buchanan* v. *Litchfield*, 102 U. 278 (bk. 26, L. ed. 138).

Messrs. **John M. Palmer** and *B. S. wards*, for appellant.

Mr. **D. T. Littler**, for appellees:

The doctrine of equity is that money property received by a party under such cumstances as are set forth in the bill in case has an implied trust character imp upon it by mere operation of law, indepen of the intention of the parties, and, as such, be enforced upon the conscience of the par

2 Story, Eq., § 1254; *Chapman* v. *Dou Co.* 107 U. S., 348 (bk. 27, L. ed. 378); *Pi tal* v. *SanFrancisco*, 21 Cal., 363; *Argen Same*, 16 Cal., 282; *Parkersburg* v. *Brown*, U. S., 487, (bk. 27, L. ed. 238); *Marsh* v. *ton Co.*, 10 Wall., 676 (77 U. S., bk. 19 ed. 1040); *Bridge Co.* v. *Utica*, Chic. L. N. A 4, 1883.

Whether a city is under a legal obliga to make restitution of the money obta without authority of law—that is, to refun the proper party or parties such sums as v actually received by its authorized agent officers upon the sale of the bonds—is n question arising in the present action whic only for the recovery of the stipulated int upon such bonds. Upon this point it is proper at this time or in this form of actio express an opinion.

Buchanan v. *Litchfield*,, 102 U. S., 293 26, L. ed. 141).

It cannot be doubted that a sound policy be promoted by restoring the parties in all cases to their position. It leaves no inducer for either party to contravene the law. corporation is compelled to return just wh has received. The other party gets no r than he has parted with. It is believed not a solitary case can be found which st opposed to this salutary rule.

Curtis v. *Leavitt*, 15 N. Y., 1. See also

[illegible] 24 N. Y., 290; *Paul* v. *Kenosha*, [illegible] Wis. [illegible]; *Nelson* v. *Mayor*, 63 N. Y., [illegible]; [illegible] v. *Talmage*, 14 N. Y., 217.

By Justice **Miller** delivered the opinion of the court.

This is an appeal from a decree in chancery [illegible] the Circuit Court for the Southern District of Illinois.

The suit was commenced by a bill brought [illegible] against the City of Litchfield. Complainant alleges that he is the owner of bonds [illegible] by the City of Litchfield to a very considerable amount. That the money received by the City for the sale to him of these bonds was used in the construction of a system of waterworks for the City, of which the City is now the owner. He alleges that one Buchanan, who was the owner of some of these bonds, brought suit on them in the same court and was [illegible] in his action in the Circuit Court and in the Supreme Court of the United States, in which courts held the bonds void.

He now alleges that though the bonds are void the City is liable to him for the money it received of him, and as by the use of that money the waterworks were constructed, he sues for a decree against the City for the amount, and, if it is not paid within a reasonable time to be fixed by the court, that the waterworks of the City be sold to satisfy the [illegible]. The bill also charges that he was induced to purchase the bonds, by the false statements of the officers, agents and attorneys of the City that the bonds were valid. Other [illegible] came into the litigation and answers were filed. The answer of the City denies any [illegible] representations as to the character of the [illegible] bonds, that all the money received for them went into the waterworks, but part of it was used for other purposes, and avers that a large part of the sum paid for the waterworks came from other sources than the sale of these bonds, and it cannot now be ascertained how much of that money went into the works.

[illegible] came to issue and some testimony was taken, the substance of which is that much of the money for which the bonds were sold was used to pay the contractors who built the waterworks, while a very considerable proportion of the cost of these works was paid for out of taxation and other [illegible] than the bonds.

There is no evidence of any false or fraudulent representations by the authorized agents of the City.

The bonds were held void in the case of [illegible] v. *Litchfield*, 102 U. S., 278 [bk. 26, [illegible]], because they were issued in violation of the following provision of the Constitution of Illinois:

"Article IX.

"Section 12. No county, city, township, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness."

It was made to appear as a fact in that case, that at the time the bonds were issued the City had a pre-existing indebtedness exceeding five per cent of the value of its taxable property, as ascertained by its last assessment for state and county taxes.

The bill in this case is based upon the fact that the *bonds are* for that reason void, and it makes the record of the proceedings in that suit an exhibit in this. But the complainant insists that though the bonds are void the City is bound, *ex æquo et bono*, to return the money it received for them. It therefore prays for a decree against the City for the amount of the money so received.

There are two objections to this proposition: 1. If the City is liable for this money an action at law is the appropriate remedy. The action for money had and received to plaintiff's use is the usual and adequate remedy in such cases where the claim is well founded, and the judgment at law would be the exact equivalent of what is prayed for in this bill, namely: a decree for the amount against the City, to be paid within the time fixed by it for ulterior proceedings.

In this view the present bill fails for want of equitable jurisdiction.

2. But there is no more reason for a recovery on the *implied* contract to repay the money than on the *express* contract found in the bonds.

The language of the Constitution is that no city, etc., "shall be allowed to become *indebted in any manner or for any purpose* to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property." It shall not *become indebted*, shall not incur any pecuniary liability; it shall not do this in *any manner*, neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any *purpose*, no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassible obstacle to the creation of any further debt in any manner or for any purpose whatever. [193]

If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law.

Counsel for appellee in their brief, recognizing the difficulty here pointed out, present their view of the case in the following language:

"The theory of relief assumed by the bill is that notwithstanding the bonds were wholly invalid, and no suit at law could be successfully maintained either upon the bonds or upon any contract as such growing out of the bonds; yet, as the City of Litchfield is in possession of the money received for the bonds, or, which is the same thing, its equivalent in property identified as having been procured with this money, and having repudiated and disclaimed its liability in respect of the bonds, it must, upon well-established equitable principles, restore to the complainants what it actually received, or at least so much of what it received as is shown now to be in its possession and in its power to restore."

If such be the theory of the bill the decree of the court is quite unwarranted by it. The money received by the City from Ballou has long passed out of his possession and cannot be restored to complainant. Neither the spe-

cific money nor any other money is to be found in the safe of the City or anywhere else under its control. And the decree of the court, so far from attempting to restore the specific money, declares that there is due from the City of Litchfield to complainants a sum of money—not that original money—but a sum equal in amount to the bonds and interest on them from the day of their issue. Is this a decree to return the identical money or property received, or is it a decree to pay as on an implied contract the sum received, with interest for its use?

As regards the waterworks, into which it is [194] said the money was transmuted, if the theory of counsel is correct the waterworks should have been delivered up to plaintiff as representing their money, as property which they have purchased, and which, since the contract has been declared void, is *their property*, as representing their money. In this view the restoration to complainants of the property which represents their money puts an end to obligations on both sides growing out of the transaction. The complainants, having recovered what was theirs, have no further claim on the City. The latter having discharged its trust by returning what complainant has elected to claim as his own, is no longer liable for the money or any part of it.

But here also the decree departs from what is now asserted to be the principle of the bill. Having decreed an indebtedness where none can exist, and declared that complainant has a lien on, not the ownership of, the waterworks, it directs a sale of the waterworks for the payment of this debt and the satisfaction of this lien.

If this be a mode of pursuing and reclaiming specific property into which money has been transmuted, it is a new mode. If the theory of appellees' counsel be true, there is no lien on the property. There is no debt to be secured by a lien. That theory discards the idea of a debt, and pursues the money into the property, and seeks the property, not as the property of the City to be sold to pay a debt, but as the property of complainant into which his money, not the City's, has been invested, for the reason that there was no debt created by the transaction.

The money received on the bonds having been expended, with other funds raised by taxation, in erecting the waterworks of the City, to impose the amount thereof as a lien upon these public works would be equally a violation of the constitutional prohibition, as to raise against the City an implied assumpsit for money had and received. The holders of the bonds and agents of the City are *participes criminis* in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an implied assumpsit against a public policy so strongly declared.

[195] But there is a reason why even this cannot be done.

Leaving out of view the question of tracing complainant's money into these works, it is very certain that there is other money besides theirs in the same property. The land on which these works are constructed was bought and paid for before the bonds were issued or voted. The streets through which the pipes are laid is public property into which no money of the complainants entered. Much, also, of tl expense of construction was paid by taxatic or other resources of the City. How mucl cannot be known with certainty, becaus though the officers of the City testify that o the books a separate waterworks account wa kept, there is no evidence that the funds whic went to build these works are traceable b those books to their source in any instance.

If the complainants are after the money the let the City have they must clearly identify th money or the fund or other property which represents that money in such a manner that i can be reclaimed and delivered without taking other property with it or injuring other persons or interfering with others' rights.

It is the consciousness that this cannot be done which caused the court and counsel to resort to the idea of a debt and a lien which cannot be sustained. A lien of a person on his own property, which is and has always been his, in favor of himself, is a novelty which only the necessities of this case could suggest.

Another objection to this assertion of a righ to the property is that the bondholders, each o whom must hold a part of whatever equity ther is to the property, are numerous and scattered and the relative amount of the interest of eac in this property could hardly be correctly ascer tained. The property itself cannot be divided its value consists in its unity as a system of water works for the City. Without the land and th use of the streets the value of the remainder o the plant is gone. In these, complainants ca have no equity.

The decree of the court is reversed and the cas remanded, with directions to dismiss the bill.

I am requested to say that *Mr. Justice* **Har lan** dissents from the judgment and opinion o the court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S

Ex Parte:
In the Matter of ELLIS G. HUGHES, *Pet tioner.*

(See S. C., Reporter's ed., 147-149.)

Mandamus—*discretion of inferior courts no controlled by.*

A writ of *mandamus* does not lie to compel the judge of an inferior court to authorize the with drawal of money from the registry of the court where said court has expressly adjudged that the litigation is not ended and has ordered that said money shall remain in the custody of the court until the final disposition of the cause.

[No 8. Orig.]

Argued, Mar. 31, 1885. Decided, Apr. 6, 1885.

PETITION for a writ of *mandamus.*

The history and facts of the case appea in the opinion of the court.

Mr. **John H. Mitchell,** for petitioner.

Mr. J. N. Dolph, contra.

Mr. Chief Justice **Waite** delivered the opin ion of the court:

This is an application for a writ of *manda mus* requiring Matthew P. Deady, Judge o the District Court of the United States for th District of Oregon, to "forthwith sign an execute, by signing or countersigning any an

[illegible] such orders, matters and things as may be [illegible] or necessary to enable your petitioner [illegible] G. Hughes, an attorney at law practicing [illegible] circuit and district courts of the United [illegible] for such district) to withdraw from the [illegible] of said court the sum of five hun[illegible] dollars belonging to him." The petition [illegible] which is sworn to by the petitioner, [illegible] that on and prior to May 3, 1882, there [illegible] pending in the Circuit Court of the United [illegible] for the District of Oregon a suit in equity [illegible] foreclosure of a mortgage in which [illegible] Ford, manager, was plaintiff, and H. [illegible] and W. B. McCallister, defendants, [illegible] that the plaintiff therein "recovered in said [illegible] a certain decree as against the defendants, [illegible] and a certain order of sale, wherein and [illegible] it was ordered, adjudged and decreed [illegible] the defendants * * * should pay to the [illegible] a certain sum of money, and interest [illegible] specified, and also the costs and dis[illegible] in the suit to be taxed, 'including [illegible] on the full amount due from the [illegible] * * * to the complainant as an [illegible] fee to the attorney of the complain[illegible] and that in default of such payment being [illegible] certain lands in said decree and order of [illegible] said described, be sold."

The petition further states "that your peti[illegible] as the attorney of the plaintiff, by ex[illegible] agreement and by the express terms and [illegible] of said decree and order of sale, was [illegible] and unconditional owner of the [illegible] recovered therein and thereby as [illegible] of the suit." It is then stated that a sale [illegible] mortgaged property was made under the [illegible] and "the amount due your petitioner [illegible] and decree and order of sale, as and for [illegible] fee, * * * having been regularly [illegible] and determined, the said purchaser [illegible] paid to the clerk of the circuit [illegible] * * * as and for and in payment of the [illegible] of your petitioner for his attorney's fee, [illegible] the full amount so as aforesaid ascertained [illegible] determined to be due to your petitioner [illegible]." The petition then states that upon [illegible] of the money it was deposited in [illegible] of the court, and that, although de[illegible] the district judge holding the circuit [illegible] refused to sign an order for its pay[illegible] in full to him, but that the sum of $500, [illegible] was retained, although it was then [illegible] the depository of the court and "absolutely [illegible] unconditionally the property of your peti[illegible]."

[illegible] of the various orders and decrees [illegible] the rights of the petitioner depend [illegible] attached to the petition; but upon the [illegible] statements of the petitioner as to [illegible] and effect, a rule was entered on [illegible] judge to show cause why the writ [illegible] should not be issued. To this rule a [illegible] has been made from which it appears [illegible] that it has never been adjudged [illegible] petitioner was the owner of the money [illegible]. On the contrary it does appear that [illegible] of December, 1884, the petitioner [illegible] the money in court, being $1,039.42, [illegible] by the clerk," and thereupon [illegible] ordered "that there be paid to said [illegible] the petitioner) out of said funds the [illegible] of $[illegible]," but the court declined to [illegible] disposition of the rest of the fund until the plaintiff had notice of the application and could be heard thereon. The amount so ordered to be paid was afterwards received from the registry of the court by the petitioner. The application for the rest of the fund was subsequently heard, the plaintiff in the suit appearing to resist, and upon full consideration it was expressly adjudged by the court that the litigation in the case was not ended, and that "neither by the terms of the decree nor the right and justice of the case was he [petitioner] entitled to the same [the money] until he had earned it by prosecuting said suit to a final decree as to all the defendants therein." The application for the remainder of the money was consequently denied, and the fund was left "in the registry of the court to be disposed of or applied hereafter as the rights of the parties and justice of the case may require." Certainly upon this return the petitioner is not entitled to the writ he asks.

The rule heretofore granted is discharged, with costs.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Ex Parte:

In the Matter of DAYTON S. MORGAN AND C. ASHLEY SMITH, *Petitioners.* [174]

(See S. C., Reporter's ed., 174-176.)

Mandamus—*discretion of inferior courts not controlled by.*

1. A writ of *mandamus* may be used to require an inferior court to decide a matter within its jurisdiction and pending before it for determination, but not to control the decision.

2. The judgment of an inferior court upon a motion to amend its original judgment in a cause cannot be reviewed by *mandamus.*

[No. 10. Orig.]

Argued Mar. 30, 31, 1885. Decided Apr. 6, 1885.

NOTE.—*Mandamus—control of inferior tribunal—discretion—classification.*

Three distinct classes of cases arise: 1. Where the decision by the lower tribunal of the question to do or not to do a certain act in itself involves discretion. 2. Where the method of doing the act alone involves a question of discretion, or, the duty to act being clear, the performance of this act requires the exercise of discretion. 3. Where the act is purely ministerial, involving no question of discretion at any stage.

In the first class of cases a *mandamus* will never be granted. *Ex parte* Morgan, *supra;* and cases cited.

In the second class of cases the writ will issue, to compel action but not to control the method of action or its discretion. For instance, a lower court may, in a proper case, be ordered to render a judgment, but it will be left to its discretion as to what judgment it will render. *Ex parte* Bradstreet, 32 U. S. (7 Pet.), 634; East Boston Ferry Co. v. Boston, 101 Mass., 486; People v. Common Council of Troy, 78 N. Y., 33; People v. Auditors of Elmira, 82 N. Y., 80; Commonwealth v. Henry, 49 Pa. St., 530.

In the third class of cases *mandamus* will, in a proper case, be granted. Board of Liquidation v. McComb, 92 U. S., 531, bk. 23, 623.

For definition of ministerial act in this connection, see Mississippi v. Johnson, 71 U. S. (4 Wall.), 498, bk. 18, 440; approved in Gaines v. Thompson, 74 U. S. (7 Wall.), 347, bk. 18.

For full citation of authorities see M'Cluny v. Silliman, 15 U. S. (2 Wh.), 369, *note.*

As to the use of the writ of injunction in related cases, see Mississippi v. Johnson, 71 U. S. (4 Wall.), 475, XVIII., 437, *note.*

ON petition for a writ of *mandamus*.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **Edward Robey**, for petitioners.

Messrs. **W. H. Calkins**, *A. L. Osborn* and *A. C. Harris*, for respondents, *contra*.

[174]

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an application for a writ of *mandamus* requiring the Circuit Court of the United States for the District of Indiana to amend a judgment entered January 20, 1883, in a cause wherein the relators were plaintiffs and Frederick Eggers defendant, "so as to conform to the complaint in said cause, and to the finding or verdict of the court rendered upon the trial of said cause."

The suit was ejectment to recover the possession of "all of the north part of lot 2, in sec. 36, T. 38, N. R. 10 W. of the second principal meridian, which lies west of the track of the Lake Shore and Michigan Southern Railroad and north of a line parallel with the north line of said lot 2, and 753 feet south therefrom."

The judgment entry, which includes the only finding in the case, is as follows:

"And the court, having heard the evidence and being fully advised, finds for the plaintiffs, and orders and adjudges that they are entitled to and shall have and recover of defendant the possession of so much of said lot two (2) as lies south of the south line of lot number one (1), as indicated by a fence constructed and maintained by the defendant as and on said south line, said fence running from the state line easterly to Lake Michigan, and assessing the damages at $1 and costs taxed at $—, which the plaintiffs shall recover of defendant. All of which is finally ordered, adjudged and decreed."

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After this entry the petitioner moved the court to amend and reform the judgment so that it would "conform to the complaint in said court and to the finding or verdict"; but the court, on full consideration, decided that the finding and judgment were not separate and distinct, and that the meaning was clear. The entry was to be construed as finding and adjudging that the plaintiffs were only entitled to recover the possession of so much of the premises sued for as lies south of the fence indicated. For this reason the motion was denied.

It is an elementary rule that a writ of *mandamus* may be used to require an inferior court to decide a matter within its jurisdiction and pending before it for judicial determination, but not to control the decision. *Ex parte Flippin*, 94 U. S., 350 [bk. 24, L. ed., 195]; *Ex parte R. Co.*, 101 U. S., 720 [bk. 25, L. ed., 875]; *Ex parte Burtis*, 103 U. S., 238 [bk. 26, L. ed., 392]. Here a judgment has been rendered and entered of record by the circuit court in a suit within its jurisdiction. The judgment is the act of the court. It is recorded ordinarily by the clerk as the ministerial officer of the court, but his recording is, in legal effect, the act of the court, and subject to its judicial control. The clerk records the judgments of the court, but does not thereby render the judgments. If there is error in the judgment as rendered, it cannot be corrected by *mandamus*, but resort must be had to a writ of error or an appeal. *Ex parte Loring*, 94 U. S., 418 [bk. 24, L. ed. 165]; *Ex parte Perry*, 102 U. S., 183 [bk. 26, L. ed., 43].

If a clerk in performing the ministerial a of recording a judgment has committed an e ror, the court may on motion at the proper tin correct it, or it may do so in a proper case upo its own suggestion without waiting for the pa ties. Here the plaintiffs, believing that th judgment as recorded did not conform to th finding, moved the court to amend it in th particular. This motion the court entertaine but, being of the opinion that the judgme had been correctly recorded, refused the amen ment which was asked. In this the court acte judicially, and its judgment on the motion ca no more be reviewed by *mandamus* than th which was originally entered in the cause.

The writ is denied with costs.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U.

Cited.—116 U. S., 402.

EAST ALABAMA RAILWAY COMPAN

Plff. in Err.,

v.

JOHN DOE, *ex dem.* DANIEL W. VISSCHE ET AL.

(See S. C. Reporter's ed., 340-355.)

Railroads—sale of right of way void if pu chaser has not the franchise—ejectment—esto pel.

*Various owners of lands in Alabama granted to railroad corporation of that State "and its assign in 1860, a right of way through the lands to mal and run a railroad, the corporation having a fra chise to do so and to take tolls; and it obtained a lil right, as to other land, by statutory proceeding. graded a part of the line. V., a judgment credit of the corporation, in 1867 levied an execution c the right of way, and it was sold to V., and the she iff deeded it to him, and he took possession of t road-bed. In 1870 he contracted with another ra road corporation to complete the grading of t line of road for so much per mile, and, on bei paid, to transfer to it all his title to the franchis right of way and property of the old corporatio He completed the work, and was not paid in fu but gave possession of the road in 1871 to the co poration, and its franchises and road and propert passed in 1880 to another corporation, the defen ant, against whom V. brought an action of ejec ment to recover the road-bed: *Held*,

(1) The right of way could not be sold on exec tion or otherwise to a purchaser who did not ow the franchise.

(2) There was nothing in the contract to est the defendant from disputing the right of V. to r cover in ejectment, on the strength of his title.

(3) V could not recover.

[No. 207.]

Submitted Mar. 20, 1885. Decided Apr. 13, 188

IN ERROR to the Circuit Court of the Uni ed States for the Middle District of Al bama.

The history and facts appear in the opinic of the court.

Messrs. **Edward Patterson** and **Harr C. Semple**, for plaintiff in error.

Messrs. **Samuel P. Rice** and *John Chilton*, for defendants in error.

Mr. Justice **Blatchford** delivered the opi ion of the court:

* Head notes by *Mr. Justice* BLATCHFORD.

In November, 1880, the defendants in error brought an action of ejectment in the Circuit Court of Chambers County, Alabama, against the East Alabama Railway Company, to recover premises described in the complaint as follows: "A certain tract or parcel of land, being the railroad bed of the railroad formerly known and called the East Alabama and Cincinnati Railroad, from Lafayette to the county line of Lee County, together with all the land contiguous to said road-bed, on each side thereof, to the distance of seventy-five feet from the center thereof, said railroad being now known and called as the East Alabama Railway, with the appurtenances situate in the County of Chambers aforesaid." Lafayette is in Chambers County, and Lee County lies south of Chambers. The suit was duly removed by the company into the Circuit Court of the United States for the Middle District of Alabama. It was tried before a jury in December, 1881, on a stipulation that the Company had been in adverse possession of the premises for more than [illegible] years before the bringing of the suit, and had made permanent and valuable improvements by building a railroad thereon; and on the issue of not guilty. The jury found for the defendants "for all the property described in the complaint," and assessed their damages at [illegible], and there was a judgment according. The Company brings a writ of error.

The bill of exceptions sets forth all the evidence in the cause. The following are all the facts which it is needful to state: The Lafayette Railroad Company was incorporated by the Legislature of Alabama February 7, 1848, to construct a railroad from Lafayette to intersect or connect with the Montgomery and West Point Railroad at some suitable point between Chehaw and West Point. By an amendatory Act of April 9, 1854, the Company was authorized to extend its road beyond Lafayette in the direction of the Tennessee River, and to connect the same with any railroad built, or being built, or to be built, so as to connect with some point on the Tennessee River. By an amendatory Act of January [illegible], its name was changed to the Opelika and Oxford Railroad Company, and it was authorized to connect its road with the Alabama and Tennessee River Railroad at or near Oxford, Calhoun County. The companies were successively organized. In 1861 one Richards was president. The Opelika and Oxford Company acquired the right of way through the land of all the proprietors of the soil from a point on the Montgomery and West Point Railroad about three miles northerly from Opelika, Lee County, to Lafayette, by deeds from all the proprietors (save in one case). The deeds, [illegible] in the description of the land through which the road was to pass, were all in the form of the following one:

Mary F. McLemore to Opelika and Oxford R. R. Co.

Alabama, Chambers County:

"This indenture, made this 31st day of August, in the year of our Lord one thousand eight hundred and sixty, between Mary McLemore, of Chambers County, of the one part, and the Opelika and Oxford R. R. Company, of the other part, witnesseth: That the said Mary F. McLemore, for and in consideration of the sum of one dollar to her in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth give, grant, bargain and sell unto the said railroad company and their successors and assigns, the right of way over which to pass at all times by themselves, directors, officers, agents, hirelings and servants, in any manner they may thing proper, and particularly for the purpose of running, erecting and establishing thereon a railroad with requisite number of tracks; and to this end the limit of said right of way shall extend in width fifty feet on each side of the slope stake of the right of way of the said railroad when completed, and to extend in length through the whole tract of land owned and claimed by said Mary F. McLemore, and known as the north half of section 22, township 22, of range 26, situated, lying and being in Chambers County, adjoining lands of James F. Dowdell, Evan G. Richards and Nolan J. Wright, and running in such direction through said tract of land as the said Opelika and Oxford Railroad Company, by their engineers, shall think best suited for the purpose of locating and establishing their works; and connected with the said right of way, the said company shall have the right to cut down and remove all such trees, underwood and growth and timber on each side of said road as would, by falling on or striking the same, injure the rails or other parts of said road, together with all and singular the rights, members and appurtenances to the said strip, tract or parcel of land being, belonging or in anywise appertaining, and more especially the right of way over the same; to have and to hold the same unto the said Opelika and Oxford R.R. Company, their successors and assigns, to their own proper use, benefit and behoof forever, in fee simple; upon condition, and it is expressly understood, that should the said railroad contemplated as aforesaid be not established on and along said strip, parcel or tract of land described in the above and foregoing indenture, then said indenture is to be wholly null and void and of no effect; and the Mary F. McLemore her heirs and assigns, will warrant and defend the title thereof unto the Opelika and Oxford Railroad Company, their successors and assigns, against the claims of all persons whatsoever. In witness whereof the said Mary F. McLemore hath hereunto set her hand and seal the day and year first above written.

"Mary F. McLemore."

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As to the excepted case, which related to a section of land one mile square in Chambers County, through which the road-bed sued for runs, in that county, the Company caused the same character of rights and right of way through that section of land as was conveyed by the deeds referred to to be condemned for its use under statute authority, and the sum assessed was finally paid to the owner. In 1860 the Company employed engineers who laid out and staked off the full right of way conveyed through all of the lands and cut out the width through woods; and it made contracts with contractors for the grading and culverting of a railroad along the right of way, who built for it a great deal of such grading and culverting; and all the work done was done on the right of way

[344]

thus staked out, but no other work was done on it except such culverting and grading, and this was not continuous through the whole line in Chambers County sued for, but there were several intervals where no work of grading and culverting was done; and the Company was in the undisturbed possession of the whole of the right of way.

The Company became embarrassed for want of means during the war, and ceased, before July, 1861, to do any work on the line, leaving it incomplete as to grading and culverting, and no work was done by it afterwards on the line. Richards, as late as 1863, removed, at a small expense to himself individually, some logs which had lodged in one of the culverts, to save the culvert and grading from injury; and he looked over the work from time to time. No meeting of the directors or stockholders was held after July, 1861, and no corporate act was done by either after that date. The Company was without means to prosecute the building of the road any further.

One Lockett and the firm of D. W. & J. G. Visscher were contractors, to whom the Company was indebted for work on the line. Lockett recovered one judgment and the Visschers another against the Company, October 26, 1866, in a court of the State, by service of process on Richards, as president, the former for $14,457.21, and the latter for $12,383.83. An execution was issued on each judgment to the sheriff of Chambers County, November 7, 1866, and levied on that day, according to the return on each writ, on a house and lot, [345] and also on "the right of way to the Opelika and Oxford Railroad, so far as the right of way has been obtained, and all the appurtenances belonging to said Railroad Company, from Lafayette to the edge of Lee County, and also the surveying instruments belonging to said Company." The plaintiff's attorney stopped proceedings on those executions on the 12th of April, 1867. A second execution was issued on each judgment to said sheriff, May 8, 1867, and levied on that day, under the Lockett execution, according to the return thereon, on a house and lot, and also on "the right of way to the Opelika and Oxford Railroad, so far as the right of way has been obtained, to the edge of Lee County, and also all the surveying instruments belonging to said Company"; and under the other execution, according to the return thereon, on the same property, omitting the words "the right of way has been obtained, to." After a sale the sheriff executed the following deed to the purchasers:

"This indenture, made and entered into this 3d day of June, 1867, between R. J. Kellam, sheriff of the County of Chambers, in the State of Alabama, of the one part, and D. W. & J. G. Visscher and A. L. Woodward, of the other part, witnesseth: That whereas on the 26th day of October, 1866, a judgment was duly rendered in the Circuit Court for the County of Chambers, in the State aforesaid, at the fall term of the said Court, for the sum of $12,383 and costs, in favor of Abner M. Lockett, and one in favor of D. W. & J. G. Visscher for $14,457.21, and against the Opelika and Oxford Railroad Company, on which said judgments there was issued by the clerk of the Circuit Court for said county, on the 8th day of May, 1867, certain writs of *fieri facias* in fav of said Abner M. Lockett and D. W. & J. G Visscher and against the said Railroad Com pany, directed to any sheriff of the State of Alabama, whereby such sheriff was directe to levy of the estate, &c., of said Railroad Com pany, and make the said sum of $26,751.0 besides costs, and which said writ was, on the 8 day of May, 1867, placed in the hands of the sai R. J. Kellam, as sheriff of said County of Chambers, for the purpose of its levy and ex cution; and whereas said R. J. Kellam, as she iff as aforesaid, after the said writ had com into his hands and while the same was in fu force, did, on the 8th day of May, 1867, lev the same on the following tract or lot of land as the property of the said Railroad Company to wit: the right of way to Opelika and Oxfor Railroad Company, so far as the right of wa has been obtained, from Lafayette to the lin of Lee County; and all the appurtenance fro Lafayette to the line of Lee County, lying an being in said County of Chambers; and when as the said R. J. Kellam, as sheriff as aforesaid after having duly advertised the said tract o land or railroad-bed for sale in the mode pr scribed by law, did, in accordance with sai advertisement, on the 3d day of June, 1867, a the court house, in the Town of Lafayette proceed to sell the same under and by virtu of said writ of *fieri facias*, and the said D. W & J. G. Visscher and A. L. Woodward, havin bid for the said land or railroad-bed, then an there selling as aforesaid, the sum of $500 and it being the highest and best bid that coul then and there be got for the same, he, the sai sheriff, did therefore sell and cry off th tract of land or railroad-bed, to the said D. W & J. G. Visscher and A. L. Woodward. Now therefore, in consideration of the premises, th said party of the first part, as sheriff of the sai County of Chambers, has and does hereby ba gain and sell, aliene and convey unto said D. W & J. G. Visscher and A. L. Woodward, th said tract of land or railroad-bed, to wit: th right to the Opelika and Oxford Railroad, s far as the right of way has been obtained, fro Lafayette to the edge of Lee County, and a the appurtenances belonging to said road fro Lafayette to the line of Lee County, to hav and to hold the aforesaid premises and land together with all and singular [its] appurte nances thereunto belonging, to the said Opelik and Oxford Railroad Company and to thei heirs and assigns, forever. And said party o the first part, as sheriff as aforesaid, does co enant with the said party of the second pa that he, as sheriff as aforesaid, will warrant th title of said ——— to said party of the secon part so far only as he by virtue of his office authorized to do; but it is expressly understoo that said R. J. Kellam, sheriff, is in no ever to be individually liable for anything herei contained.

"In testimony whereof, the said party of th first part has signed, sealed and delivered th deed on the day it bears date.

"Robert J. Kellam,

"*Sheriff of Chambers County, Alabama.*"

After the sheriff's sale Richards abandoned turned over to the purchasers the line of cu verting or grading as far as he could do s

[illegible] he exercised no further authority over [illegible] and the Opelika and Oxford Railroad Company made no further claim to it. On the 6th of April, 1870, D. W. and J. G. Visscher entered into a written contract with the Eufaula, Opelika, Oxford and Guntersville Railroad Company, which was signed on behalf of that company by one Pennington, as its president, and was recognized and acted on by it. Its name was afterwards changed to the East Alabama and Cincinnati Railroad Company. The two companies were one and the same corporation, chartered by Alabama to build a road from Eufaula to Guntersville via Opelika and Oxford. In the fall, before the contract was entered into, D. W. Visscher was informed by Pennington to see him as to whether Pennington's company could not arrange to [illegible] for its line Visscher's grading and right of way from said junction to Lafayette. Pennington told Visscher he could build by the side of Visscher's line, but would like to [illegible] it; and they agreed that the Visschers should go to work completing the grading, and the Pennington's company would furnish the money to pay for the work as it progressed. The work was begun with the verbal understanding that the written contract should be [illegible], and it went on till that contract was [illegible], and then under the contract till the Visschers completed it to Lafayette, over the [illegible] of way or line described in the deeds [illegible] and the company accepted it as done according to the contract, about May 3, 1871. By the terms of the contract it was agreed that the Visschers should "form, prepare and [illegible] the clearing and grubbing, grading, [illegible], trestlework, cattle-guards, road and [illegible] crossings, tracklaying, including switches, [illegible] and turnouts, three warehouses, three [illegible], with fixtures complete, including the furnishing of materials and all other things requisite and necessary to complete the road ready for the running of trains, except the rolling materials which go into the superstructure of the road," from Opelika, or two miles north thereof, as the Company should [illegible] and designate, for a distance of twenty miles, to a point beyond Lafayette. The contract specified the terms of compensation, and provided that on the completion of the twenty miles and the payment of the amount of the [illegible] D. W. Visscher should transfer to the company "all right and title vested in him to [illegible], right of way or other property belonging to or pertaining to the said road, under the old organization known as the Opelika and Oxford R. R." The Visschers were [illegible] and the full amount due to them for the work done under the contract, and claimed that [illegible] was due to them more than $100,000.

[illegible] a decree of sale made in a suit for the foreclosure of a mortgage made by the East Alabama and Cincinnati Railroad Company, [illegible] Livingston and Richard Irving, Jr., [illegible] and received from the proper officer [illegible] the 28th of April, 1880, a deed of the "entire [illegible] property of, or belonging to, the East Alabama and Cincinnati Railroad Company, [illegible] for railway purposes, and all and singular the entire railroad of said Company, extending from Eufaula, Alabama, to Guntersville, Alabama, being about two hundred and twenty miles in length, at present unfinished, its entire franchises and privileges held and acquired, together with the right of way, road-bed, road, * * * and all its ways and rights of way," etc. The plaintiff in error became a corporation, under the laws of Alabama, on the 28th of May, 1880, and on the 13th of July, 1880, Livingston and Irvin conveyed to it the property so deeded to them by the same description.

At the trial, the plaintiffs offered in evidence transcripts of the proceedings as to the said judgments, executions, levies, sale and sheriff's deed. The defendant objected to each of them "as illegal and irrelevant evidence, and also because they tended to show the sale under execution and conveyance by the sheriff, of an easement alone, not the subject of an ejectment." [349] The court overruled each of the objections and allowed each of the transcripts to be read in evidence, and the defendant excepted separately to each of the rulings.

After the close of the testimony the court charged the jury that if they believed from the evidence that the Company before named entered into the written contract with the Visschers, and under that contract was let into the possession by them of the route described in the deeds from McLemore and others, and failed to perform its part of the contract, and the Visschers did perform it so far as permitted by the Corporation to do so, and the Corporation failed to make the full payments due to the Visschers under the contract, the Corporation and all persons claiming under it were estopped from setting up any title in the premises sued for adverse to the Visschers, and their possession under the contract was not adverse.

The court also charged the jury that the property conveyed by the deed of the sheriff was the subject of levy and sale under execution, and that the objection made by the defendant that it was only an easement and not the subject of a levy and sale under execution, was not well founded.

To each of these charges the defendant excepted. There were exceptions to other instructions, and to refusals to charge in accordance with requests made by the defendant; but the questions which we regard as decisive of the case are raised by those already mentioned.

The right which the Opelika and Oxford Company obtained under the deeds from McLemore and others (and the right obtained by condemnation is set forth as of the same character) was described in the deeds as "the right of way over which to pass at all times, by themselves, directors, officers, agents, hirelings and servants, in any manner they may think proper, and particularly for the purpose of running, erecting and establishing thereon a railroad with requisite number of tracks"; and it was provided that "to this end the limit of said right of way shall extend in width fifty feet on each side of the slope stake of the right of way of the said railroad when completed, and [350] to extend in length through the whole tract of land owned and claimed" by the grantor, describing it, "and running in such direction through said tract of land" as the Company, by its engineers, should think best suited for the purpose of locating and establishing its works. The

grantor conveyed this to the Company and its successors and assigns. The deed also provided that, "connected with the said right of way, the said Company shall have the right to cut down and remove all such trees, underwood and growth and timber on each side of said road as would, by falling on or striking the same, injure the rails or other parts of said road, together with all and singular the rights, members and appurtenances to the said strip, tract or parcel of land being, belonging or in any wise appertaining, and more especially the right of way over the same." The *habendum* was to have and to hold the same to the Company its successors and assigns, to its "own proper use, benefit and behoof forever, in fee simple." Then followed the further provision that should the contemplated railroad not be located and established on and along the strip, parcel or tract of land described in the deed, the deed should be wholly null and void and of no effect.

The right granted was merely a right of way for a railroad. It was granted to an existing corporation which had a franchise. The grant to the "assigns" of the Corporation cannot be construed as extending to any assigns except one who should be the assignee of its franchise to establish and run a railroad. Nor did the mention of rights, members and appurtenances belonging and appertaining to the strip of land, or the use of the words "forever, in fee simple," enlarge what was otherwise the limited character of the grant. No fee in the land was conveyed, nor any estate which was capable of being sold on execution on a judgment at law, or separate from the franchise to make and own and run a railroad. The Corporation could not have made a voluntary conveyance of the right of way, severed from its franchise. What it acquired is merely an easement in the land, to enable it to discharge its function of making and maintaining a public highway, the fee of the soil remaining in the grantor. By the terms [351] of the charter of the Lafayette Branch Company it was given the power to purchase, hold, lease, sell and convey real, personal and mixed property, so far as should be necessary for the purposes mentioned in the Act, namely: to construct and operate the specific railroad authorized therein, with power to "lay and collect toll from all persons, property, merchandise or other commodities transported thereon." By the terms of its charter, therefore, in connection with the terms of the deeds of the right of way, that right was indissolubly linked to the franchise, and to the purpose of the existence of the Corporation, and to its public functions, so long as they should exist. It would violate not only the expressed intention of the grantors in the deeds, but the manifest purpose of the Legislature of Alabama, to permit a private person to seize and appropriate the right of way by the purchase of anything at a judicial sale apart from the franchise on which the right of way was dependent. The sheriff's deed purported to convey, in words, "the said tract of land or railroad-bed, to wit: the right of the Opelika and Oxford Railroad, so far as the right of way has been obtained, from Lafayette to the edge of Lee County, and all the appurtenances belonging to said road from Lafayette to the line of Lee County." If the deed undertook to convey any land or soil or road-bed, it conveyed with it the right of way. The deed in reciting the levy, states that it was made "o the following tract or lot of land, as the prop erty of the said Railroad Company, to wit: th right of way," etc., and states that that wa what was sold. It was not lawful for the pu chasers to have a deed of the right of way, an if they obtained a deed of anything the righ of way was included, or else they received nc thing beyond, perhaps, a right to carry awa from the land what the Company had put u on it.

The bill of exceptions states that a like righ of way through the lands of the proprietors o the soil was obtained by deed, in Lee County from a point about two miles north of Opelik to the south line of Chambers County; and th under executions issued to Lee County on th same judgments, there were levies made on th right of way of the Company so far as the sam had been obtained by it up the line of Chambe County, and a sale by the sheriff of Lee Count of what was so levied on, to the same perso who bought at the sale in Chambers County But at the sale in Lee County a different pu chaser might have bought the right of wa and there would then have been a division the ownership of the line of the road create as a unit and intended to remain such, resul ing in a different control, with no franchise t collect toll. No such thing could be done.

The policy of the State of Alabama on th subject is indicated by the provisions of h Constitution of 1865 (Art. 1, § 25), of 186 (Art. 1, § 25) and of 1875 (Art. 1, § 24 "That private property shall not be taken applied for public use unless just compens tion be made therefor; nor shall private pro erty be taken for private use or for the use corporations other than municipal witho the consent of the owner; *Provided, howeve* That laws may be made securing to persons corporations the right of way over the lands other persons or corporations; * * * but ju compensation shall in such cases be first made the owner." In *R. R. Co.* v. *Burkett*, 42 Ala 83, it was held that under this provision a ra road company acquired no absolute title to lan in fee simple, but only a right to use for i purposes. Nor is a right of way such as ma be thus secured, or such as was granted t deed in the present case, within the meaning the provision of the Code of Alabama, that ex cutions may be levied on real property which the defendant "has a vested legal int est, in possession, reversion or remainde whether he has the entire estate or is entitl to it in common with others." Code of 185 § 2455; Code of 1867, § 2871; Code of 1876, 3209.

We are not referred to any decision of the S preme Court of Alabama made before the righ involved in this suit arose or before this su was brought, determining the questions he involved. Two unreported cases are cited the defendants in error—*Tennessee & Coosa R. Co.* v. *East Ala. R. Co.*, decided at Dece ber Term, 1883; and *Hooper* v. *Columbus Western Railway Co.*, decided at Decemb Term, 1884. To these cases, if they were point, the doctrine always held by this cou and so emphatically repeated in *Burgess Seligman*, 107 U. S. 20 [bk. 27, L. ed. 35

would be applicable, namely: that the courts of the United States, in the administration of state laws in cases between citizens of different States, "have an independent jurisdiction coordinate with, and not subordinate to, that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws"; and that when contracts and transactions have been entered into and rights have accrued thereon, in the absence of any authoritative decision by the state courts, the courts of the United States "properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

But the cases cited are not in point. In the first case a railroad corporation having a franchise and claiming the legal title and ownership of rights of way and of a line of railroad which was being operated by the defendant, another railroad corporation, brought ejectment to recover the property. The defendant corporation had a junior franchise and claimed to have purchased the entire property sued for, under a title emanating from the plaintiff. It was held that the plaintiff could recover. In the second case an individual having a legal title to strip the land through which a railroad company had been permitted by him to construct his road was held to be entitled to recover the land in ejectment, from the company, which had failed to pay him for the right of way.

This court decided in *Gue* v. *Tidewater Canal Co.*, 24 How., 257 [65 U. S., bk. 16, L. ed. 635], that a corporate franchise to take tolls on a canal could not be seized and sold under a fieri facias unless authorized by a statute of the State which granted the Act of incorporation and that neither the lands nor the works essential to the enjoyment of the franchise could be separated from it and sold under such a writ so as to destroy or impair the value of the franchise. This decision was put on the ground that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under the execution on a judgment at law against the corporation because it was an incorporeal hereditament, and, upon the settled principles of the common law, could not be seized on a *fieri facias;* and was made in a case where the corporation owned in fee the real estate, toll-houses, canal locks and wharf canal, all of which were necessary for the uses and working of the canal. But, in the view we have taken, as before stated, of the facts of this case, it is not necessary to discuss the general question as to the right to levy an execution at law on property owned by a railroad company in fee.

It is contended for the plaintiffs that the defendant is estopped from denying that they were seized in fee of the property sued for, on the ground that Richards, after the sheriff's sale, abandoned or turned over to the Visschers the line of culverting and grading, as far as he could do so—that is, he exercised no further authority over it, and the Opelika and Oxford Company made no further claim to it; that the Visschers then made the written contract with the new Railroad Company to construct the superstructure of the road, except as to the iron materials, for the twenty miles from, in, or two miles north of Opelika to a point beyond Lafayette, for a specified compensation; and that the contract provided that, on the completion of the twenty miles and the payment of the amount agreed, Visscher should transfer to the company "all right and title vested in him to all franchises, right of way or other property belonging to or pertaining to the said road under the old organization known as the Opelika and Oxford R. R." The bill of exceptions states that the defendant offered evidence tending to show that the East Alabama and Cincinnati Railroad Company was in possession of the property sued for from the time the Visschers ceased their work on it, as well as of the remainder of its line of railroad, till assignees in bankruptcy took possession of it, from whom it passed to purchasers of them, and then a receiver in the foreclosure suit took possession of it and held it till it was sold to the persons who conveyed it to the defendant. The Visschers appear not to have been in possession from the time they ceased work. They yielded possession, but not under any provision in the contract. As to the new work done by the Visschers they became merely creditors, out of possession, with such rights as the law gave them, but certainly with no right to eject the Company or its successors or grantees. They were to construct twenty miles of road for $14,750 per mile. When all was done and paid for they were to transfer what right they had to the road under the Opelika and Oxford organization. But they yielded up possession of that with the new work. As to what they obtained by the sheriff's sale and deed they acquired nothing thereby formerly belonging to the Opelika and Oxford Company, under the name of right of way, granted to or acquired by that company, which was capable of being conveyed by them; and as to anything else, their right did not lie in ejectment. Whether they were vendors or creditors in respect to what they so agreed to transfer, it is not necessary or proper to determine in this suit. There was nothing in what occurred between the parties or in the contract or in the transactions under it, which estopped the defendant from disposing the right of the plaintiffs to recover in ejectment on the strength of their title. [355]

It follows, from these views, that the Circuit Court erred in its first and third charges to the jury; and, as this conclusion goes to show that the plaintiffs had no title on which they could recover in ejectment, it becomes unnecessary to consider any of the other questions raised by the defendant. *The judgment is reversed, and the case is remanded to the Circuit Court with a direction to grant a new trial.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[247]

BARTLETT DOE, *Appt.*,

v.

HENRY C. HYDE, Assignee in Bankruptcy of the CITY BANK OF SAVINGS, LOAN AND DISCOUNT.

(See S. C., Reporter's ed., 247-252.)

Bankruptcy—suit by creditor against assignee to recover proceeds of a security—two years' limitation.

* D., a creditor of a bankrupt, holding two securities therefor after being cited in a proceeding commenced against him by the assignee in bankruptcy, by petition, to obtain the delivery of the two securities, as being unlawfully in his possession, delivered up one of them to the assignee, in July, 1871. In November, 1872, the assignee sued D. to recover the other security, and in 1877 it was decided in that suit that D. was entitled to hold it. There being a deficiency on the debt, and the assignee having collected the security delivered to him, D., in 1879, sued the assignee to have its proceeds applied on the debt. *Held*, that the right of action accrued to D. in July, 1871, and was barred by the two years' limitation prescribed in section 2 of the bankruptcy Act of March 2, 1867 (14 Stat., 518), and section 5,057 of the Revised Statutes.

[248]

[No. 218.]

Submitted Mar. 31, 1885. Decided Apr. 13, 1885.

APPEAL from the Circuit Court of the United States for the District of California.

The history and facts of the case appear in the opinion of the court.

Mr. **W. W. Cope**, for appellant.

No counsel appeared for appellee.

[248] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is an appeal by Bartlett Doe, the plaintiff in a suit in equity brought in the District Court of the United States for the District of California, from a decree of the Circuit Court for that District affirming the decree of the District Court, dismissing the bill on demurrer. The defendant is Henry C. Hyde, assignee in bankruptcy of the City Bank of Savings, Loan and Discount, a California corporation, which was adjudicated a bankrupt by the District Court in December, 1870. The case made by the bill is this: In December, 1869, Doe lent to the bank $10,000, on its promissory note at two years, secured by the assignment of six promissory notes and six accompanying mortgages of real estate, made by other parties, amounting to $20,550. By an instrument executed by the parties at the time, it was agreed that the bank should be at liberty to substitute other securities of equal value with any of the assigned notes and mortgages, in their place, at any time before the maturing of the $10,000 note. In April, 1870, four of the six collateral notes and mortgages, amounting to $10,550, were, by consent, given up, and three other promissory notes and three like mortgages, made by other parties, amounting to $3,900, were substituted. In February, 1871, the assignee in bankruptcy presented to the District Court a petition alleging that Doe had unlawfully possessed himself of the five notes and five mortgages which he then held, amounting to $13,900, and praying that he be cited to show cause why he should not be ordered to deliver them up to the assignee. After Doe had bee so cited, the assignee demanded from him th delivery of the three notes and the three mor gages so substituted in April, 1870, and Do "believing him to be entitled to the custod thereof, delivered the same to him." Befor the assignee collected any moneys on them Do appeared to the petition, and in July, 1871, file an answer setting forth the indebtedness of th bank to him and how it was secured and th facts attending the substitution of securiti before mentioned, and averring that he was e titled to the possession of those which he ha so delivered to the assignee, and to the money collected or which might be collected on them In November, 1872, the assignee filed a bill i equity, in the District Court, against Doe, t obtain a decree for the delivery up of the tw remaining notes and mortgages, amounting $10,000, on the ground that the bank had n right to transfer them to Doe. Doe answere the bill, setting forth the transactions betwee the bank and himself respecting the loan an the securities transferred for securing it, an particularly the facts attending such substitu tion of securities; and averring that the assign had collected the money due on the securiti so delivered to him, and that he, Doe, was e titled to have them applied on the debt of th bank to him. In 1876 an interlocutory decr was made in that suit, to the effect that the a signee was entitled only to the surplus whic should remain after applying the two notes an the two mortgages to the payment of th $10,000 note, of December, 1869, and that an a counting should be had as to the amounts se erally due on that note and on those securitie The accounting was had, and on January 2 1877, the District Court decreed that on Jan ary 1, 1877, there was a balance due to Doe $7,096.82, after applying the securities retain by him. The assignee appealed to the Circu Court, but the appeal was dismissed for wa of prosecution, before July 2, 1877. Th amount of the deficiency remains due to Do The assignee collected the three notes and thr mortgages which Doe delivered to him, colle ing on one, June 19, 1872, $1,301.07; on a other, May 19, 1875, $500; and on the thir June 19, 1872, $293.80, the assignee giving th debtor an acquittance of the remainder. Aft the decree was rendered in the equity suit b gun in November, 1872, and after the appe therefrom was dismissed, and after Doe had s certained it would be necessary to resort to th three notes and three mortgages he had deli ered to the assignee, for the payment of th amount due to him from the bank, he deman ed from the assignee the delivery of those s curities or the payment of the moneys therel secured, which the assignee refused.

The bill in the present suit was filed Febr ary 25, 1879. Its prayer is for a decree th Doe is the beneficial owner of the securiti which he delivered to the assignee, and of th moneys represented by them, and is entitled have them applied on the indebtedness of th bank to him, and that the assignee pay over th proceeds, with interest, to Doe. The demurr sets forth various causes of demurrer, an among them, that eight years had elapsed, b fore the bill was filed, after Doe delivered the assignee the securities in question, and th

* Head note by *Mr. Justice* BLATCHFORD.

[illegible] right of action to recover them or their proceeds was barred by § 2 of the Bankruptcy Act of March 2, 1867 (14 Stat. at L., 518), and by § [illegible] of the Revised Statutes of the United States. The limitation referred to is that no suit at law or in equity shall in any case be maintainable by or against an assignee in bankruptcy, or by or against any person claiming a adverse interest touching any property or rights of property, of the bankrupt, transferable to or vested in the assignee, in any court whatsoever, unless the same be brought within two years from the time the cause of action accrued, for or against the assignee.

The contention of the appellant is that the necessity for resorting to the securities which were delivered to the assignee was not determined until the decree of the District Court, assuming the amount of the deficiency, became final by the dismissal of the appeal to the Circuit Court, and that the cause of action did not accrue until that time, which was within two years before the filing of this bill. It does not definitely appear when the appeal was taken or when it was dismissed, except that those events occurred between January 29, 1877, and [illegible] 1877. But this is unimportant, because it is quite clear, on the averments of the bill, that the suit was barred.

In the proceeding instituted in the District Court by the assignee, in February, 1871, the petition alleged that Doe had unlawfully possessed himself of all the collateral notes and mortgages, five of each, which he then held, and prayed for an order that he deliver all of them up to the assignee. The bill in this suit says that after Doe had been cited to appear to the petition, the assignee applied to him for, and demanded the delivery to him, as assignee, of the three notes and three mortgages in question, and that Doe, "believing him to be entitled to the custody thereof, delivered the same to him." As the bill alleges that the answer of Doe to the petition was filed before the assignee received any of the moneys on those securities, it is inferred that that answer was filed after the securities were delivered by Doe. Nothing further is alleged to have been done on the petition. The three notes and the three mortgages selected from the whole number, though the petition covered all, having been delivered to the assignee, he allowed the matter to rest from July, 1871, till November, 1872, when he brought the equity suit in respect only of the three notes and two mortgages which had not been delivered to him. The averment of the bill in the suit is that, on a demand by the assignee on Doe for the delivery to him of the five notes and three mortgages, Doe delivered them to him. It is not averred that the delivery was accompanied by any expressed qualification or condition, or any agreement or arrangement or reservation made between the parties. The delivery followed the claim which the assignee had made in the petition, that the securities were unlawfully in the possession of Doe, and was made after Doe had been cited to appear to the petition. The statement in the bill that Doe delivering the assignee to be entitled to the custody of the securities, delivered them to him, is only the statement of what Doe now remembers as to the uncommunicated motives which induced him to deliver the securities. The assignee obtained the securities directly from Doe, under an assertion of title; and, if Doe desired to make available the claim set up in regard to them in July, 1871, in his answer to the petition, it became then his duty to procure a judicial decision of the matter, the assignee having accomplished the object of his proceeding. But the litigation dropped, and was not renewed, respecting those securities. The allegation of Doe, in his answer to the bill filed by the assignee in November, 1872, in regard to the securities retained by Doe, that Doe was entitled to have the assignee apply on the debt to Doe the securities which Doe had delivered to the assignee, amounted to nothing, [252] because such a claim could not be litigated in that suit. It was not a set-off or counterclaim to any relief sought by the assignee in that suit. The cause of action in regard to the securities delivered to the assignee by Doe accrued to Doe at the time of such delivery. It did not depend upon or arise from the existence or ascertainment of any deficiency of the other securities to meet the debt. If Doe was entitled at all to have the securities which were delivered to the assignee applied to his debt, he was, on the showing of the bill, as much entitled to have them so applied as to have the other securities so applied, and as much entitled to their possession for that purpose as to the possession of the other securities. His right of action to that effect accrued, therefore, when the assignee came into the possession of the securities, on their delivery to him by Doe.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN V. WEAVER ET AL., *Appts.*, [244]
v.
SPENCER FIELD ET AL.

(See S. C., Reporter's ed., 244-247.)

Mortgages—foreclosure—plaintiff not the owner of notes.

*In a suit to foreclose a mortgage on land in Louisiana, given to secure the payment of negotiable promissory notes to their holder, it was held, on the facts, that the plaintiff was never the owner of the notes as against the mortgagor or those holding the land under him by deeds in which they assumed the payment of the notes and mortgage.

[No. 936.]

Submitted Jan. 6, 1885. Decided Apr. 13, 1885.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The history and facts of the case appear in the opinion of the court.

Messrs. **J. D. Rouse** and **Wm. Grant**, for appellants.

Mr. **R. H. Marr**, for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court: [245]

This is a suit in equity, brought by Daniel Weaver in April, 1881, in the Circuit Court of the United States for the Eastern District of Louisiana, against Spencer Field, Sr., Spencer Field, Jr., and Frederick T. Field. The bill

*Head note by *Mr. Justice* BLATCHFORD.

prays that the defendants be decreed *in solido* to pay to the plaintiff the amount of three promissory notes, made by Spencer Field, Sr., to his own order, and indorsed by him, dated November 1, 1873, one for $2,000 at one year, one for $1,500 at two years, and one for $1,500 at three years, with interest at the rate of 8 per cent per annum from maturity; and that certain land covered by a mortgage, of even date with the notes, given by Field, Sr., to one Williams, to secure the payment of the notes to their holder, be sold, and the notes be paid out of the proceeds. The other two Fields are made parties as having successively become grantees of the land, and assumed, each in the deed to himself, which he executed, the payment of the notes and the mortgage. Weaver having died in July, 1881, the suit was revived in the names of the appellants, as his heirs, in February, 1882.

The bill avers that Weaver is the holder and owner of the notes. The answer of the three defendants, filed in June, 1882, avers that Weaver never was the owner of the notes, and never the holder of them for value or in good faith; that the notes and mortgage were made by Field, Sr., for the sole purpose of enabling him to raise money for his own purposes by the sale, or discount, or other use, of the notes; that the mortgage was made in favor of Williams or any future holder, in order to facilitate the use of the notes; that Field, Sr., was not indebted to Williams; that Williams gave no consideration for the notes, and was merely the nominal mortgagee, without interest; that the notes were never the property of Williams, nor did he ever have them in his possession with the knowledge or consent of Field, Sr.; that from the date of the notes, they remained in the possession of Field, Sr., until he used them and delivered them to one Folger, as security for a loan; that when such loan was paid, Folger returned the notes to Field, Sr., who retained them in his possession until on or about June 8, 1874, when he deposited them with Weaver, to be used, if practicable, to raise money for the uses and purposes of Field, Sr.; that after the notes had so been deposited, and while they were in the possession and custody of Weaver, Weaver caused Williams to pledge the notes to him, Weaver, as security for the note of Williams for some $2,000; that Williams had no power to make such pledge, and the same was a mere nullity for the reason that Williams did not have the notes in his possession, and they did not belong to him, at the time the pledge was made; that the notes at that time belonged to Field, Sr., and were in the custody and possession of Weaver, to whom the facts with respect to the ownership and the possession of the notes were necessarily known at the time the pledge was made; that Field, Sr., did not, at any time after the notes were so returned to him by Folger, negotiate them or issue or deliver them to any person for value; that by reason of the premises, the notes and mortgage were extinguished and became of no effect; and that Weaver never had, nor have any persons deriving title from him, any right or cause of action against the defendants, or any one of them, on the notes or the mortgage.

[246]

There was a replication, and proofs were taken, Field, Sr., and Williams being witnesses for the defendants. The bill was dismissed l a decree which states that the court consider that, by the undisputed evidence of Field, Sr and Williams, and the circumstances of t case, it was shown that the notes in suit, aft being issued and delivered to Folger, were tak up by and came into the possession and ow ership of the maker, and were thus, under t laws of Louisiana, extinguished by confusio that Weaver had notice of all this; and that, the extinguishment of the notes, the mortga fell.

Without reference to the ground stated the Circuit Court as that on which it dismiss the bill, we are of opinion that the dismissal w proper. The matters of fact averred in the a swer, as above set forth, are established by t evidence. It is shown that Weaver never quired any title to the notes as owner or holder of them as security for any indebtedn from Field, Sr., to him; and that he receiv them from Field, Sr., as agent, to raise or vance money on, for or to Field, Sr., and failed do so, and retained them tortiously and witho the assent of Field, Sr. When Weaver first, February, 1878, took legal proceedings to force the mortgage, Field, Sr., in the petit in the suit he brought against Weaver in Mar 1878, more than three years before Weaver di to restrain Weaver's proceedings, denied t Weaver held or owned the notes, and alleg in substance, the same facts set up in the swer in the present suit. We have carefu considered the argument on the facts made the part of the appellants, but do not deem extended opinion upon them necessary. T property in the hands of the grantees bound only to the extent it was bound in hands of the mortgagor, and only to resp to a lawful holder of the notes.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U

FRANCES DODGE ET AL., *Appts.*,

v.

THOMAS KNOWLES.

(See S. C., Reporter's ed., 430-436.)

Husband and wife—what sufficient to bind a rate estate of wife for provisions.

*Neither the liability for provisions supplied dwelling-house where a husband and wife and t children are living together, nor a promissory

NOTE.—*Married women—separate property how charged.*

To create a charge against the separate prop of a married woman it is not sufficient that cre given on the faith of it. The wife must cont with relation to it. Manhattan B. & M. Co Thompson, 58 N. Y., 80; Hudson v. Davis, 43 256; West v. Laraway, 28 Mich., 464.

That repairs were made upon a married wom house with her consent, upon her husband's quest, is not necessarily sufficient to charge her her promise to pay may be inferred by the from the facts. Bickford v. Dane, 58 N. H., 18

Compare also Morse v. Mason, 108 Mass., Krouskop v. Shontz, 51 Wis., 204; Lovell v. iams, 125 Mass., 439; Speck v. Gurnee, 25 Hun Allen v. Graham, 12 Phila., 176; Lee v. Winsto Ala., 403; Sargeant v. French, 54 Vt., 284.

*Head note by *Mr. Justice* GRAY.

given by the husband, describing himself as trustee for the wife, in payment for such supplies, can be recovered in equity upon the wife's separate estate without clear proof that she contracted the debt as her own behalf or intended to bind her separate estate for its payment.

[No. 156.]

Submitted Jan. 9, 1885. Ordered for reargument Jan. 17, 1885. Resubmitted Mar. 2, 1885. Decided Apr. 13, 1885.

APPEAL from the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court. See also the opinion of the court on motion to set aside this judgment and dismiss appeal, *post* 296.

Mr. J. Holdsworth Gordon, for appellant.

No counsel appeared for appellee.

Mr. Justice Gray delivered the opinion of the court.

This is an appeal by the children and heirs at law of Frances I. Dodge, a married woman, from a decree ordering her real estate to be sold for the payment of debts alleged to have been due from her to the appellee, upon a bill filed by him in behalf of himself and other creditors who might come in, against the trustee in his own right and as trustee and executor of the wife, and against her children and other persons interested in the real estate.

The following facts were undisputed: By an antenuptial settlement executed on January 2, 1867, Mrs. Dodge (then Frances I. Chapman) conveyed all her real estate to Mr. Dodge in trust to hold the same for her sole and separate use and benefit during her life, and so that the same and the rents and profits thereof should not be liable for his debts, "or in any way subject to his control or contracts, except so far as is consistent with the provisions of the contract"; and to permit her, by herself or her attorney appointed by writing under her hand, to collect and receive the rents and profits from time to time accruing, and to dispose of the same as she might see fit for her own separate use and benefit; and if she should, by writing under her own hand and seal and attested by two witnesses, direct the leasing or absolute sale of the real estate or any part thereof, then the trustee should lease or sell and convey the same accordingly, and collect the proceeds of any sale and invest them in his name as her trustee in such manner as she might approve and require, "and hold the said investments, when made, for the same uses, trusts and purposes, and with the like power and authority and subject to the like limitations as aforementioned declared of and concerning the said trust subject"; and it was provided that the wife, notwithstanding her coverture, might by will devise and dispose of the estate or any part thereof as she might see fit, and the trustee should hold and dispose of the same accordingly, and further provisions were made for the disposition of the estate in case she should make no will.

In January 26, 1876, the wife died, leaving two children, and a will by which, by virtue of the power of appointment reserved to her in the marriage settlement, she devised all her real estate to her husband in trust for the use and benefit of two of her children, and appointed him executor, and made no provision for the payment of debts.

The plaintiff was a retail grocer, and at different times from 1870 to 1875 delivered groceries at the dwelling-house where the husband and wife and their children resided together, and received from the husband, in payment therefor or in renewal of other similar notes, promissory notes signed by him in this form: "F. Dodge, trustee for Fannie I. Dodge," payable to the plaintiff or order. At the time of the wife's death the plaintiff held four such notes payable at various periods not more than four months after date, for sums amounting in all to $2,171.61, and interest, and had delivered groceries to the amount of $120.10 for which no note had been given.

The personal property left by Mrs. Dodge was exhausted by a distribution made by her executor among her creditors, under a decree of the probate court by which the plaintiff received a dividend of $117 upon his claim.

It was further alleged in the bill, and denied in the answer of the children, that at the time of the giving of the four notes, and for several years before, Mrs. Dodge was indebted to the plaintiff in a large sum of money for groceries furnished to her on the credit of her sole and separate estate, for the maintenance of herself and her children and her husband, he being insolvent and entirely without property; and that she caused him for her to make and deliver the notes to the plaintiff; "all which said indebtedness said Frances I. Dodge declared was chargeable to her sole and separate estate, upon the faith of which it was incurred, it having been represented to the plaintiff that her intention to fully secure the same by a proper conveyance in trust had been from time before her death prevented by her physical condition;" and that at the time of her death there was also due to plaintiff the sum of $120.10 on open account for groceries furnished as aforesaid.

The material parts of the testimony introduced by the plaintiff were as follows:

The plaintiff testified: "The groceries were furnished to Mrs. Fannie I. Dodge. They were furnished to the credit of Mrs. Dodge. The four notes were received in part renewal of other notes and a running grocery account. Mrs. Dodge is also indebted to me in the sum of $120.10 for groceries furnished upon her faith and credit. These groceries were delivered at her dwelling-house. They were ordered by Mr. Dodge and the servants, from time to time. Occasionally Mrs. Dodge was in the store and ordered some. These articles were furnished upon the credit of Mrs. Dodge because I expected Mrs. Dodge to pay me for them. I did not expect Mr. Dodge to pay for them because Mrs. Dodge was looked upon as being worth means, and Mr. Dodge not. Mr. Dodge never offered to pay me this account or any portion of it, or to give his own note for any portion of it. He has handed me money which has been placed to the credit of the account. He has repeatedly told me that Mrs. Dodge had plenty of property to pay her debts, and would. He promised me security from Mrs. Dodge upon her real estate for this indebtedness. I did not get it owing to Mrs. [433]

Dodge's death. I did not get a promise from anybody else that I should have real estate security. Mrs. Dodge never personally promised to give me real estate security. I did not see her during the latter part of the transaction." The plaintiff put in evidence a letter written to him on January 10, 1876, by Mr. Dodge, saying: "My wife is dangerously ill, and has been ever since I saw you. Of course I can do nothing yet as to the security promised you. As long as Mrs. Dodge lives, it requires her signature; if she dies, I am still trustee for her heirs, and can then execute a deed to you as such trustee."

The husband testified that he was a clerk in an insurance office, and further testified: "The notes were signed 'F. Dodge, trustee for Fannie I. Dodge,' because I had no property. I had no property to give a note upon; I was bankrupt. They were to be chargeable to her. They would not have been signed by me as trustee unless it was for her and upon her responsibility. I never accompanied the delivery of those notes with the declaration that they were intended to bind her real estate—not that I can remember. These notes were given with the knowledge of my wife, under her general authority. The amounts do not represent any [434] indebtedness contracted by me. The articles furnished by Mr. Knowles were to eat. The family consumed them—my wife's family. Her children and servants comprised that family. These articles were purchased by her, and on her credit. She made the exclusive arrangements for their purchase through me, as trustee. I was an inmate of the family during this time; my salary furnished the marketing, and I gave everything I had to the family. I could not support the whole family. She furnished medicines, wood and coal. I told Mr. Knowles verbally that Mrs. Dodge was ill with paralysis; that she could not be spoken to on business; that when she got well I would get her to give him real estate security if I could. I afterwards wrote him the letter of January 10, 1876. The promise given by me was in connection with the notes held by Mr. Knowles. By signing a note I could not make it binding on real estate. These notes were not intended by me to be binding upon her real estate any more than suit at law would make them so. I only meant that she had real estate enough to secure any debt she was making."

At the hearing upon bill, answers, a general replication and evidence, the Supreme Court of the District of Columbia at special term entered a decree dismissing the bill. Upon appeal to the general term that decree was reversed, and it was adjudged that the plaintiff's claim, as stated in the bill, be a lien upon the real estate included in the marriage settlement. 1 Mackey, 66. The children appealed to this court.

This being an appeal in equity, the facts as well as the law are to be determined by this court. The opinion of the court below and the brief of the appellant deal principally with questions of the manner in which the wife could charge her separate estate, and of the effect of her exercise of the power of appointment as making that estate assets for the payment of her debts. But it is unnecessary to consider either of those questions, because we do not find in the record any satisfactory evidence that the debts sought to be enforced were the wife's debts, or that she intended t charge them upon her separate estate.

The plaintiff's claims are for groceries supplie to a household in which the husband and wi and their children were living together; an upon promissory notes given by the husban describing himself as trustee for the wife, i payment for groceries so supplied. The obl gation to pay for the supplies of the family ordinarily a debt of the husband. Promissor notes given by the husband, though descril ing himself as trustee for the wife, bind hi personally, and do not bind her estate unle he is clearly proved to have had authority give them in her behalf. The terms of th marriage settlement did not authorize the hu band to contract any debts on the wife's a count. The evidence introduced by the plain iff consisted of the testimony of himself and the husband. The plaintiff's testimony wa rather to his own motives and reasons fo charging the goods to the wife, than to any co tract by her; and the husband's testimony wa more to legal conclusions than to specific fact

While the plaintiff testified in general term that the goods were furnished to the wife, an upon her faith and credit, and gave, as his re son for furnishing them upon her credit, th he expected her to pay for them, and did n expect the husband to do so because she wa looked upon as worth means and he was no and stated that the husband promised him s curity from the wife upon her real estate; y the only specific facts to which he testifie bearing upon the question who was his debto were that the groceries were delivered at th dwelling house; that they were ordered by th husband and the servants, and occasionally b the wife; and that the husband had handed hi money which had been placed to the credit the account. He did not testify to any e press contract by the wife, and he admitted th she never promised to give him security on h real estate.

The testimony of the husband was hard more direct. He testified, indeed, that the goo were purchased by the wife and on her cred and that she made the exclusive arrangemen for their purchase through him as trustee; th the notes were to be chargeable to her, an would not have been signed by him as trust unless it was for her and upon her responsibi ty; and that they "were given with her know edge, under her general authority." But he d not define or indicate the nature or extent the general authority to which he referred; did not testify that she ever promised to p for the goods or expressly authorized him promise that she would pay for them; and did testify that he never, so far as he cou remember, accompanied the delivery of th notes with a declaration that they were inten ed to bind her real estate.

Such testimony is wholly insufficient to wa rant a court of equity in decreeing that deb which are *prima facie* the debts of the husban should be considered as debts of the wife, an made a lien upon her separate estate.

Decree reversed and case remanded, with dire tions to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.

Cited—116 U. S., 144.

NORMAN H. POLLOCK, *Appt.*,

v.

BRIDGEPORT STEAMBOAT COMPANY, Claimant of the Steamboat LAURA, etc.

(See S. C., "The Laura," Reporter's ed., 411-417.)

Remission, by Secretary of the Treasury, of penalties incurred by a steam vessel—when a bar is set up by informer—practice of granting remissions, too firmly established to be questioned.

1. A remission by the Secretary of the Treasury, under section 5294 of the Revised Statutes, of penalties incurred by a steam vessel for taking on board an unlawful number of passengers, where the remission is applied for before a suit *in rem* brought for the penalties against the vessel, by an informer, is tried, is effectual to destroy all liability in the suit.

2. The practice of granting remissions of pecuniary penalties and forfeitures, by officers other than the President, sanctioned by statute and acquiescence for nearly a century, as a valid exercise of authority and no invasion of the power of pardon granted by the Constitution to the President, is too long established to be questioned.

[No. 191.]

Argued Jan. 30, 1885. Decided Apr. 13, 1885.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the District Court, by the appellant, to recover certain penalties amounting to $5,661. The penalties in question having been remitted by the Secretary of the Treasury, the court entered a decree dismissing the libel. This decree having been affirmed, on appeal, by the court below, the libelant appealed to this court.

The case is further stated by the court.

Mr. **Henry G. Atwater** and *Albert A. Ames*, for appellant.

Mr. **Dennis McMahon**, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

The statutes regulating the transportation of passengers by steam vessels on such of the waters of the United States as are common highways of commerce or are open to general or unrestrictive navigation—other than public vessels of this country, vessels of other countries, and small-boats propelled in whole or in part by steam—provide that every certificate of inspection granted to steamers carrying passengers, other than ferry-boats, shall show the number of passengers of each class for whom the steamer has accommodations and whom it can carry with prudence and safety; that it shall not be lawful to take on board a greater number of passengers than is stated in the certificate of inspection, and that "for every violation of this provision the master or owner shall be liable, to any person suing for the same, to pay the amount of passage money and ten dollars for each passenger beyond the number allowed." R. S. §§ 4399, 4400, 4464, 4465; Act of Feb. 28, 1871, 16 Stat. at L., 440, 454. These penalties are declared to be a lien upon the offending vessel. § 4469. Another section in the same title provides: "If any vessel propelled in whole or in part by steam be navigated without complying with the terms of this title, the owner shall be liable to the United States in a penalty of $500 for each offense, one half for the use of the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any District Court of the United States having jurisdiction of the offense."

The libel in this case was filed by the appellant to enforce a lien, in his favor, upon a steam vessel of the class to which the above regulations apply, for penalties amounting to the sum of $5,661, which, it is claimed, accrued to the appellant, as the person suing for them, by reason of the transportation on that vessel at certain specified times, of a larger number of passengers than its certificate of inspection permitted.

Before the trial in the District Court the owner of the vessel, a corporation which had intervened, filed an amended answer, setting up in bar of the further prosecution of the suit, a warrant in due form, by the Secretary of the Treasury, remitting to the appellee "all the right, claim and demand of the United States, and of all others whatsoever, to said forfeiture of passage money and penalties, on payment of costs, if any there be."

The provision of the statute under which this warrant of remission was issued is in these words:

"The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine or penalty provided for in laws relating to steam vessels, or discontinue any prosecution to recover penalties denounced in such laws, excepting the penalty of imprisonment or of removal from office, upon such terms as he, in his discretion, shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's power of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction, prior to the application for the remission of the penalty; and the Secretary shall have authority to ascertain the facts upon all such applications, in such manner and under such regulations as he may deem proper." Rev. Stat. U. S., § 5294. [413]

The costs having been taxed and paid into court, the libel was, by order of the court, dismissed. *Pollock* v. *Steamboat Laura*, 5 Fed. Rep., 133. Upon appeal to the Circuit Court, the decree was affirmed, that court concurring with the District Court in holding that the remission by the Secretary of the Treasury discharged all liability for the penalties. *The Laura*, 19 Blatchf., 562.

The warrant of remission, it is contended by the libelant, is without legal effect and should have been disregarded, because the statute upon which it rests is in conflict with the clause of the Constitution investing the President with power "to grant reprieves and pardons for all offenses against the United States, except in cases of impeachment." The argument advanced in support of this position, briefly stated, is that the power of the President to grant pardons includes the power to remit fines, penalties and forfeitures imposed for the commission of offenses against, or for the violation of the laws of, the United States; that such power

*Dissent by Mr. Justice HARLAN.

is in its nature exclusive; and that its exercise, in whatever form, by any subordinate officer of the government, is an encroachment upon the constitutional prerogative of the President.

It is not necessary to question the soundness of some of these propositions. It may be conceded that, except in cases of impeachment and where fines are imposed by a co-ordinate department of the government for contempt of its authority, the President, under the general unqualified grant of power to pardon offenses against the United States, may remit fines, pen-
[414] alties and forfeitures of every description arising under the laws of Congress; and, equally, that his constitutional power in these respects cannot be interrupted, abridged or limited by any legislative enactment. But is that power exclusive, in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States? This question cannot be answered in the affirmative without adjudging that the practice in reference to remissions by the Secretary of the Treasury and other officers, which has been observed and acquiesced in for nearly a century, is forbidden by the Constitution. That practice commenced very shortly after the adoption of that instrument, and was perhaps suggested by legislation in England, which, without interfering with, abridging or restricting the power of pardon belonging to the Crown, invested certain subordinate officers with authority to remit penalties and forfeitures arising from violations of the revenue and customs laws of that country. Stat. 27 Geo. III., chap. 32. See also Stat. 51 Geo. III., chap. 96, and 54 Geo. III., chap. 171.

By an Act passed March 3, 1797, 1 Stat. at L., 506, the Secretary of the Treasury was authorized to mitigate or remit any fine, penalty, forfeiture or disability arising from any law providing for the laying, levying or collecting duties or taxes, or any law concerning the registering and recording of ships or vessels, or the enrolling or licensing ships or vessels employed in the coasting trade or fisheries, or regulating the same, if in his opinion the same was incurred without willful negligence, or fraudulent intention by the person or persons subject to the same. He was also authorized to direct a prosecution instituted for the recovery thereof to cease and be discontinued upon such terms and conditions as he deemed reasonable and just. This Act expired by limitation at a designated time. But by an Act passed February 11, 1800, it was revived to continue in force without limitation as to time. 2 Stat. at L., 7, chap. 6. From the adoption of the Constitution to the present moment, Congress has asserted its right by statute to invest the Secretary of the Treasury and other officers of the executive branch of the government with power to remit fines, penalties and forfeitures
[415] imposed for the violation of the laws of the United States.* And in none of the cases in this court or in the Circuit and District Courts of the United States, involving the operation or effect of such warrants of remission, was it ever suggested or intimated that the legislation was an encroachment upon the President's power of pardon—so far at least as it invested the Secretary of the Treasury, or other officers, with authority to remit pecuniary penalties and forfeitures. Indeed, the case of *U. S.* v. *Morris*, 10 Wheat., 246, may be regarded as a direct adjudication in favor of the validity of that part of the Act of 1797, brought forward in all of the subsequent statutes upon the same subject, which confers upon the Secretary the power to remit fines, penalties and forfeitures.

In that case—which involved the right to a share in a forfeiture declared by statute—the question related to the power of the Secretary under that Act, after final sentence of condemnation and judgment for the forfeiture accruing under the revenue laws, to remit the forfeiture. The court held that the power could be exercised under that Act at any time before the money was actually paid over to the collector for distribution. It was said: "The authority of the Secretary to remit at any time *before* condemnation of the property seized is not denied on the part of the plaintiff [the officer claiming the forfeiture]; and it cannot be maintained that Congress has not the power to vest in this officer authority to remit *after* condemnation; and the only inquiry would seem to be whether this has been done by the Act referred to." Evidently the court and the eminent counsel who appeared in that case accepted it as a proposition not open to discussion, that the power of the President to pardon for offenses did not preclude Congress from giving the Secretary of the Treasury authority to remit penalties and forfeitures. Touching the objection now raised as to the constitutionality of the legislation in question, it is sufficient to say, as was said in an early case, that the practice and acquiescence under it, "commencing with the organization of the judicial system, affords an irresistible answer and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course the question is at rest and ought not now to be disturbed." *Stuart* v. *Laird*, 1 Cranch, 308. The same principle was announced in the recent case of *Lithographic Co.* v. *Sarony*, 111 U. S., 53 [bk. 28, L. ed. 349], where a question arose as to the constitutionality of certain statutory provisions reproduced from some of the earliest statutes enacted by Congress. The court said "The construction placed upon the Constitution by the first Act of 1790 and the Act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight; and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is conclusive." See also *Cooley* v. *Board of Wardens*, 12 How., 315; *Martin* v. *Hunter*, 1 Wheat., 304; *Cohens* v. *Virginia*, 6 Wheat., 264.

It is however insisted that if the statute in question is constitutional it cannot be construed as giving the Secretary of the Treasury the

*1 Stat. at L., 122, chap. 12; Id., 275, chap. 35; 2 Id., 454, chap. 8, § 6; Id., 502, chap. 66, § 14; Id., 510, chap. 5, § 12; Id., 701, chap. 49, § 4; 3 Id., 92, chap. 1, § 14; Id., 617, chap. 14, § 3; Id., 739, chap. 21, § 35; 9 Id., 593, chap. 21, § 3; 11 Id., 95, chap. 159, § 10; 12 Id., 257, chap. 3, § 8; Id., 271, chap. 10, § 3; Id., 405, chap. 81, § 4; Id., 737, chap. 76, § 1; 13 Id., 198, chap. 164, § 8; 14 Id., 160, chap. 184, § 63; 15 Id., 242, chap. 273, § 8; 16 Id., 179, chap. 185, § 9; 17 Id., 325, chap. 335, § 316; 18 Id., 140, chap. 391, § 18; R. S. §§ 2858, 3001, 3078, 3115, 3220, 3412, 3461, 5292-5294.

power to remit a penalty after a suit for its recovery has been instituted by a private person. In support of this position we are referred to numerous authorities, which, it is claimed, hold that the test of what may be done under the power of pardon granted by our Constitution is what the King of England could do, by virtue of his pardoning power, at the time of the separation from that country: and that he could not grant a pardon to the injury of a subject, and therefore, could not remit a penalty after suit by a private person to recover it. It is quite true, as declared in *United States* v. *Wilson*, 7 Pet. 160, that, since the power to pardon "had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours have a close resemblance, we adopt their principles respecting the operation and effect of a pardon." But that principle has no possible application to the present case, for the statute under which the libelant proceeds and without which he would have no standing in court, declares, in terms, that "all rights granted to informers"—and the libelant is plainly of the class intended to be described—shall be held subject to the Secretary's power of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty." If the libelant had, by virtue of his suit, an inchoate interest in such penalties, that interest was acquired subject to the power of the Secretary to destroy it by a remission applied for before the right is ascertained and established by the judgment of the proper court.

The decree below is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

STATE NATIONAL BANK OF BOSTON, *Appl.*,

v.

UNITED STATES.

(See S. C. Reporter's ed., 401-410.)

Fraud—Liability of United States.

1. Where, by the connivance of a clerk in the office of an assistant treasurer of the United States, a person wrongfully obtains from that office money belonging to the United States, and, to replace it, pays to the clerk money which he obtains by fraud from a bank, the clerk having no knowledge of the means by which the latter money was obtained, the United States are not liable to refund the money to the bank.

[illegible] distinguished from U. S. v. State Bk., 96 U. S. 30 (bk. 24, L. ed. 647).

[No. 229.]

Argued Apr. 2, 1885. Decided Apr. 13, 1885.

APPEAL from the Court of Claims.

The history and facts of the case appear in the opinion of the court.

Mssrs. Geo. O. Shattuck and *W. A. Munson* for appellant:

It must be held in this case, as in that of *U. S.* v. *State Bk.*, 96 U. S., 30 (bk. 24, L. ed. 647), that Hartwell "was privy to the entire fraud from the beginning to the end, and was a participant in its consummation."

This case is stronger than that in 96 U. S. because it is found in this case that Hartwell did actually know that the draft came from the claimant's cashier and that he was to be "hurt" by the refusal to let the funds go out of the subtreasury after the count.

As against the claimant, Hartwell's fraud was much grosser than in the former case. Although he had promised to return the money, and knew that Carter was relying on the funds to be returned to repay all the parties any moneys he should obtain, and was acting on such reliance, he and the chief clerk, Whittle, had decided not to let the money go out of the subtreasury.

Hartwell and Carter were acting together for a fraudulent purpose, and the knowledge and acts of each were the knowledge and acts of the other. Whether each actually knew all the details known to the other was of no consequence.

Lincoln v. *Claflin*, 7 Wall., 132 (74 U. S., bk. 19, L. ed. 106); *Moore* v. *Tracy*, 7 Wend., 229; *Skinner* v. *Merchants' Bk.*, 4 Allen, 290; *Boas* v. *Tate*, 48 Ind., 60; *Page* v. *Parker*, 43 N.H., 363; *Tappan* v. *Powers*, 2 Hall (N. Y.), 277.

A party coming late into a conspiracy is even responsible for the prior acts of the conspirators.

Den v. *Johnson*, 3 Harr. (N. J.) 88.

Hartwell requested Carter to obtain the funds to tide over the count, and solemnly promised to return them as soon as the count was over. It was clearly his intention that Carter should act upon his assurances in dealing with the parties from whom the funds came, and when the draft of the State Bank was offered to him, he had notice that the State Bank had acted upon Carter's representations that he was to have the funds. Any one for whom false representations were intended, and who was acting upon them, has a right of action.

Polhill v. *Walter*, 3 B. & Ad., 114; *Langridge* v. *Levy*, 2 Mees. & W., 519; *S. C.*, 4 Mees. & W., 337; *Gerhard* v. *Bates*, 2 El. & B., 476; *Peek* v. *Gurney*, L. R. 6 H. L., 377.

The same rule applies to a case of fraudulent concealment.

The United States is not in the position of a holder in good faith and for value. When their agent took the money from Carter, it had been and was distinctly stated for what it was delivered, *i. e.*, to be used as a counter and then returned. It was wrongfully withheld, and in violation of the agreement under which it was originally received. It was and is therefore held to the claimant's use.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court: [401]

The appellant brought this action in the Court of Claims to recover from the United States the sum of $125,000, with interest from March 1, 1867. The petition having been dismissed, the question upon this appeal is as to the liability of the United States to any judgment in behalf of the appellant.

The facts found by the Court of Claims, and upon which the correctness of the judgment below must depend, are as follows:

The appellant in February and March, 1867, was a national banking association, having its place of business in the city of Boston, Massachusetts; and there was in that city a firm of brokers under the style of Mellen, Ward & Co., the junior member of which was Edward Carter.

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At the same time George D. Whittle was the chief clerk in the office of the Assistant Treasurer of the United States, in Boston, having its general management, and Julius F. Hartwell was disbursing clerk or paying teller.

Prior to the 28th day of February, 1867, Mellen, Ward & Co., acting through Carter, succeeded in inducing Hartwell to take out of the sub-treasury at various times and to place in Carter's hands, large amounts of money belonging to the United States until, first and last, the sums so abstracted aggregated a million to a million and a quarter dollars. This money was used by Mellen, Ward & Co. in stock speculations. About the middle of February, 1867, the amount so obtained by Carter being then very large, Hartwell informed him that in the use of the public money they were guilty of a crime. This, it is found by the court below, was the first information Carter had of the criminal character of these transactions.

Between the middle of February and the 1st of March, 1867, several conversations were held between Carter and Hartwell, in which the former expressed his purpose to make the latter's money right for the examination of the sub-treasury, which was expected to take place on the 1st of March, upon Hartwell's solemn assurance that he would let him have the money out of the sub-treasury again on the 2d of March, after the examination should be over, when Carter would repay the parties the moneys he had obtained, and, selling all the stocks and securities his firm held, replace as much as possible of the money in the sub-treasury so as to reduce the loss to the smallest possible amount. Carter promised Hartwell that he would return all the money before the 1st of April, not again to come out of the sub-treasury. During the period within which those conversations between Carter and Hartwell occurred, the latter knew in a general way the extent of the resources of Mellen, Ward & Co., and how they were using the money he had let Carter have.

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On the 28th of February Carter returned to Hartwell all the money the latter had let him have except the sum of $157,000, which the former promised to return to him the next morning. Among the funds so returned were United States gold certificates to the amount of $580,000. On the afternoon of the same day Hartwell made known to Whittle that he had been loaning to Carter the funds of the Government, and that all had been returned except about $150,000. He told Whittle that the money had been paid out to Carter from time to time to assist in stock speculations; that it was paid back again to tide over the monthly examination; that he had promised Carter that the money should be repaid to him the following day; and had told him that he would ask Whittle's consent that the money go back to him again. Whittle told Hartwell that it was an impossibility to let the money go back to Carter, and that any deficiency must be paid in before 10 o'clock the next morning.

About 9 o'clock A. M. of the 1st of March Hartwell called on Carter at Mellen, Ward & Co.'s office and asked him if he had that money. Carter told him he did not then have it but could give it to him before 10 o'clock and asked Hartwell if he could not take a draft on New York, stating to him that Mellen, Ward & Co. would have a very large amount of New York funds to dispose of as soon as Hartwell returned to them the gold certificates aforesaid. Hartwell said he would take the New York funds, and the interview then ended. It does not appear that up to this time Carter had any knowledge or intimation of Hartwell's disclosures to Whittle; nor does it appear that Carter informed Hartwell as to how he intended or expected to get the draft on New York. At the close of this interview Hartwell returned from Mellen, Ward & Co.'s office to the sub-treasury.

About half past nine o'clock of the same morning Carter went to the banking-house of plaintiff and obtained from Charles H. Smith, its cashier, his draft, as cashier, on the Manhattan Company, New York, in favor of Mellen, Ward & Co., for $125,000, which draft was in the words and figures following, to wit:

"The State National Bank of Boston,
Boston, March 1, 1867

Pay to the order of Mellen, Ward & Co., one hundred and twenty-five thousand dollars.

No. 215. C. H. Smith, *Cashier*.

To the cashier of the Manhattan Company New York."

The facts and circumstances connected with his obtaining that draft were as follows: Carter asked Smith for the Bank's draft on New York for $125,000, promising to give him immediately, in return, Mellen, Ward & Co.'s draft on New York for the same amount, with $100,000 in United States gold certificates attached, or else the Adams Express Company's receipt for that amount in gold. Upon the faith of this promise Smith drew and delivered to Carter the draft aforesaid. In this interview between Smith and Carter nothing was said by the latter about there being any deficiency in the sub-treasury for which he was responsible; nor that he desired to use the draft to help make good a deficiency there; nor what his purpose was in obtaining it; nor does it appear that Smith had, at any time before or during this interview, any knowledge or intimation of the transactions between Carter and Hartwell. Within fifteen or twenty minutes after Carter received from Smith the draft for $125,000, the former, at the office of Mellen, Ward & Co., delivered it, together with $32,000 in currency, to Hartwell. The latter paid Carter nothing for the draft; it was passed to him by Carter to make good that deficiency; and Carter supposed it would not be wanted for that purpose over an hour. Neither before nor at the time Hartwell received from Carter the draft for $125,000 did the former know anything of the means by which the latter obtained it from Smith.

Immediately after Hartwell received that draft and the $32,000 in currency from Carter he took both to the sub-treasury and delivered them to Whittle, who objected to receiving the

[illegible] because the rules of the government required the sub-treasury to receive nothing but gold, silver, legal-tender notes, or national bank notes; and besides, he had an impression that, in some form or other, the plaintiff's cashier was involved in the stock speculation which Hartwell had the day before told him of Mellen, Ward & Co.'s being engaged in; for Hartwell had then, after Whittle's refusal to let the money go out again, mentioned, among others, the name of Smith as one who was going to be [illegible]. Whittle then directed Hartwell to go out and collect the currency. Hartwell tried at several banks to raise the currency on the draft for $125,000, but could not find sufficient amount in any one bank. He then went to the Eagle National Bank of Boston, and obtained from it, in exchange for that draft, three of its drafts on New York, one for $75,000, and two of $25,000 each, with the idea that currency might be obtained in smaller amounts at different banks, but the hour was so late then—it being about ten o'clock—that he took the three drafts directly to Whittle at the sub-treasury, saying to him that he had obtained them from a cashier of the Eagle National Bank, in exchange for the draft for $125,000, and that was the most he could do. The Government examiners were at that time at work in the sub-treasury upon their monthly examination of the public funds. Whittle then went out from the sub-treasury with the three drafts of the Eagle National Bank, and sold them to the Second National Bank of Boston, and returned to the sub-treasury with the proceeds of the sale, $25,000 in currency, which he turned over, along with the $32,000 aforesaid, to the examiners. These sums made up Hartwell's deficiency and balanced the cash account of the sub-treasury. No part of the $157,000 which those two sums made up was ever returned to Hartwell or Carter, or Mellen, Ward & Co., or the bank.

Neither when the draft for $125,000 was given by Hartwell to Whittle nor when it was exchanged by the former for the drafts of the Eagle National Bank, did Whittle have any knowledge or notice of the consideration or money with which that draft had been obtained from the cashier of the appellant; but he had an impression that Carter had procured it.

About fifteen or twenty minutes after Smith received the draft for $125,000 to Carter, as mentioned stated, Smith went to Mellen, Ward & Co.'s office to inquire the reason why Carter had not brought to him the gold certificates as he had agreed to do. Carter was then absent from the office, and his partner Mellen told Smith that Carter was out about the matter at that time, and, as soon as he brought the certificates, he would take them to Smith. Immediately after this, Mellen, Ward & Co. sent to Smith the draft on New York for $125,000, but did not send with it any gold certificates nor a receipt of the Adams Express Company. After waiting perhaps fifteen minutes, Smith went again to know why the certificates or the receipt had not been brought to him, and then for the first time learned that Carter was at the sub-treasury and in trouble.

After all the foregoing transactions occurred, the bank voluntarily paid to the Eagle National Bank the draft for $125,000 which Carter obtained from Smith; and the three drafts of that bank were duly paid on presentation in New York. The aforesaid draft of Mellen, Ward & Co. for $125,000 was never paid, nor was it presented to the drawee for payment.

At the time Smith let Carter have the draft for $125,000 Smith was, as cashier, under bond to the plaintiff, with sureties, in the sum of $30,000, and after the plaintiff paid the draft it made demand upon him and his sureties, and these sureties, without being sued, paid to the plaintiff, within ninety days after the 1st of March, 1867, the full amount of their bond, and took a receipt therefor in terms such as the following:

"State National Bank, Boston, received of —— —— the amount due from them as sureties on the bond of Charles H. Smith, late cashier of said Bank, by reason of the defalcation of said Smith, resulting from an unauthorized draft made by the said Smith upon the Manhattan Co., New York, for the sum of one hundred and twenty-five thousand dollars ($125,000), which was applied to his own use.

"If the said Smith shall hereafter pay to the State National Bank the said sum of one hundred and twenty-five thousand dollars, the Bank will return to the sureties the amounts by them severally paid; or if he shall pay so much thereof that the Bank shall be in the receipt—including the payments made by the sureties—of a surplus beyond one hundred and twenty-five thousand dollars, the Bank will return and distribute such surplus to the sureties in proportion to the sums by them severally paid. [407]

"But this receipt is not to be construed or understood as an admission or recognition of any obligation on the part of the Bank to take any measures to make up said defalcation, nor as the assertion of any claim by the said Bank upon any funds, property or means whereby the said defalcation or any part thereof can be made good, nor as any admission by the said Bank that any such funds, property, or means are in existence."

The present case differs materially from *U. S.* v. *State Bank*, 96 U. S., 33 [bk. 24, L. ed. 647]. Our judgment there proceeded upon the ground that the gold certificates deposited in the sub-treasury by Smith, the cashier of the State National Bank of Boston, were known by Hartwell, at the time he received them, to be the property of that Bank, and not of Mellen, Ward & Co. The deposit was made by Smith, in the presence of Carter; and, although the receipt for the certificates was out to Mellen, Ward & Co. or order, it was immediately indorsed by Carter, in the name of his firm, to Smith as cashier. The cancellation of the certificates and their transmission to the Treasurer of the United States at Washington was therefore in derogation of the rights of the bank. It was adjudged that money or property of an innocent person, which had gotten into the coffers of the nation by means of fraud to which its agent was a party, could not be held by the Government against the claim of the wronged and injured party.

There is no room in the present case for the application of that principle. Apart from his responsibility for the crime committed in using the money of the United States, Carter, representing Mellen, Ward & Co., was under a legal obligation to replace the amount ab-

stracted from the sub-treasury. Of his purpose to do so Hartwell was informed. But he had no reason to believe that Carter would bring him money or securities which belonged to some one else and which he could not rightfully deliver in discharge of his indebtedness to the Government. When the draft of $125,000 was delivered by Carter to Hartwell, the latter was unaware of the means by which the former had obtained it from Smith, the cashier of appellant. It was, on its face, the property of Mellen, Ward & Co. Upon its receipt by Hartwell for the United States, the Government acquired the same rights in reference to it that any private citizen receiving it in the course of business would have acquired. That the Bank, by its cashier, made and delivered the draft to Carter upon the faith of his promise to give immediately, in return, Mellen, Ward & Co.'s draft on New York for the same amount, with $100,000 in United States gold certificates attached, or else the receipt of the Adams Express Company for that amount in gold, is a circumstance that does not affect the legal rights of the United States, to whom the draft was passed without knowledge. by its agent, of the condition upon which Mellen, Ward & Co. had received it from the Bank's cashier. Nor do we deem of any significance the fact that Hartwell promised to return to Carter the money which the latter should place in the sub-treasury for the purpose of concealing from the officer supervising the examination of its books the criminal transactions in question. Carter knew that that promise could not be kept without subjecting both himself and Hartwell to criminal prosecution; and it was no violation of his legal rights for the agents of the Government. after receiving from him the draft for $125,000, without any knowledge of the circumstances under which he had obtained it, to dispose of it and place the proceeds in the sub-treasury. After these proceeds reached the sub-treasury they could not be used or withdrawn except in the mode prescribed by law. The essential difference, therefore, between *U. S.* v. *State Bank, ubi supra*, and this case is, that in the former the agents of the Government appropriated to its use the property of an innocent person, knowing at the time that it belonged to that person and not to the Government; while in the present case they received, in the discharge of a debt due the Government, a draft belonging to the debtor, without any knowledge or notice that the debtor had obtained it upon conditions which had not been complied with, or by means of fraudulent representations.

[410]

We perceive no ground to question the correctness of the judgment below, and it is *affirmed*.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[355] THE STEAMSHIP BELGENLAND, Her Tackle, Apparel, etc., SAMUEL JACKSON, Master, and THE SOCIETE ANONYME DE NAVIGATION BELGE AMERICAINE, Claimants, *Appts.*

v.

THEODORE JENSEN, MASTER OF THE NORWEGIAN BARQUE LUNA.

(See S. C., Reporter's ed., 355-373.)

Jurisdiction in admiralty in cases arising the high seas between foreigners of differe nationalities—discretion—review of autho ties—negligence in cases of collision—du of steamers.

1. The Admiralty Courts of the United Sta have jurisdiction of collisions occurring on the hi seas between vessels owned by foreigners of diffe ent nationalities.

2. The courts will use a discretion about assumi jurisdiction of controversies between foreigners cases arising beyond the territorial jurisdiction the country to which the courts belong; yet wha such controversies are *communis juris* spec grounds should appear to induce the court to de its aid to a foreign suitor when it has jurisdicti of the ship or party charged.

3. Upon appeal, the action of the court of first stance in assuming jurisdiction can only be qu tioned on the ground that its discretion has be exercised on wrong principles, or so unjustly as justify the court of appeal in holding that it h been exercised wrongly.

4. Where the parties are not only foreigners b belong to different nations, and the injury or a vage service takes place on the high seas, the seems to be no good reason why the party injur or doing the service should ever be denied justi in our courts.

5. The general maritime law, as understood an administered in the courts of the country in whi the litigation is prosecuted, should be applied cases between parties or ships of different natio alities arising on the high seas not within the ju risdiction of any nation.

6. When the facts found furnish conclusive pro of negligence it may be regarded as properly four amongst the conclusions of law as a legal inferen from those facts.

7. The facts found in this case show that the co lision occurred by the negligence of those havin charge of the steamship Belgenland in not seein the barque and in not taking the proper preca tions due to such a night and such a sea, by redu ing speed and keeping a sufficient lookout.

[*No 169.*]

Argued Jan. 16, 1885. Decided Apr. 13, 188

APPEAL from the Circuit Court of t United States for the Eastern District Pennsylvania.

The history and facts of the case fully appe in the opinion of the court. For the opinio of this court on certain questions of practi which arose in this case, see bk. 27, 685, 686.

Messrs. **Morton P. Henry** and **Henry E Edmunds**, for appellants.

Messrs. **J. Langdon Ward** and **Henr Flanders**, for appellee:

The question of jurisdiction is well settled. *The Maggie Hammond*, 9 Wall., 435 (76 U. S bk. 19, L. ed. 772); *Taylor* v. *Carryl*, 20 How 611 (61 U. S., bk. 15, L. ed. 1038).

Under the circumstances the fact of a col sion is evidence of great negligence somewhe *The New Orleans*, 8 Ben., 102; *The Lie Major*, Id., 333; *The Cella*, 3 Ben., 168.

If the night was thick her speed of elev knots against wind and sea was too great. it was clear the steamer failed to see the ba as soon as she should have seen her, for wa of a proper lookout.

NOTE.—*Admiralty jurisdiction—to what places co fined.* Allen v. Newberry, 62 U. S. (21 How.), bk. 111, *note.*

Collision—rights of steam and sailing vessels w reference to each other. See St. John v. Paine, 51 S. (10 How.), 557, *note.*

The Jena, 6 Ben., 345; *The Hansa*, 5 Ben., [illegible]; *The Colorado*, 91 U. S., 692 (bk. 23, L. ed. [illegible]); *The Adriatic*, 13 Wall., 475 (80 U. S., bk. [illegible] L. ed. [illegible]).

The steamer's lookout was insufficient. Such steamships should have two besides the chief of the deck.

Chamberlain v. *Ward*, 21 How., 570 (62 U. S., [illegible] L. ed. 219).

The steamer's side-lights were not visible, the barque was not apprised of her course and therefore any change of course on the part of the barque would have been wrong.

The Rose, 2 Asp. Mar. L. C., 182; 29 L. T. [illegible]; *The James Watt*, 2 W. Rob., 270; The Reformation, 1 Mar. L. C. O. S., 413; 9 L. T. N. S., [illegible]; *The Bougainville*, L. R. 5 P. C., [illegible]; *The Great Eastern*, 2 Mar. L. C. O. S., 97; [illegible] N. S., 5.

The final porting of the barque's helm *in extremis* was no negligence if wrong.

The Carroll, 8 Wall., 302 (75 U. S., bk. 19, L. ed. [illegible]).

Rules of navigation do not apply to a vessel required to keep her course after the approach of a peril that the collision is inevitable.

The Genesee, 19 Wall., 41 (86 U. S., bk. 22, L. ed. [illegible]); *The Nichols*, 7 Wall., 656 (74 U. S., bk. [illegible] L. ed. 157); *The Johnson*, 9 Wall., 146 (76 U. S., bk. 19, L. ed. 610); *The Dexter*, 23 Wall., [illegible] U. S., bk. 23, L. ed. 84).

Mr. Justice **Bradley** delivered the opinion of the court:

This case grows out of a collision which took place on the high seas between the Norwegian barque Luna and the Belgian steamship Belgenland, in which the former was run down and sunk. Part of the crew of The Luna, including the master, were rescued by The Belgenland and brought to Philadelphia. The master immediately libeled the steamship on behalf of the owners of The Luna and her cargo, and of surviving crew, in a cause civil and maritime.

The libel stated in substance that the barque Luna, of [illegible] tons, was on a voyage from Porto Rico to Queenstown or Falmouth, with a cargo of sugar, and when in latitude 44° 33′ and longitude 21° 43′, was met by the steamship Belgenland, and on, between one and two in the morning, and was run down and sunk by her; only five of her crew escaping; that the lights of the steamship was observed right ahead [illegible] a mile or more off; that the barque kept her course, as was her duty to do; and that the steamship took no measures to avoid her but [illegible] at full speed until she struck The Luna; and that the collision was altogether the fault of those in charge of the steamship.

The master of the Belgenland appeared for his owners, and filed an answer denying that The Luna at the time of the collision was sailing on the course alleged, and averred that she was crossing the bows of the steamship, and must have changed her course, and that this was the cause of the collision; that The Luna was not discovered until the instant of the collision, when it was too late to alter the course of the steamship; and that the reason why the barque was not seen before was that she was enveloped in a shower of rain and mist; and that the steamship was plunging into a heavy head sea, throwing water over her turtle deck forward.

The proctor of The Belgenland at the time of filing his answer excepted to the jurisdiction of the court, and stated for cause that the alleged collision took place between foreign vessels on the high seas and not within the jurisdiction of the United States; that The Belgenland was a Belgian vessel, belonging to the port of Antwerp, in the Kingdom of Belgium, running a regular line between Antwerp and the ports of New York and Philadelphia; and that the barque Luna was a Norwegian vessel, and that no American citizen was interested in the barque or her cargo.

The district court decided in favor of the libelant and rendered a decree for the various parties interested, to the aggregate amount of $50,278.23. An appeal was taken to the circuit court, which found the following facts, to wit:

"1. Between one and two o'clock on the morning of September 3, 1879, in mid ocean, a collision occurred between the Norwegian barque Luna on her voyage from Humacao, in Porto Rico, to Queenstown or Falmouth, and the steamship Belgenland on a voyage from Antwerp to Philadelphia, which resulted in the sinking of the barque, in the total loss of the vessel and her cargo and in the drowning of five of her crew. [358]

2. The wind was between S. W. and W. S. W., and there was not much sea but a heavy swell. The barque was running free, heading S. E. by E. half E., having the wind on her starboard quarter. All her square sails were set except her main royal, and she carried also her fore, main and mizzen stay-sails and inner jib. Her yards were braced a little, her main sheet was down but the weather-clew was up. She was making about seven and one half knots. Her watch on deck consisted of the first mate and three men; an able seaman was on the lookout on the top-gallant forecastle, and a capable helmsman was at the wheel.

She carried a red light on her port side and a green light on her starboard side, properly set and burning brightly, which could be seen, on a dark night and with a clear atmosphere, at least two miles. The character and location of these lights conformed to the regulations of the barque's nationality, which are the same as those of the British Board of Trade. About 1.45 o'clock the lookout sighted the white mast-head light of a steamer right ahead, distant, as he thought, about a mile, and reported it at once to the mate, who cautioned the man at the wheel to "keep her steady and be very careful," and the barque held her course.

No side-lights on the steamer were seen from the barque, but as the vessels approached each other the white light of the steamer gradually drew a little on the port bow of the barque for three or four minutes. The mate of the barque seeing the steamer's sails and that she was heading directly for the barque, was close aboard of her, and reasonably apprehending that a collision was inevitable, ordered the barque's helm hard a-port. In a few seconds the steamer's starboard light came into view, and in another instant she struck the barque on her port side, cutting her in two obliquely from the after part of her fore rigging to the fore part of the main rigging. [359]

3. The Belgenland was steering N. W. by W. half W. by compass, and making about eleven knots. Her second officer had charge of the deck, and his watch was composed of ten able seamen, two quartermasters, the second boatswain and the fourth officer. One able seaman was stationed on the lee or starboard side of the bridge, as a lookout. The second officer was on the bridge. The fourth officer was stationed at the after or standard compass, which was near the mizzen-mast, but at the time was on the bridge, having come there to report a cast of the log. A quartermaster was at the wheel. The rest of the watch was underneath the turtle-back or top-gallant forecastle.

The steamer was 416 feet long and about 38 feet beam. The bridge was 150 or 180 feet from her bow, and was six or seven feet higher than the top of the turtle-back, which was about 25 feet above the water.

The steamer had her fore, main and mizzen try-sails, fore stay-sails and jib set and drawing, and probably her jigger also. She heeled to starboard from ten to fifteen degrees.

4. The only lookout on the steamer was on the bridge. None was on the turtle-back, although it would have been entirely safe to station one there, for the alleged reason that the vessel was plunging into a head sea and taking so much water over her bows that he would have been of no use there.

5. The barque was not seen by those in charge of the steamer until just at the instant of the collision, when the second officer saw her head sails just across the steamer's bow, the lookout in the lee side of the bridge saw her after-sails and stern.

6. The moon was up, but was obscured by clouds. There was no fog, but occasional rain with mist, and the wind was blowing from the S. W. to W. S. W.

7. Objects could be seen at the distance of from five hundred yards to a mile. The mast-head light of the steamer was sighted and at once reported by the lookout on the barque, at the distance of about a mile; the port light of [360] the barque was seen by a steerage passenger on the steamer, looking out of his room just under the bridge, and reported to his roommates long enough before the collision to enable the second steerage steward, who heard the report, to go up the companion ladder, cross the deck and reach the steamer's rail; after the collision the mizzen-mast of the barque was all of her above water, and this was distinctly seen from the steamer when she was at the distance of five hundred yards from it.

8. The damages caused by the collision were assessed at $50,248.23. Upon these facts the court below deduced the following conclusions:

1. That the vessels were approaching each other from opposite directions, upon lines so close to each other as to involve the necessity of a deflection by one or the other of them to avoid a collision.

2. That the lookout on the barque saw the steamer when she was nearly a mile distant, and she was held steadily on her course, and that she thereby fulfilled her legal obligation. Even if her helm was ported it was at a time and under circumstances which did not involve any culpability on her part.

3. That it was the duty of the steamer to keep out of the way of the barque, and, to that en so to change her course as to preclude all dang of collision.

4. That the barque could and ought to ha been seen by the steamer when they were suf ciently distant from each other to enable t steamer to give the barque enough sea-room avert any risk of collision. In this failure observe the barque the steamer was negligen

5. No satisfactory or sufficient reason is fu nished by the respondent's evidence for th failure of observation. If it resulted from t inattention of the steamer's lookout, or becau their vision was intercepted by her fore tr sail, she was clearly culpable. If it is exp cable by the condition of the atmosphere— matter by what cause it was produced—it w the steamer's duty to reduce her speed and place a lookout on her turtle-back. An om sion to observe these precautions was neg gence.

But considering the proof that the barq held her course and that the steamer mig have seen her by proper vigilance, when suf ble precaution against collision might ha been taken, a mere speculative explanation the steamer's presumptive culpability cannot accepted as sufficient.

A decree was thereupon entered affirmi the decree of the district court in favor of t libelants for the sum of $50,748.23, with int est from March 25th, 1861, amounting $51,954.14, and costs.

A reargument was had on the question jurisdiction, and the court held and decided th Admiralty Courts of the United States ha jurisdiction of collisions occurring on the hi seas between vessels owned by foreigners different nationalities; and overruled the plea the jurisdiction. The case is now before us appeal from the decree of the circuit court.

The first question to be considered is that the jurisdiction of the district court to he and determine the cause.

It is unnecessary here, and would be out place, to examine the question which has often engaged the attention of the common-la courts, whether and in what cases the cou of one country should take cognizance of co troversies arising in a foreign country or places outside of the jurisdiction of any count It is very fully discussed in *Mostyn* v. *Fabrig* and the notes thereto, in 1 Smith, Lead. Ca 765; and an instructive analysis of the law w be found in the elaborate arguments of coun in the case of the San Francisco Vigilant Co mittee (*Malony* v. *Dows*, 8 Abb. Pr., 316), argu before *Judge* Daly in New York, 1859. W shall content ourselves with inquiring what ru is followed by courts of admiralty in deali with maritime causes arising between foreig ers and others on the high seas.

This question is not a new one in these cour *Sir* William Scott had occasion to pass upon in 1799. An American ship was taken by t French on a voyage from Philadelphia to Lo don, and afterwards rescued by her crew, c ried to England and libeled for salvage; a the court entertained jurisdiction. The cre however, though engaged in the American sh were British-born subjects, and weight w given to this circumstance in the disposition the case. The judge, however, made the f

[illegible] remarks: "But it is asked, If they were American seamen would this court hold plea of their demands? It may be time enough to answer the question whenever the fact occurs. In the meantime I will say, without scruple, that I see no inconvenience that would arise if a British court of justice was to hold plea in such a case; or, conversely, if American courts were to hold pleas of this nature respecting the rights of British seamen on such occasions; for salvage is a question of *jus gentium*, and essentially different from the question of a seaman's contract, which is a creature of the municipal institutions of the country, to be applied and construed and explained by its own municipal rules. There might be good reason, therefore, for this court to decline to interfere in such cases and to remit them to their own domestic forum; but this is a general claim, upon the general ground of *quantum meruit*, to be governed by a sound discretion, acting on sound principles; and I can see no reason why the country should be afraid to trust to the equity of the courts of another on such a question, of such a nature, so to be determined. *The Two Friends*, 1 Rob., 271, 278.

The law has become settled very much in accord with these views. That was a case of salvage, but the same principles would seem to apply to the case of destroying or injuring a ship as to that of saving it. Both, when acted on on the high seas, between persons of different nationalities, come within the domain of the same law of nations, or *communis juris*, and are prima *facie* proper subjects of inquiry in any court of admiralty which first obtains jurisdiction of the rescued or offending ship at the termination in justice of the meritorious or guilty portion.

The same question of jurisdiction arose in another salvage case which came before this court in 1804, *Mason* v. *The Blaireau*, 2 Cranch, 240. There a French ship was saved by a British ship and brought into a port of the United States and the question of jurisdiction was raised by Mr. Martin, of Maryland, who, however did not press the point, and referred to the observations of Sir William Scott in *The Two Friends*. *Chief Justice* Marshall, speaking for the court, disposed of the question as follows: "A doubt has been suggested," said he "respecting the jurisdiction of the court; and upon reference to the authorities the point does not appear to have been ever settled. These doubts seem rather founded on the idea that upon principles of general policy this court ought not to take cognizance of a case entirely between foreigners than from any positive incapacity to act. On weighing the considerations drawn from public convenience those in favor of the jurisdiction appear much to over-balance those against it, and it is the opinion of this court that whatever doubts may exist in a case where the jurisdiction may be objected to there ought to be none where the parties assent to it." In that case the objection had not been taken in the first instance, as it was in the present. But we do not see how that circumstance can affect the jurisdiction of the court, however much it may influence the discretion in taking jurisdiction.

Many circumstances often exist which render inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong and there is no difficulty in a resort to its courts; or, where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages or because of ill-treatment are often in this category; and the consent of their consul or minister is frequently required before the court will proceed to entertain jurisdiction—not on the ground that it has not jurisdiction, but that, from motives of convenience, or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, [364] or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul. This branch of the subject will be found discussed in the following cases: *Thompson* v. *Catharina*, 1 Peter's Adm., 104; *Willendson* v. *The Försöket*, Id., 197; *Weiberg* v. *St. Oloff*, 2 Id., 428; *The Golubchick*, 1 W. Rob., 143; *The Nina*, L. R. 2 Adm. & Eccl., 44; *S. C.* on appeal, L. R. 2 P. C., 38; *The Leon XIII.*, 8 Prob. Div., 121; *The Havana*, 1 Spr., 402; *The Becherdass Ambaidass*, 1 Low., 569; *The Pawashick*, 2 Id., 142.

Of course, if any treaty stipulations exist between the United States and the country to which a foreign ship belongs, with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed. *The Elwine Kreplin*, 9 Blatchf., 438, reversing *S. C.*, 4 Ben., 413. See *S. C.* on application for *mandamus*, *Ex parte Newman*, 14 Wall., 152 [81 U. S., bk 20, L. ed. 877]. Many public engagements of this kind have been entered into between our government and foreign States. See Treaties and Conventions, ed. 1871, Index p. 1288.

In the absence of such treaty stipulations, however, the case of foreign seamen is undoubtedly a special one when they sue for wages under a contract which is generally strict in its character and framed according to the laws of the country to which the ship belongs; framed also with a view to secure, in accordance with those laws, the rights and interests of the shipowners as well as those of master and crew, as well when the ship is abroad as when she is at home. Nor is this special character of the case entirely absent when foreign seamen sue the master of their ship for ill-treatment. On general principles of comity, admiralty courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so, and will require the foreign consul to be notified, and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction.

Not alone, however, in cases of complaints made by foreign seamen, but in other cases also [365] where the subjects of a particular nation invoke the aid of our tribunals to adjudicate between them and their fellow-subjects as to matters of contract or tort solely affecting themselves and determinable by their own laws, such tribunals will exercise their discretion whether to take cognizance of such matters or not. A salvage

case of this kind came before the United States District Court of New York in 1848. The master and crew of a British ship found another British ship near the English coast apparently abandoned (though another vessel was in sight) and took off a portion of her cargo, brought it to New York and libeled it for salvage. The British consul and some owners of the cargo intervened and protested against the jurisdiction, and *Judge* Betts discharged the case, delivered the property to the owners upon security given, and left the salvors to pursue their remedy in the English courts. *One Hundred and Ninety-four Shawls*, 1 Abb. Adm., 317.

So, in a question of ownership of a foreign vessel, agitated between the subjects of the nation to which the vessel belonged, the English admiralty, upon objection being made to its jurisdiction, refused to interfere, the consul of such foreign nation having declined to give his consent to the proceedings. *The Agincourt*, 2 Prob. Div., 239. But in another case, where there had been an adjudication of the ownership under a mortgage in the foreign country, and the consul of that country requested the English court to take jurisdiction of the case upon a libel filed by the mortgagee, whom the owners had dispossessed, the court took jurisdiction accordingly. *The Evangelistria*, 2 Prob. Div., 241, note.

But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*—that is, where they arise under the common law of nations—special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be whether it is expedient to exercise it. See 2 Parsons on Ship. & Adm., 226, and cases cited in notes. In the case of *The Jerusalem*, 2 Gall., 191, decided by *Mr. Justice* Story, jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte, and it did not appear that it was intended that the vessel should come to the United States. In this case *Justice* Story examined the subject very fully and came to the conclusion that wherever there is a maritime lien on the ship an admiralty court can take jurisdiction on the principle of the civil law—that in proceedings *in rem* the proper forum is the *locus rei sitæ*. He added: "With reference, therefore, to what may be deemed the public law of Europe, a proceeding *in rem* may well be maintained in our courts where the property of a foreigner is within our jurisdiction. Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy." That, as we have seen, was a case of bottomry, and *Justice* Story, in answer to the objection that the contract might have been entered into in reference to the foreign law, after showing that such law might be proven here, said: "In respect to maritime contracts there is still less reason to decline the jurisdiction, for in almost all civilized countries these

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are in general substantially governed by t same rules."

Justice Story's decision in this case was ferred to by Dr. Lushington with strong app bation, in the case of *The Golubchick*, 1 W. Ro 143, decided in 1840, and was adopted as thority for his taking jurisdiction in that ca

In 1889 a case of collision on the high s between two foreign ships of different countr (the very case now under consideration) ca before the English Admiralty. *The Joha Friederich*, 1 W. Rob., 35. A Danish ship w sunk by a Bremen ship, and on the latter bel libeled, the respondents entered a protest agai the jurisdiction of the court. But jurisdicti was retained by Dr. Lushington, who, amon other things, remarked: "An alien friend is titled to sue [in our courts] on the same fo ing as a British-born subject; and, if the f eigner in this case had been resident here a the cause of action had originated *infra cor comitatus*, no objection could have been take Reference being made to the observations *Lord* Stowell in cases of seamen's wages, judge said: "All questions of collisions questions *communis juris;* but in cases mariners' wages, whoever engages voluntar to serve on board a foreign ship necessarily dertakes to be bound by the law of the coun to which such ship belongs, and the legality his claim must be tried by such law. One the most important distinctions, therefore, specting cases where both parties are forei ers is whether the case be *communis juris* not. * * * If these parties must wait until vessel that has done the injury returned to own country their remedy might be altoget lost, for she might never return; and if she there is no part of the world to which t might not be sent for their redress."

In the subsequent case of *The Griefswal* Swab., 430, decided by the same judge, in 18 which arose out of a collision between a Bri barque and a Persian ship, in the Dardanel Dr. Lushington said: "In cases of collisio has been the practice of this country, and far as I know, of the European States and the United States of America, to allow a pa alleging grievance by a collision to proceed *rem* against the ship wherever found, and practice, it is manifest, is most conducive justice, because in very many cases a rem *in personam* would be impracticable."

The subject has frequently been before own admiralty courts of original jurisdicti and there has been but one opinion expres namely: that they have jurisdiction in s cases and that they will exercise it un special circumstances exist to show that jus would be better subserved by declining it. was exercised in two cases of collision com before *Mr. Justice* Blatchford, whilst dist judge of the Southern District of New Y *The Jupiter*, 1 Ben., 536, and *The Steam Russia*, 3 Ben., 471. In the former case law was taken very much for granted; in latter it was tersely and accurately expoun with a reference to the principal authori Other cases might be referred to, but it is necessary to cite them. The general doct on the subject is recognized in the case of *Maggie Hammond*, 9 Wall., 435, 457 [76 U

[illegible] L. ed. 772, 780]; and is accurately stated [illegible] Justice Taney in his dissenting opinion [illegible] v. Carryl, 20 How., 611 [61 U. S., bk. [illegible] ed., 1068].

[illegible] assumption of jurisdiction in such [illegible] depends so largely on the discretion of the [illegible] of first instance, it is necessary to inquire [illegible] an appellate court should undertake to [illegible] his action. We are not without author[illegible] of a very high character on this point. In [illegible] case in England—that of *The Leon* [illegible] Prob. Div., 121—the subject was dis[illegible] in the court of appeal. That was the [illegible] of a Spanish vessel libeled for the wages of [illegible] British seamen who had shipped on [illegible] of her and the Spanish consul at Liver[illegible] protested against the jurisdiction of the [illegible] court on the ground that the ship[illegible] articles were a Spanish contract, to be [illegible] by Spanish law, and any controversy [illegible] thereon could only be settled before a [illegible] court or consul. *Sir* Robert Philli[illegible] held that the seamen were to be regarded [illegible] that case as Spanish subjects, and under [illegible] circumstances he considered the protest a [illegible] and dismissed the suit. The court [illegible] held that the judge below was right [illegible] regarding the libelants as Spanish subjects; [illegible] the question of reviewing his exercise of [illegible] in refusing to take jurisdiction of the [illegible] *M. R.*, said: "It is then said that [illegible] judge has exercised his discretion [illegible] What, then, is the rule as regards this [illegible] in the court of appeal? The plaintiffs [illegible] show that the judge has exercised his [illegible] on wrong principles, or that he has [illegible] absolutely differently from the view [illegible] the court of appeal holds, that they are [illegible] in saying he has exercised it wrongly. [illegible] that any wrong principle has been [illegible] by the learned judge or anything done [illegible] exercise of his discretion so unjust or [illegible] to entitle us to overrule his discre[illegible]."

[illegible] to us to be a very sound view of [illegible] and acting on this principle we [illegible] nothing in the course taken by the [illegible] court in assuming jurisdiction of the [illegible] case, which calls for animadversion. [illegible] where the parties are not only foreign[illegible] belong to different nations, and the [illegible] or salvage service takes place on the high [illegible] there seems to be no good reason why the [illegible] or doing the service should ever [illegible] justice in our courts. Neither party [illegible] peculiar claim to be judged by the [illegible] law of his own country, since the [illegible] one *communis juris* and [illegible] be more impartially and satisfac[illegible] by the court of a third nation [illegible] jurisdiction of the *res* or parties than it [illegible] by the courts of either of the nations [illegible] the litigants belong. As *Judge* Deady [illegible] said, in a case before him in the [illegible] of Oregon: "The parties cannot be re[illegible] to a home forum, for, being subjects of [illegible] governments, there is no such tribunal. [illegible] which is common to them both by [illegible] is any court of admiralty within [illegible] of whose process they may both be [illegible] *Bernhard* v. *Greene*, 3 Sawy., 230, 235. [illegible] the law which should be applied in [illegible] between parties or ships of different nationalities, arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law as understood and administered in the courts of the country in which the litigation is prosecuted. The rule is laid down in many cases; amongst others the following: *The Johann Friederich*, 1 W. Rob., 35; *The Dumfries*, 1 Swab., 63; *The Zollverein*, Id., 96; *The Griefwald*, Id., 430; *The Wild Ranger*, Lush., 553; *The Belle*, 1 Ben., 320; *The Scotia*, 14 Wall., 171 [81 U. S., bk. 20, L. ed. 822]; *The Scotland*, 105 U. S., 24, 29 [bk. 26, L. ed. 1001, 1003]; *The Leon*, 6 Prob. Div., 148. In the case last cited, which was that of a British ship run down by The Leon, a Spanish ship, the question was specifically raised by the respondents (the owners of The Leon), who set up in defense that if there was any negligence in her navigation her master and crew, and not her owners, were liable by the Spanish law. This defense was overruled, and the general maritime law as understood and administered in England was held to govern the case; by which law the owners were held responsible. The same rule was followed by this court in The Scotland, and was applied to the collision of a British with an American ship on the high seas, although it is true we applied to that [370] case the rule of limited liability established by the Act of Congress, regarding that Act as declarative of the general maritime law to be administered by our courts.

The rule requiring the application of the general maritime law to such cases has some qualifications which, though not affecting the present case, should always be borne in mind. One of these qualifications is that the persons in charge of either ship will not be open to blame for following the sailing regulations and rules of navigation prescribed by their own government for their direction on the high seas; because they are bound to obey such regulations. *The Scotia*, 14 Wall., 170, 184 [81 U. S., bk. 20, L. ed. 822, 824]. Another qualification is that if the maritime law as administered by both nations to which the respective ships belong be the same in both in respect to any matter of liability or obligation, such law, if shown to the court, should be followed in that matter in respect to which they so agree, though it differ from the maritime law as understood in the country of the forum; for, as respects the parties concerned, it is the maritime law which they mutually acknowledge. *The Scotland* [*supra*].

The first of these qualifications can rarely be called into requisition at the present day, since for more than twenty years past all the principal maritime nations of the world (at least those whose vessels navigate the Atlantic Ocean) have concurred in adopting a uniform set of rules and regulations for the government of vessels on the high seas. These rules and regulations have become international, and virtually a part of the maritime law. *The Scotia* [*supra*]. They will be presumed to be binding upon foreign as well as domestic ships unless the contrary is made to appear.*

*The International Rules of 1863 (Abbott on Ship., 11th ed., App. CCCLXIX; 13 Rev. Stat., 58) were revised by an Order of Council in England, in August, 1879, to take effect from the 1st of September, 1880, and as thus revised have been adopted by most commercial nations. (See 4 Prob. Div., 241-249.)

We are then brought to the question of the merits of the case between the parties as shown by the pleadings and finding of facts. And [371] this does not require any extended discussion. It is shown that the barque had her proper lights burning brightly, visible, on a dark night and with a clear atmosphere, at least two miles; and that, in character and location, they conformed to the regulations of the barque's nationality, which are the same as those of the British Board of Trade (or the International Rules before referred to); that the mast-head light of the steamer was sighted right ahead, distant about a mile; that the barque was kept steady on her course until the steamer was almost upon her and apparently about to run her down; that then the order was given to put the helm hard a-port; that in a few seconds the steamer's starboard light came in view, and in another instant she struck the barque in her port side, cutting her in two obliquely. In all this we see nothing that the people in charge of the barque did which it was not their duty to do by the International Rules. It was their duty to keep her steady on her course, and it was the duty of the steamer to see the barque and to avoid a collision.

On the other side it appears that the steamer, which was a large and powerful one, 416 feet long and 38 feet beam, was coming towards the barque, end on, at about eleven knots an hour; that she had a lookout on the lee side of her bridge (which was over 150 feet from her bow), where the officer in charge of the deck also was; but had no other lookout on duty, the rest of the watch, except the man at the compass and one at the wheel, were underneath the turtle-back, or top-gallant forecastle. No lookout was on the turtle-back, although it would have been entirely safe to station one there. The omission to do so was for the alleged reason that the vessel was plunging into a head sea and taking so much water over her bows that he would have been of no use there. The barque was not seen by those in charge of the steamer until just at the instant of the collision; yet objects could be seen at a distance of from 500 yards to a mile and the port light of the barque was seen by a steerage passenger on the steamer, looking out of his room just under the bridge, and was reported to his roommates long enough before the collision to enable the second steerage stewart, who heard the report, [372] to go up the companion ladder, cross the deck and reach the steamer's rail.

We think that these facts furnished a sufficient ground for the conclusions at which the court arrived, as before rehearsed; the substance of which was that the collision occurred by the negligence of those having charge of the Belgenland, in not seeing the barque and in not taking the proper precautions due to such a night and such a sea, by reducing speed and keeping a sufficient lookout.

It is argued that there is no express finding of negligence or fault as matter of fact, but only as an inference from the facts found. But we think that the facts found furnish conclusive proof of negligence that it may be regarde as properly found amongst the conclusions c law as a legal inference from those facts. U S. v. *Pugh*, 99 U. S., 265 [bk. 25, L. ed. 322

The counsel of the appellants suppose that th court below found the Belgenland in fault o the mere presumption arising from the fact c collision and the primary duty of the stean ship to avoid it. But this is not a just view c the decision. There was much more in th facts of the case than the existence of such presumption, as the foregoing rehearsal of th facts clearly shows. The ability to see objec at a distance; the fact that the men in charge c the steamer failed to see the barque, whilst a passenger did see her from his room; the fa that there was but one lookout for such a larg steamer; that other lookouts could have bee stationed on the turtle-back; the fact that th speed was not slackened and no precautio taken to get a better view ahead;—these facts, i addition to the presumption arising from th steamer's duty, present a very different ca from that supposed by the appellants. Th decision of the court must be taken as the co lective result from the whole case. It cann be judged from mere isolated expressions i the opinion.

The rule contended for by the appellants that negligence and fault must be proved an not presumed—is undoubtedly a sound one an hardly needs cases to support it. But the ci cuit court evidently did not rest the case c presumption, but upon proof, from which properly deduced negligence on the part of th steamship. At all events this court, upon careful consideration of the facts found, is sa isfied that there was such negligence, and th it was the cause of the catastrophe.

The decree of the Circuit Court is affirme with interest to be added to the amount from t date of the same.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.

GLOUCESTER FERRY COMPANY, *Pl in Err.*,
v.
COMMONWEALTH OF PENNSYLVA NIA.

(See S. C., Reporter's ed., 196-218.)

Constitutional law—interstate commerce; reg lation of taxation of capital stock of fer company engaged in—review of authorities- note.

1. Commerce among the States consists of inte course and traffic between their citizens, and i cludes the transportation of persons and propert and the navigation of public waters for that pu pose, as well as the purchase, sale and exchange c commodities.

2. The power to regulate interstate and foreig commerce vested in Congress is the power to pr

NOTE.—*Constitutional law—interstate commerc regulation of—power of Congress—how far exclusi*

The power to regulate interstate commerce vest in Congress is the power to prescribe the rules b which it shall be conducted, to determine when shall be free from, and when subject to, duties c other exactions.

When the subjects of commerce are national

They were adopted for both public and private vessels of the United States by Act of Congress approved March 3, 1885. (Public Act No. 100.) They had been adopted for public vessels before. (See Luce's Seamanship, 360, ed. 1884.)

[illegible] the rules by which it shall be governed—that [illegible] the conditions upon which it shall be conducted; [illegible] when it shall be free from, and when [illegible] tolls or other exactions.

[illegible] relevance to the subjects of commerce [illegible] and limited in their nature or sphere [illegible] the States may prescribe regulations [illegible] interference and assumes control.

[illegible] the subjects of commerce are national [illegible] and require uniformity of regulation [illegible] all of the States the power of Congress [illegible].

[illegible] commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a [illegible] of national character and requires uniformity of regulation. Congress alone can deal with [illegible] transportation, and its non-action is a declaration that it shall remain free from burdens imposed by state legislation.

[illegible] Freedom of transportation implies exemption [illegible] other than such as are imposed by way of compensation for the use of the property [illegible], or for facilities afforded for its use, or as [illegible] upon the value of the property within the jurisdiction of the State.

[illegible] and landing passengers and freight [illegible] in their transportation. All restraints [illegible] in the form of taxes upon such transportation or upon acts necessary to its completion [illegible] of the exclusive power of Congress.

[illegible] The only state interference with the landing [illegible] of passengers and freight which is [illegible] is confined to such measures as will prevent confusion among the vessels and collision among them, insure their safety and convenience, [illegible] the discharge or receipt of their passengers and freight.

[illegible] A ferry is a means—and a necessary means—of [illegible] intercourse between States bordering [illegible] waters, and it must therefore be conceded [illegible] the imposition by the States of [illegible] or other burdens upon the commerce between them.

[illegible] The capital stock of the Gloucester Ferry [illegible], a New Jersey corporation engaged in [illegible] of persons and property between [illegible] in that State and Philadelphia in Pennsylvania, is not subject to taxation by the State of Pennsylvania.

[illegible] The State can impose a tax on that portion of [illegible] commerce which is involved in the [illegible] of persons and property, whatever [illegible] by which it is carried on.

[No. 185.]

Argued Mar. 13, 1885. Decided Apr. 13, 1885.

IN ERROR to the Supreme Court of the State of Pennsylvania.

The history and facts appear in the

Statement of the case by *Mr. Justice* **Field:** [197]

In March, 1865, the Gloucester Ferry Company, the plaintiff in error here, was incorporated by the Legislature of New Jersey to establish a steamboat ferry from the town of Gloucester, in that State, to the city of Philadelphia in Pennsylvania, with a capital stock of $50,000, divided into shares of $50 each. During that year it established, and has ever ever since maintained, a ferry between those places, across the river Delaware, leasing or owning steam ferry-boats for that purpose. At each place it has a slip or dock on which passengers and freight are received and landed; the one in Gloucester it owns, the one in Philadelphia it leases. Its entire business consists in ferrying passengers and freight across the river between those places. It has never transacted any other business. It does not own, and has never owned, any property, real or personal, in the city of Philadelphia other than than the lease of the slip or dock mentioned. All its other property consists of certain real estate in the county of Camden, New Jersey, needed for its business, and steamboats engaged in ferriage. These boats are registered at the port of Camden, New Jersey. It has never owned any boats registered at a port of Pennsylvania, and its boats are never allowed to remain in that State except so long as may be necessary to discharge and receive passengers and freight.

In July, 1880, the auditor-general and the treasurer of the State of Pennsylvania stated an account against the Company of taxes on its capital stock, based upon its appraised value, for the years 1865 to 1879, both inclusive, finding the amount of $2,593.96 to be due the Commonwealth. From this finding an appeal was taken to the Court of Common Pleas of Philadelphia, and was there heard upon a case stated, in which it was stipulated that if the court were of opinion that the Company was liable for the tax, judgment against it in favor of the

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[illegible] and require uniformity of regulation. [illegible] power of Congress is exclusive. In addition to [illegible] case of Gloucester Ferry Co. v. Pa., see [illegible] 114 U. S., bk. 28, 247, 249; Gilman v. [illegible], 13 U. S. (9 Wall.), 713, bk. 18, 96; Henderson v. Mayor, 92 U. S., 259, bk. 23, 543; Mobile v. Hunter, 118 U. S., 602, bk. 30, 241; Brown v. Houston, 114 U. S. 622, post.

[illegible] when exercised by Congress, the power [illegible] of all state interference. Gibbons v. Ogden, 9 L. Ed. (9 Wh.), 1; Sinnot v. Davenport, 63 U. S. (22 How.), 227, bk. 16, 243; Hall v. De Cuir, 95 U. S. 485, bk. 24, L. ed., 547.

[illegible] by Congress amounts to a declaration that [illegible] within its exclusive control shall remain free and unrestricted. In addition to the [illegible] of Gloucester Ferry Co. v. Pa., see Welton v. Mo., 91 U. S., 275, bk. 23, 347; Escanaba Co. v. Chicago, 107 U. S. 678, bk. 27, 442; Henderson v. [illegible], 92 U. S., 259, bk. 23, 543; Brown v. Houston, [illegible]

[illegible] power vested in Congress covers navigation. [illegible] v. Ogden, 22 U. S. (9 Wh.), 1; Passenger [illegible] 7 How. 283.

[illegible] *of the largest import.* • • • [illegible] power to regulate it embraces all the instruments by which such commerce may be conducted. [illegible] v. Hall, *supra.*

[illegible] control of the telegraph as an agency [illegible] Pennsylvania Tel. Co. v. West. U. Tel. [illegible] U. S. 1, bk. 24, 708.

[illegible] transportation is essential to commerce, and every [illegible] or burden laid upon it by legislative authority is regulation. H. & St. J. R. Co. v. Husen, 95 U. S., 465, bk. 24, 527, and authorities cited.

"*Legislation may in a great variety of ways affect commerce* and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution." Hall v. De Cuir, 95 U.S., 485, *supra*; Sherlock v. Alling, 93 U. S., 103, bk. 23, 820; State Tax on R. Gross Receipts, 82 U. S. (15 Wall.), 284, bk. 21, 164; Munn v. Illinois, 94 U. S., 113, bk. 24, 77.

The power of Congress does not extend to contracts not designed to create impediments to commerce. A contract by an elevator company to handle all grain brought by a railroad company at a certain price is not repugnant to the power of Congress. Dubuque, etc., R. Co. v. Richmond, 86 U. S. (19 Wall.), 584, bk. 22, 173.

The paramount authority to regulate bridges and other structures that affect the navigation of the navigable waters of the United States is in Congress. Newport & Cin. Bridge Co. v. U. S., 105 U. S., 470, bk. 26, 1143, and authorities cited.

But in the absence of legislation by Congress, the States may authorize and regulate bridges and other obstructions to navigation within their limits. Cardwell v. Bridge Co., 113 U. S., 205, bk. 28, and authorities cited.

Congress may improve harbors and rivers. S. Car. v. Ga., 93 U. S., 4, bk. 23, 782.

The States may also improve the navigable waters within their limits, subject to the control of Congress. Mobile Co. v. Kimball, 102 U. S., 691, bk. 26, 238.

The States may regulate subjects of commerce which

Commonwealth should be entered for the above amount; but if the court were of opinion that the Company was not liable, judgment should be entered in its favor.

A Statute of Pennsylvania passed June 7, 1879, "to provide revenue by taxation," in its fourth section enacted as follows: "That every company or association whatever, now or [198] hereafter incorporated by or under any law of this Commonwealth, or now or hereafter incorporated by any other State or Territory of the United States or foreign government, and doing business in this Commonwealth or having capital employed in this Commonwealth in the name of any other company or corporation, association or associations, person or persons, or in any other manner, except foreign insurance companies, banks and savings institutions, shall be subject to and pay into the treasury of the Commonwealth annually a tax to be computed as follows, namely If the dividend or dividends made or declared by such company or association as aforesaid, during any year ending with the first Monday of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one half mill upon the capital stock for each one per centum of dividend so made or declared; if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of three mills upon each dollar of a valuation of the said capital stock," made in accordance with the provisions of another section of the Act.

It was under the authority of this Act that the taxes in question were stated against the Company by the auditor-general and the state treasurer

The court of common pleas held that the taxes could not be lawfully levied, for there was no other business carried on by the Company in Pennsylvania except the landing and receiving of passengers and freight, which is a part of the commerce of the country and protected by the Constitution from the impositio of burdens by state legislation. It therefor gave judgment in favor of the Company. Th case being carried on a writ of error to the Su preme Court of the State, the judgment wa reversed and judgment ordered in favor of th Commonwealth for the amount mentioned To review this latter judgment the case i brought here.

Messrs. **John G. Johnson, Morton P Henry,** *Geo. M. Dallas, M. E. Olmstead an Samuel Dickson,* for plaintiff in error:

The business in which the plaintiff in erro was engaged was interstate transportation o freight and passengers, and was therefore wit in the protection of the Constitution of th United States.

Guy v. *Baltimore,* 100 U. S., 434 (bk. 25, L ed. 743).

A foreign corporation has the same right a an individual to conduct everywhere the bus ness of interstate transportation.

Paul v. *Virginia,* 8 Wall., 168 (75 U. S., bk 19, L. ed. 357); *Pensacola Tel. Co.* v. *W. U Tel. Co.,* 96 U. S., 12 (bk. 24, L. ed. 711); *Doy* v. *Ins. Co.,* 94 U. S., 544 (bk. 24, L. ed. 152 *Tel. Co.* v. *Texas,* 105 U. S., 460 (bk. 26, L ed. 1067).

It is not competent for the State to tax direc ly, either the transportation or the goods of pe sons in transit.

State Freight Tax, 15 Wall., 232 (82 U. S bk. 21, L. ed. 146); *State Tax on Railway Gro Receipts,* 15 Wall., 284 (82 U. S., bk. 21, L. ed 164); *Passenger Cases,* 7 How., 283; *Crandal* v. *Nevada,* 6 Wall., 35 (73 U. S., bk. 18, L. ed 745); *Henderson* v. *Mayor of N. Y.,* 92 U. S 259 (bk. 23, L. ed. 543); *Guy* v. *Baltimore, su pra; R. R. Co.* v. *Husen,* 95 U. S., 465 (bk. 24 L. ed. 527); *Cook* v. *Pennsylvania,* 97 U. S 566 (bk. 24, L. ed. 1015); *Sweatt* v. *R. R. Co.,* Cliff., 339; *Tel. Co.* v. *Texas, supra; Welton* v *Missouri,* 91 U. S., 275 (bk. 23, L. ed. 347 *Car Co.* v. *Nolan,* 22 Fed. Rep., 279; *Woodruff* v. *Parham,* 8 Wall., 138 (75 U. S., bk 19, L. ed. 886); *Cannon* v. *New Orleans,* 2 Wall., 577 (87 U. S., bk. 22, L. ed. 417).

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are local and limited in their nature or sphere of operation until Congress intervenes. In addition to the above case of Gloucester Ferry Co. v. Pa., see Welton v. Mo., *supra,* 347; Brown v. Houston, *supra;* Cooley v. Port Wardens, 53 U. S. (12 How.), 299; Pound v. Turck, 95 U. S., 459, bk. 24, 525; Gilman v. Philadelphia, 70 U. S. (3 Wall.), 713, bk. 18, 92; Wilson v. Blackbird Creek M. Co., 27 U. S. (2 Pet.), 245; Escanaba Co. v. Chicago, *supra,* Miller v. Mayor, etc., 109 U. S., 385, bk. 27, 971; Cardwell v. Am. Bridge Co., *supra.*

The power of Congress to regulate navigation does not interfere with the power of the States to protect and regulate the fisheries within their limits. McCready v. Va., 94 U. S., 391, bk. 24, 248; Smith v. Md., 59 U. S. (18 How.), 71, bk. 15, 269; Green v. The Helen, 1 Fed. Rep., 916.

The power of Congress does not interfere with the police powers of the States. H. & St. J. R. Co. v. Husen, *supra;* Webber v. Va., 103 U. S., 344, bk. 26, 565.

A statute which prevents the introduction of all Texas, Mexican and Indian cattle into the State during eight months in the year, and which makes no distinction between those which are diseased and such as are not, is void, not being a proper exercise of the police power. H. & St. J. R. Co. v. Huser, *supra.*

The States cannot so exercise the police power as to work a practical assumption of the power vested in Congress. H. & St. J. R. Co. v. Husen, *supra.*

The internal commerce of a State is not within the power of Congress. The Daniel Ball v. U. S., 77 U S. (10 Wall.), 557, bk. 19, L. ed., 999; U. S. v. DeWit 76 U. S. (9 Wall.), 41, bk. 19., L. ed., 593; Veazie v Moore, 55 U. S. (14 How.), 568.

Taxation of a chattel used in interstate commerc is not necessarily a regulation of such commerc within the meaning of the Constitution. Wiggin Ferry Co. v. East St. Louis, 107 U. S., 365, bk. 27, 41 Transp. Co. v. Wheeling, 99 U. S., 273, bk. 25, 412.

A license tax on persons dealing in merchandise no the growth, produce or manufacture of the Stat conflicts with the power of Congress. Tiernan v Rinker, 102 U. S., 123, bk. 26, 103; Cook v. Pa., 97 U S., 566, bk. 24, 1015; Guy v. Baltimore, 100 U. S., 43 bk. 25, 743, and authorities cited and reviewed.

"No State can, consistently with the Federal Con stitution, impose upon the products of other State brought therein for sale or use, or upon citizens be cause engaged in the sale therein, or the transpor tation thereto of the products of other States, mor onerous public burdens or taxes than it impose upon the like products of its own territory." Gu v. Baltimore, *supra.* See also Moran v. New Or leans, 112 U. S., 69, bk. 28, 653, and authorities cite

Reasonable charges for the use of property or fo additional facilities, whether imposed as a tax o otherwise, do not interfere with the power of Con gress. See the above case of Gloucester Ferry Co v. Pa., and authorities cited in the opinion of th court.

See, generally, Gibbons v. Ogden, 22 U. S. (9 Wh. 1, *note;* Brown v. Md., 25 U. S. (12 Wh.), 419, *note.*

Commercial intercourse is guaranteed by the Constitution of the United States. It cannot be [illegible] by any State of the Union. All individuals and corporations are entitled to do everything which is necessary to facilitate this intercourse. They do not derive their rights thus to facilitate it from any of the States, and are therefore not subject to a tax because they exercise it.

[illegible] v. [illegible] Co., 61 Ind., 520; *Ex parte* [illegible], 2 [illegible], 269; *Council Bluffs* v. *R. R.* [illegible], 45 Iowa, [illegible]; *Coal Co.* v. *Carrigan*, 89 N. [illegible]; *Hays* v. *Steamship Co.*, 17 How., 597 (58 U. S., bk. 15, L. ed. 254); *Gibbons* v. *Ogden*, 9 Wheat., 1; *Brown* v. *Maryland*, 12 Wheat., 419.

Have Robert Snodgrass, *Deputy Attorney of Pennsylvania*, and *Lewis C. Cassidy*, *Attorney of Pennsylvania*, for defendant in error.

The right of a State to impose a tax upon the capital stock of foreign railroad, canal, express and other corporations, graduated by the extent to which their franchises are exercised within the State, cannot at this day be successfully controverted.

[illegible] v. *R. R. Co.*, 18 Wall., 206 (85 U. S., bk. 22, L. ed. 868).

"A public ferry is a public highway of a special description, and its termini must be in places where the public have rights, as towns or *villes*, or highways leading to towns or *villes*."

Charles River Bridge v. *Warren Bridge*, 11 Pet. 420.

The business of ferriage is not "commerce," within the meaning of the Federal Constitution, so as to cause that it must be free from state or municipal authority and control.

A ferry may be an instrument of commerce. It is as much so, and perhaps in the same sense, as a bridge, but in any case it is at most no more than a local aid or instrument, which Congress has never undertaken to regulate or control.

The distinction was forcibly recognized by Mr. Justice Field, in *County of Mobile* v. *Kimball*, 102 U. S., 702 (bk. 26, L. ed. 241).

That the power to establish and regulate ferries as well as other local aids to commerce rests in the State Legislatures and not in Congress is well settled.

[illegible] v. *Taylor's Ex.*, 1 Black., 603 (66 U. S., bk. 17, L. ed. 191); *People* v. *Babcock*, 11 Wend., [illegible]; *Gibbons* v. *Ogden*, 9 Wheat., 1; [illegible] v. *Freeholders of Hudson*, 3 Zab., 206; [illegible] v. *Gregoria*, 16 How., 524; *Ferry Co.* v. *R. R. Lewis*, 107 U. S., 365 (bk. 27, L. ed. [illegible]).

Ferries are established by the legislative authority of the several States. Without such authority no one, although he may own both banks of a navigable river, has the right to establish the ferry.

Charles River Bridge v. *Warren Bridge*, 11 Pet. 420; *Burk* v. *Miller*, 3 Mo., 470; *Trustees* v. *Johnson*, 13 Ill., 27.

As a geographical fact, as each ferriage of persons and property is made across the entire stream, this Company is "doing business in this commonwealth," and is manifestly within the class of corporations intended to be taxed by our act. But it is not merely within the taxing jurisdiction; it is plainly within the taxing power of the State. It is a foreign corporation, not strictly engaged in interstate commerce, and it it sufficient to say that never, since the decision of *Bk. of Augusta* v. *Earle*, 13 Pet., 519, has it been denied that where a State can restrict or control the business of a corporation when transacted within her limits, she can tax such business so far as it is done within her jurisdiction or can exclude the corporation altogether if she so desires.

See also *St. Louis* v. *Ferry Co.*, 11 Wall., 423 (78 U. S., bk. 20, L. ed. 192.)

It is moreover to be observed that the tax here sought to be imposed is not a tax upon the specific property of the corporation in which its capital may be invested. It is not an attempt to tax the ferry-boats of this Company, nor is it an effort to tax a corporation in proportion to the number of ferry-boats it owns. The tax is not imposed either directly or indirectly upon them; it is not measured in amount by their numbers; it is the same whether the Company owns few or many of them, and is unaffected by the frequency of their use. It therefore clashes with none of the following decisions which form part of the judicial argument against its validity:

Cannon v. *New Orleans*, 20 Wall., 577 (87 U. S., bk. 22, L. ed. 417); *Transportation Co.* v. *Wheeling*, 99 U. S., 273 (bk. 25, L. ed. 412); *Morgan* v. *Parham*, 16 Wall., 471 (83 U. S., bk. 21, L. ed. 303); *Hays* v. *Steamship Co.*, 17 How., 596 (58 U. S., bk. 15, L. ed. 254); *Hoyt* v. *Commissioners*, 23 N. Y., 227; *Passenger Cases*, 7 How., 283; *Almy* v. *People*, 24 How., 169 (65 U. S., bk. 16, L. ed. 644); *Crandell* v. *Nevada*, 6 Wall., 35 (73 U. S., bk. 18, L. ed. 745).

It is rather a tax upon the capital stock of the corporation, "not in separate parcels, as representing distinct properties, but as a homogeneous unit, partaking of the nature of personalty," and taxable where its corporate functions are exercised or its business done.

If the business of ferriage is commerce, as defined by *Chief Justice* Marshall, we concede that any tax laid upon such business which comes within the ruling of the *Passenger Cases* or the *State Freight Tax Cases* or the many other cases involving the same principle, is an interference with commerce, and, for that reason, unconstitutional.

Mr. Justice **Field** delivered the opinion of the court: [202]

The Supreme Court of the State, in giving its decision, stated that the single question presented for consideration was whether the Company did business within the State of Pennsylvania during the period for which the taxes were imposed; and it held that it did do business there because it landed and received passengers and freight at its wharf in Philadelphia, observing that its whole income was derived from the transportation of freight and passengers from its wharf at Gloucester to its wharf at Philadelphia, and from its wharf at Philadelphia to its wharf at Gloucester; that at each of these points its main business—namely, the receipt and landing of freight and passengers—was transacted; that for such business it was dependent as much upon the one place as upon [203]
the other; that, as it could hold the wharf at Gloucester, which it owned in fee, only by pur-

chase by virtue of the statutory will of the Legislature of New Jersey, so it could hold by lease the one in Philadelphia only by the implied consent of the Legislature of the Commonwealth; and that therefore it "was dependent equally, not only for its business, but its power to do that business, upon both States, and might therefore be taxed by both." 98 Pa. St., 105, 116.

As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to—indeed, is a part of—their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation.

It matters not that the transportation is made in ferry-boats which pass between the States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property and the navigation of public waters for that purpose as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress is the power to prescribe the rules by which it shall be governed—that is, the conditions upon which it shall be conducted; to determ[illegible] when it shall be free, and when subject to, duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them is a subject of national character and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products and against those of other States. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulatio that the power to regulate commerce with fo eign nations and among the States was veste in Congress.

[204]

Nor does it make any difference wheth such commerce is carried on by individuals by corporations. *Welton* v. *Missouri*, 91 U. S 275 [bk. 23, L. ed. 347]; *Mobile Co.* v. *Kimbal* 102 U. S., 691 [bk. 26, L. ed. 238]. As w said in *Paul* v. *Virginia*, at the time of th formation of the Constitution a large part the commerce of the world was carried on b corporations; and the East India Company, t Hudson's Bay Company, the Hamburgh Com pany, the Levant Company, and the Virgini Company were mentioned as among the co porations which, from the extent of their oper tions, had become celebrated throughout th commercial world. 8 Wall., 168 [75 U. S., bk 19, L. ed. 357]. The grant of power is gener in its terms, making no reference to the age cies by which commerce may be carried on. includes commerce by whomsoever conducte whether by individuals or by corporations. A the present day nearly all enterprises of a com mercial character requiring for their succes ful management large expenditures of mone are conducted by corporations. The usu means of transportation on the public wate where expedition is desired are vessels pr pelled by steam; and the ownership of a line such vessels generally requires an expenditu exceeding the resources of single individual Except in rare instances it is only by associate capital furnished by persons united in corpor tions, that the requisite means are provided f such expenditures.

As to the second reason given to the decisio below—that the Company could not lease i wharf in Philadelphia except by the implie consent of the Legislature of the Commo wealth, and thus is dependent upon the Co monwealth to do its business, and therefo can be taxed there—it may be answered that n foreign or interstate commerce can be carrie on with the citizens of a State without the u of a wharf or other place within its limits o which passengers and freight can be lande and received, and the existence of power in State to impose a tax upon the capital of a corporations engaged in foreign or interstat commerce for the use of such places would b inconsistent with and entirely subversive of th power vested in Congress over such commerc Nearly all the lines of steamships and of sai ing vessels between the United States and En land, France, Germany and other countries Europe, and between the United States an South America, are owned by corporation and, if by reason of landing or receiving passe gers and freight at wharves or other places in State, they can be taxed by the State on the capital stock on the ground that they are thereb doing business within her limits the tax which may be imposed may embarrass, imped and even destroy such commerce with the ci zens of the State. If such a tax can be levie at all its amount will rest in the discretion the State. It is idle to say that the interests the State would prevent oppressive taxatio Those engaged in foreign and interstate co merce are not bound to trust to its moderatio in that respect; they require security. And th

[illegible] on the power of Congress to prevent [illegible] interference by the State until the act of [illegible]—the transportation of passengers and [illegible] is completed. The only interference [illegible] State with the landing and receiving of [illegible] and freight which is permissible is [illegible] to such measures as will prevent con[illegible] among the vessels, and collision between [illegible] secure the safety and convenience, and [illegible] the discharge or receipt of their passen[illegible] and freight, which fall under the general [illegible] of port regulations, of which we shall [illegible] speak.

[illegible] true that the property of corporations en[illegible] in foreign or interstate commerce, as [illegible] as the property of corporations engaged [illegible] other business, is subject to state taxation, [illegible] always it be within the jurisdiction of [illegible] State. As said by *Chief Justice* Marshall [illegible] *McCulloch* v. *Maryland*, 4 Wheat., 429, "All [illegible] over which the sovereign power of a [illegible] extends are objects of taxation; but those [illegible] which it does not extend are, upon the [illegible] principles, exempt from taxation. [illegible] proposition may also be pronounced self-[illegible]."

[illegible] *Hays* v. *Pacific Mail Steamship Co.*, 17 [illegible], 596 [38 U. S., bk. 15, L. ed. 254], the de[illegible] a corporation of New York, owned [illegible] vessels employed in the transportation of [illegible] and freight between New York and [illegible] Francisco and between New York and [illegible] ports in Oregon, which were registered [illegible] New York. The principal office of the com[illegible] for transacting its business was also in [illegible] York, though for its better management [illegible] were established in Panama and in [illegible] Francisco. It had a naval dock and ship[illegible] at Benicia, in California, for furnishing [illegible] repairing its steamers. On their arrival at [illegible] port of San Francisco they remained only [illegible] enough to land their passengers, mail and [illegible], which was usually done in a day, and [illegible] proceeded to Benicia, where they remained [illegible] repairs and refitting until the commence[illegible] of the next voyage, which was generally [illegible] ten or twelve days. It was held that the [illegible] were not subject to taxation in Califor[illegible] as they were only temporarily there while [illegible] in lawful trade and commerce; that [illegible] was at their home port, where their [illegible] were liable to be taxed for the capital [illegible]. The court, in giving its decision, [illegible] that the ships are "engaged in the business [illegible] commerce of the country, upon the high[illegible] of nations, touching at such ports and [illegible] as their great interests demand, and [illegible] held out to the owners sufficient induce[illegible] by the profits realized or expected to be [illegible]. And so far as respects the ports and [illegible] within the United States they are en[illegible] and cargoes discharged or laden on board [illegible] of any control over them except [illegible] such municipal and sanitary regu[illegible] of the local authorities as are not in[illegible] with the Constitution and laws of [illegible] General Government, to which belongs the [illegible] of commerce with foreign nations [illegible] between the States. Now it is quite ap[illegible] that if the State of California possessed [illegible] authority to impose the tax in question, [illegible] other State in the Union into the ports of [illegible] the vessels entered in the prosecution of their trade and business, might also impose a like tax."

In *Morgan* v. *Parham*, 16 Wall., 471 [83 U. S., bk. 21, L. ed. 303], it was held that a vessel registered in New York was not subject to taxation in Alabama, though engaged in commerce as one of a regular line of steamers between Mobile in that State and New Orleans in Louisiana. In rendering the decision it was said "It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only and that it was engaged in lawful commerce between the States, with its situs at the home port of New York, where it belonged and where its owner was liable to be taxed for its value," referring to the case of *Hays* v. *Pacific Mail Steamship Co.*, as decisive of the case; and adding: "The jurisdiction of this court over the present case, as in the case of *Hays* v. *The Pacific Mail Steamship Company*, arises from the facts, first, that the property had not become blended with the business and commerce of Alabama, but remained legally of and as in New York; and, secondly, that the vessel was lawfully engaged in the interstate trade over the public waters. It is in law as if the vessel had never before been within the port of Mobile, but, touching there on a single occasion when engaged in the interstate trade, had been subjected to a tax as personal property of that city. Within the authorities it is an interference with the commerce of the country not permitted to the States." [208]

In *St. Louis* v. *Ferry Co.*, 11 Wall., 423 [78 U. S., bk. 20, L. ed. 192], the company was incorporated by Illinois to run a ferry from a place opposite St. Louis to that city across the Mississippi. It had its principal place of business in St. Louis, in which its chief officers resided, and there the business meetings of its directors were held. Its engineers and subordinate officers resided in Illinois, where its real estate was situated. Its ferry-boats when not in use were laid up in Illinois and forbidden to remain at the wharf in St. Louis. It paid a ferry license to St. Louis and a wharfage tax for the use of its wharf there. In addition to these charges the city authorities assessed a tax on the company for the value of the boats as property *within the city*, all property within it being taxable under a statute of the State. The court held that the tax was illegally levied, as the boats were not property within the city, and said: "Where there is jurisdiction neither as to person nor property the imposition of a tax would be *ultra vires* and void. If the Legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons or property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

In *R. R. Co.* v. *Pennsylvania*, 15 Wall., 300 [82 U. S., bk. 21, L. ed. 179], sometimes called *Case of State Tax on Foreign-held Bonds*, which was brought here on a writ of error to the Supreme Court of the State, this court said that "the

power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business." This proposition would seem, [209] as stated by *Chief Justice* Marshall, to be self-evident, and no force of expression could add to its manifest truth.

In the recent case of *Pennsylvania* v. *Standard Oil Co.*, 101 Pa. St., 119, the liability of foreign corporations doing business within that State is elaborately considered by its Supreme Court. The corporation was doing business there, and it was contended on the part of the Commonwealth that the tax should be imposed upon all of the capital stock of the company; while on the other side it was urged that only so much of the stock was intended by the statute to be taxed, as was represented by property of the company invested and used in the State. In giving its decision the court said that it had been repeatedly decided and was settled law that a tax upon the capital stock of a company is a tax upon its property and assets (citing to that effect a large number of decisions); that it was undoubtedly competent for the Legislature to lay a franchise or license tax upon foreign corporations for the privilege of doing business within the State, but that the tax in that case was in no sense a license tax; that the State had never granted a license to the Standard Oil Company to do business there, but merely taxed its property—that is, its capital stock—to the extent that it brought such property within its borders in the transaction of its business; that the position of the Commonwealth—that a foreign corporation entering the State to do business brought its entire capital—was ingenious but unsound; that it was a fundamental principle that in order to be taxed the person must have a domicil in the State, and the State must have a situs therein; that persons and property *in transitu* could not be taxed; that the domicil of a corporation was in the State of its origin and it could not emigrate to another sovereignty; that the domicil of the Standard Oil Company was in Ohio, and when it sent its agents into the State to transact business it no more entered the State in point of fact than any other foreign corporation, firm or individual who sent an agent there to open an office or branch house, nor brought its capital there constructively; that it would be as reasonable to assume that a business firm in Ohio brought its entire capital there because it sent [210] its agent to establish a branch of its business, as to hold that the Standard Oil Company by employing certain persons in the State to transact a portion of its business thereby brought all its property or capital stock within the jurisdiction of the State; that there was neither reason nor authority for such a proposition; that the company was taxable only to the extent that it brought its property within the State; and that its capital stock, as mentioned in the Act of the Legislature, must be construed to mean so much of the capital stock as was measured by the property actually brought within the State by the company in the transaction of its business. The justice who delivered the opinion of the court added, speaking for himself, that he conceded the power of the Commonwealth to exclude foreign corporations altogether from her borders, or to impose a license tax so heavy a to amount to the same thing; but he denied great and searching as her taxing power is, tha she could tax either persons or property no within her jurisdiction. "A foreign corpora tion," he said, "has no domicil here and ca have none; hence it cannot be said to draw t itself the constructive possession of its propert located elsewhere. There are a large numbe of foreign insurance companies doing busine here under license from the State. Some c them have a very large capital. It is usuall invested at the domicil of the company. If th position of the Commonwealth is correct ab can tax the entire property of the Royal Insu ance Company although the same is locate almost wholly in England, or the assets of th New York Mutual, located in New York."

Under this decision there is no property hel by the Gloucester Ferry Company which ca be the subject of taxation in Pennsylvania ex cept the lease of the wharf in that Stat Whether that wharf is taxed to the owner or t the lessee it matters not, for no question he is involved in such taxation. It is admitted th it could be taxed by the State according to i appraised value. The ferry-boats of the Com pany are registered at the port of Camden i New Jersey, and according to the decisions i *Hays* v. *Steamship Co.* and in *Morgan* v. *Parha* [*supra*], they can be taxed only at their home por According to the decision in the Standard C Company case, and by the general law on th subject the Company has no domicil in Pen sylvania, and its capital stock representing i property is held outside of its limits. It is sol ly, therefore, for the business of the Compar in landing and receiving passengers at the wha in Philadelphia that the tax is laid; and th business, as already said, is an essential part the transportation between the States of Ne Jersey and Pennsylvania, which is itself inte state commerce. While it is conceded that th property in a State belonging to a foreign co poration engaged in foreign or interstate com merce may be taxed equally with like proper of a domestic corporation engaged in that bu ness, we are clear that a tax or other burden im posed on the property of either corporation b cause it is used to carry on that commerce, upon the transportation of persons or propert or for the navigation of the public waters ov which the transportation is made, is inval and void as an interference with and an c struction of the power of Congress in the regul tion of such commerce. This proposition is su ported by many adjudications. Thus, in *Gi bons* v. *Ogden*, the earliest and leading case up the commercial power of Congress, it was he that the Acts of New York giving to Livin ston and Fulton the exclusive right, for a c tain number of years, to navigate all the wat within its jurisdiction with vessels propelled steam, were unconstitutional and void. Maki the navigation of those waters subject to license of the grantee of the State—that is, such a tax or other burden as they might levy was an obstruction to commerce between t States and in conflict with the laws of Congr respecting the coasting trade. 9 Wheat., Although the sole point in judgment was whe er the State could regulate commerce on t waters in the face of such legislation by C

[illegible] yet the argument of the court was that [illegible] attempted control of the navigable waters [illegible] State was an encroachment upon the [illegible] power of Congress independently of that [illegible].

[illegible] *Ownership Co.* v. *Portwardens*, 6 Wall., 31 [illegible] U. S., bk. 18, L. ed. 749], it was held that a [illegible] of Louisiana declaring that the master [illegible] wardens of the port of New Orleans should [illegible] entitled to demand and receive, in addition [illegible] other fees, the sum of $5 for every [illegible] arriving at that port whether called on [illegible] perform any service or not, was unconstitutional and void, as imposing a burden upon commerce both interstate and foreign. The [illegible] was in effect a tax for entering the [illegible], for the navigation of its waters. The control of the navigable waters of the port, and of all public waters constituting channels of communication between the States and foreign countries, is embraced within the commercial power of Congress, and equally beyond the interference of the States. It was claimed that the tax was for compensation to the master and wardens for the performance of certain duties required of them, and that the law for its collection stood, therefore, on the same constitutional grounds as the laws authorizing the collection of pilotage; but the court answered that in Acts of Congress recognize such laws as those of Louisiana as proper and beneficial regulations, whilst state laws in respect to pilotage are not recognized. The court also added that the right to recover pilotage and half-pilotage prescribed by state legislation rested not only upon state laws but upon contract, carrying that pilotage was compensation for services performed, and half-pilotage was compensation for services which a pilot had put himself in readiness to perform by labor, risk and cost, and had offered to perform; whilst in the case in Louisiana the state law subjected the vessel to the demand of the master and wardens whether called upon to perform any service or not. The case therefore was simply that of a tax imposed upon the vessel for the navigation of the public waters of the State, and as such was a regulation of commerce and an illegal encroachment upon the power of Congress.

In *Railway R. R. Co.* v. *Pennsylvania*, sometimes called the *Case of the State Freight Tax*, [illegible] U. S., bk. 21, L. ed. 146], it was held that the Act of the Legislature of Pennsylvania requiring railroad companies to pay to the state treasurer, for the use of the Commonwealth, a tax on each two thousand pounds of freight carried, was unconstitutional and void so far as it affected commodities imported through the State, or from points without the State to points within the State, or from points within the State to points without, as being a regulation of interstate commerce. The court said that the imposition of the tax whether large or small was a restraint upon the privilege or right to have the subjects of commerce passed freely from one State to another without being obstructed by the intervention of state lines. Its payment was a condition upon which the prosecution of that branch of commerce was made to depend, and the imposition therefore was in conflict with the power of Congress over the subject.

In *Henderson* v. *Mayor of N. Y.*, 92 U. S., 259 [Bk. 23, L. ed. 543], an Act of the State of New York requiring the owner or consignee of a vessel arriving at the Port of New York to give a bond for every passenger in a penalty of $300, with two sureties, each a resident and freeholder, conditioned to indemnify the Commissioner of Emigration, and every county, city and town in the State against any expense for the relief or support of the person named in the bond, for four years thereafter, but allowing in commutation of the bond a payment of one dollar and a half for each passenger within twenty-four hours after his landing, and imposing a penalty of $500 for each passenger if such payment were not made within that time, the penalty to be a lien upon the vessel, was held to be unconstitutional and void. In its decision the court said that the State imposed a tax on the shipowner for the right to land his passengers, and that it was in effect a tax on the passenger himself, since its payment was required as part of his fare. "The transportation of a passenger from Liverpool to the city of New York," it added, speaking by *Mr. Justice* Miller, "is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city. A law or a rule emanating from any lawful authority which prescribes terms or conditions on which alone the vessel can discharge its passengers is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations." 92 U. S., 259, 271 [Bk. 23, L. ed., 543, 548].

These cases would seem to be decisive of the character of the business which is the subject of taxation in the present case. Receiving and landing passengers and freight is incident to their transportation. Without both there could be no such thing as their transportation across [214] the river Delaware. The transportation, as to passengers, is not completed until, as said in the *Henderson Case*, they are disembarked at the pier of the city to which they are carried; and, as to freight, until it is landed upon such pier. And all restraints by exactions in the form of taxes upon such transportation or upon acts necessary to its completion are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.

The cases where a tax or toll upon vessels is allowed to meet the expenses incurred in improving the navigation of waters traversed by them; as, by the removal of rocks, the construction of dams and locks to increase the depth of water and thus extend the line of navigation, or the construction of canals around falls—rest upon a different principle. The tax in such cases is considered merely as compensation for the additional facilities thus provided in the navigation of the waters. *Kellogg* v. *Union Co.*, 12 Conn., 7; *Thames Bank* v. *Lovell*, 18 Conn., 500; *McReynolds* v. *Smallhouse*, 8 Bush, 447.

Upon similar grounds, what are termed harbor dues or port charges exacted by the State from vessels in its harbors, or from their owners, for other than sanitary purposes are sustained. We say for other than sanitary purposes, for the power to prescribe regulations to protect the health of the community and prevent the spread of disease is incident to all

local municipal authority, however much such regulations may interfere with the movements of commerce. But independently of such measures the State may prescribe regulations for the government of vessels whilst in its harbors; it may provide for their anchorage or mooring, so as to prevent confusion and collision; it may designate the wharves at which they shall discharge and receive their passengers and cargoes, and require their removal from the wharves when not thus engaged, so as to make room for other vessels. It may appoint officers to see that the regulations are carried out, and impose penalties for refusing to obey the directions of such officers; and it may impose a tax upon vessels, sufficient to meet the expenses attendant upon the execution of the regulations. The authority for establishing regulations of this character is found in the [215] right and duty of the supreme power of the State to provide for the safety, convenient use and undisturbed enjoyment of property within its limits; and charges incurred in enforcing the regulations may properly be considered as compensation for the facilities thus furnished to the vessels. *Vanderbilt* v. *Adams*, 7 Cow., 351.

Should such regulations interfere with the exercise of the commercial power of Congress, they may at any time be superseded by its action. It was not intended, however, by the grant to Congress to supersede or interfere with the power of the States to establish police regulations for the better protection and enjoyment of property. Sometimes, indeed, as remarked by Mr. Cooley, the line of distinction between what constitutes an interference with commerce and what is a legitimate police regulation is exceedingly dim and shadowy, and, he adds, "it is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions if it shall be deemed advisable; and that to whatever extent ground shall be covered by those directions, the exercise of state power is excluded. Congress may establish police regulations, as well as the States, confining their operations to the subjects over which it is given control by the Constitution; but as the general police power can better be exercised under the provisions of the local authority, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the National Congress, the regulations which are made by Congress do not often exclude the establishment of others by the State covering very many particulars." Cooley, Const. Lim., 732.

The power of the States to regulate matters of internal police includes the establishment of ferries as well as the construction of roads and bridges. In *Gibbons* v. *Ogden* [9 Wheat., 203], *Chief Justice* Marshall said that laws respecting ferries, as well as inspection laws, quarantine laws, health laws regulating the internal commerce of the States, are component parts of an immense mass of legislation, embracing everything within the limits of a State not surrendered [216] to the General Government; but in this language he plainly refers to ferries entirely within the State, and not to ferries transporting passengers and freight between the States and a foreign country; for the power vested in Congress, he says, comprehends every species of commercial intercourse between the United States and fo eign countries. No sort of trade, he adds, can b carried on between this country and another which the power does not extend; and what true of foreign commerce is also true of com merce between States over the waters separa ing them. Ferries between one of the Stat and a foreign country cannot be deemed, ther fore, beyond the control of Congress under th commercial power. They are necessarily go erned by its legislation on the importation an exportation of merchandise and the immigratio of foreigners—that is, are subject to its reg lation in that respect; and if they are not b yond the control of the commercial power Congress, neither are ferries over waters sep rating States. Congress has passed vario laws respecting such international and intersta ferries, the validity of which is not open question. It has provided that vessels used e clusively as ferry-boats, carrying passenger baggage and merchandise, shall not be require to enter and clear, nor shall their masters be r quired to present manifests, or to pay entran or clearance fees, or fees for receiving or ce tifying manifests; "but they shall, upo arrival in the United States, be required report such baggage and merchandise to th proper officer of the customs, according to law (R. S., § 2792); that the lights for ferry-boa shall be regulated by such rules as the Boa of Supervising Inspectors of Steam Vessels sha prescribe (R. S., § 4233, Rule 7); that an foreign railroad company or corporation who road enters the United States by means of ferry or tug-boat, may own such boat, and th it shall be subject to no other or different r strictions or regulations in such employme than if owned by a citizen of the United Stat (R. S., § 4370); that the hull and boilers of ever ferry-boat propelled by steam shall be inspec ed, and provisions of law for the better securit of life, which may be applicable to them, shal by regulations of the supervising inspectors, b required to be complied with before a certi cate of inspection be granted; and that the shall not be navigated without a licensed eng neer and a licensed pilot (R. S., § 4426).

It is true that from the earliest period in th history of the government the States have a thorized and regulated ferries not only ove waters entirely within their limits, but ove waters separating them; and it may be concede that in many respects the States can more a vantageously manage such interstate ferri than the General Government; and that th privilege of keeping a ferry, with a right to tak toll for passengers and freight, is a franchis grantable by the State, to be exercised withi such limits and under such regulations as ma be required for the safety, comfort and co venience of the public. Still the fact remai that such a ferry is a means—and a necessar means—of commercial intercourse between th States bordering on their dividing waters, an it must therefore be conducted without the in position by the States of taxes or other burde upon the commerce between them. Freedo from such imposition does not of course in ply exemption from reasonable charges as con pensation for the carriage of persons, in th way of tolls or fares, or from the ordinary tax tion to which other property is subjected, an

[illegible] like freedom of transportation on land implies such exemption. Reasonable charges for the use of property either on water or land are not an interference with the freedom of transportation between the States secured under the commercial power of Congress. *Packet Co.* v. *Keokuk*, 95 U. S., 80 [Bk. 24, L. ed., 377]; *Packet Co.* v. *St. Louis*, 100 U. S., 423 [Bk. 25, L. ed., 688]; *Vicksburg* v. *Tobin*, Id., 24 L. ed., 696]; *Packet Co.* v. *Catlettsburg*, 105 U. S., 559 [Bk. 26, L. ed., 1170]; *Transportation Co.* v. *Parkersburg*, 107 U. S., 691 [Bk. 27, L. ed., 396].

That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property. The conflicting legislation of the two States on the subject of ferries on waters dividing them is to be met and treated is not a question before us for consideration. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Delaware River. Any one, so far as her laws are concerned, is free, as we are informed, to establish such ferries as he may choose. No license fee is exacted from ferrykeepers. She merely reserves the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question, therefore, respecting the tax in the present case is not complicated by any action of that State concerning ferries. However great her power, no legislation on her part can impose a tax on the portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on.

It follows that upon the case stated the tax imposed upon the Ferry Company was illegal and void. *The judgment of the Supreme Court of the State of Pennsylvania must therefore be reversed, and the cause remanded for further proceedings in conformity with this opinion.*

Attest:
James H. McKenney, Clerk. Sup. Court, U. S.

DELINZO A. WALDEN, *Appt.*,
v.
SHERMAN W. KNEVALS.

(See S. C. Reporter's ed., 373-376.)

Indemnity to railways, attach when—route definitely fixed when—subsequent entry, void.

1. Under the Act of July 23, 1866, the land-grant to the St. Joseph and Denver Railroad Company attaches to the adjoining sections when the route designated by the company, and a map designating it was filed with the Secretary of the Interior and accepted by him.

2. A subsequent entry by one without notice acquires no interest in him, and the patent issued on such entry passes none. VanWyck v. Knevals, 106 U. S., 360, affirmed.

[No. 220.]

Submitted Apr. 1, 1885. Decided Apr. 13, 1885.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

The bill in this case was filed in the court below, by the appellee, to secure the conveyance to him of the legal title to certain premises alleged to be held in trust by the defendant.

The court below having entered a decree for the complainant, upon an agreed statement of facts, the defendant appealed to this court.

The facts of the case are sufficiently stated by the court.

Messrs. **Delinzo A. Walden,** in person, *John M. Thurston*, *L. M. Colby* and *Alfred Haslett*, for appellant.

Mr. **J. M. Woolworth,** for appellee.

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Mr. Justice **Field** delivered the opinion of the court:

The questions presented in this case are similar to those considered and decided in *Van Wyck* v. *Knevals*, reported in 106 U. S. Reports [bk. 27, L. ed. 201]. By the Act of Congress of July 23, 1866 [14 Stat. at L., 210], there was granted to the State of Kansas, for the use and benefit of the St. Joseph and Denver Railroad Company, in the construction of a railroad from Ellwood in that State to its junction with the Union Pacific Railroad or a branch thereof, not further west than the 100th meridian of west longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of the road, to the point of intersection. The grant was accompanied, however, with this qualification—that in case it should appear that the United States had, when the line or route of the road was "definitely fixed," sold any section or part thereof thus granted, or that the right of preemption or homestead settlement had attached to the same, or that it had been reserved by the United States for any purpose whatever, then it should be the duty of the Secretary of the Interior to cause an equal quantity of other lands to be selected from the odd sections nearest to those designated, in lieu of the lands thus appropriated. The main question here, as in the case mentioned, is, When was the route of the road to be considered as "definitely fixed" so that the grant attached to the adjoining sections. In the case mentioned we held that the route must be considered as "definitely fixed" when it had ceased to be the subject of change at the volition of the company; that until the map designating the route of the road was filed with the Secretary of the Interior the company was at liberty to adopt such a route as it might deem best after an examination of the ground had disclosed the advantages of different routes. But it was held that when the route was adopted by the company and a map designating it was filed with the Secretary of the Interior and accepted by that officer, the route was established. In the language of the Act, it was "definitely fixed" and could not be the subject of further change so as to affect the grant except by legislative consent; and that no further action was required on the part of the company to establish the route. It then became the duty of the Secretary to withdraw the lands granted from market, and the court said: "If he should neglect this duty, the neglect would not impair the rights of the company however prejudicial it might prove to others. Its rights are not made dependent upon the issue of the Secretary's order or upon notice of the withdrawal being given to the local land officers. Congress,

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which possesses the absolute power of alienation of the public lands, has prescribed the period at which other parties than the grantee named shall have the privilege of acquiring a right to portions of the lands specified, and neither the Secretary nor any other officer of the Land Department can extend the period by requiring something to be done subsequently, and until done continuing the right of parties to settle on the lands as previously." 106 U. S., 366 [Bk. 28, L. ed. 203]. Since the decision of that case the court, in *R. Co.* v. *Dunmeyer*, 113 U. S., 629 [Bk. 28, L. ed. 1122], has reconsidered the question and come to the same conclusion, the receipt of the map in the land-office without objection being considered as equivalent to its acceptance.

It appears from the agreed statement of facts that previous to the 21st of March, 1870, the engineers of the railway company surveyed and staked out upon the ground the proposed line of the road, made a topographical map of the country through which the line ran, showing the government surveys and the proposed route with reference to the section lines, and the towns, counties and rivers; that such map was on that day approved by the board of directors, and on the 25th of the same month was filed, together with a certificate of the approval indorsed thereon, with the Secretary of the Interior, who approved the same, and on the 28th of the same month transmitted it to the Commissioner of the General Land-Office, with directions to instruct the proper local land officers to withdraw from sale or other disposal all the odd-numbered sections falling within the limits of twenty miles on each side of the line of the route. On the 8th of April following the Commissioner transmitted by mail a copy of the map to the register and receiver of the local land office at Beatrice, in Nebraska, but it was not received by them until the 15th of that month. On the 8th of April, 1870, one Clark Irvin entered the lands in question at the land office in Beatrice, and on the 1st of November, 1871, a patent was issued to him. At the time of his entry no instructions had been received [376] from the Land Department of the Government that the lands were withdrawn from market, and he made his entry without any actual knowledge of the filing of the company's map with the Secretary, or of his order to withdraw the lands from market. Subsequently the company applied to the Land Department for a patent of the lands, and tendered the necessary fees and charges. The application was refused on the ground that Irvin's right of entry had attached to the lands and a patent for them had been issued to him. The plaintiff deraigned title from the railroad company, and the defendant deraigned title from Irvin, by deed, for which he paid a valuable consideration, without notice of the claim of the plaintiff. It thus appears that the defendant made his entry and therefore acquired whatever rights he possesses after the map of the company designating its route had been filed with the Secretary of the Interior, March 25, 1870, and the route had thereby become definitely established. The title of the company to the adjoining odd sections was then fixed. No rights could be initiated subsequently which could affect that title. The entry of the defendant being on the 8th of April afterwards created no interest in him, and the patent issued upon that entry passed none.

All other questions presented in this case are fully considered in *Van Wyck* v. *Knevals*, and we see no ground to change the conclusion then reached. For the reasons there stated, the *decree of the court below must therefore be affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

PENN NATIONAL BANK, *Appt.*,

v.

JAMES T. FURNESS, FRANCIS BRINLEY, Administrator of EDWARD L. BRINLEY, Deceased, ET AL.

(See S. C., Reporter's ed., 376-381.)

Partnership—neither retiring member nor firm liable for loans to new firm used in payment of his capital and debts of old firm.

Certain members of a copartnership agreed to pay a retiring member a fixed amount as his capital, all erroneously believing the firm to be solvent. The new firm borrowed on its own notes and applied the proceeds in payment of part of the capital so agreed upon and of some of the debts of the old firm. Upon the failure of the new firm the holder of its notes cannot charge the old firm or the retiring partner with the money loaned on said notes although it was thus applied.

[No. 221.]

Argued Mar. 31 and Apr. 1, 1885. Decided April, 1885.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The bill in this case was filed in the court below by the appellant, to charge the defendants with certain moneys upon an accounting.

The court below having entered a decree dismissing the bill the complainant appealed to this court.

The facts of the case are stated by the court.

Mr. **Nathan H. Sharpless**, for appellant.

Mr. **Charles Hart**, for Furness *et al.*, appellees.

Messrs. **Samuel Dickson** and *E. G. Platt*, for Francis Brinley, appellee.

Mr Justice **Field** delivered the opinion of the court:

This is a suit by the Penn National Bank to charge the firm of Furness, Brinley & Co., of Philadelphia, with moneys obtained from the Bank by the firm of Furness, Ash & Co., of that city, in a discount of its paper, and used in payment of the debts of the first firm; and also to charge the defendant Edward L. Brinley with the moneys thus obtained by Furness, Ash & Co., which were used to pay its debts to him.

It appears from the record that for many years preceding January 1, 1878, the firm of Furness, Brinley & Co. was engaged in business as auctioneers in the City of Philadelphia and was in good standing and credit. It consisted, up to October 1, 1878, of James T. Furness, Edward L. Brinley, Joshua P. Ash, William H. Ash, Henry Day and Dawes E. Fu

[illegible] at that time Henry Day and Dawes E. Furness [illegible] from the firm. Soon afterwards Edward L. Brinley expressed a desire also to [illegible] from it. An agreement was accordingly [illegible] into between him and James T. Furness and Joshua P. Ash to the effect that he should [illegible] his retirement to take place as of the first of July 1877, but not to be announced until the first of January, 1878, and that he was to withdraw his capital in the firm, $25,000, to be paid in monthly payments of $5,000, commencing on the first of December, 1877. For the payment of this amount James T. Furness and Joshua P. Ash made themselves individually liable. On the first of January, 1878, Brinley's retirement was accordingly announced, and a new firm was then formed under the name of Furness, Ash & Co., consisting of James T. Furness, Joshua P. Ash and William [illegible] Ash, to continue the same business at the same stand, as successors of Furness, Brinley & [illegible]. This new firm existed only till the 15th of the following month when it failed. During its existence it obtained large discounts of its paper at the Penn National Bank and from other parties, and the money derived from them was used by it, among other purposes, to pay the instalments of $5,000 each month to Edward L. Brinley, the retired partner. Of the sum agreed upon, $20,000 were thus paid. The retirement of Edward L. Brinley from the old firm, and the formation of the new firm, the insolvent condition of the old firm was unknown to its members; but upon an examination of their books after the failure of the new firm it appeared that the old firm was in fact insolvent on the first of July, 1877, and on the first day of January, 1878. The bill in the present case charges that this agreement for the retirement of Brinley and the payment to him of $25,000 was made with knowledge of the insolvency of the old firm and upon a corrupt conspiracy between the partners to enable Brinley to fraudulently withdraw his capital from the firm and escape liability for its debts. It also charges that the discounts of the paper of the new firm were promoted by false statements on the part of Edward L. Brinley to intending parties who discounted the paper; and that they were made to carry out the corrupt conspiracy mentioned. All the allegations of fraud and conspiracy are explicitly and emphatically denied in the answers of the defendants, and are not wholly unsustained by the proofs. Although the business of the old firm for the last year of its existence was loosely conducted, there is not the slightest evidence that any of its members, except perhaps James G. Furness, had a suspicion of its insolvent condition. He may have suspected its condition, but if so he was too suspicious to himself, in no way intimating them to the other members of the firm. He kept the accounts of the partnership, and it does not appear that any other member knew anything of them. It is clear that they believed the firm was financially sound, and not only capable of paying all its debts but that there was a large surplus. It also appears that the National Bank at the time it discounted the paper of Furness, Ash & Co. knew who composed the firm and relied entirely upon its solvency and its obligations.

The case, then, stands thus: Certain members of the copartnership agreed to pay another member a fixed amount as his capital, on his withdrawal from the concern, all parties believing at the time in the firm's solvent condition. The member accordingly withdraws and a new partnership is thereupon formed between the remaining members. The new firm, on its own responsibility, borrows money on its notes from different parties—among others from the plaintiff—who were acquainted with its members, and pays part of the capital as agreed upon to the retiring member and also some of the debts of the old firm. Soon afterwards the new firm fails, and the plaintiff Bank now seeks to charge the old firm with the moneys thus loaned, which were used to pay its debts, and the retiring member for the amount due to him. We are clear that this cannot be done. The discount was a transaction entirely between the new firm and the plaintiff. No credit was given to the old firm or to the retired partner. It was not a matter between the Bank and either of them. It is simply a common instance of credit given to an insolvent firm without knowledge by the lender, of its insolvency; and in the course of business the loss is to be ascribed to overconfidence in the firm's responsibility, whilst in ignorance of its true condition.

The old firm remains liable for its debts contracted whilst it was in existence, and unpaid, and the retired member, as a partner in that firm, is liable with the other partners; and it seems from the record, that since the failure of the new firm he has himself discharged outstanding liabilities of the old firm amounting to over $37,000, exceeding by about $17,000 the sums paid to him by the new firm. The new firm is alone liable for the debts of its own contracting. [380] They cannot be transferred to others with whom the plaintiff never dealt.

The case is different from those where a retiring partner draws out a portion of the capital of the concern with an agreement that the other members will pay the debts, and it turns out that the firm was at the time insolvent. There the retiring party will be held to restore the capital, so far as may be necessary to pay the debts of the concern existing at the time, and this, too, whether there was any fraud designed in the transaction or not. He cannot be permitted to remove any portion of the capital of the insolvent concern beyond the reach of its existing creditors, if necessary to satisfy their demands, nor, if there be any scheme of future fraud in the removal, beyond the reach of its future creditors. Here the defendant Brinley has paid, as already mentioned, in the discharge of the debts of the old firm, several thousand dollars more than he received as his capital in that concern from the new firm. There has been no attempt at any time on his part to avoid the liabilities falling upon him as one of the partners in that firm.

The case of *Anderson* v. *Maltby*, 2 Ves. Jr., 244, to which counsel of appellant refers as a beacon-light for nearly a hundred years in this branch of the law, differs from the one at bar in essential particulars. There, upon the retirement of a partner in the firm of Maltby & Son a fictitious account was made up, showing indebtedness to him of several thousand pounds which was entered upon the books of the [illegible] This was done without any examination

books at the time, or valuation of the property of the firm, or calculation of its debts, and no public notice was given of the retirement of the partner except by changing the title of the firm in the books of the Bank of England, and other books, from Maltby & Sons to Maltby & Son. The other members continued the partnership and failed. On a bill filed by its assignee, an account was decreed in favor of the new partnership against the retiring partner for the moneys thus received, owing to the circumstances of fraud attending the transaction. In deciding the case the Chancellor, after observing that when partners make up an account of profits which do not exist it is colorable, said: "If at [381] the close of the former partnership he (the retiring partner) was *bona fide* entitled, all the payments were just and legal; if he was not *bona fide* entitled to any demand on account of the former partnership as against the two about to form a new partnership, but that, to the knowledge and conviction of all three, was mere color and not a real but a nominal transaction, all the payments were made not merely without consideration but upon a bad consideration, and such as a court of equity, and, I think, a court of law, equally, ought to condemn." page 256. This is nothing more than declaring that a suit will lie by the assignee of a bankrupt concern to compel a retired partner to account for moneys paid to him by the firm upon a fraudulent claim.

In the case at bar there was no fraudulent claim advanced. The amount to be paid Brinley was for the capital put by him into the firm of Furness, Brinley & Co., all the partners, except perhaps one of them, supposing at the time of his retirement that the firm was not only solvent, but in possession of a large surplus; and the plaintiff is neither the new company nor its assignee, but the Bank which lent the money to that company upon its supposed solvency, and now seeks to charge the parties to whom the company paid it in discharge of its obligations. Equity does not follow money thus lent into the hands of persons to whom it has been paid in discharge of obligations to them and with whom the lender had no relations.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[381] JOSE AURRECOECHEA, *Plff. in Err.*,

v.

JOSEPH L. BANGS, Admr. of AMOS S. BANGS, Deceased.

(See S. C. Reporter's ed., 381-387.)

Public lands—suit to have legal holder declared to be a trustee—grant of school lands to California—Act of July 23, 1866.

1. Under the Act of July 23, 1866, passed to remedy the effects of the unauthorized survey and selection, by the State of California, of school lands granted by the Act of March 3, 1853, land *claimed* to be within a valid Mexican grant is within the excepting clause of section 1.

2. After the survey, the land thus restored to the public domain is open to preemption, and the preemptor acquire a valid title as against one who claims under the invalid selection made by the State.

The case of Huffy v. Doyle, bk. 23, p. 975, affirmed.

[No. 703.]

Submitted Jan. 5, 1885. Decided Apr. 13, 1885.

IN ERROR to the Supreme Court of the State of California.

The petition in this case was filed in the Third District Court, County of Alameda, California, by the plaintiff in error, to hold the defendant, who had the legal title to certain premises, to be a trustee for the plaintiff.

The court sustained a demurrer and rendered judgment for the defendant. This judgment having been affirmed on appeal, by the court below, the complainant sued out this writ of error.

Messrs. **Edward J. Pringle** and *H. F. Crane*, for plaintiff in error.

Mr. **A. Chester**, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of California.

The case relates to the title to lands in that State and was decided on a demurrer, which was sustained, to a petition of plaintiff in error. This petition was in the nature of a bill in chancery seeking to hold the defendant, who had the legal title to the land, by a patent from the United States, to be a trustee for the plaintiff, on the ground that in a contest between the two before the Land Department the officers of that department had, by the decision in favor of the defendant, deprived plaintiff of his superior right by a misconstruction of the law.

The land in controversy was within the exterior limits of a claim under a Mexican grant. The validity of this grant was established by proceedings under the Act of Congress on the subject. But when the survey was made and finally confirmed which ascertained the locality of this grant, it was found that the land in suit was not within it. This fact was established on June 6, 1871, by the confirmation of the final survey of that grant.

On July 1, 1871, the map of the congressional survey of the township, which included the land and which was completed by subdivision into sections and quarter sections, was filed in the local land office of the district of San Francisco.

Bangs, the defendant, who had been residing on the land for some time, made and filed with the register and receiver his declaratory statement asserting an intention to preempt the land June 26, 1871. Under this claim the defendant, having complied with the requirements of law, received the patent of which plaintiff claims the benefit.

Plaintiff's superior equity, as he sets it out in his petition, arises under the Act of Congress of March 3, 1853, granting to the State of California every sixteenth and thirty-sixth section of the public lands for school purposes. 10 Stat. at L., 244. As none of the public lands in California had been surveyed, it could not then be known where these school sections would be located; and in view of the fact that many settlements would be made on those sections before they could be ascertained by survey, the seventh section of the Act, while val

[illegible] the claims of such settlers, authorized the State to select other lands in lieu of them, and a list of such as were reserved for public [illegible] or taken for private claims.

The history of the attempt of the State to make these surveys for herself, and to exercise the right of selection under this seventh section of the Act of 1853, is given in the opinion of the court in the case of *Huff* v. *Doyle*, 93 U. S. 335 [Bk. 23, L. ed. 975], and reference is now made to that history for an understanding of the present case. Indeed the land in that case, as in this, was a part of the Mexican claim of Parkins, and the principles announced in that case are decisive of this.

It appears from the history there detailed that the Land Department of the United States [illegible] to recognize the surveys made by the authority, and the selection made by the State and sold and certified to its purchasers, [illegible] on July 23, 1866 (14 Stat. at L., [illegible]), passed an Act for the relief of such persons and to remedy the evils of this unauthorized action on the part of the State of California so far as possible.

The first section of this Act is as follows: "That in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant to the State by any Act of Congress, and has disposed of the same to purchasers in pursuance with her laws, the lands so selected shall be and hereby are confirmed to said State." A proviso making several exceptions to this confirmation excludes from it, among others, "any land held or claimed under any valid Mexican or Spanish grant." The second section makes it the duty of the authorities of the State, when the selections named in section 1 have been made upon land which has been surveyed by the authorities of the United States, to notify the register of the land-office of such selection, and if, upon inquiry by the land officers, such selection is found to be in accordance with section 1, the Commissioner of the General Land-Office shall certify the land to the State in the usual manner. This section of the statute had reference to cases where the selections had been made of lands which had been surveyed at the date of the passage of the Act.

The third section made provisions for selections made of lands which had not been surveyed by the United States at the date of the Act, which is the case before us. This section says that the selection so made shall have, when the lands are afterwards surveyed, the same force and effect as the preemption rights of a settler on the unsurveyed public lands, and the claimant shall be allowed the same time after the surveys have been made to prove up to purchase as is allowed under the preemption laws.

The bill alleges that in the year 1863 the State, by its agent, selected this land and sold it to a purchaser for a valuable consideration, from whom plaintiff purchased it. It then alleges that some time in the year 1866 this selection was made known to the register and receiver of the land-office, and a note of it made on their books. Complainant further says that within three months after the completion of the surveys by the United States he appeared before these officers and asserted his claim under that selection, and proved it upon the contest with Bangs before the department.

There would seem to be no objection to the case made by plaintiff but for the fact that the land in controversy was, at the time of this selection by the State, part of a claim under a Mexican grant. The grant itself was confirmed as valid by judicial proceedings, though upon final survey this piece of land did not fall within it. But the exclusion of the proviso of the first section of the Act of 1866 is of land held or *claimed* under a valid Mexican grant. This land was claimed under a Mexican grant, which proved to be valid, though, as located, it did not include all the land claimed. [385]

In the case of *Huff* v. *Doyle*, already cited, we held that land embraced in this Mexican claim, though not included in the final survey, was within the excepting clause of the proviso of the Act of 1866.

When this selection was made by the State in 1866, the land was not subject to such selection. The Act of making such a selection was a nullity. It conferred no right to the State or its vendee, and when the United States made its remedial and confirmatory statute it refused to confirm selections within the bounds of Mexican claims, and did not confirm this.

But in the case of *Huff* v. *Doyle* we held that, after the grant was surveyed and the surplus thus restored to the public domain and the congressional survey completed, the party might then present his claim under the selection, and if no superior right existed he would be entitled to the land. We said, referring to this legislation: "In all this we see the purpose of Congress to refer the exercise of the right of the State to select indemnity for school lands to the condition of the lands for which indemnity is claimed, as well as those out of which it is sought at the time the official surveys are made and filed in the proper office, or as soon thereafter as the right is asserted."

In that case the claimant under the State made and proved up his claim as soon as the survey was made, and the land was accordingly certified to the State. His opponent, who had also made his declaration as preemptor while the land was still claimed under the Mexican grant, which claim was for that reason also void, and before the public survey or the survey of that grant was made, renewed his claim after that of plaintiff, and was rejected. To both parties the condition of the land, as liable to either claim at the time the claim was *rightfully* asserted, governed the case. [386]

In the case before us the preemptor was the first, after the land ceased to be a part of the Mexican claim and was restored to the public domain, to make application to the land-office and assert his right to appropriate it as public land. The officers of the department recognized his claim, as we think they were bound to do, for the land had only a few days before this become public land, and thus liable to preemption or to the valid selection of the State. The invalid selection, made at a time when the land was not subject to selection, was not made good by the Act of 1866, which expressly excluded it; and while we held that, after the land became public land and liable to selection the former selection might be made good, its *validity* could

only relate to the time of its assertion in the land-office after it became so liable.

But if, before this latter proceeding was had, or notice to the land-office of an intention to rely on the old selection was given, other rights had intervened, the state right of selection could not be made to the prejudice of those rights.

On this principle we think all the benefit which could possibly be derived from the confirmatory Act of 1866 in regard to such cases as this is had, while the just rights of others are preserved. The statute, in express language, gives the holder of the invalid state selection the same right as a preemption settler on unsurveyed lands, and no more. Here Bangs had asserted his right as soon as the land was released from the Mexican claim and a few days before the congressional survey became fixed. The least that can be said of Bangs' claim is, that it was of equal force when the maps of these surveys were filed, and by his superior diligence, in a lawful manner, he obtained the patent, and plaintiff has no *superior* equity which should take it from him.

As to the allegation in the bill that Bangs made a forcible intrusion on the possession of complainant in September, 1870, before the land became public land, that was a question to be considered by land officers in the contest be-
[387] tween the parties, and is not a fraud or mistake for which the patent can be held to inure to plaintiff's benefit. Nor does the plaintiff rely on it as sufficient. His claim to the benefit of defendant's title rests upon the selection made under state authority. That is the question of federal law which this court must decide, and, as we have seen, that was well decided against him by the state court.

Its decree is accordingly affirmed.

Jose Aurrecoechea, Plff. in Err.,
v.
Duncan Sinclair *et al.*—No. 258.

This case is submitted on the same facts and principles and the same briefs as the foregoing case, and the same judgment necessarily follows.

The judgment of the Supreme Court of California is accordingly affirmed.

Jose Aurrecoechea, Plff. in Err.,
v.
Joseph Bangs *et al.*—No. 1014.

Jose Aurrecoechea, Plff. in Err.,
v.
George Gerk *et al.*—No. 1015.

Jose Aurrecoechea, Plff. in Err.,
v.
John W. Clark *et al.*—No. 1016.

Jose Aurrecoechea, Plff. in Err.,
v.
Earl B. French *et al.* No. 1017.

In accordance with stipulations by the parties on file in this court, that the above mentioned cases should abide the result of the judgment in the case of the plaintiff against Amos Bangs, the judgments in the cases are affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HENRY AMY AND GUSTAVE L. HO
PENSTEDT, Partners as H. AMY & C
ET AL., *Plffs. in Err.*,
v.
TAXING DISTRICT OF SHELBY COU
TY (Tenn.) ET AL.

(See S. C., Reporter's ed., 387-394.)

Constitutional law—impairing obligation of co tracts—validity of legislation of Tennessee pr viding for the refunding of the indebtedness the extinct municipality of Memphis—set-off.

1. A state law authorizing a debtor to procure t obligations of his creditor and use them as a set-o for his own debt is not liable to impeachment devesting vested rights or impairing the obligati of contracts.

2. The Acts of March 23, 1883, of the Legislatu of Tennessee, providing for the refunding of t indebtedness of the extinct municipality of Me phis in the bonds of the Taxing District of Shel County, and the collection and application of ba taxes, did the plaintiffs no injustice, but rath benefited them. It violated no right of theirs, n any contract of theirs, that the new bonds e changed for old indebtedness should be received back taxes at the same rate that the old indebte ness would have been received if no exchange h been made.

[No. 974.]

Submitted Jan. 8, 1885. Decided Apr. 13, 188

IN ERROR to the Supreme Court of t State of Tennessee.

This writ of error is prosecuted by t plaintiffs in error, to reverse the decree of t court below affirming, with certain modific tions, the decrees of the Chancery Court Shelby County, Tennessee, in three cases whi were heard together in the court below.

The facts of the case are sufficiently stat by the court.

Messrs. **Wm. M. Randolph,** *E. Myers* a *Wm. N. Sneed*, for plaintiffs in error.

Mr. **S. P. Walker,** for the Taxing Distr of Shelby County, defendant in error.

Messrs. **Minor Merriweather** and *La rence Lamb*, for defendants in error.

Mr. Justice **Miller** delivered the opinion the court:

This is a writ of error to the Supreme Co of Tennessee.

By an Act of the Legislature of the State Tennessee, approved January 29, 1879, charter of the City of Memphis was repeal and by another Act, approved the same day, territory which had constituted the city v created a taxing district; and the property the city and all debts due to it and all unc lected taxes were vested in the State.

On March 13th of the same year anot statute, familiarly called "Chapter 92," direc the appointment of an officer for each of corporations whose charter was repealed the earlier statute, to be called the receiver back taxes, who was to be under the con of a court of chancery in the collection paying out of the taxes so collected by h Section 2 of this Act directs that "he s distinguish, in making such payments, the

NOTE.—*Constitutional law—impairing obligat of contracts.* See Fletcher v. Peck, 10 U. S. (6 87, *note.*

[illegible] sources from which the moneys paid [illegible] are derived, showing what is collected from taxes for general purposes and what for taxes for special purposes, designating the particular or special purpose, so that the same may be kept separate in the State treasury, in order that the treasurer may pay the same according to any lien, priority or equity, if any, which may be declared by the chancery court, touching any of said funds, in favor of any creditor or class of creditors." Another section authorized the receiver of back taxes to file a bill in chancery, in the name of the State, in behalf of all the creditors, against all delinquent taxpayers, for the ascertainment and enforcement of the rights of the parties in regard to these back taxes unpaid.

Such a bill was filed, and important proceedings have been had under it.

A bill was pending, however, in the Circuit Court of the United States before the bill authorized by this statute was filed, which sought to enforce the collection of taxes by certain parties, to which the receiver of back taxes was afterwards made a defendant; and under that bill a decree was rendered which treated the new provisions of this state legislation as void. On appeal from that decree this court reversed it and announced certain principles which upheld the validity of the legislation of the State, [illegible] the power of courts of the United States to enforce against the receiver and in his hands any decree or judgment by [illegible] for levying and collecting taxes which had been made by such court prior to the beginning of this legislation.

The case—a report of which contains the history of this legislation and the statutes above referred to—is that of *Merriweather* v. *Garrett*, [illegible] U. S., 472 [Bk. 26, L. ed. 197].

Section 5 of the Act last mentioned provided with some particularity for the receipt by the back tax collector, in payment of these back taxes of certain classes of outstanding indebtedness of the City of Memphis, and fixed the rate, as always the same, at which they might be received, chiefly at the rate of fifty cents on payment of taxes for each dollar of indebtedness.

The collection of these taxes and their distribution continued under the supervision of the court of chancery in the suit already mentioned, and many orders and decrees on the subject were made.

The State in the meantime passed statutes which authorized the Taxing District to compromise the indebtedness of the City of Memphis, by taking up its old obligations and issuing bonds of the Taxing District at the rate of fifty cents of the latter for one dollar of the former.

The two statutes on this subject which are supposed to violate the Constitution of the United States were passed March 23, 1883.

One of these Acts, chapter 170 of the Acts of that year, authorizes all municipal corporations and taxing districts to compromise and scale their debts, and to issue the bonds and scrip of taxing districts at the rate of fifty per cent of the principal and past due interest; and a section of the Act is as follows:

"Sec. 16. *Be it further enacted*, That the acceptance and consummation by any creditor, of the compromise provided by this Act, shall of itself operate to assign and transfer to said municipal corporation or taxing district all his rights to and claims against the uncollected taxes or other assets whatever of said municipal corporation, with the right in said municipal corporation or taxing district to enforce the same either in its own name or in the name of the creditor; the funds that may be realized therefrom to be paid into the designated depository of such municipality or taxing district; and they are hereby devoted and appropriated exclusively to the payment of the bonds and coupons that come under the provisions of this Act."

The other statute, passed the same day, is an Act modifying the provision of chapter 92 (March 13, 1879), as to what shall be received in payment of back taxes, and the rate at which the various items of debt should be received. One of these changes, made in evident relation to the Act passed the same day for refunding this old indebtedness by bonds of the taxing district, is in these words: "*And provided, further*, That when any indebtedness of such extinct municipality shall be hereafter funded into new bonds at fifty cents on the dollar, such new bonds and matured coupons thereon shall be received in payment of the back taxes due such extinct municipality, at the same rate as herein provided for Flippin compromise bonds." The Flippin compromise bonds were to be received at double their face value. [391]

The obvious reason for this was that both the Flippin compromise bonds and the bonds to be issued under the new Act just passed represented two dollars of old debt for one dollar on the face of the new bonds; and this new regulation was making all old indebtedness receivable at par. It was necessary, therefore, in order to place the holders of Flippin bonds who had compromised this old debt for fifty cents on the dollar, and those who might do the same under the new statute just passed, at the same rate, on an equality with those who still held the old debt unchanged, to make this difference in the rate at which they might be received for back taxes.

It is the decree of the Supreme Court of Tennessee holding this legislation valid which is assigned for error, and the principal error in the case.

The plaintiffs in error are parties who held and still hold debts against the City of Memphis, which were not secured by a lien or claim on any tax specially assessed for their payment. Their debts belonged to the unpreferred class. While a large part of the debt of the city during the time between the first and latest enactments we have mentioned was satisfied by using it in payment of back taxes at the rate of two dollars for one, or by exchanging it for the new bonds of the Taxing District, the parties now complaining did neither, but still held their old bonds with accumulated interest. It is to be observed, also, that the special taxes assessed under writs of *mandamus* to pay judgments prior to the repealing law could only be paid in money; and as fast as it was paid it was appropriated to the payment of the debts for which it was specifically assessed. And so also of all taxes assessed for any special purpose. [392]

One result of this process was that the back

taxes were gradually being paid and satisfied by exchange for this old indebtedness, whereby the holders of it, who sold it to taxpayers to be used for that purpose, were getting something for it, and both the indebtedness and the back taxes were being extinguished by a process of set-off. For when a tax debtor became by purchase an owner of any part of this debt, the extinguishment of the tax and the debt was clearly within the doctrine of set-off of mutual obligations.

When, however, the back tax receiver began to receive in payment, under the law of 1883, the new bonds of the Taxing District, issued in compromise of the old indebtedness, these plaintiffs in error insisted that this could not be done to their prejudice; and by a petition to the chancery court they prayed its interference to prevent it. As the language of the statute was plain they insisted that it was void because forbidden by the Constitution of the United States. The Supreme Court of the State held the law to be valid, and hence this writ of error.

The assignment of errors in plaintiff's brief points out no special provision of the Constitution which forbids the legislation of Tennessee complained of, which, it is to be remembered, is only the more recent statutes we have referred to.

The language of the brief, as repeated in several forms, is that the court erred because it did not hold that these statutes as construed by the court were a violation of the Constitution of the United States, and devested the rights of plaintiffs as set out in their petition.

This expression, when the argument in its support is examined, resolves itself into the proposition that chapter 92 of the Acts of 1879 conferred on them some right, which they insist became a vested right, of which right they have been deprived by the later Act.

But we do not see what right was vested in them by that statute. It is to be remembered that *their* debts did not belong to any class which at the time the statute was passed constituted a lien on any part of these back taxes. [393] Such liens as did exist, or such vested rights in any special class of taxes as then existed, were carefully preserved by the statute; and these taxes could only by its terms be collected in money and used to discharge these liens or special claims. It gave no lien of the general debtor on the back taxes or any part of them. It provided for their collection and for their use when collected, in payment of the debts of the city. In this respect it did not change any existing law, but provided the means of enforcing the rights of the creditors of the city against its assets.

The Legislature having assumed charge of the property of the defunct corporation, and undertaken to administer its assets, passed judicious laws for this purpose, and it is not asserted that the original Act which allowed the use of the debt of the city in payment of the taxes was unjust, though it required two dollars of the former in satisfaction of one of the latter. All holders of the general city debt were placed on equality in this respect. Plaintiffs here could have used their debt or disposed of it in that manner, as others did. The State did not come under any obligation to pay their debt, except as it could be paid in this manner and it did not guarantee that the back taxes whether paid in this manner or in any other would give it a fund sufficient to pay all bac indebtedness. It only undertook to do the bes it could with the means it had.

The legal and equitable right, in a genera way, of a debtor to procure the obligations c his creditor and use them as a set-off for hi own debt, will hardly be denied when the lav of the State authorizes it; and such a law ca be liable to no impeachment as devesting veste rights or impairing the obligation of contracts *Blount* v. *Windley*, 95 U. S., 173 [Bk. 24, L ed. 424]. Both the original Act (chapter 92 and the Acts of 1883 did this. The fact tha the latter Acts made a change in the rate a which this set-off should be allowed did n injustice to plaintiffs, but rather favored them since it permitted their debt, with its accumu lated interest, to be set off, dollar for dollar whereas this could only be done before at tw dollars for one. It did them no injustice, an violated no right of theirs nor any contract c theirs, that the new bonds exchanged for ol indebtedness should be receivable for bac taxes at the same rate that the old indebtedne would have been received if no exchange ha been made.

We see no vested right of plaintiffs which violated by the decree, no contract of thei impaired by the legislation complained of, an no injustice done them, and especially non which this court can remedy.

The decree of the Supreme Court of Tennessee therefore affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

BOATMEN'S SAVINGS BANK, *Plf. in Err.*, v. STATE SAVINGS ASSOCIATION OF ST. LOUIS.

(See S. C., Reporter's ed., 265-269.)

Jurisdiction—federal controversy—bankruptcy

When the question in a state court was, whethe the presentation of a check, drawn on a banker b a depositor, transferred to the holder so much c the debt due the drawer as was sufficient to pay th check, no federal question is presented and th court is without jurisdiction. The subsequen bankruptcy of the drawer, and a claim by the ban of a set-off against his deposit, under § 5073, R. S., d not operate to give this court jurisdiction, the re question at issue not depending on the bankrup law.

[No. 228.]

Argued Apr. 1, 1885. Decided Apr. 13, 1885

IN ERROR to the St. Louis Court of Appeal of the State of Missouri.

The history and facts of the case appear i the opinion of the court.

Messrs. **John W. Noble, W. Hallet Phillips, P. Phillips,** *John C. Orrick* an *A. M. Gardner*, for plaintiff in error:

The case presented arises under the Bankrup Act. R. S., § 5013.

[illegible] v. *Hopkins*, 104 U. S., 303 (bk. 27, L. ed. [illegible]).

It is analogous to the case of *Factors' Ins. Co.* v. *Murphy*, 111 U. S., 740 (Bk. 28, L. ed., 582). See also *Roy* v. *Norsworthy*, 23 Wall., 123 ([illegible] U. S., bk. 23, L. ed. 116).

The judgment of the state court was against the right asserted and exercised by the defendant under the Bankrupt Act. This is all that is necessary to confer the jurisdiction.

[illegible] v. *Kelly*, 16 Wall., 620 (83 U. S., bk. [illegible], L. ed. [illegible]).

Messrs. **Jeff. Chandler**, *John M. Glover*, [illegible] *F. Shepley* and *George H. Shields*, for defendant in error:

The record must affirmatively show that the judgment in the state court was founded on a decision of a federal question.

[illegible] v. *Vose*, 14 Wall., 5 (81 U. S., bk. 20, L. ed. [illegible]); *Bk. of West Tenn.* v. *Citizens Bk.*, [illegible] Id., 314; *Hurley* v. *Street*, Id., 85 (Id., [illegible]); *Caperton* v. *Bowyer*, Id., 216 (Id., 882); [illegible] v. *Ins. Co.*, Id., 661 (Id., 757); *Smith* v. [illegible], 15 Wall., 185 (83 U. S., bk. 21, L. ed. 310).

Section 25 does not give jurisdiction to review decisions against mere assertions of authority under the United States.

Millinger v. *Hartupee*, 6 Wall., 258 (73 U. S., bk. 18, L. ed. 829); *Mills* v. *Brown*, 16 Pet., 525; [illegible] v. *Kelly*, 22 Wall., 57 (89 U. S., bk. 22, L. ed. [illegible]).

The Supreme Court has no jurisdiction unless the state court decides against the privileges claimed.

[illegible] v. *Coldcleugh*, 3 Cranch, 268; *McClung* v. *Silliman*, 6 Wheat., 598; *Fulton* v. *Shaw*, 16 Pet., 149; *Ableman* v. *Booth*, 21 [illegible] (62 U. S., bk. 16, L. ed. 169); *Silver* v. *Ladd*, 6 Wall., 440 (73 U. S., bk. 18, L. ed. [illegible]).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought by the State Savings Association of St. Louis against the Boatmen's Savings Bank to recover the amount of two checks drawn on the Bank by the firm of Cobb, Delhonde & Co., dated respectively September [illegible], and October 23, 1874, and presented for payment November 5, 1874. When the checks were presented there was a balance on deposit in the Bank to the credit of the firm more than enough to take them up, but the firm had failed between the dates of the checks and the time of their presentation, and had notified the Bank to that effect. The Bank, on that account, refused payment. At the time of the presentation of the checks, and also at the time of the failure of the firm, the Bank held a draft, not then due, drawn by one Bradley and accepted by the firm, for $3,174, dated October 3, 1874, and payable in forty days from date. On the same day that the checks were presented and refused it was arranged between the Bank and the Savings Association that if the Bank succeeded in collecting this draft from the drawer it would pay the checks. The draft was never collected and the checks still remain unpaid.

Cobb, Delhonde & Co. did not resume payment after their failure; and on the 23d of March, 1875, they were duly adjudicated bankrupts on a petition filed January 8, 1875. The Bank indorsed on the Bradley draft the amount standing to the credit of the firm at the time of the failure, and proved its claim in the bankruptcy proceeding for the balance remaining due after this indorsement was made. Upon this balance dividends were paid by the assignee in bankruptcy. The Savings Association also proved its claim in bankruptcy and received dividends thereon. The total amount of its claim was much more than the amount of the checks.

The ground on which the Savings Association sought to recover in the suit was that the presentation of the checks to the Bank for payment, while there was a balance of deposits to the credit of the firm exceeding the amount drawn for, charged the Bank with the liability to pay the checks to the Association as the holder thereof. The defenses set up by the Bank in its answer were: (1) that the failure of the firm, and notice thereof to the Bank, was equivalent to instructions from the firm not to pay any checks that might thereafter be presented; 2, that the Savings Association was not the assignee or indorsee of the checks; (3) that, in consideration of the agreement of the Bank to pay the checks if the Bradley draft was collected, the Savings Association bound itself not to hold the Bank liable if the collection was not made; and (4) that, relying on this agreement by the association, the Bank credited the full amount of the balance of deposits in favor of the firm upon the Bradley draft and proved up its demand against the estate of the bankrupts on account of the draft for no more than remained due after this credit was given, and that dividends were paid by the assignee only on the amount proven. Upon the trial, judgment was given in favor of the Savings Association for the full amount of the checks, and this judgment was affirmed by the St. Louis Court of Appeals, which is the highest court of the State in which a decision in the suit could be had.

We are unable to discover any federal question in the record. No title, right, privilege or immunity under the Constitution or laws of the United States was set up in the pleadings, and no claim of that kind was made at the trial. The whole controversy at and before the trial seems to have been as to the right of the holder of a banker's check to recover against a bank having funds of the drawer when presentation has been duly made and payment demanded, and as to the effect of the arrangement between the parties when it was agreed that the Bank should pay the checks if the Bradley draft was collected. [267]

In the Court of Appeals it was, among other things, assigned for error that "the judgment was against the right of the defendant to a judgment in his favor, under the provisions of the Act of Congress of the United States establishing and providing for a uniform system of bankruptcy, in force at the time of the transaction between the parties, out of which the controversy arises"; and, from the opinion of the court, section 5078 of the Revised Statutes seems to have been relied on. That section provides: [268]

"In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set

off against the other, and the balance only shall be allowed or paid."

No rights under this section were set up in the pleadings or claimed at the trial; and, besides, the right of the Bank to apply whatever credit there may be in its accounts in favor of the bankrupt firm to the reduction of the amount due on the draft is not denied. The only dispute is as to the amount of the credit, and we are unable to see that the bankrupt law is involved in the determination of that question. The Court of Appeals decided that the presentation of the checks on the 5th of November operated as an equitable assignment at that date, of an amount of the fund then standing to the credit of the firm equal to the amount of the checks, and made the Savings Association from that time, in equity, the creditor of the Bank to that extent. Debts are provable against a bankrupt's estate as of the date of the commencement of the proceedings in bankruptcy. Rev. Stat., § 5067. As section 5073 relates to the amount which may be allowed upon such proof, it is clear that the mutual debts or mutual credits there referred to must be such as are in existence at the same date. In the present case the question was whether on the 5th of November, 1874, more than two months before the commencement of the proceedings in bankruptcy, a part of the balance standing to the credit of Cobb, Dolhonde & Co. on the books of the Bank had been assigned to the plaintiff in this action. That did not depend on the bankrupt law, but on the legal effect of what was done at and before that time by the parties, and when, so far as appears from the record, no proceedings in bankruptcy were contemplated. The point for determination was whether the presentation of a check drawn on a banker by a customer having funds to his [269] credit transferred in equity to the holder of the check so much of the debt due from the bank to the drawer as was sufficient to pay the check. This clearly is not a federal question.

It follows that we have no jurisdiction of the case, and it is dismissed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[262] BRADSTREET COMPANY, *Plff. in Err.*,

v.

FORRESTER H. HIGGINS.

(See S. C., Reporter's ed., 262-264.)

Costs on motion to dismiss for want of jurisdiction.

1. Upon the dismissal of a case for want of jurisdiction, on motion of the defendant, he is entitled to judgment for the costs of the motion.
2. The right to decide a motion to dismiss for want of jurisdiction implies the right to decide as to costs incident to the motion.

[No. 657.]

Submitted Apr. 6, 1885. Decided Apr. 13, 1885.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri.

Motion for an order that the plaintiff in error be required to pay the costs of printing the record and the clerk's fees for supervising t same.

Messrs. **W. Hallett Phillips**, *Karnes Ess* and *Chas. L. Dobson* for defendant in erro in support of motion.

Mr. **Henry Wise Garnett**, for plaint in error, *contra.*

Mr. Chief Justice **Waite** delivered the opi ion of the court:

This writ of error was dismissed at a form day in this term, on motion of the defendant error, for want of jurisdiction, because the val of the matter in dispute did not exceed $5,00 112 U. S., 227 [Bk. 28, L. ed. 715]. In ord to present his motion to dismiss, it became n cessary for the defendant in error to cause t record to be printed; and to do that he was co pelled to pay the cost of printing and the fee the clerk for supervising. The judgment, entered on the motion to dismiss, made no der as to costs, and the defendant in error no moves that the cost of printing and the clerl fee for supervising be taxed against the plai iff in error.

It has been orten decided that if a suit is d missed for want of jurisdiction in this court judgment for the costs of the suit can be give *Ingles* v. *Coolidge*, 2 Wheat., 368; *McIver* *Wattles*, 9 Wheat., 650; *Strader* v. *Graham*, How., 602 [59 U. S., bk. 15, L. ed. 464]; *Ho thall* v. *Collector*, 9 Wall., 566 [76 U. S., bk. L. ed. 562]. A different rule prevails wh there has been a reversal here because the C cuit Court did not have jurisdiction, as t court has authority to correct the error of Circuit Court in taking jurisdiction. *Tur* v. *Enville*, 4 Dall., 7; *Winchester* v. *Jackson* Cranch, 514; *Montalet* v. *Murray*, 4 Cran 47; *M. C. & L. M. R. Co.* v. *Swan*, 111 U. 387 [Bk. 28, L. ed. 465].

Here, however, the question is not as to right of the defendant in error to recover costs in the suit, but only such as are incid to his motion to dismiss. It has been decid that the writ of error was wrongfully sued by the plaintiff in error. To get rid of the w and the *supersedeas* which had been obtai thereunder, the defendant in error was co pelled to come to this court and move to dism That motion we had jurisdiction to hear and cide. The right to decide implies the right adjudge as to all costs which are incident to motion.

Under Rule 10, section 2, of this court was the duty of the plaintiff in error to ca the record to be printed and to pay all the co and fees incident thereto in time for use wh required in the progress of the cause. I failed in this the defendant in error might the costs and fees and thus secure the printi Under section 7, in case of reversal, affirma or dismissal with costs, the amount of the c of printing the record and the clerk's fee ar be taxed to the party against whom the co are given.

In this case the plaintiff in error neglecte have the record printed by the time it wanted by the defendant in error on his mo to dismiss. Under these circumstances we not doubt our authority to adjudge the cost cident to the printing against the plaintiff i ror as part of the costs of the motion to dism

It is accordingly ordered that the judgment herein entered be amended so as to charge the plaintiff in error with all the costs of the motion to dismiss, which shall include the cost of printing the record and the clerk's fee for supervising.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOHN DOBSON AND JAMES DOBSON, trading as JOHN & JAMES DOBSON, and as "THE FALLS OF SCHUYLKILL CARPET MILLS," *Appts.*,

v.

HARTFORD CARPET COMPANY.

SAME, *Appts.*,

v.

BIGELOW CARPET COMPANY.

SAME, *Appts.*,

v.

SAME.

(See S. C., Reporter's ed., 439–447.)

Patent law—infringement—measure of damages—joinder of claims—practice—costs.

1. In suit in equity, for the infringement of a patent for a design for carpets, where no profits were found to have been made by the defendant, the Circuit Court allowed to the plaintiff, as damages, in respect to the yards of infringing carpets made and sold by the defendant, the sum per yard which was the profit of the plaintiff in making and selling carpets with the patented design, there being no evidence as to the value imparted to the carpet by the design. *Held*, that such award of damages was improper, and that only nominal damages should have been allowed.

2. Where a bill founded on a design patent, with a claim for a pattern and separate claims for each of the suits, is taken as confessed, it alleging infringement of the "invention," the patent will be held valid for the purposes of the suit.

3. The joinder of such claims in one patent does not prevent invalidate the patent, or any claim, at the objection of a defendant.

4. A claim of "the design for a carpet, substantially as shown," refers to the description and the drawing, and is valid.

5. An objection that a patent for a design is for an aggregation of old ornaments, and embodies no "invention," is concluded, where the bill alleges infringement of the "invention" and is taken as confessed.

6. Where the master reported no profits, and nominal damages, in a suit in equity for the infringement of a patent for a design, and on exception by the plaintiff the Circuit Court allowed a sum for damages, and this court reversed its decree, the plaintiff was allowed costs in the Circuit Court and including the interlocutory decree, and the defendant was allowed his costs after such decree.

[Nos. 231, 232, 233.]

Argued Apr. 2, 1885. Decided Apr. 20, 1885.

APPEALS from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The history and facts of the cases appear in the opinion of the court.

Mr. Hector T. Fenton, *Richard P. Wade* and *George E. Buckley*, for appellants.

Mr. Arthur Briesen, for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

These are three suits in equity, brought in the Circuit Court of the United States for the Eastern District of Pennsylvania, against John Dobson and James Dobson, trading as John & James Dobson and as "The Falls of Schuylkill Carpet Mills." No. 1 is brought by the Hartford Carpet Company, for the infringement of design letters patent No. 11074, granted March 18, 1879, to the plaintiff, as assignee of Winthrop L. Jacobs, for three and one half years, for a design for carpets. No. 2 is brought by the Bigelow Carpet Company, for the infringement of design letters patent No. 10778, granted August 13, 1878, to the plaintiff, as assignee of Hugh Cristie, for three and one half years, for a design for carpets. No. 3 is brought by the Bigelow Carpet Company, for the infringement of design letters patent No. 10870, granted October 15, 1878, to the plaintiff, as assignee of Charles Magee, for three and one half years, for a design for carpets.

No. 1 was commenced on the 26th of April, 1879, and Nos. 2 and 3 on the 7th of May, 1879. [441] In No. 1 and No. 3 the defendants appeared by a solicitor, but did not plead, answer or demur to the bill, and it was taken as confessed, in each suit, on the 11th July, 1879; and, on the 2d of September, 1879, an interlocutory decree was entered in each suit awarding a perpetual injunction and an account of profits and damages.

In No. 2 an answer was filed on the 3d of September, 1879, denying infringement and setting up a want of novelty. A replication was filed, and on the 5th of November, 1879, a preliminary injunction was granted. Testimony was taken, and on April 23, 1880, on final hearing, a decree was made for a perpetual injunction and an account of profits and damages. Some testimony on the accounting in Nos. 1 and 3 was taken in November, 1879, but most of the evidence before the master was taken in the three suits at the same time, in June, 1880.

In No. 1 the master filed a report on January 18, 1881, setting forth that the plaintiff, before the master, waived all claim for profits and limited its claim to the damages it had suffered by the infringement; that the defendants had sold twenty pieces, of fifty yards each, of carpet containing the patented design; that the plaintiff claimed $13,400 damages, being 67 cents a yard on 400 pieces of carpet of fifty yards each, as being the decrease of the plaintiff's sales caused by the infringement, estimating the cost to the plaintiff of making and selling the carpet at $1.08 per yard, and his selling price at $1.75 per yard; and that the master had rejected that claim, as founded on admissible evidence, and a further claim of $3,000 damages for expenses caused to the plaintiff by the infringement, in getting up other designs and changing its looms to other carpets. The report was for six cents damages. The plaintiff excepted to the report because it did not find profits to have been made by the defendants and did not report more than nominal damages. The court sustained the exceptions, and decreed to the plaintiff $737, being for twenty pieces of infringing carpet made and sold by the defendants at fifty-five yards per piece, or 1,100 yards, at 67 cents per yard, as the plaintiff's profit per yard on carpet of the patented design. The final decree was for $737 [442] and costs, and a perpetual injunction. The defendants have appealed.

Head notes by Mr. Justice BLATCHFORD.

In No. 2 the master filed a report on January 18, 1881, setting forth that the plaintiff, before the master, waived all claim for profits, and limited its claim to the damages it had suffered by the infringement; that no testimony had been taken showing the amount of the defendants' sale of the infringing carpet; that the plaintiff claimed $11,250 damages, being 75 cents a yard on 300 pieces of carpet of fifty yards each, as being the decrease of the plaintiff's sales caused by the infringement, estimating the costs to the plaintiff of making and selling the carpet at $1.10 per yard, and his selling price at $1.85 per yard; and that the master had rejected that claim as not sustained by the evidence, and also a further claim for expense caused to the plaintiff by the infringement, in getting up another design and in resetting its looms to manufacture the same. The report was for six cents damages. The plaintiff excepted to the report for not finding more than nominal damages. The court sustained the exceptions and decreed to the plaintiff $750, being for twenty pieces of infringing carpet made by the defendants, at fifty yards per piece, or 1,000 yards, at 75 cents per yard, as the plaintiff's profit per yard on carpet of the patented design. The final decree was for $750 and costs, and a perpetual injunction. The defendants have appealed.

In No. 3 the master filed a report on January 18, 1881, setting forth that the plaintiff, before the master, waived all claim for profits, and limited its claim to the damages it had incurred by the infringement; that the defendants had sold thirty-one pieces, amounting to 1,684¼ yards, of carpet containing the patented design; that the plaintiff claimed $3,750 damages, being 75 cents a yard on 5,000 yards of carpet, as being the decrease of the plaintiff's sales caused by the infringement, estimating the plaintiff's profit on making and selling the carpet at 75 cents per yard; and that the master had rejected that claim as not sustained by the evidence, and also a furthur claim for the cost of getting up another design to replace the one infringed. The report was for six cents damages. The plaintiff excepted to the report because it did not find profits to have been made by the defendants and did not report more than nominal damages. The court sustained the exceptions and decreed to the plaintiff $1,312.50, being for thirty-five pieces of infringing carpet made and sold by the defendants at fifty yards per piece, or 1,750 yards, at 85 cents per yard, as the plaintiff's profit per yard on carpet of the patented design. The final decree was for $1,312.50 and costs and a perpetual injunction. The defendants have appealed.

[443]

The Circuit Court proceeded on the ground, as stated in its decision (10 Fed. Rep., 385), that it was to be presumed that the defendants' carpets displaced in the market an equal quantity of the plaintiff's carpets; and that the profits which the plaintiffs would have made on that quantity of carpets was the measure of their damages. It rejected the claims for losses for any greater decline in the plaintiff's sales, and on looms, as "too remotely connected with the defendants' acts as their supposed cause" and "too speculative in their character" to be allowed."

Leaving out of view all question as to the presumption that the plaintiffs would h made and sold, in addition to the carpets of patented designs which they did make and s the infringing carpets which the defenda made and sold, which are alleged to have b of poorer quality and cheaper in price, it is pl that the price per yard allowed as damages v the entire profit to the plaintiffs, per yard, the manufacture and sale of carpets of the tented designs, and not merely the value wh the designs contributed to the carpets. Th was no evidence as to that value.

It is provided by section 4921 of the Revis Statutes that, in a suit in equity for the fringement of a patent the plaintiff may, o decree in his favor, recover the damages he l sustained, in addition to the profits to be counted for by the defendant, such damages be assessed by the court, or under its directic and with the same power to increase the da ages, in the discretion of the court, as in t case of verdicts; and the damages intended "the actual damages sustained," in the langua of section 4919. *Root* v. *R. Co.*, 105 U. S., 1 212 [bk. 26, L. ed. 975, 983]. By section 49 all these provisions apply to patents for desig

This court has, in a series of decisions, l down rules as to what are to be regarded "profits to be accounted for by the defendan and what as "actual damages," in suits for t infringement of patents; and no rule has be sanctioned which will allow, in the case of patent for a design for ornamental figures c ated in the weaving of a carpet, or imprint on it, the entire profit from the manufactu and sale of the carpet, as profits or damages, cluding all the profits from carding, spinnin dyeing and weaving, thus regarding the enti profits as due to the figure or pattern, unless is shown by reliable evidence that the enti profit is due to the figure or pattern. It is m ter of common knowledge that there is an i finite variety of patterns in carpets, and th between two carpets of equal cost to make a equal merit as to durability of fabric and fa ness of color, each with a pattern pleasing the taste, one having a design free to be us and the other a design protected by a pate the latter may or may not command in t market a price larger than the former. If does, then the increased price may fairly be tributed to the design, and there is a solid ba of evidence for profits or damages. But, sh of this, under the rules established by t court, there is no such basis. The same pri ciple is applicable as in patents for inventior The burden is upon the plaintiff, and if he fa to give the necessary evidence, but resorts, i stead, to inference and conjecture and specu tion, he must fail for want of proof. There another suggestion of great force. The car with the infringing design may be made on infringing loom, and various infringing proce es or mechanisms for carding, spinning or d ing may be used in making it, and if the e tire profit in making and selling it is necessari to be attributed to the pattern, so it may as we on principle, be attributed to each of the oth infringements, and a defendant might be call on to respond many times over for the sar amount. There is but one safe rule—to requi the actual damages or profits to be establish by trustworthy legal proof.

It is not necessary to cite at length from the [illegible] decided by this court on the subject. It is sufficient to refer to them as follows: *Livingston v. Woodworth*, 15 How., 546; *Seymour v. [illegible]*, 16 How., 480; *Mayor v. Ransom*, 23 [illegible] 87 [64 U. S., bk. 16, L. ed. 515]; *Mowry v. [illegible]*, 14 Wall., 620 [81 U. S., bk. 20, L. ed. [illegible]]; *[illegible] v. York*, 17 Wall., 460 [84 U. S., bk. [illegible] L. ed. 679]; *Littlefield v. Perry*, 21 Wall., 205 [illegible] 5, bk. 22, L. ed. 577]; *Birdsall v. Coolidge*, [illegible] S., 64 [Bk. 23, L. ed. 802]; *Cawood Patent*, [illegible] 86 [Bk. 24, L. ed. 238]; *Blake v. Robert*[illegible] [Id., 245]; *Garretson v. Clark*, 111 [illegible] [Bk. 28, L. ed. 371]; *Black v. Thorne*, [illegible] 372].

The rule, which applies also to a patent for a design, was formulated thus by this court, [illegible] v. *Clark*: "The patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show by equally reliable and satisfactory evidence that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine as a marketable article is properly and legally attributable to the patented feature." The case of *Mfg. Co. v. [illegible]*, 96 U. S., 253 [Bk. 26, L. ed. 987], was a case falling within the last clause of the rule laid down, and was an exceptional case, as was said by the Chief Justice, in the opinion. The general rule was recognized in that case, and the question was made in regard to the oil-well pump there involved because there was only a limited and local demand for it, which could not be met and was not supplied by any other [illegible].

The rule in question is even more applicable to a patent for a design than to one for mechanism. A design or pattern in ornamentation or [illegible] appeals only to the taste through the eye, and is often a matter of evanescent caprice. The article which embodies it is not necessarily or generally any more serviceable or durable for an article for the same use having a different design or pattern. Approval of the particular design or pattern may very well be one motive for purchasing the article containing it, but the article must have intrinsic merits of quality and structure, to obtain a purchaser, aside from the pattern or design; and to attribute in law the entire profit to the pattern, to the exclusion of the other merits, unless it is shown by evidence, as a fact, that the profit ought to be so attributed, not only violates the statutory rules of "actual damages" and of "profits to be accounted for," but confounds all distinctions between cause and effect.

The decrees must therefore, all of them, be reversed as to the damages awarded.

In No. 1, though the bill was taken as confessed, the defendants take the point that the patent is void on its face because it has nineteen claims. It has a claim for an entire pattern, and for a separate claim for each of eighteen separate parts making up the whole. The bill alleges infringement by the making and selling of the "invention" and of carpets containing the "invention." Even if the defendants can raise this point after a decree *pro confesso* (see *Thomson v. Wooster*, 114 U. S., 104 [*ante*, 105]), the patent must be held valid at least for the purposes of this case.

In No. 2, the question of proof of making and selling by the defendants before suit brought is raised. But we think, on the pleadings and all the proofs, including the defendant's letter of April 13, 1880, the case is made out. The point is also taken that this patent is void because it has a claim for the entire pattern and three claims for each of three constituent parts of it. No such point is taken in the answer, which speaks of the patent as one for a single design. If the Patent Office, in view of the question of fees, and for other reasons, grants a patent for an entire design, with a claim for that and a claim for each one of various constituent members of it, as a separate design, we see no objection to it, leaving the novelty of the whole and of each part and the validity of the patent open to contestation. The mere joinder of such claims in one grant does not *per se* invalidate the patent or any particular claim, at the objection of a defendant.

In No. 3 objection is taken to the patent because it claims "the design for a carpet, substantially as shown." As the bill is the same in form as that in No. 1 and was taken *pro confesso*, the patent is valid at least for the purposes of this case. Aside from this we see no good objection to the form of the claim. It refers to the description as well as the drawing, in using the word "shown." The objection is also made, as to No. 3, that the patent is for an aggregation of old ornaments and embodies no invention. This objection is concluded, for this case, by the language of the bill and the decree *pro confesso*. [4

The final decrees in all of the suits are reversed, and the cases are remanded to the Circuit Court with directions to disallow the award of damages in each suit, and to award six cents damages in each, and to allow to the defendants a recovery in each case for their costs after interlocutory decree, and to the plaintiff in each case a recovery for its costs to and including interlocutory decree.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting: *Mr. Justice* **Bradley.**

RUDGER CLAWSON, *Plff. in Err.*, [4

v.

UNITED STATES.

(See S. C., Reporter's ed., 477–488.)

Juries in Utah—exclusion of believers in polygamy—§ 5, Act March 22, 1882, and § 4, Act June 23, 1874.

*Under § 5 of the Act of Congress of March 22, 1882 (22 Stat. at L., 30), which provides "that in any prosecution for bigamy, polygamy or unlawful cohabitation under any statute in the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman, * * * that he believes it right for a man to have more than one living and undivorced wife at the same time," the proceedings to impanel the grand jury which finds an indictment for one of the offenses named, under a statute of the United States, against

*Head notes by *Mr. Justice* BLATCHFORD.

a person not before held to answer, are a part of the prosecution, and the indictment is good, although persons drawn and summoned as grand jurors were excluded by the court from serving on the grand jury, on being challenged by the United States, for the cause mentioned, the challenges being found true.

The statute applies to grand jurors.

Where, under § 4 of the Act of Congress of June 23, 1874 (18 Stat. at L., 254), "in relation to courts and judicial officers in the Territory of Utah," in the trial of an indictment, the names in the jury-box of 200 jurors, provided for by that section, are exhausted, when the jury is only partly impaneled the District Court may issue a *venire* to the United States marshal for the Territory, to summon jurors from the body of the judicial district, and the the jury may be completed from persons thus summoned.

[No. 1263.]

Argued Apr. 8, 1885. Decided Apr. 20, 1885.

IN ERROR to the Supreme Court of the Territory of Utah.

The history and facts of the case fully appear in the opinion of the court. See also *Clawson* v. *U. S.*, *ante*, 47.

Messrs. **Franklin S. Richards** and **Wayne MacVeagh**, for plaintiff in error.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for defendant in error.

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Mr. Justice **Blatchford** delivered the opinion of the court:

At April Term, 1884, of the Third Judicial District Court of Utah Territory, Rudger Clawson was indicted, under two counts in the same indictment, one for polygamy and the other for cohabiting with more than one woman. The first count was founded on § 5352 of the Revised Statutes of the United States, as amended by § 1 of the Act of Congress of March 22, 1882 (22 Stat. at L., 30); and the second on section 3 of that Act. By section 4, counts for those offenses may be joined in the same indictment. The defendant was tried in October, 1884, and found guilty on both counts, as charged, and sentenced, on the first count, to pay a fine of $500 and to be imprisoned three years and six months; and on the second count to pay a further fine of $300 and to be imprisoned the further term of six months; and further, to be confined till the fines be paid. From this judgment he appealed to the Supreme Court of the Territory, which affirmed the judgment and sentence, and he has brought the case to this court by a writ of error.

The indictment was presented and filed in court April 24, 1884. On the 30th of April, 1884, before plea, the defendant moved to set aside the indictment, on the ground that the grand jury was not legally constituted, in that qualified grand jurors, drawn and summoned, were illegally excluded from the grand jury on the challenge of the prosecuting attorney. The motion was heard on an agreed statement of facts, which is set out in the bill of exceptions, and was overruled, and the defendant excepted to the decision. The first error here assigned is that that motion was improperly overruled.

By § 4 of the Act of Congress of June 23, 1874 (18 Stat. at L., 254), entitled "An Act in Relation to Courts and Judicial Officers in the Territory of Utah," it is provided as follows: "That within sixty days after the passage of this Act, and in the month of January annually thereafter, the clerk of the District Court i each judicial district, and the judge of probat of the county in which the District Court is nex to be held, shall prepare a jury list from whic grand and petit jurors shall be drawn, to serv in the District Courts of such district until new list shall be made as herein provided. Sai clerk and probate judge shall alternately selec the name of a male citizen of the United State who has resided in the district for the period o six months next preceding, and who can rea and write in the English language; and, as se lected, the name and residence of each shall b entered upon the list until the same shall con tain two hundred names, when the same shal be duly certified by such clerk and probat judge; and the same shall be filed in the offic of the clerk of such District Court, and a dupl cate copy shall be made and certified by suc officers and filed in the office of said probat judge. Whenever a grand or petit jury is to b drawn to serve at any term of a District Cou the judge of such district shall give public no tice of the time and place of the drawing o such jury, which shall be at least twelve day before the commencement of such term; an on the day and at the place thus fixed th judge of such district shall hold an open sessio of his court, and shall preside at the drawin of such jury; and the clerk of such court shal write the name of each person on the jury list returned and filed in his office upon a separat slip of paper, as nearly as practicable of th same size and form, and all such slips shall, b the clerk in open court, be placed in a covere box, and thoroughly mixed and mingled; an thereupon the United States marshal or hi deputy shall proceed to fairly draw by lot fron said box such number of names as may hav previously been directed by said judge; and i both a grand and petit jury are to be drawn the grand jury shall be drawn first; and whe the drawing shall have been concluded, th clerk of the District Court shall issue a *venir* to the marshal or his deputy, directing him t summon the persons so drawn, and the sam shall be duly served on each of the persons s drawn at least seven days before the commence ment of the term at which they are to serve and the jurors so drawn and summoned shal constitute the regular grand and petit juries fo the term for all cases. And the names thu drawn from the box by the clerk shall not b returned to or again placed in said box until new jury list shall be made. If during an term of the District Court any additional gran or petit jurors shall be necessary, the same shal be drawn from said box by the United State marshal in open court; but if the attendanc of those drawn cannot be obtained in a reason able time, other names may be drawn in th same manner. * * * The grand jury must in quire into the case of every person imprisone within the district on a criminal charge an not indicted. * * *"

A jury list of 200 persons from which t draw grand and petit jurors for the Third Ju dicial District Court for the year 1884 was made certified and filed in the office of the clerk o the court, under the above cited provisions o the Act of June 23, 1874, and a number wa set opposite to each name. Those having eve numbers opposite to their names were selecte

[illegible] the probate judge and were reputed Mormons, and those having odd numbers opposite their names were selected by the clerk of the court and were reputed not to be Mormons. On the 21st of March, 1884, at a session of the court thirty names were drawn from the jury box from which to impanel a grand jury for the April Term, 1884. Of these thirty, thirteen were even numbers, and seventeen odd numbers. Of the thirty, five did not appear or were excused, leaving twenty-five, of whom ten had even numbers and fifteen odd numbers. Those twenty-five persons, during the proceedings to impanel the grand jury, were all called and sworn and examined as to their qualifications as grand jurors, fifteen of them being each asked the following questions: "Do you believe in the doctrine and tenets of the Mormon church? Do you believe in the doctrine of plural marriage, as taught by the Mormon church? Do you believe it is right for a man to have more than one undivorced wife living at the same time?" Each of the fifteen persons so interrogated answered the questions affirmatively, each was thereupon challenged by the prosecuting attorney, and the court allowed the challenges and excluded each of those fifteen persons from the grand jury. Thus every one of the twenty-five persons who was a reputed Mormon was excluded from the grand jury. Each of the fifteen persons so interrogated had all the qualifications prescribed by law for grand jurors, unless disqualified by such answers. The defendant had not been charged nor held to answer the offenses charged in the indictment, or any criminal offense, at the time the grand jury was impaneled; the examination of the persons called as grand jurors, and the challenges, were wholly conducted and made by the prosecuting attorney; and no questions were propounded to or answered by persons with odd numbers opposite their names, concerning their religious belief. After those fifteen persons were excluded, only ten grand jurors accepted by the United States remained, out of the list of thirty originally drawn; and thereupon the court ordered a drawing of ten additional names from the general list of 200, which was done, three having even numbers, and seven odd numbers. A *venire* was issued for them, and six of them appeared, all having odd numbers, and five of the six were added to the ten accepted, and the jury, as impaneled and sworn, consisted of those fifteen, all of them reputed non-Mormons, and it found and presented the indictment against the defendant.

The challenging and exclusion of the fifteen persons is maintained to have been proper, under [illegible] of the Act of March 22, 1882, before referred to, and which reads as follows: "That in any prosecution for bigamy, polygamy or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juror or talesman, first, that he is or has been living in the practice of bigamy, polygamy or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable by either of the foregoing sections, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the Act of July first, eighteen hundred and sixty-two, entitled 'An Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States and Other Places, and Disapproving and Annulling Certain Acts of the Legislative Assembly of the Territory of Utah'; or, second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman; and any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge, and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court. But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offense named in sections one or three of this Act; but if he declines to answer on any ground he shall be rejected as incompetent." [482]

As each of the fifteen persons challenged and excluded answered, when questioned on oath, that he believed it right for a man to have more than one undivorced wife living at the same time, he was properly excluded, if section 5 of the Act applied to the case.

It is contended that that section did not apply because the defendant had not been held to answer, and there was no prosecution against him. The language of the section is, that "in any prosecution for bigamy, polygamy or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge," etc. It is urged that the proceedings to impanel a grand jury were not part of a prosecution, and that the prosecution could not begin until after the grand jury had been completely impaneled. But we think this is too narrow a view of the statute. The whole scope of section 5 is to prescribe what shall be sufficient causes of challenge to be made by the United States in a case of bigamy, polygamy or unlawful cohabitation. It is the United States alone which would desire to exclude from the grand jury persons answering the descriptions named in the section. It is not contemplated that a person to be prosecuted for the offenses specified would challenge for any of the causes set forth. The mischief to be remedied was the having as grand jurors, against the interest of the United States, the persons specified, in a prosecution for the particular offenses named. If the grand jury enters upon the investigation of cases involving the offenses designated, and such investigation results in the finding of an indictment for any of those offenses, it cannot properly be alleged by the defendant in the indictment that the prosecution did not, within the meaning of section 5, begin with the first step in the proceedings to obtain the grand jury which found the indictment. And, for the protection of the defendant himself, it would necessarily be equally held that he was entitled to claim that such proceedings were a part of the prosecution against him, because otherwise [483]

he could have no right to question those proceedings.

The prosecution was one for offenses created by a statute of the United States. That is the meaning of section 5 of the Act. And it is not an objection that can be urged by this defendant that the same grand jury might have been called upon to act on other offenses than those named in that section.

It is also urged that section 5 does not apply to grand jurors. The language is, "any person drawn or summoned as a juryman or talesman" —"any person appearing or offered as a juror or talesman." In view of the fact that by § 4 of the Act of June 23, 1874, both grand jurors and petit jurors are to be drawn from the box containing the two hundred names, and are to be summoned under *venires*, and are to constitute the regular grand and petit juries for the term, and of the further fact that the persons to be challenged and excluded are persons not likely to find indictments for the offenses named in section 5, we cannot doubt that the words "jurymen" and "juror" include a grand juror as well as a petit juror. There is as much ground for holding that it includes the former alone, as the latter alone, if it is to include but one. It must include one at least, and we think it includes both. The purpose and reason of the section include the grand juror; and there is nothing in the language repugnant to such view. The use of the words "drawn or summoned as a juryman or talesman," and of the words "appearing or offered as a juror or talesman," does not have the effect of confining the meaning of "juror" to "petit juror," on the view that the ordinary meaning of "talesman" refers to a petit juror. A grand juror is a juryman and a juror, and is drawn and summoned, and it might well have been thought wisest to mention a "talesman" specifically, lest the words "juryman" and "juror" might be supposed not to include him.

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It is objected that none of the grand jurors who were retained on the panel were interrogated as to whether they believed it right for a man to live in the practice of cohabiting with more than one woman. As to this it is sufficient to say that the challenges were based on the affirmative answers to the third question, and that the statute only specifies what shall be a sufficient cause of challenge, and does not compel the making of the challenge or the asking of the questions.

After the motion to set aside the indictment was overruled, the trial was had on a plea of not guilty. In impaneling a jury it appeared that the list of jurors drawn and summoned for the term, and also the general jury list for the year, consisting of two hundred names selected and returned for a general jury list, were exhausted, and that no names remained in the general jury box. Thereupon the prosecuting attorney, on the ground that the jury list provided for by statute was exhausted, moved the court that an open *venire* issue, to summon such jurors as were necessary. The defendant objected to the issuing of an open *venire* or any *venire* for jurors, on the ground that there was no law authorizing it. The court overruled the objection, and the defendant excepted. By an order of the court a *venire* was then issued to the United States marshal for Utah Territory, commanding him to summon from the body of the judicial district fifty jurors. They were summoned, and on the return of the *venire* the panel was challenged by the defendant because the jurors were selected and summoned on an open *venire*. The challenge was overruled and the defendant excepted. Like proceedings took place in respect to two further open *venires* for thirty and twenty-four jurors respectively. Of the twelve persons who composed the jury, eleven were obtained from those summoned under the open *venires*.

It is assigned for error that the petit jury was illegally constituted, in that the court had no right to summon petit jurors on an open *venire*. The argument is, that the provisions of § 4 of the Act of June 23, 1874, are, on their face exclusive; that the method prescribed by that section for obtaining jurors is the only one that can be employed; that only the probate judge and the clerk of the court can select the jurors and make the jury list; that the grand and petit jurors for a term must be drawn by the marshal from a box containing names of persons thus selected, and constitute the regular grand petit juries for the term; that if, during the term, any additional grand or petit jurors are necessary, they must be drawn by the marshal in open court from the same box; and that if the two hundred names are all drawn out, for grand or petit jurors, at any time during the year, there can be no more indictments found, or any more civil or criminal jury trials had, in the court of the district for the rest of the year, because it is provided in section 5 that the jurors drawn from the box shall be jurors only for the term, of which there are four in the year, and that the names drawn shall not be again placed in the box until a new jury list is made, which is to be done annually in January. A result so disastrous to the administration of justice, so certain to impair, if not destroy, public and private rights is not to be permitted unless imperatively required. The Act of June 23, 1874, does not prescribe the making of a new list by the probate judge and clerk except once a year, in January, or the making by them of an additional list at any time during the year. But that Act does not directly, or by implication or intendment, exclude the use of an open *venire* when the two hundred names are exhausted during the year. It provides that the jurors drawn and summoned shall constitute "the *regular* grand and petit juries for the term, for all cases." By other provisions of law, each of the district courts of the Territory is required to hold four terms a year. There is no doubt that jurors must be drawn from the two hundred names, or those of them remaining in the box, so long as any remain. But the question is, What is to be done when those names are exhausted? If there is no method that can be resorted to to obtain jurors in such event, the provisions in § 5 of the Act of 1882, for challenges by the United States, with a view to indictments for the offenses named in that section, will have proved suicidal, and resulted in destroying all opportunity to find or try such indictments. We are not referred to any statutory provision in any Act of Congress or an Act of the Territory which forbids the use of an open *venire* when the 200 names are e

[illegible]. The argument is, that the provisions of § 5 of the Act of 1882 cover the entire subject of obtaining jurors and do not allow of any supplementary measures, and that such measures cannot be resorted to unless affirmative statute authority, directed to the very point, is to be found.

The Supreme Court of Utah, in its opinion affirming the judgment in the present case, did not refer to any statute of Congress or of the Territory directly authorizing the open *venire*, but rested the power to issue it on the fact that such power was inherent in the court and was not forbidden by any statute in force in Utah; and held that it followed as an incident to the authority and duty of the District Court to hold its sessions and try by jury indictments for crimes. We concur in this view so far as the [illegible] to the open *venire* after the exhaustion of the two hundred names is concerned.

The fourth section of the Act of 1874 prescribes the rule to be observed, to the extent in which it prescribes any rule. It proceeds on the view that the jury list of two hundred names will be sufficient for ordinary purposes, or, as it expresses it, for "the regular grand and petit juries for the term"; and it provides what shall be done so long as there are any names left in the box. But it is silent as to what shall take place when the names are all exhausted. It does not forbid the ordinary and well known [illegible] to an open *venire*. Moreover, section 5 of the Act of 1882, in regard to prosecutions like the present one, prescribes what shall be a sufficient cause of challenge to a person [illegible] or summoned as a juryman or talesman," and what questions may be put to "any person appearing or offered as a juror or talesman," thus recognizing a "talesman" as distinct from a "juryman" or a "juror." The persons drawn from the box of two hundred names are "jurors," and are so defined and called in section 4 of the Act of 1874. Congress, therefore, in using the word "talesman," had reference to a person not drawn from such box. The word "talesman" is not satisfied by referring it to the additional jurors which section 4 of the Act of 1874 says may and shall be drawn from the box, if they "shall be necessary" during the term. They are not talesmen in any proper sense, but are as much regular jurors as those first drawn from that box.

The principle which authorized the action of the court in obtaining petit jurors in this case after the statutory measures had been exhausted is sanctioned by authority. Bac. Abr., Juries, C.; 1 Chit. Crim. Law, 518; 2 Hale, P. C., [illegible], 266; *U. S.* v. *Hill*, 1 Brock., 156; [illegible] v. *People*, 2 Col., 13; *Stone* v. *People*, [illegible]; *Straughan* v. *State*, 16 Ark., 37, [illegible]; *Wilburn* v. *State*, 21 Ark., 198, 201; *Gibson* v. *Commonwealth*, 2 Va., Cas., 111, 121; *Kaffer* v. *State*, 1 How. (Miss.), 238, 241; *Woodside* v. *State*, 2 How. (Miss.), 655, 659; *State* v. [illegible], Supreme Court of Iowa, September, [illegible], 17 Chic. Leg. News, 58. By section 1868 of the Revised Statutes, the district courts of the Territory have common-law jurisdiction, and, under § 1874 of the Revised Statutes and § [illegible] of the Compiled Laws of Utah of 1876 these courts have original jurisdiction in criminal cases. By § 217 of the Criminal Procedure Act of Utah of February 22, 1878, all issues of fact in criminal cases must be tried by jury, and by section 7 the defendant in a criminal action is entitled to a speedy trial. A *venire* to summon jurors is a writ necessary to the exercise of the jurisdiction of the court and agreeable to the principles and usages of law, where it is not forbidden or excluded, and where the affirmative provisions of law have, so far as they extend, been first observed. In *U. S.* v. *Hill* (before cited) *Chief Justice* Marshall, speaking of the law as it then existed, says: "It has been justly observed that no Act of Congress directs grand juries or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is, that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to exercise; and it can only be exercised through the instrumentality of grand juries. They are therefore given by a necessary and indispensable implication. But how far is this implication necessary and indispensable? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential." [488]

The cases to which we are referred by the plaintiff in error were cases where express statute provisions had been disregarded or violated. If, in this case, an open *venire* had been issued before the two hundred names were exhausted, a different question would have been presented.

The record shows no error, and the judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

FREDERICK HOPT, *Plff. in Err.*, [488]
v.
PEOPLE OF THE TERRITORY OF UTAH.

(See S. C., Reporter's ed., 488–492.)

Criminal procedure—Code of Utah—defective record.

*Under the Utah Code of Criminal Procedure of 1878, a judgment upon a verdict of guilty of murder, the record of which states that the court charged the jury, and does not contain the charge in writing, nor show that with the defendant's consent it was given orally, is erroneous, and must be reversed on appeal.

[No. 1141.]

Submitted Jan. 28, 1885. Decided Apr. 20, 1885.

IN ERROR to the Supreme Court of the Territory of Utah.

The history and facts of the case appear in the opinion of the court.

Messrs. **R. N. Baskin**, *W. G. Van Horne* and *S. H. Snider*, for plaintiff in error.

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court:

This is a writ of error to reverse a judgment

*Head note by *Mr. Justice* GRAY.

rendered by the Supreme Court of the Territory of Utah, affirming, upon appeal from the District Court of the Third Judicial District of the Territory, a judgment and sentence of death upon a conviction of murder. The decisions of this court, after former trials of the case, are reported in 104 U. S., 631 [Bk. 26, L. ed. 873], and 110 U. S., 574 [Bk. 28, L. ed. 262].

One of the errors now assigned in the brief filed in behalf of the plaintiff in error is that the record did not comply with the statute of Utah requiring that the written charges of the court should form part of the record.

[489] In the copy of the record of the District Court contained in the record transmitted by the Supreme Court of the Territory to this court, the statement relating to the charge of the court to the jury, and the exceptions to the charge, are as follows: On May 5 the case was finally argued by the counsel for either party, "and the court charged the jury; defendant's counsel except generally to the instructions given by the court on its own motion, and exception allowed; and a verdict of guilty of murder in the first degree was returned and entered." And on May 16, "the time allowed by law for filing the bill of exceptions herein having passed, the court, upon application of defendant's counsel, refuses to further extend the time. Defendant excepts." The record also shows that on May 10, after judgment and sentence, a notice of appeal was filed by the defendant with the clerk, and a copy of the notice served on the district attorney.

Appended to the brief filed in this court in behalf of the United States is an affidavit, taken January 7, 1885, of the deputy clerk of the District Court, testifying that the counsel for the defendant at the trial in that court, who requested him to prepare the transcript of record on appeal to the Supreme Court of the Territory, requested him to omit the written charge given by the court to the jury at the trial, and told him that no point was to be made by the defendant upon the instructions given by the court to the jury; that the transcript prepared in accordance with that request was delivered by the clerk to the counsel, and by them filed with the clerk of the Supreme Court of the Territory; that by reason alone of that request the written charge was omitted from the record; and that no bill of exceptions was ever filed or offered to be filed or presented to the Judge of the District Court for settlement.

[490] By the Utah Code of Criminal Procedure of 1878, the charge of the court to the jury "must be reduced to writing before it is given, unless by mutual consent of the parties it is given orally." § 257, cl. 7. Within five days after judgment upon a conviction, the clerk must annex together and file the papers necessary to constitute the record, including "4. A copy of the minutes of trial; 5. A copy of the minutes of the judgment; 6. The bill of exceptions, if there be one; 7. The written charges asked of the court and refused, if there be any; 8. A copy of all charges given and of the indorsements thereon." § 339. The defendant may either take exceptions to the instructions of the court to the jury in matter of law at the trial of an indictment, or he may, without a bill of exceptions, appeal from a final judgment of conviction on any question of law presente by written charges requested, given or refused or any other question of law appearing on th record. §§ 309, 315, 358, 360. The manner o taking an appeal is by filing a notice with th clerk of the court in which the judgment is en tered, and serving a copy thereof upon the at torney of the adverse party. § 368.

The statute expressly and peremptorily re quires that the charge of the court to the jur shall be reduced to writing before it is given unless by mutual consent of the parties it i given orally; and, as has already been adjudge by this court in this case, the giving, withou the defendant's consent, of any oral charge o instruction to the jury is an error, for whic judgment must be reversed. 104 U. S., 63 [Bk. 26, L. ed. 873]. The requirement of th statute that the clerk of the court in which th trial is had shall include, in making up its re ord, a copy of all written charges, as well as o the minutes of the trial, is equally positive The object of these provisions, requiring the in structions to be in writing and recorded, is t secure an accurate and authentic report of th instructions, and to insure to the defendant th means of having them revised in an appellat court.

When the record shows that the jury wer charged by the court, nothing can excuse th omission to set forth in the record a charge i writing, except express consent of the defendar that it should be given orally, and that conser must appear of record. The record must eithe set forth the charge in writing, or a waiver b the defendant of such a charge. If it does ne ther, it fails to show what is made by expres statute an essential requisite to the validity c the conviction, and contains upon its face fatal error, of which the defendant may ava himself by appeal, without tendering a bill c exceptions.

The duty of making up a complete record the duty of the clerk; and the duty of seein that the record contains everything that act ally took place, necessary to support the co viction, is the duty of the district attorney. the copy of the record made up by the clerk c the District Court, and entered by the defen ant in the Supreme Court of the Territory, wa defective in a material point, the district atto ney might have moved in the latter court t have the defect supplied by *certiorari* or othe proper process. The defendant and his cou sel were under no obligation to cure, and ca not be held to have waived, any defect in th record, but were entitled to take advantag either in the Supreme Court of the Territor or in this court, of any error apparent upon th record as it stood in that court.

Applying these principles to the record b fore us, the conviction cannot be supporte The record merely states that the court charge the jury, and does not state whether the charg was written or oral. If the charge was wri ten, it should have been made part of the re ord, which has not been done. If it was ora the consent of the defendant was necessary, an that consent does not appear of record an cannot be presumed.

It is hardly necessary to add that the affidav taken since the entry of the case in this cou cannot be considered. The lawfulness of th

[illegible] and sentence of the defendant is to be determined by the formal record, made up and transmitted as required by law, of what was done in his presence at the trial in open court, and not by *ex parte* affidavits of private conversations supposed to have afterwards taken place in his absence between the counsel and the clerk.

Judgment reversed and case remanded, with direction to order the verdict to be set aside and a new trial granted.

The Chief Justice and *Mr. Justice* **Harlan** dissented.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

THOMAS POINDEXTER, *Plff. in Err.*,

v.

SAMUEL C. GREENHOW, Treasurer of the CITY OF RICHMOND, VA.

(See S. C. Reporter's ed., 270-306.)

Constitutional Law—*Virginia Law of January 26, 1882, and March 15, 1884, impair the obligation of the contract to receive coupons in payment of taxes under the Act of March 30, 1871, and are void—detinue—liability of officer for acts unauthorized by law—suit against officer for such acts not a suit against the State.*

In an action of detinue for personal property, brought by the defendant for delinquent taxes, a moiety of which the plaintiff had duly tendered coupons cut from bonds issued by the State of Virginia under the Funding Act of March 30, 1871;

1. That by the terms of that Act, and the issue of bonds and coupons in virtue of the same, a contract was made between every coupon holder and the State that such coupons should "be receivable for all taxes, debts, dues and demands due the State"; the right of the coupon holder under which was to have his coupons received for taxes when offered, and that any Act of the Legislature which forbids the receipt of these coupons is a violation of the contract, and void as to coupon holders.

2. The faculty of being receivable in payment of taxes is of the essence of the right. It constituted a self-executing remedy in the hands of a creditor, and it became thereby the legal duty of every collector to receive such coupons in payment of taxes, upon an equal footing and with equal effect as though they were money; after a tender of such coupons duly made for that purpose, the relation and rights of the taxpayer and coupon holder were precisely what they would have been if he had made a like tender in money.

3. It is well settled by many decisions of this court that, for the purpose of affecting proceedings consequent upon the payment of taxes, a lawful tender of coupons is equivalent to actual payment, either sufficient to deprive the collecting officer of authority for further action, and making every subsequent step illegal and void.

4. The coupons in question are not "bills of credit" in the sense of the Constitution, which forbids a State to "emit bills of credit;" because, although issued by the State of Virginia on its credit, and made receivable in payment of taxes, and transferable so as to pass from hand to hand by delivery merely, they were not intended to circulate as money between individuals, and between governments and individuals, for the ordinary purposes of money.

5. In an action or suit brought by a taxpayer, who has tendered such coupons in payment of his taxes against the person who, under color of office, was collector, and acting in the enforcement of the law which gave it is also a contract, and

[illegible] by *Mr. Justice* MATTHEWS.

of a void law passed by the Legislature of the State, having refused such tender or coupon, proceeds by seizure and sale of the property of the plaintiff, to enforce the collection of such taxes, is an action or suit against him personally as a wrongdoer, and not against the State, within the meaning of the Eleventh Amendment to the Constitution of the United States. [271]

6. Such a defendant, sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense but is bound to establish it; and as the State is a political corporate body, which can act only through agents and command only by laws, in order to complete his defense he must produce a valid law of the State, which constitutes his commission as its agent, and a warrant for his act.

7. The Act of the General Assembly of Virginia of January 26, 1882, "To Provide for the More Efficient Collection of the Revenue to Support Government, Maintain the Public Schools, and to Pay Interest on the Public Debt," requiring tax collectors to receive in discharge of the taxes, license taxes and other dues, gold, silver, United States treasury notes, national bank currency, and nothing else, and thereby forbidding the receipt of coupons issued under the Act of March 30, 1871, in payment therefor, although it is a legislative Act of the government of Virginia, is not a law of the State of Virginia, because it impairs the obligation of its contract and is annulled by the Constitution of the United States.

8. The State has passed no such law, for it cannot; and what it cannot do, in contemplation of law it has not done. The Constitution of the United States and its own contract, both irrepealable by any act on its part, are the law of Virginia, and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax thereafter taken to be without warrant of law, and therefore a wrong. This strips the defendant of his official character, and convicts him of a personal violation of the plaintiff's rights, for which he must personally answer.

9. It is no objection to the remedy in such cases that the statute, the application of which in the particular case is sought to be prevented, is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States.

10. In cases of detinue the action is purely defensive on the part of the plaintiff. Its object is merely to resist an attempted wrong and to restore the *status in quo* as it was when the right to be vindicated was invaded. It is analogous to the preventive remedy of injunction in equity when that jurisdiction is invoked, of which frequent examples occur in cases to prevent the illegal taxation of national banks by state authorities.

11. The suit authorized by the Act of General Assembly of Virginia of January 26th, 1882, against the collector of taxes, refusing to accept a tender of coupons, to recover back the amount paid under protest, is no remedy at all for the breach of the contract, which required him to receive the coupons in payment. The taxpayer and coupon holder has a right to say he will not pay the amount a second time, and, insisting upon his tender as equivalent to payment, to resist the further exaction, and treat as a wrongdoer the officer who seizes his property to enforce it. [272]

12. Neither can it be considered an adequate remedy, in view of the supposed necessity for summary proceedings in matters of revenue, and the convenience of the State, which requires that the prompt collection of taxes should not be hindered or embarrassed; for the revenue system must yield to the contract which the State has lawfully made, and the obligation of which, by the Constitution, it is forbidden to impair.

13. The right to pay in coupons cannot be treated as a mere right of set-off, which is part of the remedy merely, when given by the general law, and therefore subject to modification or repeal, be-

therefore cannot be changed without mutual consent.

14. The Acts of the General Assembly of Virginia of January 26, 1882, and the amendatory Act of March 13, 1884, are unconstitutional and void because they impair the obligation of the contract of the State with the coupon holder under the Act of March 30, 1871; and that being the main object of the two Acts, the vice which invalidates them pervades them throughout and in all their provisions. It is not practicable to separate those parts which repeal and abolish the actions of trespass and trespass on the case, and other particular forms of action, as remedies for the taxpayer, who has tendered his coupons in payment of taxes, from the main object of the Acts, which that prohibition was intended to effectuate; and it follows that the whole of these and similar statutes must be declared to be unconstitutional, null and void. It also follows that these statutes cannot be regarded in the courts of the United States as laws of the State, to be obeyed as rules of decision in trials at common law under § 721, Rev. Stats., nor as regulating the practice of those courts under § 914, Rev. Stats.

15. The present case is not covered by the decision in Antoni v. Greenhow, 107 U. S., 769 [bk. 27, L. ed. 468], the points now involved being expressly reserved in the judgment in that case.

[No. 588.]

Argued Mar. 20, 23, 24, 25, 1885. Decided Apr. 20, 1885.

IN ERROR to the Hustings Court of the City of Richmond, State of Virginia.

The history and facts of the case fully appear in the opinion of the court. See also the six following and related cases, *post*, 198, 199, 200, 202, 204, and 205, and the dissenting opinion, applicable to and entitled in all, *post*, 207 (330).

Messrs. **William L. Royall, Daniel H. Chamberlain, Wm. M. Evarts, Wager Swayne** and *Wm. B. Hornblower*, for plaintiff in error:

No question of jurisdiction can arise in these cases on the ground that these are suits against the State of Virginia.

A suit against a public officer for trespass is a suit against such a person individually and personally and not against the political State or body of which he is the officer.

U. S. v. *Lee*, 196 U. S., 196 (bk. 27, L. ed. 171); *Cunningham* v. *R. R. Co.*, 109 U. S., 446 (bk. 27, L. ed. 992).

The existence and terms of the contract of the State of Virginia to receive the coupons for taxes and other dues to the State are not open to dispute.

Antoni v. *Wright*, 22 Gratt., 883; *Wise* v. *Rogers*, 24 Gratt., 169; *Clarke* v. *Tyler*, 30 Gratt., 137; *Hartman* v. *Greenhow*, 102 U. S., 672 (Bk. 26, L. ed. 271); *Antoni* v. *Greenhow*, 107 U. S., 769 (Bk. 27, L. ed. 468).

The coupon is a legal tender for the tax.

Antoni v. *Wright, supra; Wise* v. *Rogers, supra; Clarke* v. *Tyler, supra; Williamson* v. *Massey*, 33 Gratt., 237; *Hartman* v. *Greenhow, supra.*

A tender of that which ought to be received for a tax produces exactly the same effect, so far as the rights of the taxpayer are concerned, as a receipt by the officer of what is tendered.

Bennett v. *Hunter*, 9 Wall., 326 (76 U. S., bk. 19, L. ed. 672); *Tracey* v. *Irwin*, 18 Wall., 549 (85 U. S., bk. 21, L. ed. 786); *Atwood* v. *Weems*, 99 U. S., 183 (Bk. 25, L. ed. 471); *U. S.* v. *Lee*, 106 U. S., 196 (Bk. 27, L. ed., 171); *Thorndike* v. *U. S.*, 2 Mason, 1.

Property taken unlawfully by a public officer may be recovered in detinue.

Burnley v. *Lambert*, 1 Wash. (Va.), 308; *O'Neill* v. *Henderson*, 15 Ark., 235; *Owing* *Fisher*, 2 A. K. Marsh., 268; *Overfield* v. *L* *lett*, 1 Mo., 749; *Beazely* v. *Mitchell*, 9 Ala., 7 *Spaulding* v. *Scanland*, 4 B. Mon., 365; *Hai* *Reed*, 15 B. Mon., 479; *Schulenberg* v. *Campb* 14 Mo., 491.

This court will enjoin the collection of state tax laid under an Act which impairs obligation of a contract.

Dodge v. *Woolsey*, 18 How., 331 (59 U. S., 21, L. ed. 401); *R. R. Co.* v. *Reid*, 13 Wall., 264 U. S., bk. 20, L. ed. 563); *Charleston* v. *Branch*, Wall., 470 (82 U. S., bk. 21, L. ed. 193); *Bra* v. *Charleston*, 92 U. S., 677 (Bk. 23, L. ed. 7 *Humphery* v. *Pegues*, 16 Wall., 244 (83 U. bk. 21, L. ed. 326); *Home of Friendless* v. *Ro* 8 Wall., 430 (75 U. S., bk. 19, L. ed. 4 *Washington University* v. *Rouse*, Id., 439 (1 498); *McGee* v. *Mathis*, 4 Wall., 143 (71 U. (Bk. 18, L. ed. 314).

It will enjoin the collection of any tax wh the laws of the United States forbid the St to impose.

Osborn v. *Bank*, 9 Wheat., 838; *Pelton* v. *Ba* 101 U. S., 143 (Bk. 25, L. ed. 901); *Cummi* v. *Bank*, Id., 153 (Id., 903); *Davis* v. *Gray*, Wall., 220 (83 U. S., bk. 21, L. ed. 453).

A court of equity will always enjoin the lection of a tax where it is clear that in mak the collection the officer is a simple naked t passer. His character of officer and his fu tion as collector give him no immunities wh the character of trespasser is fixed on him cl ly and without doubt.

Belknap v. *Belknap*, 2 Johns. Ch., 4 *Frewin* v. *Lewis*, 4 Mylne & C., 249; *Comm wealth* v. *Supervisors*, 29 Pa. St. 121; *Leba* v. *R. R. Co.*, 77 Ill., 539.

Messrs. **F. S. Blair,** *Atty-Gen.* of Virgi **A. H. Garland, R. T. Merrick,** *J. Am* *Smith* and *S. B. Witt*, for defendant in er

We rely on the following cases against jurisdiction of the court and the right to m tain the foregoing suit against the State and officers.

Louisiana v. *Jumel* and *Elliott* v. *Wilts*, 10 S., 711 (Bk. 27, L. ed. 448); *Antoni* v. *Gr* *how*, Id., 769 (Id., 468); *Cunningham* v. *R. Co.*, 109 U. S., 446 (Bk. 27, L. ed. 992).

Virginia has consented to be sued in her c courts and by remedies she has prescribed, she can be sued in no other tribunal and by other procedure.

The coupons were not verified to be genu by a verdict of a jury and the judgment of court, as required by either the Act of Janu 14, 1882, or that of January 26, 1882, fo in Acts of 1881-82, the first of which Acts declared to be constitutional and to furni complete remedy to the taxpayers, by the preme Court of the United States in *Anton* *Greenhow, supra;* and the later Act of Janu 26, 1882, was in effect declared to be const tional and to afford a sufficient remedy, by Supreme Court in the case of *Tennessee* *Sneed*, 96 U. S., 71 (Bk. 24, L. ed. 611).

Mr. Justice **Matthews** delivered the opi of the court:

The plaintiff in error, who was also plai below, brought his action in detinue on the day of April, 1883, against Samuel C. Gr how, for the recovery of specific personal p

[illegible] one office desk of the value of $30, [illegible] police justice in the City of Richmond, [illegible] the case for want of jurisdiction. [illegible] was taken by the plaintiff to the [illegible] Court for the City of Richmond, [illegible] facts were found by agreement of [illegible] to be as follows: That the plaintiff was [illegible] of the city of Richmond, in the State [illegible] that he owed to the State of Virginia, for taxes on property owned by him in [illegible] for the year 1882, $12.45, which said [illegible] were due and leviable for, under the laws [illegible] on the first day of December, 1882; [illegible] defendant, Samuel C. Greenhow, was [illegible] Treasurer of the City of Richmond, and as [illegible] charged by law with the duty of collecting taxes due to the State of Virginia by all [illegible] said city; that on the 25th day of [illegible] the defendant, as such Treasurer [illegible] of taxes, made upon the plaintiff [illegible] for the payment of the taxes due by [illegible] the State as aforesaid; that the plaintiff, [illegible] was so made for payment of his [illegible] tendered to defendant in payment thereof [illegible] in lawful money of the United States, and coupons issued by the State of Virginia under the provisions of the Act of the General Assembly of that State of March 30, [illegible] entitled "An Act to Provide for the Funding and Payment of the Public Debt"; that said coupons so tendered by plaintiff were all due and past maturity, and amounted in the aggregate to $12, and were all cut from bonds issued by the said State of Virginia under the provisions of the said Act of March 30, 1871; that the said coupons and money so tendered by the plaintiff amounted together to exactly the [illegible] due the State by the plaintiff for taxes; but the defendant refused to receive the said coupons and money so tendered in payment of the plaintiff's taxes; that the defendant, after [illegible] was made, as he deemed himself [illegible] to do by the Acts of Assembly of Virginia, entered the plaintiff's place of business in said city and levied upon and took possession of the desk, the property of the plaintiff, now [illegible] for the purpose of selling the same to pay the taxes due from him; and that the said desk is of the value of $30, and still remains in possession of the defendant for the purpose [illegible], he having refused to return the same to the plaintiff on demand.

The Hustings Court was of the opinion that the police justice erred in deciding that he had no jurisdiction, and that the issue in the action should have been tried by him, and that it should be tried by that court on the appeal; but it was also of the opinion that in tendering to the defendant, as part of the tender in payment of the plaintiff's taxes, the coupons mentioned and described, the plaintiff did not tender what the law required, nor what the defendant was, as Treasurer, obliged to or should have received in payment of the plaintiff's taxes, under the provisions of the Act of the General Assembly of Virginia, approved January 26, 1882, entitled "An Act to Provide for the More Efficient Collection of the Revenue to Support Government, Secure the Public Schools, and to Pay Interest on the Public Debt"; that the plaintiff's remedy for the failure of the defendant as Treasurer, to receive coupons in payment of taxes, was to be found in the provisions of said Act of January 26, 1882; and that therefore the defendant does not unlawfully or wrongfully detain the plaintiff's property levied on by the defendant, as Treasurer of the City of Richmond, for the plaintiff's taxes; and judgment was accordingly rendered for the defendant.

It appears from the record that there was drawn in question the validity of the said Act of the General Assembly of Virginia, approved January 26, 1882, and of the 18th section of the Act of the General Assembly of the State of Virginia, approved April 1, 1879, which authorizes the collection of delinquent taxes by distraint of personal property, upon the ground that these Acts are repugnant to section 10 of article I of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, the judgment of the court being in favor of the validity of said Acts and against the rights claimed by the plaintiff under the Constitution of the United States. The Hustings Court is the highest court of the State to which the said cause could be taken. [275]

The Act of January 26, 1882, the validity of which is thus questioned, is as follows:

"*Be it enacted by the General Assembly of the State of Virginia*, That the several tax collectors of this Commonwealth shall receive in discharge of the taxes, license taxes and other dues, gold, silver, United States treasury notes, national bank currency, and nothing else; provided that in all cases in which an officer charged by law with the collection of revenue due the State shall take any steps for the collection of same claimed to be due from any citizen or taxpayer, such person against whom such step is taken, if he conceives the same to be unjust or illegal, or against any statute, or to be unconstitutional, may pay the same under protest, and under such payment the officer collecting the same shall pay such revenue into the state treasury, giving notice at the time of such payment to the treasurer that the same was paid under protest. The person so paying such revenue may at any time within thirty days after making such payment, and not longer thereafter, sue the said officer so collecting such revenue in the court having jurisdiction of the parties and amounts.

"If it be determined that the same was wrongfully collected, for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid and ought to be refunded; and thereupon the auditor of public accounts shall issue his proper warrant for the same, which shall be paid in preference to other claims on the treasury, except such as have priority by constitutional requirement.

"There shall be no other remedy in any case of the collection of revenue, or the attempt to collect revenues illegally, or the attempt to collect revenue in funds only receivable by said officers under this law, the same being other and different funds than the taxpayer may tender or claim the right to pay, than such as are herein provided; and no writ for the prevention of any revenue claim, or to hinder or delay the collection of the same, shall in any wise issue, either injunction, *supersedeas*, *mandamus*, prohibition or any other writ or process whatever; but in all cases, if, for any rea- [276]

son, any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided, and in no other manner. In all such cases, if the court certify of record that the officer defendant acted in good faith and diligently defended the action, the necessary costs incurred by him shall be taxed to and paid by the State, as in criminal cases. The commonwealth attorney for the county or corporation in which suit is brought shall appear and represent the defense. In every case where judgment is rendered for the defendant, a fee of $5 shall be taxed in favor of said attorney and against the plaintiff, and whenever the court shall refuse to certify the good faith and diligence of the officer defending the case, a like fee of $5 shall be taxed against said officer. Any officer charged with the collection of revenue, who shall receive payment thereof in anything other than that hereinbefore provided, shall be deemed guilty of a misdemeanor, and fined not less than $100 nor more than $500, in the discretion of the court; but nothing herein contained shall be construed to subject any officer of the State to any suit, other than as hereinbefore provided, for any refusal on his part to accept in payment of revenue due the State any kind or description of funds, security or paper not authorized by this Act.

"2. This Act shall be in force from and after the first day of December, eighteen hundred and eighty-two."

The 18th section of the Act of April 1, 1879, (Acts of 1878–79, p. 318), so far as material, is that "it shall be the duty of the treasurer, after the first day of December, to call upon each person chargeable with taxes and levies, who has not paid the same prior to that time, or upon the agent of such person resident within the county or corporation, and upon failure or refusal of such person or agent to pay the same he shall proceed to collect by distress or otherwise." Goods and chattels distrained by an officer, by provisions of other statutes then in force, were required to be sold at public sale after due notice, as prescribed.

[277] The Act of January 26, 1882, was amended by an Act which was passed and took effect March 13, 1884, by the addition of the following sections:

"Sec. 2. Whenever any papers, purporting to be coupons cut from bonds of this State, shall be tendered to the collecting officer in payment of any taxes due to the State by any party desiring to bring a suit under this statute, it shall be the duty of the collecting officer to place the coupons so tendered in an envelope, to seal the said envelope, write his name across the seal thereof, indorse it with the numbers of the coupons enclosed, and return it to the taxpayer. Upon the trial of any proceeding under this Act the said coupons, enclosed in the said envelope so sealed and indorsed, must be produced in evidence to prove the tender. If the court shall certify that the money paid under protest ought to be refunded, the said coupons shall be delivered to the auditor of public accounts, to be canceled simultaneously with the issue of his warrant.

"Sec. 3. No action of trespass or trespass on the case shall be brought or maintained against any collecting officer for levying upon the property of any taxpayer who may h tendered in payment, in whole or in part, a coupon or paper purporting to be a coup cut from bonds of this State, for such tax and who shall refuse to pay his taxes in go silver, United States treasury notes, or natio bank notes. The suit contemplated by t Act shall be commenced by a petition filed rules, upon which a summons shall be issu to the collecting officer; and the said s shall be regularly matured like other actic at law, and the coupons tendered shall filed with said petition."

The contract which the plaintiff in error leges has been violated is with the State Virginia, and is contained in the Act of Ma 30, 1871, known as the Funding Act, entit "An Act to Provide for the Funding and P ment of the Public Debt," and in the bonds a coupons issued under its authority. It provid for the funding of two thirds of the existi State debt and of two thirds of the inter accrued thereon to July 1, 1871, in new per cent bonds, to run thirty-four years, bonds, coupon or registered, payable to or or bearer, and the coupons to bearer, a declared that the coupons should be paya semi-annually and "be receivable at a after maturity for all taxes, debts, dues a demands due the State," and that this sho be expressed on their face. For the remaini one third, certificates were to be issued the creditors to hold as claims against State of West Virginia, that being assum as her just proportion of the entire debt. "U der this Act," it was said by this court *Hartman* v. *Greenhow*, 102 U. S., 672, [Bk. 26, L. ed. 271, 274], "a large number of creditors of the State, holding bonds amou ing — including interest thereon — to ab thirty millions of dollars, surrendered th and took new bonds with interest coupons nexed for two thirds of their amount and c tificates for the balance. A contract was t consummated between the State and the hold of the new bonds and the holders of the c pons, from the obligation of which she could n without their consent, release herself by a subsequent legislation. She thus bound h self not only to pay the bonds when they came due, but to receive the interest coup from the bearer at and after their maturity, their full amount, for any taxes or dues by h to the State. This receivability of the coup for such taxes and dues was written on th face, and accompanied them into whate hands they passed. It constituted their ch value and was the main consideration offe to the holders of the old bonds to surren them and accept new bonds for two thirds their amount.

The same view had been taken by the preme Court of Appeals of Virginia in cases of *Antoni* v. *Wright*, 22 Gratt., 833; W v. *Rogers*, 24 Gratt., 169, and *Clarke* v. *Tyler*, Gratt., 184, in the last of which cases it was clared to be the settled law of the State. It repeated by this court in *Antoni* v. *Greenh* 107 U. S., 769 [Bk. 28, L. ed. 468], where was said (p. 775): "The right of the coup holder is to have his coupon received for ta when offered"; and (page 771): "Any Act the State which forbids the receipt of th

[illegible] taxes is a violation of the contract, [illegible] against coupon-holders." Upon [illegible] propositions, there was an entire agreement between the majority and minority of [illegible] in that case.

[illegible] and value of this contract right [illegible] coupon-holder deserved to be further [illegible]. It was evidently a part of the con[illegible] which the creditors of the State [illegible] to accept, under the Act of March [illegible] from the State of Virginia, new obli[illegible] for two thirds of their claim, in ex[illegible] for the surrender of the original bonds. [illegible] depended for their payment, [illegible] principal and interest, upon the con[illegible] faith of the State in making from [illegible] necessary appropriations out of [illegible] treasury, to meet its recurring liabili[illegible] legislation to that effect. In [illegible] there was no remedy by legal [illegible]. The State itself could not be sued. Its [illegible] to pay had no sanction but the [illegible] of duty to the public creditors. [illegible] security for their performance was [illegible] faith.

[illegible] immediately on the passage of the Act [illegible] 30, 1871, and thereafter, occasional [illegible] default in the payment of interest [illegible] issued in pursuance of its provi[illegible] by reason of failures to provide by laws [illegible] appropriations for its payment, was [illegible] obviated, by a self-executing remedy [illegible] by the law in the hands of the creditor [illegible] for from that time it became the [illegible] duty of every tax-collector to receive [illegible] from these bonds, offered for that pur[illegible] by taxpayers, in payment of taxes, upon [illegible] footing, at an equal value, and with [illegible] effect, as though they were gold or silver [illegible] tender treasury notes. They were by [illegible] reduced, in effect, into money, and as [illegible] the State and its taxpayers were a [illegible] tender as money; and being not only a [illegible] a contract, it became, by force of the [illegible] of the United States, irrepealable, [illegible] is to-day what it was when first [illegible] the unchangeable law of Virginia. [illegible] a tender of such coupons by a taxpayer [illegible] of taxes, and a refusal by a tax [illegible] to receive them, the situation and [illegible] of the taxpayer and coupon-holder were [illegible] what they would have been if he had [illegible] a like tender in gold coin and it had been [illegible]. What they would be we shall have [illegible] presently to inquire. In the mean[illegible] it is clear that the contract obligation em[illegible] in the quality imparted by law to these [illegible] of being receivable in payment of [illegible] is a distinct, collateral and real security [illegible] in the hands of the creditor, intended to [illegible] him to collect them without process of [illegible]. As long as the annual taxes of the State [illegible] sufficient in amount to absorb all coupons [illegible] and unpaid, a certain market [illegible] for them which will maintain them [illegible] their par value. In the hands of the [illegible] who buys them for tender, they are [illegible] no longer *chose in action*, but equal [illegible] and quality to money, and equivalent [illegible] for taxes already paid.

[illegible] of the passage of the Act of March [illegible] there existed a remedy by *mandamus* [illegible] a tax collector refused to receive [illegible] coupons issued under that Act, tendered in payment of taxes, to compel him specifically to do so. The case of *Hartman* v. *Greenhow* [*supra*] was one in which that relief was administered; and in *Antoni* v. *Greenhow* [*supra*] it is stated to have been the settled practice of the Supreme Court of Appeals of Virginia to entertain suits for similar relief. By an Act of January 14, 1882, the General Assembly of that State modified the proceedings in *mandamus* in such cases so as to require the taxpayer first to pay his taxes in money, and then the coupons tendered having in another proceeding been determined to be genuine, he was entitled to a judgment upon the *mandamus*, requiring them to be received in payment of the taxes, and the money previously paid refunded. The validity of this Act became the question in *Antoni* v. *Greenhow*, *ubi supra*, and it was affirmed on the ground that, for the purpose of specifically enforcing the right to have the coupons received in payment of taxes, the new remedy was substantially equivalent to the old one. The court were not willing to decide that it was a suit against the State, in which the mode of proceeding could be modified, or the remedy taken away altogether, at the pleasure of the State. And it affirmed the right of the coupon holder to have his coupon received for taxes when offered. "The question here," said the court, "is not as to that right, but as to the remedy the holder has for its enforcement when denied." "The question," said the Chief Justice, delivering the [281] opinion of the court, "we are now to consider is not whether, if the coupon tendered is in fact genuine and such as ought, under the contract, to be received, and the tender is kept good, the treasurer can proceed to collect the tax by distraint or such other process as the law allows, without making himself personally responsible for any trespass he may commit, but whether the Act of 1882 violates any implied obligation of the State in respect to the remedies that may be employed for the enforcement of its contract if the collector refuses to take the coupon."

That was a case in which it was sought, by *mandamus*, specifically to enforce the contract of the State with the coupon holder, by compelling, by affirmative action and process of law, the collector actually to receive the coupons tendered in satisfaction of taxes. It left unaffected the right of the coupon holder and taxpayer, after his tender had been unlawfully refused, to stand upon his contract and the law, in defense of his rights, both of person and property, against all unlawful assaults and seizures. In the former he was an actor, seeking affirmative relief, to compel the specific performance of the contract. In the latter he is a defendant, passively resting on his rights, and resisting only demands and exactions sought to be enforced against him in denial of them. He has himself, in all things, performed the contract on his part, and obeyed the law, and simply insists, that if more is illegally exacted and taken from him, he shall have the remedy which the law gives to every other citizen, not himself in default, against the wrongdoer who, under color of law, but without law, disturbs or dispossesses him. As we have seen, the coupon holder, whose tender of genuine coupons in payment of taxes has been refused, stands upon the same footing in this respect as though

he had tendered gold coin in similar circumstances and with like result.

The question next in order is, whether he has any, and if any, what remedy for the recovery of property distrained to pay the same tax which he has thus already offered and attempted to pay in money or its equivalent. It is well settled by many decisions of this court, that, for [282] the purpose of affecting proceedings to enforce the payment of taxes, a lawful tender of payment is equivalent to actual payment, either being sufficient to deprive the collecting officer of all authority for further action, and making every subsequent step illegal and void. In *Woodruff* v. *Trapnall*, 10 How., 190, 208, it was held that a tender of the notes of the bank of the State of Arkansas, by law and a contract with the noteholders made receivable in payment of public dues to the State, was equivalent to payment, in extinguishing the judgment in satisfaction of which they were offered. The court said: "The law of tender which avoids future interest and costs, has no application in this case. The right to make payment to the State in this paper arises out of a continuing contract, which is limited in time by the circulation of the notes to be received. They may be offered in payment of debts due to the State in its own right, before or after judgment, and without regard to the cause of indebtment." In the case of *U.S.* v. *Lee*, 106 U. S., 196 [Bk. 27, L. ed., 171], it was held that a certificate of a sale of land for taxes, made by commissioners, which by law was impeachable by proof that the taxes had been paid previous to sale, was rendered void by proof that the commissioners had refused to receive the taxes, without proof of an actual tender, where the commissioners had waived it by a previous notice that they would not accept it. In the opinion of the court it is said: "This court has in a series of cases established the proposition that where the commissioners refused to receive such taxes their action in thus preventing payment was the equivalent of payment in its effect upon the certificate of sale," citing *Bennett* v. *Hunter*, 9 Wall., 326 [76 U. S., bk. 19, L. ed., 672]; *Tracey* v. *Irwin*, 18 Wall., 549 [85 U. S., bk. 21, L. ed. 786]; *Atwood* v. *Weems*, 99 U. S., 183 [Bk. 25, L. ed., 471]; and *Hills* v. *Exchange Bk.*, 105 U. S., 319 [Bk. 26, L.ed., 1052].

The case, then, of the plaintiff below is reduced to this: He had paid the taxes demanded of him by a lawful tender. The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so, he ceased to be an officer of the law and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully, with force [283] and arms, seized, taken and detained the personal property of another. That an action of detinue will lie in such a case, according to the law of Virginia, has not been questioned. The right of recovery would seem to be complete, unless this case can be met and overthrown on some of the grounds maintained in argument by counsel for the defendant in error. These we proceed now to examine in their order.

It is objected, in the first place, that the law and contract, by which the quality of being receivable in payment of taxes to the State is imputed to the coupons, is itself in violation of that clause of the Constitution of the Unit States, art. I. sec. 10, which declares that State shall "emit bills of credit," and is the fore void.

The coupons in question are in the ordina form, and one of them reads as follows:

"Receivable at and after maturity for taxes, debts and demands due the State.

"The Commonwealth of Virginia will pay t bearer thirty dollars, interest due 1st Januar 1884, on bond No. 2731.

"Coupon No. 20.

"Geo. Rye, Treasurer."

It is contended that this is a bill of credit the sense of the Constitution, because, bei receivable in payment of debts due the Sta and negotiable by delivery merely, it was tended to pass from hand to hand and circul as money.

The meaning of the term "bills of credit," used in the Constitution, has been settled decisions of this court. By a sound rule of terpretation it has been construed in the lig of the historical circumstances which are kno to have led to the adoption of the clause p hibiting their emission by the States, and view of the great public and private mischi experienced during and prior to the period the War of Independence, in consequence unrestrained issues, by the Colonial and St governments, of paper money, based alone on credit. The definition thus deduced not founded on the abstract meaning of words, so as to include everything in the ture of an obligation to pay money, reposi on the public faith, and subject to future demption, but was limited to those particu forms of evidences of debt which had been abused to the detriment of both private public interests Accordingly, *Chief Just* Marshall, in *Craig* v. *Missouri*, 4 Pet., 410, said that "bills of credit signify a paper medi intended to circulate between individuals, between governments and individuals, for ordinary purposes of society." This definiti was made more exact by merely expressi however, its implications, in *Briscoe* v. *Ba of Ky.*, 11 Pet., 257, 314, where it was sa "The definition, then, which does include classes of bills of credit emitted by the Co nies or States, is a paper issued by the soverei power, containing a pledge of its faith and signed to circulate as money." And again 318), "To constitute a bill of credit, within the Constitution, it must be issued by a Sta on the faith of the State, and be designed circulate as money. It must be a paper wh circulates on the credit of the State, and is received and used in the ordinary business life." The definition was repeated in *Darri ton* v. *Bank of Ala.*, 13 How., 12.

It is very plain to us that the coupons in qu are not embraced within these terms. Th are not bills of credit in the sense of this c stitutional prohibition. They are issued by State, it is true. They are promises to p money. Their payment and redemption based on the credit of the State, but they w not emitted by the State in the sense in wh a government emits its treasury notes, or a ba its bank notes—a circulating medium or pa currency—as a substitute for money. And th is nothing on the face of the instruments,

[illegible] or nature, nor in the terms of the [illegible] authorize their issue, nor in the circumstances of their creation or use, as shown [illegible] on which to found an inference [illegible] coupons were designed to circulate, [illegible] common transactions of business, as [illegible] that in fact that they were so used. [illegible] relied on to show such a de[illegible] prove such a use is, that they are [illegible] receivable in payment of taxes and other [illegible] State. From this it is argued that [illegible] such a circulation from hand [illegible] money, as the demand for them, [illegible] such a quality, would naturally [illegible] But this falls far short of their fitness [illegible] circulation in the community, as a [illegible] and substitute for money, in the [illegible] transactions of business, which is nec[illegible] bring them within the constitutional [illegible] against bills of credit. The notes [illegible] bank of the State of Arkansas, which [illegible] subject of controversy in *Woodruff* v. [illegible] 10 How., 190, were by law receiv[illegible] by the State in payment of all dues to it, [illegible] circumstance was not supposed to make [illegible] bills of credit. It is true, however, that [illegible] case it was held they were not so be[illegible] they were not issued by the State and [illegible] none, although the entire stock of the [illegible] was owned by the State, which furnished [illegible] capital and was entitled to all the [illegible] profits. In this case the coupons were issued [illegible] State of Virginia and in its name, and [illegible] obligations based on its credit, and which [illegible] as one mode of redemption, to re[illegible] in payment of all dues to itself in the [illegible] of any holder; but they were not issued [illegible] money, nor was this quality im[illegible] upon them to fit them for use as mon[illegible] with the design to facilitate their circula[illegible] such. It was conferred, as is apparent [illegible] all the circumstances of their creation and [illegible] merely as an assurance, by way of con[illegible] the holder, of the certainty of their [illegible] in the ordinary transactions be[illegible] the state treasury and the taxpayers. [illegible] not become receivable in payment of [illegible] till they are due, and the design, we are [illegible] to presume, was that they would be [illegible] at maturity. This necessarily excludes [illegible] that they were intended for circulation [illegible]

It is [illegible] objected that the suit of the plain[illegible] below could not be maintained because it is [illegible] an action against the State of Vir[illegible] which it has not assented. It is said that [illegible] collector, who is sued, was an officer and [illegible] of the State, engaged in collecting its [illegible] under a valid law, and that the tax he [illegible] to collect from the plaintiff was lawfully [illegible] that, consequently, he was guilty of no [illegible] wrong, but acted only in an official [illegible] representing the State; and, in refus[illegible] to receive the coupons tendered simply [illegible] the commands of his principal, whom [illegible] was lawfully bound to obey; and that, if [illegible] wrong has been done, it has been done by [illegible] State in refusing to perform its contract, [illegible] for that wrong the State is alone liable, but [illegible] from suit by the Eleventh Article of [illegible] to the Constitution of the United [illegible] which declares that "The judicial power [illegible] United States shall not be construed to [illegible]

extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens of or subjects of any foreign State."

This immunity from suit, secured to the States, is undoubtedly a part of the Constitution, of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument. That immunity, however, does not exempt the State from the operation of the constitutional provision that no State shall pass any law impairing the obligation of contracts; for it has long been settled that contracts between a State and an individual are as fully protected by the Constitution as contracts between two individuals. It is true that no remedy for a breach of its contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open, under the Constitution, in the courts of the United States, by a direct suit against the State itself, on the part of the injured party, being a citizen of another State or a citizen or subject of a foreign State. But it is equally true that whenever in a controversy between parties to a suit, of which these courts have jurisdiction, the question arises upon the validity of a law by a State impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised, with whatever legal consequences, to the rights of the litigants, may be the result of the determination. The cases establishing these propositions, which have been decided by this court since the adoption of the Eleventh Amendmendment to the Constitution, are numerous. *Fletcher* v. *Peck*, 6 Cranch, 87; *N. J.* v. *Wilson*, 7 Cranch, 164; *Green* v. *Biddle*, 8 Wheat., 1, 84; *Providence Bk.* v. *Billings*, 4 Pet., 514; [287]
Woodruff v. *Trapnall*, 10 How., 190; *Wolff* v. *New Orleans*, 103 U.S., 358 [Bk. 26, L. ed. 395]; *Jefferson Branch Bk.* v. *Skelly*, 1 Black, 436 [66 U. S., bk. 17, L. ed. 173].

It is also true that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record. The provision is to be substantially applied in furtherance of its intention, and not to be evaded by technical and trivial subtleties. Accordingly, it was held in *N. H.* v. *La.* and *N. Y.* v. *La.*, 108 U. S., 76 [Bk. 27, L. ed., 656], that although the judicial power of the United States extends to "controversies between two or more States," it did not embrace a suit in which, although nominally between two States, the plaintiff State had merely permitted the use of its name for the benefit of its citizens in the prosecution of their claims, for the enforcement of which they could not sue in their own names. So, on the other hand, in *Cunningham* v. *Macon and B. R. R. Co.*, 109 U. S., 446 [Bk. 27, L. ed. 992], where the State of Georgia was not nominally a party on the record, it was held that, as it clearly appeared that the State was so interested in the property that final relief could not be granted without making it a party, the court was without jurisdiction.

In that case, the general question was discussed in the light of the authorities, and the cases in which the court has taken jurisdiction, when the objection has been interposed that a State was a

necessary party to enable the court to grant relief, were examined and classified. The second head of that classification is thus described: "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him." And in illustration of this principle reference was made to *Mitchell* v. *Harmony*, 13 How., 115; *Bates* v. *Clark*, 95 U. S., 204 [Bk. 24, L. ed. 471]; *Meigs* v. *McClung*, 9 Cranch, 11; *Wilcox* v. *Jackson*, 13 Pet., 498; *Brown* v. *Huger*, 21 How., 305 [62 U. S., bk. 16, L. ed. 125]; *Grisar* v. *McDowell*, 6 Wall., 363 [73 U. S., bk. 18, L. ed. 863]; and *U. S.* v. *Lee*, 106 U. S., 196 [Bk. 27, L. ed. 171].

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The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do. He relied on the Act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative Act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character, and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defense.

No better illustration of this principle can be found than that which is furnished by the case of *U. S.* v. *Lee* [*supra*], in which it was applied to a claim made on behalf of the national government. The action was one in ejectment, to recover possession of lands to which the plaintiff claimed title. The defendants were natural persons, whose defense was that they were in possession as officers of the United States under the orders of the government and for its uses. The Attorney-General called this aspect of the case to the attention of the court, but without making the United States a party defendant. It was decided by this court that

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to sustain the defense and to defeat the pla iff's cause of action it was necessary to sh that the defendants were in possession un the United States, and on their behalf, by vir of some valid authority. As this could not shown, the contrary clearly appearing, pos sion of lands actually in use as a national ce tery was adjudged to the plaintiffs. The cision in that case was rested largely upon authority of *Osborn* v. *Bank of U. S.*, 9 Whe 738, which was a suit in equity against an ficer of the State of Ohio, who sought to enfo one of her statutes which was in violation rights secured to the bank by the Constitut of the United States. The defendants, Osb and others, denied the jurisdiction of the co upon the ground that the State was the party in interest and could not be sued, that a suit against her officers, who were e cuting her will, was in violation of the Eleve Amendment of the Constitution. To this jection, *Chief Justice* Marshall replied: "If State of Ohio could have been made a party fendant, it can scarcely be denied that would be a strong case for an injunction. objection is that, as the real party cannot brought before the court, a suit cannot be s tained against the agents of that party; and ca have been cited to show that a court of ch cery will not make a decree unless all th who are substantially interested be made par to the suit. This is certainly true where it i the power of the plaintiff to make them part but if the person who is the real principal— person who is the true source of the r chief, by whose power and for whose adv tage it is done—be himself above the law, be empt from all judicial process, it would be s versive of the best established principles to that the laws could not afford the same re dies against the agent employed in doing wrong which they would afford against could his principal be joined in the suit." T language it may be observed, was quoted w approval in *U. S.* v. *Lee*. The principle wh it enunciates constitutes the very foundat upon which the decision in that case rested.

In the discussion of such questions the tinction between the government of a State the State itself is important and should be served. In common speech and common prehension they are usually regarded as ide cal; and as ordinarily the acts of the gove ment are the acts of the State, because wit the limits of its delegation of power, the g ernment of the State is generally confoun with the State itself, and often the forme meant when the latter is mentioned. The St itself is an ideal person, intangible, invisil immutable. The government is an agent, a within the sphere of the agency, a perfect re sentative; but outside of that it is a law usurpation. The Constitution of the Stat the limit of the authority of its government, both government and State are subject to supremacy of the Constitution of the Uni States and of the laws made in pursua thereof. So that, while it is true in respec the government of a State, as was said in *La ford* v. *U. S.*, 101 U. S., 341 [Bk. 25, L. 1010], that the maxim that the King can do wrong has no place in our system of gove ment: yet it is also true, in respect to the St

[illegible] that whatever wrong is attempted in its [illegible] is imputable to its government and not [illegible] the State, for, as it can speak and act only [illegible] law, whatever it does say and do must be [illegible]. That which, therefore, is unlawful [illegible] made so by the supreme law, the Con[illegible]tion of the United States, is not the word [illegible] act of the State, but is the mere wrong and [illegible] of those individual persons who false[illegible] speak and act in its name. It was upon the [illegible] of this important distinction that this [illegible] was decided in the case of *Texas* v. *White*, [illegible] Wall., 700 [74 U. S., bk. 19, L. ed. 227], [illegible] adjudged that the acts of secession [illegible] constituted the civil war of 1861 were [illegible] lawful acts of usurping State govern[illegible] and not the acts of the States themselves, [illegible] as "the Constitution, in all its pro[illegible], looks to an indestructible Union, com[illegible] of indestructible States"; and that conse[illegible] the war itself was not a war between [illegible] States, nor a war of the United States [illegible] States, but a war of the United States [illegible] unlawful and usurping governments, [illegible] not the States, but a rebellion [illegible] United States. This is, in substance, [illegible] said by *Chief Justice* Chase, deliver[illegible] the opinion of the court in *Thorington* v. [illegible], 1, 9 [75 U. S., bk. 19, L. ed. [illegible]], when he declared, speaking of the [illegible] Government, that "it was regarded [illegible] the military representative of the in[illegible] against the authority of the United [illegible]." The same distinction was declared [illegible] in *Williams* v. *Bruffy*, 96 U. S., [illegible] [Bk. 24, L. ed. 716, 720], and in *Horn* [illegible], 17 Wall., 570 [84 U. S., bk. 21, L. [illegible]], both of which were referred to and [illegible] in *Keith* v. *Clark*, 97 U. S., 454, 465 [illegible], L. ed. 1071, 1075].

[illegible] distinction is essential to the idea of con[illegible] government. To deny it or blot it [illegible] obliterates the line of demarcation that [illegible] constitutional government from abso[illegible], free self-government based on the [illegible] of the people, from that despotism, [illegible] of the one or the many, which enables [illegible] of the State to declare and decree that [illegible] State—to say "*L'Etat, c'est moi.*" Of [illegible] are written constitutions, whose bills [illegible] for the security of individual liberty [illegible] written, too often, with the blood of [illegible] upon the battle field and the scaf[illegible], if their limitations and restraints upon [illegible] may be overpassed with impunity by the [illegible] created and appointed to guard, [illegible] and enforce them; and that, too, with [illegible] authority of law, not only compel[illegible], but entitled to respect? And [illegible] these principles of individual liber[illegible] be maintained, if, when violated, [illegible] tribunals are forbidden to visit pen[illegible] upon individual offenders, who are the [illegible] of wrong, whenever they interpose [illegible] of the State? The doctrine is not to [illegible]. The whole frame and scheme of [illegible] institutions of this country, State [illegible], protest against it. Their contin[illegible] is not compatible with it. It is [illegible] of absolutism, pure, simple and [illegible], and of communism, which is its twin; [illegible] progeny of the same evil birth.

[illegible] said by *Chief Justice* Chase, speaking

for the whole court in *Lane Co.* v. *Oregon*, 7 Wall., 71, 76 [74 U. S., bk. 19, L. ed. 101, 104], that the people, through the Constitution of the United States, "established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States." In no other way can the supremacy of that Constitution be maintained. It creates a government in fact as well as in name, because its Constitution is the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding"; and its authority is enforced by its power to regulate and govern the conduct of individuals, even where its prohibitions are laid only upon the States themselves. The mandate of the State affords no justification for the invasion of rights secured by the Constitution or the United States; otherwise that Constitution would not be the supreme law of the land. When, therefore, an individual defendant pleads a statute of a State, which is in violation of the Constitution of the United States, as his authority for taking or holding property to which the citizen asserts title, and for the protection or possession of which he appeals to the courts, to say that the judicial enforcement of the supreme law of the land, as between the individual parties, is to coerce the State, ignores the fundamental principles on which the Constitution rests, as contrasted with the Articles of Confederation which it displaced; and practically makes the statutes of the States the supreme law of the land within their respective limits. [292]

When, therefore, by the Act of March 30, 1871, the contract was made by which it was agreed that the coupons issued under that Act should thereafter be receivable in payment of taxes, it was the contract of the State of Virginia, because, though made by the agency of the government, for the time being, of the State, that government was acting within the scope of its authority, and spoke with its voice as its true representative; and inasmuch as, by the Constitution of the United States, which is also the supreme law of Virginia, that contract, when made, became thereby unchangeable and irrepealable by the State, the subsequent Act of January 26, 1882, and all other like Acts which deny the obligation of that contract and forbid its performance, are not the Acts of the State of Virginia. The true and real Commonwealth which contracted the obligation is incapable in law of doing anything in derogation of it. Whatever having that effect, if operative, has been attempted or done, is the work of its government acting without authority, in violation of its fundamental law, and must be looked upon, in all courts of justice, as if it were not and never had been. The argument, therefore, which seeks to defeat the present action, for the reason that it is a suit against the State of Virginia, because the nominal defendant is merely its officer and agent, acting in its behalf, in its name and for its interest, and amenable only to it, falls to the ground, because its chief postulate fails. The State of Virginia has done none of these things with which this defense charges her. The defendant in error is not her officer, her agent or her representative, in the [293]

matter complained of, for he has acted not only without her authority, but contrary to her express commands. The plaintiff in error, in fact and in law, is representing her, as he seeks to establish her law, and vindicates her integrity as he maintains his own right.

Tried by every test which has been judicially suggested for the determination of the question, this cannot be considered to be a suit against the State. The State is not named as a party in the record; the action is not directly upon the contract; it is not for the purpose of controlling the discretion of executive officers or administering funds actually in the public treasury, as was held to be the case in *Louisiana* v. *Jumel*, 107 U. S., 711 [Bk. 27, L. ed. 448]; it is not an attempt to compel officers of the State to do the acts which constitute a performance of its contract by the State, as suggested by a minority of the court in *Antoni* v. *Greenhow*, 107 U. S., 769, 783 [Bk. 27, L. ed. 468, 474]; nor is it a case where the State is a necessary party, that the defendant may be protected from liability to it after having answered to the present plaintiff; for, on this supposition, if the accounting officers of the state government refuse to credit the tax collector with coupons received by him in payment of taxes, or seek to hold him responsible for a failure to execute the void statute, which required him to refuse coupons in payment of taxes, in any action or prosecution brought against him in the [294] name of the State, the grounds of the judgment rendered in favor of the present plaintiff will constitute his perfect defense. And as that defense, made in any cause, though brought in a state court, would present a question arising under the Constitution and laws of the United State, it would be within the jurisdiction of this court to give it effect, upon a writ of error, without regard to the amount or value in dispute.

In the case of *Osborn* v. *Bank of U. S.*, 9 Wheat., 738, 853, *Chief Justice* Marshall put, by way of argument and illustration, the very case we are now considering. He said: "Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New York and New Jersey. Suppose, while such a controversy is pending, the collecting officer of one State should seize property for taxes belonging to a man who supposes himself to reside in the other State, and who seeks redress in the federal court of that State in which the officer resides. The interest of the State is obvious. Yet it is admitted, that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the State. That it would not so act may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the State against him, may plead in bar the judgment of a court of competent jurisdiction. If this plea ought to be sustained—and it is far from being certain that it ought not—the judgment so pleaded would have acted directly on the revenue of the State in the hands of its officers. And yet the argument admits that the action in such a case would be sustained. But suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for t specific thing, while yet in possession of t seizing officer. It being admitted in argume that the action sounding in damages would b we are unable to perceive the line of distincti between that and the action of detinue. I the latter action would claim the specific artic seized for the tax, and would obtain it, shou the seizure be deemed unlawful."

Although the plaintiff below was nomina the actor, the action itself is purely defensiv Its object is merely to resist an attempted wro and to restore the *status in quo* as it was wh the right to be vindicated was invaded. In t respect it is upon the same footing with t preventive remedy of injunction in equity, wh that jurisdiction is invoked, and of which conspicuous example, constantly followed the courts of the United States, was the case *Osborn* v. *Bank of U. S.*, *ubi supra*. In th case the taxing power of the State was resist on the ground that its exercise threatened deprive the complainant of a right conferr by the Constitution of the United States. T jurisdiction has been constantly exerted by t courts of the United States to prevent the illeg taxation of national banks by the officers of t States; and in *Cummings* v. *Nat. Bk.*, 101 S., 153, 157 [Bk. 25, L. ed. 903, 904], it was la down as a general principle of equity jurisd tion "that when a rule or system of valuati is adopted by those whose duty it is to ma the assessment, which is designed to oper unequally and to violate a fundamental pri ciple of the Constitution, and when this rule applied not solely to one individual, but to large class of individuals or corporations, equi may properly interfere to restrain the operati of this unconstitutional exercise of power."

And it is no objection to the remedy in su cases, that the statute whose application in t particular case is sought to be restrained is r void on its face, but is complained of only b cause its operation in the particular instan works a violation of a constitutional right; f the cases are numerous, where the tax laws a State, which in their general and proper a plication are perfectly valid, have been held become void in particular cases, either as u constitutional regulations of commerce, or violations of contracts prohibited by the Co stitution, or because in some other way th operate to deprive the party complaining, o right secured to him by the Constitution of t United States. At the present term of t court at least three cases have been decid in which railroad companies have been co plainants in equity, seeking to restrain offic of States from collecting taxes, on the grou of an exemption by contract, and no questi of jurisdiction has been raised. The pract has become common, and is well settled incontestable principles of equity procedu *Memphis R. R.* v. *Railroad Commissioners*, U. S., 609 [Bk. 28, L. ed. 837]; *St. Louis, e R. Co.* v. *Berry*, 113 U. S., 465 [Bk. 28, L. 1055]; *Ches. & O. R. Co.* v. *Miller*, 114 U. 176 [*ante*, 121].

It is still urged upon us, however, in ar ment, that notwithstanding all that has b or can be said it still remains that the cont versy disclosed by the record is between an dividual and the State; that the State alone

[illegible] interest in its determination; that the [illegible] effect of such determination is to control the action of the State in the regular and [illegible] administration of its public affairs; and that therefore the suit is and must be regarded as a suit against the State, within the prohibition of the Eleventh Amendment to the Constitution. Omitting for the time being the consideration already enforced, of the fallacy that lies at the bottom of this objection arising from the distinction to be kept in view between the government of a State and the State itself, the premises which it assumes may all be admitted, but the conclusion would not follow. The same argument was employed in the name of the United States in the *Lee Case* and did not prevail. It was pressed with the greatest force of which it was susceptible in the case of *Osborn* v. Bank of U. S., and was met and overcome by the masterly reasoning of *Chief Justice* Marshall. It appeared early in the history of this court, in 1799, in the case of *Fowler* v. Lindsay, 3 Dall., 411, in which that able magistrate, *Mr. Justice* Washington, pronounced the first reported opinion. On a motion to remove the cause by *certiorari* from the circuit court, on the ground that it was a suit in which a State was a party, it being an ejectment for lands the title to which was claimed under grants from different States, he said: "A case which belongs to the jurisdiction of the Supreme Court, on account of the interest that a State has in the controversy, must be a case in which a State is either nominally or substantially a party. It is not sufficient that a State may be consequentially affected; for in such case (as when the grants of different States are brought in question) the circuit court has clearly a jurisdiction. And this remark furnishes an answer to the suggestions that have been founded on the remote interest of the State, in making validity to her grantees, upon the event of a verdict."

Nothing prohibited by the Eleventh Amendment is the exercise of jurisdiction in a "suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." Nothing else is touched; and suits between individuals, unless the State is the party in a substantial sense, are left untouched, however much their determination may incidentally and consequentially affect the interests of a State or the operations of its government. The actual inconvenience of an interference with the collection of its taxes by the government of Virginia, by suits against its tax-collectors, vanishes at once upon the suggestion that such interference is not possible except when that government seeks to enforce the collection of its taxes contrary to the law and consent of the State and in violation of the Constitution of the United States. The immunity claimed by the State, now invoked vainly to protect individual wrongdoers, finds no [illegible] in the Eleventh Amendment to the Constitution, and is in fact a protest against the enforcement of that other provision which forbids any State from passing laws impairing the obligation of contracts. To accomplish that result requires a new amendment which would not forbid any State from passing laws impairing the obligation of its own contracts.

What we are asked to do is, in effect, to overrule the doctrine in *Fletcher* v. *Peck*, 6 Cranch, 87, and hold that a State is not under a constitutional obligation to perform its contracts; for it is equivalent to that to say that it is not subject to the consequences when that constitutional prohibition is applied to suits between individuals. We could not stop there. We should be required to go still further, and reverse the doctrine on which that constitutional provision rests, stated by *Chief Justice* Marshall in that case, when he said: "When, then, a law is in its nature a contract, when absolute [298] rights have vested under that contract, a repeal of the law cannot devest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community. It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the Legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of legislative power, is well worthy of serious reflection." And, in view of such a contention, we may well add the impressive and weighty words of the same illustrious man, when he said, in *Marbury* v. *Madison*, 1 Cranch, 137: "The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

It is contended, however, in behalf of the defendant in error, that the Act of January 26, 1882, under which he justified his refusal of the tender of coupons, does not impair the obligation of the contract between the coupon-holder and the State of Virginia, inasmuch as it secures to him a remedy equal in legal value to all that it takes away, and that consequently, as the State may lawfully legislate by changing remedies so that it does not destroy rights, the remedy thus provided is exclusive and must defeat the plaintiff's action.

The remedy thus substituted and declared exclusive is one that requires the taxpayer demanding to have coupons received in payment of taxes, first, to pay the taxes due from him in money, under protest, when, within thirty days thereafter, he may sue the officer to recover back the amount paid, which, on obtaining judgment therefor, shall be refunded by the auditor of public accounts out of the treasury. By the amendment passed March 13, 1884, the [299] coupons tendered are required to be sealed up and marked for identification, filed with the petition at the commencement of the suit, produced on the trial as evidence of the tender, and delivered to the auditor of public accounts to be canceled when he issues his warrant for the amount of the judgment.

It is contended that, in view of this remedy, the case is ruled by the decision of this court in *Antoni* v. *Greenhow*, 107 U. S., 769 [Bk. 27, L. ed. 468]. We have, however, already shown, by extracts from the opinion of the court in that case, that the question involved in the

present proceeding was not covered by that judgment. In that case the plaintiff in error was seeking to compel the officer specifically to receive his coupons in payment of taxes by *mandamus*, on the ground that he was entitled to that remedy when the contract was made by the law of March 30, 1871. The law giving that remedy was subsequently amended, requiring the petitioner to pay the taxes in money in the first instance, and permitting the writ to issue only after a trial in which the genuineness of the coupons tendered had been established. The court held that he might have been put to the same proof in the former mode of proceeding, and that the amendment did not destroy the efficiency of the remedy.

But here the plaintiff did not seek any compulsory process against the officer to require him specifically to receive the coupons tendered. He offered them and they were refused. He chose to stand upon the defensive and maintain his rights as they might be assailed. His right was to have his coupon received for taxes when offered. That was the contract. To refuse to receive them was an open breach of its obligation. It is no remedy for this that he may acquiesce in the wrong, pay his taxes in money which he was entitled to pay in coupons, and bring suit to recover it back. His tender, as we have already seen, was equivalent to payment, so far as concerns the legality of all subsequent steps by the collector to enforce payment by distraint of his property. He has the right to say he will not pay the amount a second time, even for the privilege of recovering it back. And if he chooses to stand upon a lawful payment once made, he asks no remedy to recover back taxes illegally collected, but may resist the exaction, and treat as a wrongdoer the officer who seizes his property to enforce it.

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It is suggested that the right to have coupons received in payment of taxes is a mere right of set-off, and is itself but a remedy subject to the control of legislation. Ordinarily, it is true, the right to set off mutual independent debts, by way of compensation and satisfaction, is dependent on the general law, does not enter into the contract, although it may be the *lex loci contractus*, and is dependent for its enforcement upon the *lex fori*, when suit is brought, and consequently may be changed by the Legislature without impairing vested rights. But in such cases the right is entirely dependent upon the general law, and changes with it. It is different when, as in many cases of equitable set-off, it inheres in the transaction, or arises out of the relations of the parties; and it may in any case, as it was in this, be made the subject of contract between parties. When this is done, it stands upon the footing of every other lawful contract, upon valuable consideration, the obligation of which cannot be impaired by subsequent legislation.

It is urged upon us, however, that in a revenue system, a provision of law which gives to a party complaining of an illegal exaction of taxes the right to recover back the amount in dispute only after previous payment under protest, as the sole remedy against either the officer or the government, is a just and reasonable rule, sufficiently securing private rights, and convenient, if not necessary, to the interests of the public. We are referred to the revenue laws of the United States for illustration and exa ple, and the question is put, why a similar pr vision, as it is assumed to be, should not be co sidered adequate as a remedy for the holders coupons in Virginia, who have been denied t right to use them in payment of taxes.

The answer is obvious and complete. V ginia, by a contract which the Constitution the United States disables her from impairin has bound herself that it shall be otherwi The State has agreed that the coupons cut fr her bonds shall be received in payment of ta due to her, as though they were money. Wh the taxpayer has tendered such coupons, he h complied with the agreement, and in legal c templation has paid the debt he owed the Sta So far as that tax is concerned, and every s taken for enforcing its payment in disregard that tender, the coupon holder is withdra from the power and jurisdiction of the Sta He is free from all further disturbance, and securely shielded by the Constitution in his i munity. No proceeding, whatever its prete which does not respect this right, can be ju cially upheld. The question is not of the r sonableness of a remedy for a breach of contract to receive the tendered coupons in p ment of the tax; it is whether the right to h them so received, and the use of that right defense against all further efforts to exact compel payment of the tax, in denial and d ance of that right, can be taken away with a violation of that provision of the Const tion which prohibits the States from pass laws which impair the obligation of contra Certainly, a law which takes from the pa his whole contract, and all the rights whic was intended to confer, must be regarded law impairing its obligation.

Another point remains for consideration. tion 721, R. S., provides that "The laws of several States, except where the Constituti treaties or statutes of the United States ot wise require or provide, shall be regarded rules of decision in trials at common law, in courts of the United States, in cases where t apply"; and section 914, R. S., declares "The practice, pleadings and forms and m of proceeding in civil causes, other than eq and admiralty causes, in the Circuit and Dis Courts, shall conform, as near as may b the practice, pleadings and forms and mod proceeding existing at the time in like ca in the courts of record of the State wi which such Circuit or District Courts held, any rule of court to the contrary not w standing." Upon these sections it is ar that, admitting the Acts of the General As bly of Virginia of January 26, 1882, and amendment by the Act of March 13, 188 be unconstitutional and void, so far as they bid tax collectors from receiving coupon payment of taxes, nevertheless, as the Stat control over the forms of action and mod proceeding by way of remedy, and has fo den, in cases where the tax collector has ref coupons in payment of taxes, any persons tion against him other than the suit to re back the tax demanded and paid under pr the same law, by force of the Revised Sta of the United States, must govern in the c of the United States.

It is not entirely clear, on the face of th

of January 28, 1882, that it does forbid actions against the officer for illegally levying upon the property of the coupon holder for the tax which he has offered to pay. The language of the Act seems to embrace only such suits as are [illegible] with the direct object of preventing or restraining him from taking steps to collect the tax. And this uncertainty is not made clear by the mandatory Act of March 13, 1884, which, by expressly forbidding actions of trespass or trespass on the case to be brought or maintained against any collecting officer for seizing upon the property of any taxpayer who shall have tendered coupons in payment of the tax demanded, would seem to have left the action of detinue, which was authorized in such cases by the previously existing law of Virginia, untouched by the prohibition.

We shall assume, however, for the purposes of this opinion, that these Acts of the General Assembly of Virginia were intended to and do bar every action, of whatever kind, against a collecting officer, for the recovery of specific property taken by distraint or of damages for conversion or detention, and leaves to the coupon holder, as his sole right of action, the suit to recover back the money illegally collected from him.

This action, as we have already seen, is no remedy whatever for the loss of the specific tax of paying his taxes with coupons. It does not even profess so to be. Neither is it a remedy for the loss of the right sought to be vindicated in this and other personal actions against the collector for unlawfully taking from the plaintiff his property. And, upon the supposition made, this wrong is without remedy by any act of Virginia.

The direct result, then, of giving effect to the provisions of the Act in question is to deny entirely the right of the coupon holder to pay his taxes with his coupons, which we have already said avoids that part of the Acts in question which forbids it in terms, and to take from him that right as a defense against the wrongful trespasses committed upon him and his property in denial and defiance of it. All persons whose property is unlawfully taken, otherwise than to enforce payment of taxes, are secured in their right of action for redress. But the coupon holder, to whom the Constitution of the United States guarantees the right, conferred upon him by the law and contract of Virginia, to pay his taxes in coupons, is excluded. The discrimination is made against him in order to deprive him of that right, and, if permitted, will have the effect of denying to him all redress for a deprivation of a right secured to him by the Constitution. To take away all remedy for the enforcement of a right is to take away the right itself. But that is not within the power of the State.

Section 721, R. S., it will be observed, makes no express exception, in reference to the adoption of state laws as rules of decision, of cases where the Constitution otherwise requires, such follows wherever the adoption of the state law deprives a complaining party of a remedy essential to the vindication of a right, and that right is derived from or protected by the Constitution of the United States. The same exception is implied in section 914, the language of which, indeed, is not imperative, as the conformity required in the practice and procedure of the courts of the United States with that of the State Courts needs only to be "as near as may be." No one would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law. This is exactly what the statutes in question undertake to do, in respect to that class of persons whose property is taken from them for the offense of asserting, under the protection of the Constitution, the right to pay their taxes in coupons. The contract with Virginia was not only that the coupons should be received in payment of taxes, but, by necessary implication, that the taxpayer making such a tender should not be molested further, as though he were a delinquent; and that, for [304] every illegal attempt subsequently to enforce the collection of the tax, by the seizure of property, he should have the remedies of the law in force when the contract was made, for redress, or others equally effective. "The obligation of a contract," said this court, in *McCracken* v. *Hayward*, 2 How., 608, 612, "consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them, as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence, any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

The Acts of Assembly in question must be taken together, as one is but an amendment to the other. The scheme of the whole is indivisible. It cannot be separated into parts. It must stand or fall together. The substantive part of it, which forbids the tax collector to receive coupons in payment of taxes, as we have already declared, as, indeed, on all sides, is admitted, cannot stand, because it is not consistent with the Constitution. That which is merely auxiliary to the main design must also fall with the principal of which it is merely an incident; and it follows that the Acts in question are not laws of Virginia, and are therefore not within the sections of the Revised Statutes referred to, nor obligatory upon the courts of the United States.

It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be de- [305] clared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare, that the intention of the Legislature

was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact. An illustration of this principle is found in the *Trade-Mark Cases*, 100 U. S. 82, [Bk. 25, L. ed. 550], where an Act of Congress, which, it was claimed, would have been valid as a regulation of commerce with foreign Nations and among the States, was held to be void altogether, because it embraced all commerce, including that between citizens of the same State, which was not within the jurisdiction of Congress, and its language could not be restrained to that which was subject to the control of Congress. "If we should," said the court in that case (page 99), "in the case before us undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do."

Indeed it is quite manifest, from the face of the laws themselves, that they are together but parts of a larger whole. By an Act of the General Assembly of Virginia, passed February 14, 1882, the Legislature restated the account between the State and its creditors on a basis of readjustment which reduced it to the sum of $21,085,877.15, including interest in arrears to July 1, 1882, which was thereby declared to be her equitable share of the debt of the old and entire State, and on which it was also declared that the State was not able to pay interest for the future at a larger rate than 3 per cent per annum. The outstanding debt, of which this was a reduction, was then classified, and bonds of the State were authorized to be issued, bearing interest at the rate of three per cent per annum, in exchange for outstanding bonds of the different classes, scaled at rates of 53 per cent, 60 per cent, 69 per cent, 63 per cent, and, as to one class, as high as 80 per cent, which [306] were to be retired and canceled. The coupons on the new bonds were not made receivable in payment of taxes. To coerce creditors holding bonds issued under the Act of March 30, 1871, to exchange them for these new bonds, at these reduced rates, and with them to give up their security for the payment of interest arising out of the receivability of coupons in payment of taxes, is the evident purpose of the Acts of January 26, 1882, and of March 13, 1884, and all together form a single scheme, the undisguised object of which is to enable the State to rid itself of a considerable portion of its public debt, and to place the remainder on terms to suit its own convenience, without regard to the obligation it owes to its creditors.

The whole legislation, in all its parts, as to creditors affected by it and not consenting to it, must be pronounced null and void. Such is the sentence of the Constitution itself, the fundamental and supreme law for Virginia, as for all the States and for all the people, both of the States separately and of the United States, and which speaks with sovereign and commanding voice, expecting and receiving ready and cheerful obedience, not so much for the display of its power, as on account of the majesty of its authority and the justice of its mandates.

The judgment of the Hustings Court of the City of Richmond is accordingly reversed and the cause will be remanded, with directions to render judgment upon the agreed statement of facts in favor of the plaintiff; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting, *Mr. Chief Justice* **Waite** and *Justices* **Bradley, Miller** and **Gray.** See opinion, *post*, 207.

Cited—114 U. S., 308, 310, 314; 116 U. S., 570, 571.

R. B. CHAFFIN, *Plff. in Err.*,
v.
WILLIAM TAYLOR.

(See S. C., Reporter's ed., 309, 310.)

*This case falls within the decision in Poindexter v. Greenhow (*ante*, 185) and is decided by it.

[No. 1260.]

Argued Mar. 20, 23, 24, 25, 1885. Decided April 20, 1885.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

The history and facts of the case appear in the opinion of the court. See, also, the related case of *Poindexter* v. *Greenhow*, *ante*, 185, and the dissenting opinion, *post*, 207.

Messrs. **William L. Royall, Daniel H. Chamberlain, Wager Swayne, Wm. M. Evarts** and **Wm. B. Hornblower,** for plaintiff in error.

Mr. **F. S. Blair,** *Atty-Gen.* of Virginia, **R. T. Merrick** and **A. H. Garland,** for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This was an action in trespass *de bonis asportatis*, brought by the plaintiff in error against the defendant in the Circuit Court for the County of Henrico in Virginia, for the recovery of $150 damages for unlawfully entering upon the plaintiff's premises and seizing, taking and carrying away one horse, the property of the plaintiff, of the value of $100.

The defendant justified the taking, etc., as treasurer of Henrico County, charged by law with the duty of collecting taxes due the State of Virginia on property and persons in said county, alleging that the property was lawfully seized and taken for taxes due from the plaintiff to the State, which, on demand, he had refused to pay.

To this plea the plaintiff replied a tender in payment of the taxes, when demanded and before the trespass complained of, of the amount due, in coupons cut from bonds of the State of Virginia, receivable in payment of taxes by virtue of the Act of March 30, 1871.

To the replication the defendant demurred specially, on the ground, first, that by the Act of January 26, 1882, he was forbidden to receive coupons in payment of taxes; and, second, that by the Act of March 13, 1884, an action of trespass would not lie in such a case.

In this demurrer the plaintiff joined, and assigned, as a reason why it should be overruled,

*Head note by *Mr. Justice* MATTHEWS.

[illegible] the two statutes mentioned and relied on by [illegible] were repugnant to section 10, [illegible] of the Constitution of the United [illegible] and therefore null and void.

[illegible] was rendered on the demurrer in [illegible] of the defendant. Thereafter, on Novem[illegible] 1884, the plaintiff filed his petition in the [illegible] Court of Appeals of Virginia for the [illegible] of a writ of error; whereupon, as the [illegible] recites, the petition "having been ma[illegible] considered, and the transcript of the rec[illegible] of the judgment aforesaid seen and inspect[illegible] the court, being of opinion that said judg[illegible] a plainly right, doth deny the said writ." [illegible] this judgment this writ of error is [illegible]

[illegible] judgment of the Supreme Court of Ap[illegible] in substance, a judgment affirming the [illegible] of the Circuit Court of Henrico [illegible], and is therefore reviewable upon this [illegible] error by this court, the case being one [illegible] under the Constitution of the Unit[illegible] *Williams* v. *Bruffy*, 102 U. S., 248 [illegible] L. ed. 135].

[illegible] merits of the case are disposed of by the [illegible] *Poindexter* v. *Greenhow* [*ante*, 185], [illegible] it was decided that the Act of January [illegible] and the Act of March 13, 1884, were [illegible], and therefore null and void. [illegible] denied that, but for these Acts, the [illegible] of trespass would lie in such a case under [illegible] of Virginia; and as the Acts relied on [illegible] defendant must be treated as ineffectual [illegible] purpose, they do not work a repeal of [illegible] existing law.

[illegible] *of the Supreme Court of Ap[illegible] accordingly reversed, and the cause is re[illegible] to that court, with directions to take [illegible] proceedings, in accordance with law, in [illegible] with this opinion; and it is so or[illegible]*

[illegible] Test:

[illegible] H. McKenney, Clerk, Sup. Court, U. S.

[illegible] *Mr. Chief Justice* **Waite** and [illegible] **Miller**, **Bradley** and **Gray**. See [illegible] *post*, 307.

WILLIAM L. WHITE, *Ptf. in Err.*,

v.

SAMUEL C. GREENHOW.

([illegible] S. C., Reporter's ed., 307-308.)

[illegible] falls within the decision in Poindexter [illegible] *ante*, 185, and is decided by it.

[No. 589].

[illegible] Mar. 20, 23, 24, 25, 1885. Decided Apr. 20, 1885.

[illegible] ERROR to the Circuit Court of the Unit[illegible] for the Eastern District of Virginia.

[illegible] history and facts of the case appear in [illegible] of the court. See, also, the pre[illegible] and related case of *Poindexter* v. *Green[illegible]* *ante*, 185, and the dissenting opinion, [illegible]

[illegible] by *Mr. Justice* MATTHEWS.

Messrs. **William L. Royall, Daniel H. Chamberlain, Wm. M. Evarts, Wager Swayne** and **Wm. B. Hornblower**, for plaintiff in error.

Messrs. **F. S. Blair**, *Atty-Gen.* of Virginia, **A. H. Garland, R. T. Merrick, J. Ambler Smith** and **S. B. Witt**, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court: [307]

The plaintiff in error, who was plaintiff below, brought his action in the Circuit Court of the United States for the Eastern District of Virginia against the defendant, both being citizens of that State. The declaration, in substance, sets out that the plaintiff, owning property in the City of Richmond, was assessed thereon for the year 1882 for certain taxes to be paid to the State of Virginia, leviable for after December 1, 1882; that the defendant was Treasurer of the City of Richmond, and, as such, collector of taxes due to the State assessed on property in that City; that plaintiff tendered to the defendant, on demand being made for payment of said taxes, the amount thereof in coupons cut from bonds issued by the State of Virginia under the Act of March 30, 1871, entitled "An Act to Provide for the Funding and Payment of the Public Debt," which coupons, by the terms of said Act, were receivable in payment of taxes by virtue of a contract with the State of Virginia; that the defendant refused to receive said coupons, under color of the authority of the Act of the General Assembly of the State of Virginia, passed January 26, 1882, which forbade him to receive the same; that the defendant, after refusal of said tender, forcibly and unlawfully entered the premises of the plaintiff, and levied upon and [308] seized and carried away personal property of the plaintiff of the value of $3,000, in order to sell the same for the satisfaction of said taxes, which he claimed to be unpaid and delinquent; that the Acts of the General Assembly of Virginia, specified in the pleadings, which require the tax collector to refuse to receive such coupons in payment of taxes, and to proceed with the collection of taxes, for the payment of which they have been tendered, as if they were delinquent, impair the obligation of the said contract between the State of Virginia and the plaintiff; and that by reason of the said wrongs the plaintiff has suffered damage in the sum of $6,000, for which he brings suit.

To this declaration the defendant demurred generally, the demurrer was sustained, and judgment was rendered for the defendant. The plaintiff sued out this writ of error.

All the questions raised and argued upon the merits of this case have been fully considered in the opinion of the court in the case of *Poindexter* v. *Greenhow* [*ante*, 185].

The present action, as shown on the face of the declaration, was a case arising under the Constitution of the United States, and was one, therefore, of which the Circuit Court of the United States had rightful jurisdiction by virtue of the Act of March 3, 1875, without regard to the citizenship of the parties, the sum or value in controversy being in excess of $500.

In conformity with the views expressed in the opinion in *Poindexter* v. *Greenhow*, the judg-

ment in the present case is reversed and the cause is remanded, with directions to proceed therein in conformity with law.

Judgment reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting, *Mr. Chief Justice* **Waite** and *Justices* **Miller, Bradley** and **Gray.** See opinion, *post*, 207.

Cited—116 U. S., 559.

S. BROWN ALLEN, Auditor of Public Accounts of the STATE OF VIRGINIA, ET AL., *Appts.*

[311]

v.

BALTIMORE AND OHIO RAILROAD COMPANY.

(See S. C., Reporter's ed., 311-317.)

Taxes — tender of tax — receivable coupons by railroad corporation — injunction lies to prevent subsequent distraint.

*1. The general questions arising and argued in this case are fully discussed and decided in the case of Poindexter v. Greenhow (*ante*, 185).

2. The remedy by injunction to prevent the collection of taxes by distraint upon the rolling stock, machinery, cars and engines, and other property of railroad corporations, after a tender of payment in tax-receivable coupons, is sanctioned by repeated decisions of this court, and has become common and unquestioned practice, in similar cases, where exemptions have been claimed in virtue of the Constitution of the United States; the ground of the jurisdiction being that there is no adequate remedy at law.

[No. 826.]

Argued Mar. 25, 26, 1885. Decided Apr. 20, 1885.

APPEAL from the Circuit Court of the United States for the Western District of Virginia.

The history and facts of the case appear in the opinion of the court. See, also, the related case of *Poindexter* v. *Greenhow*, *ante*, 185, and the dissenting opinion, *post*, 207.

Messrs. **F. S. Blair,** *Atty-Gen.* of Virginia, **R. T. Merrick** and **A. H. Garland,** for appellants.

Messrs. **John H. Cowen, Hugh W. Sheffey, William L. Royall, Daniel H. Chamberlain** and **Wm. B. Hornblower,** for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

[311]

This is a bill in equity filed by the Baltimore and Ohio Railroad Company, a Corporation created by the laws of Maryland, and a citizen of that State, against the appellants, who were defendants below, of whom Allen is Auditor of Public Accounts; Revely, Treasurer of the State of Virginia, and Hamilton, Treasurer of Augusta County, in that State, and all citizens of Virginia.

The complainant is the lessee in possession of certain railway lines in Virginia—the Winchester and Potomac, the Winchester and Strasburg, and the Strasburg and Harrisonburg Railroads—and also operates a railroad belonging to the Valley Railroad Company in that St

It is alleged in the bill that, "By the 2 and 21st sections of an Act of the General A sembly of Virginia, approved on the 22d day April, 1882, and entitled 'An Act for the A sessment of Taxes on Persons, Property, I come, and Licenses, and Imposing Taxes Ther on for the Support of the Government ar Free Schools and to Pay the Interest on th Public Debt,' provision was made for the a sessment and taxation of the railroads with the State, the board of public works, actin upon the reports of the officers of the railro companies, and upon the best and most reliab information that could be procured, being a thorized and required to ascertain and asse the value of the real and personal property such companies for taxation at the rate forty cents on every $100 of the estimat value thereof; and said Act further provid that it shall be the duty of every railroad co pany so assessed to pay into the treasury of t State, within sixty days after receipt of noti of such assessment, the tax imposed by la and a company failing to pay the tax assess upon its property shall be immediately assess under the direction of the auditor of public a counts, by any person appointed by him f the purpose, rating their real estate and rolli stock at $20,000 per mile, and a tax there levied of forty cents on the $100 of su fixed value; and the amount so assessed sh be collected by any treasurer to whom the a ditor may deliver the assessment, who is a thorized to distrain and sell any personal pro erty of such company for the amount of su taxes."

It is further alleged, that on November 2 1882, the board of public works assessed sa railroads for taxation at the rate of $15,000 p mile, of which notice was given to the co plainant, on January 17, 1883, as the party able by law for the payment of the taxes sessed upon them; that on March 16, 18 within sixty days thereafter, the complaina obtained from the auditor of public accou warrants to pay into the treasury the seve amounts charged as to each of said railroa which the treasurer of the Commonwealth, indorsement thereon, required to be paid i a specified bank in the City of Richmond, t being the only mode recognized by law making such payments; that, at that time, complainant, being the owner and holder the requisite amount of coupons for interest from bonds of the State of Virginia, issued der the Act of March 20, 1871, entitled " Act to Provide for the Funding and Paym of the Public Debt," and receivable by vir thereof in payment of taxes tendered the sam with coin sufficient exactly to make the quired amounts, to the said bank in Richmo in discharge of said warrants; that said coup were refused, and the same having been set ap the complainant brings the same into co subject to its order, in payment of said ta that similar tenders were made to the audito public accounts, and to the treasurer of St on the same day, each of whom refused to ceive the same; that thereupon the defend Allen, the auditor of public accounts, proce to assess the said railroads upon their rea tate, not having any rolling stock, at $20

*Head notes by *Mr. Justice* MATTHEWS.

[illegible] as being in default for nonpayment of the taxes assessed by the board of public works; and placed copies of said assessment in the hands of the defendant, Hamilton, as treasurer of Augusta County, for collection, in pursuance of which he levied upon certain cars and locomotives belonging to the complainant, used in operating said railroads, for part of said taxes, and threatens to make further levies upon other cars and engines, to be sold for payment of said taxes, so assessed by the auditor of public accounts.

The bill prays for an injunction on the several grounds of irreparable damage; that the acts complained of prevent the proper exercise by the complainant of its franchise, involving a public duty, of operating the railroads of which it is lessee, and in possession; to avoid multiplicity of suits; the want of adequate remedies at law; to remove the cloud upon the title to the railroad property, occasioned by the fact that assessed taxes are a lien thereon; and because it is necessary to protect the complainant in the immunity to which it is entitled, by virtue of the contract with the State of Virginia secured against state laws impairing its obligation by the Constitution of the United States.

It is admitted by the parties in the record that the coupons tendered are genuine, though not verified as required by the Act of January [illegible]. It is also admitted in like manner, that if the property of the complainant levied on should be sold "Great sacrifice and loss must result therefrom; and that the withdrawal from complainant's use of the amount of rolling stock and machinery levied on and proposed to be sold as aforesaid will cause serious and prolonged embarrassment to complainant's business; that much delay must accrue before such rolling stock and machinery, if sold, can be replaced, and that it will be difficult, if not impracticable, to ascertain and estimate, with even proximate certainty, the losses and damages which would result to complainant from such sale; so that, although the estate of said J. M. Hamilton should be sufficient to meet any verdict for damages, in case the sale should be adjudged to have been illegal, the pecuniary value of the complainant's losses and damages could not be properly and adequately ascertained and fixed by the verdict of a jury."

There was a final decree in favor of the complainant for a perpetual injunction, as prayed for, and the case is brought here by appeal by the defendants.

The general questions arising and argued in the said other cases involving them are fully discussed in the opinion in the case of *Poindexter* v. *Greenhow* [*ante*, 185]. The conclusions reached in that judgment apply to the present appeal, and require that the decree of the Circuit Court should be affirmed.

It is deemed proper to add a few observations to the question of the jurisdiction of the Circuit Courts, in such cases, in equity, to grant relief by injunction.

The circumstances of this case bring it, so far as that remedy is in question, fully within the principle firmly established in this court by the decision in *Osborn* v. *U. S. Bank*, 9 Wheat., [illegible], and within the terms of the rule as declared in *Cummings* v. *Nat. Bk.*, 101 U. S., 153 [Bk. 25, L. ed. 903]; quoted in the case of *Poindexter* v. *Greenhow*.

The jurisdiction was exercised with energy in behalf of a stockholder in a banking corporation in *Dodge* v. *Woolsey*, 18 How., 331 [59 U. S., bk. 15, L. ed. 401], where the refusal of the directors of the company to resist the collection of an unconstitutional tax was made the ground of interposition in behalf of a stockholder as a breach of trust.

In *Board of Liquidation* v. *McComb*, 92 U. S., 531–541 [Bk. 23, L. ed. 623, 628], it is said in the opinion of the court, speaking on the question of remedies: [315]

"On this branch of the subject, the numerous and well considered cases heretofore decided by this court leave little to be said. The objections to proceeding against state officers by *mandamus* or injunction are: first, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and injunction are some what correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void." And the opinion cites *Osborn* v. *Bank*, 9 Wheat., 859, and *Davis* v. *Gray*, 16 Wall., 220 [83 U. S., bk. 21, L. ed. 453]. The same principle was applied in the *State Railroad Tax Cases*, 92 U. S., 575 [Bk. 23, L. ed. 663]. In the opinion of the court it is said (page 615): "In the examination which we have made of these cases, we do not find any of the matters complained of to come within the rule which we have laid down as justifying the interposition of a court of equity. There is no fraud proved if alleged. There is no violation of the Constitution, either in the statute or in its administration, by the board of equalization. No property is taxed that is not legally liable to taxation; nor is the rule of uniformity prescribed by the Constitution violated." If the facts here negatived had been affirmed the converse of the rule would have been equally applicable. [316]

In *Trans. Co.* v. *Parkersburg*, 107 U. S., 691–695 [Bk. 27, L. ed. 584, 586], it was declared that a bill in equity would lie which seeks to have a wharfage ordinance declared void, and for an injunction to restrain further collections under it, and any further interference with the right of the complainant to the free navigation of the Ohio River, and, perhaps, as incidental

to the other relief, a demand for the return of of the wharfage already paid.

The remedy to restrain by injunction taxes levied upon railroads, in alleged violation of a contract with the State, was administered in *Tomlinson* v. *Branch*, 15 Wall., 460 [82 U. S., bk. 21, L. ed. 189], and in numerous other similar cases, where it has been denied, the jurisdiction to grant the relief if the facts warranted it has been assumed without question. And see *Litchfield* v. *Webster Co.*, 101 U. S., 773 [Bk. 25, L. ed. 925].

In the case of national banks, the assessment and collection of taxes illegally assessed under the authority of state laws, in violation of Acts of Congress, are habitually restrained by the preventive remedy of injunction; and the jurisdiction of the Courts of the United States in those cases is regarded as in the highest degree beneficial and necessary to prevent the agencies of the Goverment of the United States from being hindered and embarrassed in the performance of their functions by state legislation. The exercise of that jurisdiction, and by means of that remedy, in such cases is to vindicate the supremacy of the Constitution, and to maintain the integrity of the powers and rights which it confers and secures; and that jurisdiction is vested in the Courts of the United States because the cases embraced in it are necessarily cases arising under the Constitution and laws of the United States.

Where the rights in jeopardy are those of private citizens, and are of those classes which the Constitution of the United States either confers or has taken under its protection, and no adequate remedy for their enforcement is provided by the forms and proceedings purely legal, the same necessity invokes and justifies, in cases to which its remedies can be applied, that jurisdiction in equity vested by the Constitution [317] of the United States, and which can not be affected by the legislation of the States.

In the present case the jurisdiction in equity to grant the relief prayed for by injunction, and the propriety of its exercise, are alike indisputable.

The decree of the Circuit Court is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

Dissenting, *Mr. Chief Justice* **Waite** and *Justices* **Miller, Bradley** and **Gray.** See opinion *post*, 207.

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[317] SAMUEL S. CARTER, *Plff. in Err.*,

v.

SAMUEL C. GREENHOW.

(See S. C., Reporter's ed., 317-323.)

Taxes; remedy for violation of contract of Virginia to receive coupons in payment of—trespass does not lie under sec. 629, R. S., against collector.

*1. The 16th clause of sec. 629, R. S., authorizing suits, without reference to the sum or value in controversy or the citizenship of the parties, to be brought in the Circuit Courts of the United States to redress the deprivation, under color of state law, of any right, privilege, or immunity secured by the Constitution of the United States, in violation sec. 1979, R. S., does not embrace an action of tre pass on the case in which the plaintiff seeks a reco ery of damages against a tax collector in Virgini who, having rejected a tender of tax-receivable co pons, issued under the Act of March 30, 1871, see to collect the tax for which they were tendered a seizure and sale of personal property of t plaintiff.

2. Although the right to have such coupons r ceived in payment of taxes is founded on a contra with the State, and that right is protected by t Constitution of the United States by article 1, se tion 10, forbidding the State to pass any laws i pairing the obligation of the contract, the on mode of redress in case of any disturbance or d possession of property, or for other legal rig based on such violation of the contract, is to hav judicial determination, in a suit between indivi uals, of the invalidity of the law, under color which the wrong has been committed. No dire action for the denial of the right secured by t contract will lie.

[No. 590.]

Argued Mar. 20, 23, 24, 25, 1885. Decid Apr. 20, 1885.

IN ERROR to the Circuit Court of the Unit States for the Eastern District of Virginia.

The history and facts of the case appear the opinion of the court. See, also, the case *Poindexter* v. *Greenhow*, *ante*, 185, and the d senting opinion, *post* 207.

Messrs. **William L. Royall, Daniel Chamberlain, Wm. M. Evarts, Wag Swayne** and **Wm. B. Hornblower,** plaintiff in error.

Messrs. **F. S. Blair,** *Atty-Gen.* of Virgin **A. H. Garland, R. T. Merrick, Ambler Smith** and **S. B. Witt,** for defe ant in error.

Mr. Justice **Matthews** delivered the op ion of the court:

The plaintiff in error brought his action, the Circuit Court of the United States, agai the defendant, on May 7, 1883. His cause action is set forth in the declaration as follo

"Samuel S. Carter, plaintiff, complains Samuel C. Greenhow, defendant, of a plea of tr pass on the case, for that the said plaintiff is a c zen of the State of Virginia and a resident of City of Richmond in said State. That the plai iff owns property in said city, and that he w lawfully assessed on said property by the o cers of the State of Virginia whose duty it w under the laws of Virginia to make such asse ment, with taxes to be paid to the State of V ginia for the year 1882, and that said taxes w due and leviable for, on and after the first d of December, 1882.

"That the defendant, Samuel C. Greenho is the treasurer of the City of Richmond in State of Virginia, and that the laws of Virgi make it his duty to collect all taxes due to State of Virginia by residents of said city property situated and being in said city. T on the 3d day of May, 1883, the plaintiff v indebted to the said State of Virginia on count of the taxes so assessed upon his prope as aforesaid for the year 1882, and that on s last named date he tendered to the defenda in payment of his said taxes, coupons cut fr bonds issued by the State of Virginia, under provisions of the Act of the General Assem of the State of Virginia, approved March 1879, entitled 'An Act to Provide a Plan of S tlement of the Public Debt,' which coupo together with a small amount of lawful mo

*Head notes by *Mr. Justice* MATTHEWS.

of the United States, tendered at the same time, amounted exactly to the sum so due by the plaintiff for taxes as aforesaid, and which coupons were due and past maturity, in payment of the said taxes so due as aforesaid. That by the terms of the Act of the General Assembly under which said coupons were issued, the said coupons are receivable in payment of all taxes due to the State of Virginia, and that each of said coupons bore upon its face the contract of the State of Virginia that it should be received in payment of taxes due to said State. That the defendant refused to receive the said coupons and money in payment of the taxes so due by the plaintiff. That after said tender the said defendant unlawfully entered into and upon the plaintiff's premises and place of business and broke open and seized the plaintiff's property and carried the same away to sell the same in payment of plaintiff's taxes. That plaintiff was always ready and willing to deliver to the defendant in payment of said taxes, up to the moment when the defendant so levied upon his said property, the said coupons and money, and in many times offered to do so, but the defendant always refused to receive the same. That the plaintiff has the right, under the Constitution of the United States, to pay his said taxes to the said defendant in the said coupons and money, and that this right is secured to him by the Constitution of the United States. That when the defendant refused to receive the said coupons and money in payment of the taxes so due as aforesaid by the plaintiff, he did so under color of and by the command of an Act of the General Assembly of the State of Virginia, approved January 26, 1882, entitled 'An Act to Provide for the More Efficient Collection of the Revenue, to Support Government, Maintain the Public Schools, and to Pay Interest on the Public Debt,' which Act forbids collectors of revenue to said State to receive in payment thereof anything except gold, silver, United States treasury notes, and national bank currency, and that when he so levied upon the plaintiff's property he did so by virtue of and under the command of the 18th section of an Act of the General Assembly of the State of Virginia, approved April 1, 1879, which Act is chapter sixty of the laws published by authority of the General Assembly of the State of Virginia for the special session of 1879, and by virtue of and under the command of other statutes enacted by the General Assembly of the State of Virginia. That the said two last mentioned Acts of the General Assembly of the State of Virginia, and the other mentioned statutes of said State, commanding the defendant to levy as aforesaid upon the property of the plaintiff, are repugnant to the Constitution of the United States, and are therefore void; that in refusing to receive the said coupons and money in payment of said taxes, and in levying and seizing the plaintiff's property for said taxes after the plaintiff had tendered the same in payment thereof, the defendant deprived the plaintiff of a right secured to him by the Constitution of the United States, under color of statutes enacted by the General Assembly of the State of Virginia, to the damage of the plaintiff one hundred dollars ($100), and therefore he brings this suit."

To this declaration a general demurrer was filed and sustained, and judgment rendered accordingly for the defendant. To reverse that judgment the present writ of error is prosecuted.

The sixteenth clause of section 629, Rev. Stats., defining the original jurisdiction of the Circuit Court of the United States, gives to them cognizance, without reference to the sum or value in controversy, or the citizenship of the parties, "Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

Similar jurisdiction is conferred upon District Courts by the twelfth clause of section 563, R. S.

Section 1979, Rev. Stats., provides that "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

These three provisions constituted the first section of the Act of April 20, 1871, entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." 17 Stat. at L., 13. In that section, the language conferring jurisdiction in the courts was as follows: [321]

Such proceeding to be prosecuted in the several District or Circuit Courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the Act of the ninth of April, eighteen hundred and sixty-six, entitled "An Act to Protect All Persons in the United States in Their Civil Rights, and to Furnish the Means of Their Vindication," and the other remedial laws of the United States which are in their nature applicable in such cases.

The second section of the Act here referred to, of April 9, 1866, 14 Stat. at L., 27, provided "That any person who, under color of any law, statute, ordinance, regulation or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory, to the deprivation of any right secured or protected by this Act, or to different punishment, pains or penalties on account of such person having, at any time, been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

The question presented in this record is

whether the facts stated in the plaintiff's declaration constitute a cause of action within the terms of section 1979, Revised Statutes; that is, whether he shows himself, within its meaning, to have been subjected by the defendant, under cover of a statute of a State, to the deprivation of a right, privilege or immunity secured by the Constitution.

The acts charged against the defendant are, that he refused to receive from the plaintiff the coupons tendered in payment of taxes, and thereafter proceeded to levy upon and take his property for the purpose of collecting such taxes in money. The rights alleged to be violated are the right to pay taxes in coupons instead of [322] in money, and, after a tender of coupons, the immunity from further proceeding to collect such taxes as though they were delinquent. These rights the plaintiff derives from the contract with the State, contained in the Act of March 28, 1879, and the bonds and coupons issued under its authority.

How and in what sense are these rights secured to him by the Constitution of the United States? The answer is, by that provision, article 1, section 10, which forbids any State to pass laws impairing the obligation of contracts That constitutional provision, so far as it can be said to confer upon, or secure to, any person, any individual rights, does so only indirectly and incidentally. It forbids the passage by the States of laws such as are described. If any such are nevertheless passed by the Legislature of a State, they are unconstitutional, null and void. In any judicial proceeding necessary to vindicate his rights under a contract, affected by such legislation, the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it. The right to pay his taxes in coupons, and the immunity from further proceedings, in case of a rejected tender, are not rights directly secured to him by the Constitution, and only so indirectly as they happen in this case to be the rights of contract which he holds under the laws of Virginia. And the only mode in which that constitutional security takes effect is by judicial process to invalidate the unconstitutional legislation of the State, when it is set up against the enforcement of his rights under his contract. The mode in which Congress has legislated in aid of the rights secured by that clause of the Constitution, is, as is pointed out with clearness and fullness in the opinion of the court in the *Civil Rights Cases*, 109 U. S., 3-12 [Bk. 27, L. ed. 835-840], by providing for a review on writ of error to the judgments of the state courts, in cases where they have failed properly to give it effect, and by conferring jurisdiction upon the Circuit Courts by the Act of March 3, 1875, chap. 137, 18 Stat. at L., 470, of all cases arising under the Constitution and laws [323] of the United States, where the sum or value in dispute exceeds $500. Congresss has provided no other remedy for the enforcement of this right.

It might be difficult to enumerate the several descriptions of rights secured to individuals by the Constitution, the deprivation of which, by any person, would subject the latter to an a tion for redress under section 1979, Rev. Stat and, fortunately, it is not necessary to do so this case. It is sufficient to say that the de laration now before us does not show a cau of action within its terms.

The judgment of the Circuit Court is accor ingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.

Dissenting: *Mr. Chief Justice* **Waite** a *Justices* **Miller, Bradley** and **Gray.** S opinion, *post*, 207.

Cited—114 U. S., 324.

J. ADAIR PLEASANTS, *Appt.*,
v.
SAMUEL C. GREENHOW, Treasurer of t CITY OF RICHMOND.

(See S. C., Reporter's ed., 323, 324.)

*This case falls within the decision in Carter Greenhow (*ante*, 202).

[No. 941.]

Submitted Dec. 1, 1884. Decided Apr. 20, 18

APPEAL from the Circuit Court of the U ed States for the Eastern District of V ginia.

The history and facts of the case appear the opinion of the court. See, also, the prec ing case of *Carter* v. *Greenhow*, *ante*, 185, a the dissenting opinion, *post*, 207.

Messrs. **William L. Royall, Daniel Chamberlain, Wager Swayne** and **W B. Hornblower,** for appellant.

Mr. **F. S. Blair,** *Atty-Gen.* of **Virginia,** appellee.

Mr. Justice **Matthews** delivered the op ion of the court:

This is a bill in equity filed by the appellan citizen of Virginia, praying that the defenda Greenhow, Treasurer of the City of Richmo may be perpetually enjoined from taking ste by distraint of the complainant's property collect certain taxes claimed by the defend to be due to the State of Virginia, amount to $36.25, but for which the bill avers the c plainant tendered in payment the exact amo thereof, for a part, coupons cut from bond sued by the State under the Act of March 1871, and part in money.

On demurrer to the bill, it was dismissed the Circuit Court for want of jurisdiction, amount in controversy being less than $ and the complainant has brought this app

It is sought to maintain the jurisdiction this case on the ground that the suit is aut ized by section 1979, Revised Statutes, ju diction to entertain which is conferred by sixteenth clause of section 629, R. S.

The case comes within the decision just dered in *Carter* v. *Greenhow* [*ante*, 202], a governed by it. It is not, in our opinion, su suit as is contemplated by the sections of Revised Statutes referred to.

*Head note by *Mr. Justice* MATTHEWS.

As the sum or value in controversy does not exceed $[illegible], the suit cannot be maintained as a case arising under the Constitution and laws of the United States, provided for in the Act of March 3, 1875, chap. 137, 18 Stat. at L., 470. The bill was, therefore, rightly dismissed.

The decree of the Circuit Court is accordingly affirmed.

Transcript. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Dissenting, *Mr. Ch. J.* **Waite** and *Justices* **Miller, Bradley** and **Gray.** See opinion, post, [illegible].

MORTON MARYE, Auditor of the STATE OF VIRGINIA, ET AL., *Appts.*,

v.

EDWIN PARSONS.

(See S. C., Reporter's ed., 325-330.)

Contract right of coupon holder under Act of Virginia of March 30, 1871—bill calling for decree declaring merely an abstract right does not lie.

The contract right of a coupon holder under the Virginia Act of March 30, 1871, whereby his coupons are receivable in payment of taxes, can be executed only by a taxpayer; and a bill in equity for an injunction to restrain tax collectors from refusing to receive them, when tendered in payment of taxes, will not lie in behalf of a coupon holder who does not allege himself to be also a taxpayer. Such a bill calls for a decree declaring merely an abstract right, and does not show any breach of the contract, or other ground of relief.

[No. 1278.]

Argued Mar. 26, 27, 1885. Decided Apr. 20, 1885.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

The history and facts of the case appear in the opinion of the court. See, also, the case of Poindexter v. *Greenhow*, *ante*, 185, and the dissenting opinion, *post*, 207.

Messrs. **P. S. Blair,** *Atty-Gen.* of Virginia, **Walter R. Staples** and **A. H. Garland,** for appellants.

Messrs. **Richard L. Maury, Wager Swayne** and **Daniel H. Chamberlain,** for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

The appellee, who was complainant below, a citizen of New York, filed his bill in equity, in the Circuit Court of the United States for the Eastern District of Virginia, against Morton Marye, described as Auditor of the Commonwealth of Virginia; Samuel C. Greenhow, Treasurer of the City of Richmond; A. L. [illegible], Treasurer of the City of Norfolk, and V. G. Dunnington, Treasurer of the City of Lynchburg; R. B. Munford, Commissioner of Revenue for the City of Richmond; Charles W. Price, for the City of Lynchburg, and Charles D. Langley, for the City of Norfolk, all citizens of Virginia.

The complainant avers in his bill that he is the owner of overdue coupons to the amount of $[illegible], cut from bonds of the State of Virginia issued under the Act of March 30, 1871, which coupons are receivable, by the terms of that Act, in payment, at and after maturity, for all taxes, debts and demands due the State. A list of these coupons, described by the numbers and amounts of the bonds, is exhibited with the bill. He claims that these coupons [326] constitute a contract with the State, by which it agreed to pay the amount of each to the holder at maturity; and, second, in case of default, that the holder should have the right to assign or transfer the same to any taxpayer or other debtor of the State, with the quality of being received for taxes and other demands due the State, and with the guaranty that the State would receive them specifically in payment *pro tanto* for any such taxes and demands, and that they should be accepted by any of her tax collectors from any of her taxpayers or debtors in discharge and payment of such taxes or other dues.

The defendants to the bill, it is alleged, are officers of the State, charged severally with the collection of certain taxes and license fees and other dues to the State; and it is charged that, in pursuance of certain statutes passed since the Act of March 30, 1871, and the issue of the bonds and coupons under it, they are forbidden to receive these and similar coupons in payment of taxes and other dues to the State, which statutes, it is averred, impair the obligation of the contract between the State and the holder of its coupons, and are accordingly in violation of the Constitution of the United States, and are null and void; but that, nevertheless, the defendants, as officers of the State, as is publicly known, habitually refuse to accept coupons when tendered by taxpayers, in payment of taxes and other dues to the State, with the collection of which they are severally charged, and the General Assembly of Virginia has also passed statutes repealing all laws which provided any remedy for the enforcement of the right to have them so received.

The bill then proceeds as follows:

"And your petitioner furthermore shows that, confiding in his right to a specific performance of said contract, and in his title to equitable relief, should the same be denied, he hath made arrangements with sundry taxpayers of Virginia to use his above coupons in payment of their taxes and license taxes now due, by which arrangement, if the said coupons can be used without delay or difficulty, he will receive nearly par therefor, and thus be able to have his coupons collected. But, unless they [327] are so accepted in payment when tendered, the said taxpayers will not use them at all, because they are compelled to pay their taxes forthwith under heavy penalties, and to obtain their licenses immediately, or cease from business, so that, if the collectors of these taxes continue to refuse to accept these coupons, and so render necessary an appeal to the courts, and a separate action by each taxpayer upon each tender, such refusal will be tantamount to an utter destruction of the rights of your petitioner, because delays will thus occur which the taxpayers cannot submit to for the above named reasons and others, and thus your petitioner will be deprived of the benefit of the arrangements he has made, as well as of all opportunity of having his coupons so used at any time save in small amounts and at rare intervals."

*Good note by Mr. Justice MATTHEWS.

The prayer for relief is as follows:

"In tender consideration whereof, and inasmuch as your petitioner is without adequate relief save in a court of equity, wherein such matters are properly cognizable, and inasmuch as he will suffer great and irreparable loss and damage, exceeding $500 in amount, unless relief is afforded him immediately, and the above named officers are required to perform specifically the contract aforesaid, and receive his said coupons in payment of all or any of the dues and taxes above named immediately upon their being tendered therefor by any taxpayer or applicant for a license, and to avoid a multiplicity of suits and prevent an obstruction of justice, he prays that Morton Marye, Auditor of Virginia, Samuel C. Greenhow, A. L. Hill, and V. G. Dunnington, Treasurers of the Cities of Richmond, Norfolk and Lynchburg, respectively, and R. B. Munford, Charles D. Langley and Charles W. Price, Commissioners of the Revenue for said cities, respectively, be made parties defendant hereto, with apt words to charge them, and may be required on oath to answer fully the allegations hereof.

"And that the said defendants, their assistants, clerks and agents, be required and compelled to specifically perform the said coupon contract according to its legal tenor and effect, and to accept your orator's said coupons, or [328] any of them, from any taxpayer presenting them or any of them in payment of his taxes, license taxes, or other dues, and to receipt therefor, or certify the payment and deposit thereof, in cases of applications for license, in precisely the same form and with precisely the same force and effect as they would do if said tender, payment, or deposit were made in money. And that your honors will decree said coupons to be genuine, legal coupons, legally receivable for all taxes, debts and demands due the State of Virginia, and especially for all license taxes or assessments by whatever name the same may be called. And to the end that your orator may have full relief in the premises, he also prays that a preliminary restraining order and injunction may be issued without delay, enjoining and restraining the said defendants, their assistants, clerks and agents, and each and every one of them, from refusing to accept any of the coupons named in the Exhibit A herewith, in full payment *pro tanto* of the taxes, license taxes, or other dues, due by any taxpayer to the State who may tender the same in payment thereof, and enjoining and restraining them from refusing to execute and deliver forthwith to such taxpayer his tax bill, duly receipted, or to an applicant for a license, a certificate that the amount of coupons tendered by such applicant has been deposited with him in payment of the tax or deposit required or assessed for said license, and from refusing, immediately upon the presentation of such certificate, to grant and issue the license applied for to such applicant, all in the same manner, and to have precisely the same force and effect as if said payments were made in coin or currency."

There is also a prayer for general relief.

There was a final decree on bill, answer, replication and proofs, granting the injunction as prayed for, and the defendants appealed.

This bill is without precedent, and should have been dismissed. It is a clear case, as stated, of *damnum absque injuria*. So far as the co tract with the complainant was that the Sta should pay to him his coupons at maturit there is, no doubt, a breach; but he asks no r lief as to that, for there is no remedy by suit compel the State to pay its debts. So far as t contract was to receive the coupons of the co plainant in payment of taxes and other dues the State, there is no breach, for he does not a lege that any of them have been tendered any taxpayer or debtor to the State in payme of taxes or other dues; nor that there has bee a refusal on the part of any tax collector, other officer of the State charged with the co lection and receipt of taxes and dues to the Sta to receive them in payment therefor. Perso ally the complainant has no right to offer the for such purpose, for he owes no taxes or oth debt to the State. There is nothing shown the bill by which he is prevented from tran ferring them to others who would have th legal right to use them in that way, except tha being discredited for such uses by the previo refusals of the officers of the State to receiv other but similar coupons, the complainant ca find no one willing to purchase them from hi at a reasonable price for such purposes. Th damage is not actionable, because it is not direct and legal consequence of a breach of th contract, and is not distinguishable from th damage any creditor might suffer from th known inability or unwillingnes of his debto to perform their obligations. Such discred might, and often does, result in the bankruptc and financial ruin of the creditor, but no actio lies to recover damages for the consequenti loss, which the law does not connect with th default, as cause and effect. To enable th complainant to avail himself of the benefit his contract with the State, to receive his co pons in payment of taxes, he must first assig them to some one who has taxes to pay, as has not; but when he does so, by the assig ment, he has lost his interest in the contract an his right to demand its performance, all rig to which he has transferred with the coupon It is only when in the hands of taxpayers or other debtors that the coupons are receivab in payment of taxes and debts due to the Stat

The bill as framed, therefore, calls for a de laration of an abstract character, that the co tract set out requiring coupons to be receive in payment of taxes and debts due to the Sta is valid; that the statutes of the General A sembly of Virginia impairing its obligatio are contrary to the Constitution of the Unite States, and therefore void; and that it is th legal duty of the collecting officers of the Sta to receive them when offered in payment such taxes and debts.

But no court sits to determine questions law *in thesi*. There must be a litigation upo actual transactions between real parties, grov ing out of a controversy affecting legal or equ table rights as to person or property. All que tions of law arising in such cases are judicial determinable. The present is not a case of th description.

The decree of the Circuit Court is according reversed and the cause is remanded, with directio to dismiss the bill; and it is so ordered

True Copy. Test:

James H. McKinney, Clerk, Sup. Court U.

Thomas Poindexter, Plff. in Err., v. Samuel C. Gwathmey, Treasurer of the City of Richmond, Virginia. No. 588. [Reported *ante*, 185.]

William L. White, Plff. in Err., v. Samuel C. Gwathmey. No. 589. [Reported *ante*, 199.]

Samuel S. Carter, Plff. in Err., v. Samuel C. Gwathmey. No. 590. [Reported *ante*, 202.]

S. Brown Allen, Auditor of Public Accounts of the State of Virginia, et al., Appts., v. The Baltimore and Ohio Railroad Co. No. 826. [Reported *ante*, 200.]

J. Adair Pleasants, Appt., v. Samuel C. Gwathmey, Treasurer of the City of Richmond. No. 861. [Reported *ante*, 204.]

R. R. Chaffin, Plff. in Err., v. William Taylor. No. 1260. [Reported *ante*, 198.]

Marye, Auditor of the State of Virginia, et al., Appts., v. Edwin Parsons. No. [illegible] [Reported *ante*, 205.]

Mr. Justice **Bradley**, dissenting in all of the above entitled cases.

The Chief Justice and *Justices* **Miller, Gray** and Strong dissent from the opinions and judgments of the majority of the court in which they sustain the claims of the holders of coupons against the State of Virginia, and I have been requested to state the grounds on which our dissent is based. And, first, those which apply to the case of the Baltimore and Ohio Railroad Company. This company is a corporation of the State of Maryland, and operates, as lessee, certain railroads situated in Virginia. It filed a bill in equity in the Circuit Court of the United States for the Western District of Virginia, alleging a tender of coupons in payment of taxes due upon the railroads in its possession, and praying for a decree declaring that such tender with a deposit of the coupons in court amounted to payment, and that the proceedings of the auditor in imposing a penal assessment for pretended non-payment of the taxes were void, and that an injunction be issued to restrain the treasurer from seizing or selling any of the property of the company for the said taxes.

The fundamental ground of our dissent is, that the proceeding, and all the other proceedings on those coupons brought here for our review, are virtually suits against the State of Virginia to compel a specific performance by the State of her agreement to receive the said coupons in payment of all taxes, dues and demands. However just such a proceeding may seem in the abstract, or however willing courts might be to entertain it if it were constitutional, we, looking at the case as it really is, we regard it as directly repugnant to the Eleventh Amendment of the Constitution, which declares that "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against any one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

The counsel for the bondholders press upon us the notion that provision of the Constitution which declares that no State shall pass any law impairing the obligation of a contract, and have shown that the laws passed by the Legislature of Virginia forbidding the receipt of coupons between the passage of the Act of 1871 by which they were made receivable, are unconstitutional and absolutely void, and that no officer or tax collector of the State is bound to regard, but, on the contrary, each is bound to disregard them. So that we have one provision of the Constitution set up against the other, and are asked to enforce that relating to contracts by regarding the individual officers as the real parties proceeded against, and ignoring the fact that, in the matter of receiving coupons in payment of taxes, the officers only represent the State. By this technical device it is supposed that the Eleventh Amendment may be evaded. In our opinion this is not a sound or fair interpretation of the Constitution. If the contract clause and the Eleventh Amendment come into conflict, the latter has paramount force. It was adopted as an amendment to the Constitution, and operates as an amendment of every part of the Constitution to which it is at any time found to be repugnant. Every amendment of a law or constitution revokes, alters or adds something. It is the last declared will of the law-maker, and has paramount force and effect. The States became dissatisfied with certain parts of the Constitution as construed by the courts, whereby, in a manner not anticipated, they were subjected to be dragged into court like a common delinquent at the suit of individuals. They demanded that this should be changed, and it was changed by the Eleventh Amendment. The language of the Constitution was not changed, but it became subject and subordinate to the paramount declaration of the amendment. The Constitution still de- [332]
clares that no State shall pass any law impairing the obligation of a contract; but the effect of the amendment is that, even if a State should pass a law impairing the validity of its own contract, no redress can be had for the enforcement thereof against the State in the Federal Courts. In other words, in consequence of the amendment, no State can be coerced into a fulfillment of its contracts or other obligations to individuals by the instrumentality of the federal judiciary. It is true, it cannot proceed against them contrary to its contract; but, on the other hand, it cannot be proceeded against on its contract. All those who deal with a State have full notice of this fundamental condition. They know, or are bound to know, that they must depend upon the faith of the State for the performance of its contracts, just as if no Federal Constitution existed, and cannot resort to compulsion unless the State chooses to permit itself to be sued.

Moreover, the Eleventh Amendment is not intended as a mere formula of words, to be slurred over by subtle methods of interpretation, so as to give it a literal compliance, without regarding its substantial meaning and purpose. It is a grave and solemn condition, exacted by sovereign States, for the purpose of preserving and vindicating their sovereign right to deal with their creditors and others propounding claims against them, according to their own views of what may be required by public faith and the necessities of the body politic. We have no right, if we were disposed, to fritter away the substance of this solemn stipulation by any neat and skillful manipulation of its words. We are bound to give it its full and substantial meaning and effect. It is only thus that all public instruments should be construed.

Now, what is the object of all this litigation which fills our courts in reference to the Virginia bonds and coupons, but an attempt, through the medium of the Federal Courts, to coerce the State of Virginia into a fulfillment of her contract? To enforce a specific performance of her agreement? It is nothing less. That is the object of the bill in the case of the Baltimore and Ohio Railroad Company. That
[333] is the object of the bill of Parsons against the State Auditor and others. That is also the object of those actions of detinue and trespass which are brought against the collectors of Richmond and other places. Injunctions are sought, mandamuses are sought, damages are sought, for the sole purpose of enforcing a specific performance of the engagement made by the State by the Act of 1871, to receive the coupons of its bonds issued under that Act in payment of taxes and other dues to the State.

There is no question about the validity of the taxes. They are admittedly due. The officer is entitled to collect them; his authority is undisputed. The coupons are tendered in payment, not as money, for they have no quality of money, but as a set-off, which, as is insisted, the State has agreed to allow. The taxpayer stands on this agreement. That is the situation; and that is the whole of it. He stands on the agreement and seeks to enforce it. All suits undertaken for this end are, in truth and reality, suits against the State, to compel a compliance with its agreement.

A set-off is nothing but a cross action, and can no more be enforced against a State without its consent than a direct action can be. When set-offs are allowed against the sovereign, it is always by virtue of some express statute.

It is argued, however, that these coupons are not set-offs, but cash. How it can be pretended that they are cash it is difficult to comprehend. To regard them as cash would make them unconstitutional and void under that clause of the Constitution which prohibits any State from emitting bills of credit. But it is insisted that, if not cash, the State agreed that they should be received as cash. Then, it is the agreement which is relied on, and, as before said, it is the performance of this agreement which is sought to be enforced.

Another argument made use of to show that the coupons are not set-offs is, that by virtue of the agreement to receive them in payment they inhere in the claim for taxes as a ground of extinguishment and not as a distinct counter demand. This cannot be true, because taxes imposed by the State, or by its authority, are pure and unmixed duties, accruing year by year for the public service, without any relation to,
[334] or dependence upon, collateral obligations. Whether the taxpayer has or has not any coupons is an accidental circumstance in no way affecting his taxes. If he has them, and does not tender them, his taxes must be paid; if he has them, and does tender them, they can only be tendered by way of set-off; for, as we have seen, they have no necessary connection with or relation to the taxes until they are so tendered.

The coupons, then, are tendered, and the tax collector declines to receive them. The State does not permit him to receive them. By subsequent legislation it has declared that the taxes must be paid in money, and that the tax c lector must receive nothing else in payme and that coupons, if offered, must be inve gated in a juridical way to ascertain t genuineness before they will be paid, and wl so ascertained, the provision for paying then ample. The officers have no power but w the State gives them. They act for and behalf of the State, and in no other way. sue them, therefore, because they will not ceive the coupons in payment, is virtually sue the State. The whole object is to coe the State. To say otherwise is to talk only effect, without regard to the truth of thing

If the taxes were not due, or were uncon tutional, and the collector should attempt collect them by seizing property or otherw it would be a different thing. There wo then be an invasion of the citizen's prop without lawful authority. That would b trespass on the part of the officer for whicl would be properly liable in suit. So, if taxpayer should tender the amount of his in lawful money and the collector should re it, and should proceed to distrain for the then he would also be a trespasser.

But neither of these things is this case. tax is due, undisputedly due; no money is dered; the taxpayer only offers to set off coupons, which are nothing but due bill the State, and pleads the State's collat agreement to receive them. This is not mo and bears no resemblance to money. It is ply a promise. The State, for reasons o own, declines to comply with its agreemen mode and form, and forbids its officers t ceive the coupons in payment of taxes. taxpayer insists that the State shall con with its agreement. All the proceedings i tuted by him to enforce the receipt of the pons, or to obtain redress against the colle for not receiving them, or for proceedin collect the tax, have that object alone in vie to compel the State to fulfill its agreement. is idle to say that the proceeding is against the officers. That is a mere prete The real object is to coerce the State thro its officers; to compel a specific performanc the State of its agreement. It all comes to this.

But it is said that it is not the State, bu government of the State, which declines t ceive the coupons, contrary to engagement is said that the government does not repr the State when it does an unconstitutional or passes an unconstitutional law. Whilst may be averred (as it was averred in *Ta White*, 7 Wall., 700 [74 U. S., bk. 19, L. ed. 2 when the government of a state attempts to the State from its constitutional relations the United States, and to produce a disru of the fundamental bonds of the national pact; and whilst in such a case it may b missible to say that the government o State has exercised a usurped authority, mode of speech is not admissible in ordi cases of legislation and public administra A State can only act by and through its c tuted authorities, and it is represented by in all the ordinary exhibitions of sove power. It may act wrongly; it may act u stitutionally; but to say that it is not the that acts is to make a misuse of terms,

[illegible] confound all just distinctions. It also [illegible] in our judgment, to inculcate the dan[illegible] doctrine that the government may be [illegible] and resisted as a usurpation whenever [illegible] in the exercise of his private judg[illegible] deems its acts to be unconstitutional.

But then, it will be asked, has the citizen [illegible] against the unconstitutional acts or [illegible] of the State? Certainly he has. There [illegible] difficulty on the subject. Whenever his [illegible] liberty or property is threatened, assailed or [illegible] by unconstitutional acts, or by an at[illegible] to execute unconstitutional laws, he may [illegible] himself, in every proper way, by *habeas* [illegible] by defense to prosecutions, by actions [illegible] on his own behalf, by injunction, by [illegible] Any one of these modes of redress, [illegible] to his case, is open to him. A citizen [illegible] in any way, be harassed, injured or de[illegible] by unconstitutional laws without having [illegible] means of resistance or redress. But [illegible] where the State or its officers moves [illegible] him. The right to all these means of [illegible] and redress against unconstitutional [illegible] and exaction is a very different [illegible] from the right to coerce the State into a [illegible] of its contracts. The one is an in[illegible] right, a right which cannot be taken [illegible] the other is never a right, but may or [illegible] be conceded by the State: and if con[illegible] may be conceded on such terms as the [illegible] chooses to impose.

[illegible] cases that are cited from the books [illegible] redress has been afforded to individ[illegible] by the courts against State action are [illegible] out of the first class, and not out [illegible] second; cases of State aggression, and [illegible] refusal to fulfill obligations. The case of [illegible] against *The United States Bank* was of [illegible] so was that of the *Dartmouth Col*[illegible] was that of *New Jersey* v. *Wilson*. So, [illegible] carefully, were those of *Davis* v. [illegible] and the *Board of Liquidation* v. *Mc*[illegible] although these last cases approach near[illegible] suits against a State than any others [illegible] have received the sanction of this court. [illegible] these cases the State has attempted to do [illegible] unconstitutional act injurious to the [illegible] or some act which it had entered into a [illegible] not to do; and redress was sought [illegible] such aggressive act; they, none of them, [illegible] the case of a State declining to pay a [illegible] to perform an obligation, and the party [illegible] to enforce its performance by judicial [illegible]

[illegible] the great mass of cases in which the [illegible] of mandamus and injunction have [illegible] mentioned, to compel State officers to do, [illegible] from doing, some act in which the [illegible] had an interest, they have generally [illegible] in which the law made it the duty [illegible] officers to do the act commanded, or not [illegible] the act forbidden. Those of a different [illegible], as where a remedy has been taken [illegible], have been purely cases of demands by [illegible] individual against another, and not of an [illegible] against the State.

[illegible] cases differ *toto cœlo* from any [illegible] They are attempts to coerce a State [illegible] judicial proceedings; as before stated, they [illegible], and nothing else. It it useless to at[illegible] ourselves by an adroit use of words, or by a train of metaphysical reasoning. We cannot, in that way, change the nature of things.

This is the first time, we believe, since the Eleventh Amendment was adopted, in which a State has been coerced by judicial proceedings at the suit of individuals in the Federal Courts. That this is such a case, seems one of the plainest propositions that can be stated.

As the observations already made apply equally to actions against the officers of the State brought to recover damages, or to recover property taken for taxes, as to bills for injunction and applications for *mandamus*, only a few words are necessary to be added in reference to the suit of *Poindexter* v. *Greenhow*, in which the first opinion was read, and to the trespass cases similarly situated. Those are actions brought not by citizens of another State, but by citizens of Virginia herself, in her own courts; and the highest court of Virginia has adjudged them to be untenable. Our jurisdiction is invoked to reverse this decision, and to sustain the actions.

The Eleventh Amendment, it is true, does not prohibit the extension of the judicial power of the United States to suits prosecuted against a State by its own citizens. But the evident reason of this is, that the judicial power was not granted to the United States by the original Constitution in such cases; hence, as it was not granted, it was not deemed necessary to prohibit it. It was evidently supposed that the control of all litigation against a State by its own citizens was in its own power, amongst that mass of rights which was reserved to the States and the people. It would be very strange to say that although a State cannot, in any case, be sued by a citizen of another State since the adoption of the Eleventh Amendment, yet, in a case arising under the Constitution and laws of the United States, it may be sued by its own citizens. This would be to deprive the State, with regard to its own citizens, of its sovereign right of exemption from suit. [338]

It seems to us that the absurdity of this proposition is its sufficient answer. Unless the State chooses to allow itself to be sued, it cannot be sued; it has this perogative if no other. It is admitted in point of form, that it cannot be sued by the citizens of other States, or of foreign States, because of the Eleventh Amendment. The whole argument of the opinions of the majority of the court is directed to the object of showing that the State is not sued in the suits under consideration. We do not remember that it is anywhere contended that the State can be sued by its own citizens, against its own law, merely because the Eleventh Amendment does not in terms extend to that case.

In our judgment none of these suits can be maintained, for the reason that they are in substance and effect suits against the State of Virginia.

We have not thought it necessary or proper to make any remarks on the moral aspects of the case. If Virginia or any other State has the prerogative of exemption from judicial prosecution, and of determining her own public policy with regard to the mode of redeeming her obligations, it is not for this court, when

considering the question of her constitutional rights, to pass any judgment upon the propriety of her conduct, on the one side or on the other.

True Copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

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[447] WESTERN ELECTRIC MANUFACTURING COMPANY, *Appt.*,
v.
ANSONIA BRASS AND COPPER COMPANY.

(See S. C., Reporter's ed., 447-453.)

Patent law—patents, void when anticipated—sec. 4888, R. S.—process patent being void, product patent is also void.

1. Reissued letters patent, number 6954, for the process of compressing the coating used in the insulation of telegraph wires, is void, having been substantially anticipated by the process described in the English patents of Dundonald and Baudouin, dated January 22, 1852, and April 3, 1857.
2. Reissued letters patent number 6954, for a process, being invalid, it follows that reissued letters patent number 6955, for the product, are also invalid.
3. The scope of letters patent should be limited to the invention covered by the claim; and, though the claim may be illustrated, it cannot be enlarged by the language in other parts of the specification.
4. Under sec. 4888, R. S., an element of an invention not described in the specification, is not covered by the patent.

[No. 227.]

Argued Apr. 2, 1885. Decided Apr. 20, 1885.

APPEAL from the Circuit Court of the United States for the District of Connecticut.

The history and facts of the case appear in the

Statement of the case by *Mr. Justice* **Woods:**

[447] The case was a suit in equity, brought by the appellant, the Western Electric Manufacturing Company, against the Ansonia Brass and Copper Company, to restrain the infringement of two reissued letters patent, numbered 6954 and 6955, respectively, granted to the appellant as the assignee of Joseph Olmstead, both dated February 29, 1874, for improvements in insulating telegraph wires. The reissues are divi-
[448] sions of original letters patent No. 129858, dated July 23, 1872. The descriptive specifications of the two patents were identical. They differed only in the claims, the first being for a process, and the second for the product of the process.

The specification of both patents, after stating that Olmstead had invented a new and useful improvement in insulating telegraph wires, proceeded as follows:

"The method of insulating now in use consists in braiding over the wires a fibrous covering, after which it is dipped in wax, for the purpose of filling and closing its pores, and, after a subsequent scraping to remove the surplus wax, it is ready for use. This method is, however, objectionable, inasmuch as it leaves the covering in a very rough and soft condition, and fails to secure perfect insulation.

"In my improved method, after the wire has received its coating, I dip it in paraffine or wax, after which, instead of scraping off the surplus coating, I pass the whole through a suitabl machine, which compresses the covering an forces the paraffine or wax into the pores an secures perfect insulation. By so compressin the covering the paraffine or wax is forced in the pores, and the surface becomes and appear polished.

"Wire insulated in this manner is entirel impervious to the atmosphere, of greater durability, and less cumbersome than any heretofore made."

The claim of the process, patent No. 6954 was as follows: "The method of insulating tel egraph wire by first filling the pores of the cov ering and subsequently compressing this cover ing, and thereby polishing its surface, substan tially as described."

The claim of the product, patent No. 6955 was: "An insulated telegraph wire, the cover ing of which has its pores filled and its surfac polished, substantially as described."

The defendant denied in its answer that Olm stead was the first and original inventor of th improvement described in the patents, or o any substantial or material part thereof, or tha the same was patentable or the subject-matte of invention, and that the alleged invention ha been previously patented by letters patent o Great Britain granted to Thomas Earl of Dun donald, dated July 22, 1851, and by letters pa tent of Great Britain granted to Felix M. Bau douin, dated April 3, 1857. The defendant als denied infringement.

The Circuit Court, on final hearing, dismisse the bill, and the plaintiff appealed.

Mr. **George P. Barton,** for appellant.

Messrs. **O. H. Platt** and **William H Wooster,** for appellee.

Mr. Justice **Woods** delivered the opinion o the court:

It is clear that the two patents must stand o fall together. If the patent for the process i invalid so must be the patent for the product What we have to say will refer to the proces patent.

The alleged invention described in the paten is not for insulating telegraph wires, for tha art long antedated the original patent. Th specification disclaims as a part of the inventio the braiding of a fibrous covering over the wire and then dipping it in wax for the purpose o filling and closing the pores, and the subsequen scraping of the surplus wax from the wire The patent does not cover the material in whic the wire, after it has received its fibrous coa ing, is dipped, which may be either paraffine wax, or bitumen, or any other suitable materia The three substances mentioned had long bee used for that purpose. Nor does the paten specify or cover any device by which the pro ess is to be carried on. Any suitable machin may be used.

The process described by the patent consist therefore, simply in this: After the wire has r ceived its fibrous coating, and been dipped i paraffine, wax, or other suitable substance, th compressing and forcing of the paraffine, wa or other substance, without scraping off an part of it, into the pores of the fibrous materi by some suitable means. We think this pro ess was not new.

It was subsequently anticipated both by th

process described in the patent of Dundonald and is that of Baudouin, the first dated January 2, 1842 and the other April 8, 1857. Dundonald describes his process thus:

"I also employ a bituminous material to cover and thus insulate, the conducting wires of electric telegraphs, which are intended to be laid under ground. For this purpose I employ the said bitumen, either simple or compounded of a flexible description, and pass the wire through it when it is in a melted state, then causing the wire to pass through some die or orifice, which will deprive it of all the superfluous bitumen. * * * The incasement of the wire with bitumen may also be affected by covering it with a filamentous material, which has been previously saturated with melted bitumen, and then passing the wire so covered through a heated die or orifice, so as to melt or soften the bitumen upon the filamentous material, and press the whole of the coating against the wire in such a way as to cause it to form one compact continuous covering of the wire, and thus secure its insulation."

The patent of Baudouin describes his process as follows:

"My invention relates to the preparation of conductors of electricity for electric telegraphs, using wires insulated to prevent the loss or deviation of the electric currents used for that purpose, and also in the machinery for the preparation or manufacture of such conductors. Coat the wires with bituminous or such like substances that are not liable to become hard or soft, but, on the contrary, are constantly acted on by the temperature of the atmosphere. Substances of this material in themselves are insufficient to maintain the proper protection and insulation for telegraph conductors, but when combined with other materials, such as paper, woven fabrics of cotton, silk, wool or hemp, in a particular manner, are well adapted for the purpose.

"I prefer to use three ribbons and bobbins for this purpose, the first covering of the wire being enveloped by the second in such manner that the helical junction of the first ribbon is covered by the second, and the second by the first. The wire is passed through a bath of bituminous matter, and has the superfluous matter removed by passing through suitable dies or parts to compact and smooth its surface, and render it of uniform thickness. The first and second ribbons are also passed through bituminous or other suitable matter to render them more impervious to electricity. The coated and lapped wire is passed through suitable dies to remove superfluous matter, to smooth down the laps of the ribbons, and to compress and cause their proper adhesion.

"The coated and lapped wire passes through the or smoothing holes both in entering and emerging the rotating frame; these dies or smoothers have a reciprocatory motion, the better to enable them to wipe and smooth the coated wire."

It is plain that these patents anticipate the process set out in the specification of the Olmstead process patent. They all three describe the compounding of the wax, paraffine or bituminous coating of a wire covered with the fibrous material, so as to attain the same result, namely, the insulation of the wire.

The Olmstead patent, therefore, covers an old process applied to the same subject, with no change in the manner of applying it, and with no result substantially distinct in its nature. It cannot, therefore, be a valid patent. *Penn. R. R. Co.* v. *Truck Co.*, 110 U. S., 490 [Bk. 28, L. ed., 222]; *Vinton* v. *Hamilton*, 104 U. S. 485 [Bk. 26, L. ed., 807].

The fact that in the process described in the Olmstead patent the surplus wax or paraffine is not scraped off, but all that adheres to the wire is compressed against it and forms part of the covering, is relied on to distinguish that process from those of Dundonald and Baudouin. But the Dundonald process does not differ in this respect from that of Olmstead, for in the Dundonald process the whole of the coating is pressed against the wire, and is left to form the covering; and as to the Baudouin process, the difference consists merely in the use of a greater quantity of wax or paraffine to form the coating. This may be an improvement upon the Baudouin process, but it does not involve invention.

So far as the present case is concerned, another answer to this contention of the appellant is, that, in this respect, the defendant follows the Baudouin, and not the Olmstead process, by scraping off the superfluous material.

It was insisted in argument, by appellant's counsel, that one of the features of the process [452] described in the Olmstead patent was the allowing of the wax or paraffine covering to cool before compressing it upon the wire, and as this was not done in the Dundonald or Baudouin process, they did not anticipate the Olmstead process. But neither the specification nor claim of the Olmstead patent mentions, as a part of the process, the cooling of the wax or paraffine coating before compressing it upon the wire. The appellant's counsel, however, contends that it must be considered a part of the process, because the polished appearance of the surface of the covering described in the specification is the result of allowing the paraffine or wax to cool before compressing it upon the wire. But, clearly, a patentee cannot claim the benefit of an element of his invention thus vaguely and indefinitely hinted at. The law in force when the patent of Olmstead was issued (Act of July 8, 1870 [16 Stat. at L., 201], section 4888, Revised Statutes) requires that "Before any inventor shall receive a patent for his invention or discovery he shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, or use the same, and he shall particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery." It is clear that if the patentee intended to include the cooling of the wax or paraffine before compressing it upon the wire, he has failed to describe in his specification that element of his invention, as required by the statute. Instead of describing the process he mentions a quality of the product, and asks the court to infer the process from that quality. Such a vague and inverted method of description is not a compliance with

the statute. That part of the alleged invention is not even referred to in the most distant manner in the claim. It has been held by this court that "the scope of letters patent should be limited to the invention covered by the claim; and, though the claim may be illustrated, it cannot be enlarged by the language in [453] other parts of the specification. *R. R. Co.* v. *Mellon*, 104 U. S., 112 [Bk. 26, L. ed. 639]. The element of the process under consideration cannot, therefore, be held to be covered by the patent. The contention that the patentee intended to include it in his process is evidently an afterthought.

The result of the views expressed is that both the patents sued on are void.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[464]

JOHN S. CAVENDER, *Appt.*,
v.
ROBERT S. CAVENDER.

(See S. C., Reporter's ed., 464-474.)

Trusts—removal of trustee for neglect to invest trust funds—pleading and practice.

1. Where the acts or omissions of a trustee are such as to show a want of reasonable fidelity, a court of equity will remove him.
2. Where trust funds are to be invested by the trustee, neglect to invest constitutes of itself a breach of trust, and is ground for removal.
3. Where one person is to pay and receive the same money, and nothing remains but to make proper entries in his accounts, the law will consider that as done which ought to be done.
4. A demurrer to a bill setting up a trust will not be sustained on the ground that the nature of the trust is not sufficiently set forth, when the facts stated are sufficient, if true, to enable the court to act intelligently.
5. An answer which states material facts omitted from the bill, waives any objection to such omission.
6. A defendant to a bill, who states in his answer under oath the provisions of a writing which is presumed to be in his possession, cannot complain that the court acted upon his admission without the production of the writing.

[No. 235.]

Argued Apr. 6, 1885. Decided Apr. 20, 1885.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The history and facts of the case appear in the

Statement by *Mr. Justic* **Woods**:

Robert S. Cavender, the appellee, was the [464] plaintiff in the Circuit Court. He stated his case in the bill of complaint substantially as follows:

John Cavender, deceased, by his last will and testament, dated May 6, 1858, and probated in the Probate Court of the City, then county, of St. Louis and State of Missouri, February 4, 1862, made and constituted the defendant, John S. Cavender, executor of his estate, and, after payment of debts, as therein mentioned, bequeathed one half of the remainder of his estate to John S. Cavender aforesaid, as trustee, to hold the same in trust for the use and benefit of the plaintiff during the term of his natural life, and by said will directed him to invest the same in real or personal securities, and to pay over the rents, profits, issues and incomes thereof to the plaintiff semi-annually, at the end of every half year, during his lifetime.

The Probate Court, by its order and decree made on October 5, 1878, found in the hands of the defendant, as such executor, the sum of $17,169.49 belonging to the trust estate, and directed him to pay over the same to himself as trustee; and afterwards, on December 3, 1878, the defendant executed his bond as trustee, with sureties, in the penalty of $25,000 conditioned for the faithful execution of his trust. On April 22, 1879, John S. Cavender, trustee, filed in the Probate Court his written receipt, whereby he acknowledged that he had received from John S. Cavender, executor, the sum of $17,169.49; and thereupon prayed for his discharge as executor of the said estate, which, on the same day, the court granted.

The bill then averred that if the said sum of $17,169.49 had thereafter been properly invested by the trustee, as, by the terms of the will, it became his duty to invest the same, it would have fairly yielded an annual income of 6 per cent, which was, by the terms of the will payable semi-annually.

It further alleged that, by the obligations assumed by John S. Cavender, as trustee of the plaintiff under the will, it became his duty to set apart and invest in safe and permanent securities said trust fund so acknowledged to have been received by him, in order that it might remain intact, and yield a regular and certain income to the plaintiff from year to year. But the bill averred that Cavender had been guilty of a gross breach of his trust; that he had never set apart or invested any sum whatever in securities of any description, or in property or assets of any sort, as a trust fund for the benefit of plaintiff, or deposited in bank or elsewhere any sum of money to the credit of the trust estate, but, on the contrary, had converted to his own use and dissipated the whole of the trust estate and all the assets and money belonging thereto, except certain lands in the State of Illinois; and that the income for the first six months from the trust funds was due, had been demanded, and was unpaid at the commencement of the suit.

The bill further averred that there were large tracts of land in the State of Illinois belonging to the estate of John Cavender, the proceeds and income of which were, under his will, part of the trust estate; that the profits of said lands and the proceeds of their sale would probably be large, which John S. Cavender would be likely to convert to his own use.

The prayer of the bill was, that Cavender might be removed from his office of trustee and a proper person appointed in his stead, whom he might be ordered to pay over the said sum of $17,169.49, with the interest due thereon.

A demurrer was filed to the bill and overruled by the court.

Thereupon Cavender answered, admitti

that John Cavender, deceased, by his last will and testament, dated and probated as specified in the bill, did constitute the defendant executor of his estate, and bequeathed one half the residue of his estate, after the payment of debts to the defendant as trustee, to hold said money in trust for the use and benefit of complainant during complainant's natural life, to be invested in real or personal securities, and the income thereof only to be paid over to the complainant, semi-annually, during his lifetime" but averring that, by the terms of said will after the lapse successively of the life estates of complainant and Charlotte M., his wife, the trust property aforesaid, such property must descend to defendant and his heirs, in fee simple, forever discharged of the trust aforesaid.

The answer also admitted "that the Probate Court of the City of St. Louis, by its judgment of October 5, 1878, found to be due, and ordered to be paid, by this defendant, as executor to the defendant as trustee, the sum of $17,169.49, and that thereafter the defendant made and executed his bond as such trustee, with good and sufficient sureties, whereby he bound himself to the State of Missouri, to the use of all persons beneficially interested, in the penal sum of $25,000, and conditioned for the faithful performance by this defendant as such trustee of the trust created by the provisions of said will as aforesaid," but denied "that on the 23d day of April, 1879, as alleged in said bill he filed as such trustee in said Probate Court his written receipt, whereby he acknowledged to have received from himself as executor the said sum of $17,169.49, and was thereafter on April 30, 1879, granted his discharge as executor by said Probate Court," and averred the fact to be that he had "never received as trustee, at the date of said alleged receipt, or at any other time, from himself as executor aforesaid, or from any source, the sum of $17,169.49, or any other sum whatsoever, on account of said trust estate," and denied that any income had accrued in his hands from said trust estate to which the plaintiff was entitled, and admitted that no part of such income had ever been paid to the plaintiff.

The answer admitted that Cavender held the funds referred to in the bill, and that their proceeds and income should be set aside for the benefit of said trust estate, but denied that he would be likely to convert and absorb the same, and denied that he had mismanaged the trust estate.

The plaintiff filed the general replication to the answer, and, upon the final hearing, before the admissions of the answer, offered the following evidence:

First. A certified copy of the original receipt of the defendant, on file in the Probate Court of the City of St. Louis, which was in the words and figures following:

"In the Probate Court, City of St. Louis. In the matter of the estate of John Cavender, deceased. St. Louis, April 23, 1879. I, John S. Cavender, trustee of Robert S. Cavender and Caroline under the last will and testament of John Cavender, deceased, acknowledge that I have received from John S. Cavender, executor of said deceased the sum of seventeen thousand one hundred and sixty-nine and $\frac{49}{100}$ dollars, ordered to be paid to me by said Probate Court. Entered of record in the records of said court on the 5th day of October, 1878. John S. Cavender, Trustee."

Second. A certified copy of a paper writing, on file in the same Probate Court, signed by W. G. Eliot, George Partridge, E. S. Rouse and John S. Cavender, entitled "In the matter of the estate of John Cavender, deceased," and dated St. Louis, April 23, 1879, in which it was recited that John S. Cavender, executor of the last will of John Cavender, deceased, had, on October 5, 1878, been ordered by the said Probate Court to pay over to himself, as trustee of Robert S. Cavender, under the last will of John Cavender, the sum of $17,169.49, and after such order the said John S. Cavender, trustee, as principal, and the said Eliot, Partridge and Rouse, as sureties, executed and filed their bond, dated December 3, 1878, in the penalty of $25,000, conditioned for the faithful execution of his trust by said trustee, and that said John S. Cavender had given to himself, as said executor, his receipt, dated April 22, 1879, for the sum of $17,169.49, and, on the strength of said receipt as a voucher, was about to apply to the said Probate Court for his discharge as such executor. The writing then proceeded as follows: [468]

"Now we, William G. Eliot, George Partridge, and Edward S. Rouse, acknowledge, as such sureties, that said John S. Cavender, has, in law, received, and is now bound, as such trustee, for said sum of seventeen thousand one hundred and sixty-nine and $\frac{49}{100}$ dollars, as for cash actually received, and that the said bond is still in full force, and binding upon the undersigned, to all intents and purposes, in contemplation of law, touching the custody of said fund, as for cash actually received, and the execution of said trust concerning the same.

"And John S. Cavender, on his own part, as trustee and principal in said bond, admits the full and binding force of the above admission."

Third. A certified copy of the order of the Probate Court discharging John S. Cavender as executor of the estate of John Cavender, deceased, which was dated April 30, 1879, and was based on the ground that John S. Cavender had filed a receipt, signed by himself as trustee, acknowledging the receipt from himself, as executor, of the sum of $17,169.49, and was as follows:

"*Estate of John Cavender.*

Now comes John S. Cavender, executor, and files the receipt dated April 22, 1879, given by John S. Cavender, trustee of Robert S. Cavender, and Caroline M. Cavender to said executor, for seventeen thousand one hundred and sixty-nine $\frac{49}{100}$ dollars, ordered by this court October 5, 1878, to be paid by said executor to said trustee, and it appearing to the court that on the 9th day of December, 1878, said trustee filed his bond as trustee in the St. Louis Circuit Court, conditioned for the faithful execution of the trust vested in him under the will of said John Cavender, deceased, with William G. Eliot, George Partridge, and Edward S. Rouse, as sureties; and said trustee, with said sureties, having, on the 23d day of April, 1879, filed in this court their written ad [469]

mission that said trustee has in law received and is bound for said sum of seventeen thousand one hundred and sixty-nine $\frac{48}{100}$ dollars, as for cash actually received, and that said bond is in full force as to the custody of said sum as for cash actually received, and for the execution of the trust touching the same; and said executor, asking for his discharge on the strength of said receipt and admission, and said Robert S. and Caroline M. Cavender, having by counsel, T. A. Post, appeared to said motion for discharge, and submitting the same on their part without argument or objection; now, therefore, in view of the premises, the court being in possession of the evidence, and having fully considered the same, doth order that said John S. Cavender be, and he is hereby, finally discharged as such executor."

All the foregoing evidence was received by the court without objection by the defendant.

Fourth. The deposition of J. S. Fullerton, who testified that money could be safely lent on real estate security in the City of St. Louis, in 1878 and part of 1879, at 7 per cent per annum, and in the latter part of 1879, and since that year, at 6 per cent per annum net.

Fifth. The deposition of John S. Cavender, the defendant, who stated that he was the trus-
[470] tee of Robert S. Cavender, but had made no investments for him, and that he had placed no money to the benefit of the trust fund in securities of any sort, or in bank, and had set aside no annuities for the benefit of Robert S. Cavender or the trust estate.

No proofs were offered for the defendant, and the court, upon the evidence above recited, made a decree removing John S. Cavender as trustee and appointing John M. Glover in his stead, and directing Cavender, upon demand, to pay over to Glover, trustee, the said sum of $17,169.49 and such sums of money as had been received and collected by Cavender from sales of land or otherwise since April 30, 1879, belonging to the trust fund.

From this decree John S. Cavender has brought the present appeal.

Messrs. **Henry Hitchcock,** *Lucien Eaton, Edward C. Eliot* and *James S. Garland,* for appellant.

Mr. **Wm. A. McKenney,** for appellee.

[470] *Mr. Justice* **Woods** delivered the opinion of the court:

The first contention of the plaintiff in error is that the demurrer to the bill should have been sustained, because the nature of the trust was not therein so sufficiently set forth as to form the foundation of a decree on the part of a court of equity.

Whether the trust was fully and accurately set forth could not be known until the filing of the answer or the taking of the proofs. When the demurrer was heard, from all that then appeared, the exact provisions of the will of the testator raising the trust, and all the terms and conditions of the trust, were stated in the bill. It could not then be known whether or not there was anything more to state. What was stated showed the creation of a trust estate, the appointment of a trustee, the designation of a *cestui que trust,* and specific directions to the trustee in respect to his duties. The court could not assume that any of the provisions of the will relating to the subject-matter of the trus were omitted from the bill, and what was statec was sufficient, if correctly stated, to enable th court to act intelligently. The demurrer was therefore, properly overruled. But the defend ant refused to stand on his demurrer and an swered the bill. Having, as it may be fairl presumed, the will of the testator before him he undertook to set out in his answer, unde oath, the provisions of the will in respect to th trust estate and trust in question. There is n pretense that any material word or clause, i relation to the subject of the trust was omitte from the answer. It is, therefore, too late fo the defendant, on final hearing in the appellat court, to object that the provisions of the wi were not fully set out in the bill of complain If there was any defect in the statement mad in the bill, it was rendered immaterial by th statements of the answer, and is not now groun of complaint. *Greenleaf* v. *Birth,* 5 Pet., 13

A similar assignment of error to that just n ticed is, that the court erred in removing th appellee from his office of trustee without ha ing before it the will or declaration of trust fc interpretation.

But it is clear that a defendant to a bill i equity, who states in his answer under oath tl provisions of a writing, which is presumed to l in his possession, cannot complain that tl court acted upon his admission. The cou might in its discretion have refused to interpr the writing without its production. But havir acted upon the presumption that the defen ant in his answer stated truly the contents the writing, the latter cannot, on the ground th the writing itself was not put in evidence, ask reversal of the decree. Courts of equity are fr quently required to act on the admissions of tl answer without other proof. Thus, when cause is heard upon bill and answer, the decree based entirely on the admissions of the answ without other testimony. *Reynolds* v. *Crawford ville Bk.* 112 U.S., 405 [Bk. 28, L. ed. 733]; *Bri kerhoff* v. *Brown,* 7 Johns. Ch., 217; *Grosvenor Cartwright,* 2 Cas. Ch., 21; *Perkins* v. *Nicho* 11 Allen, 542. At all events, it does not lie the mouth of a defendant in equity to compla that the court assumed his answer made und oath to be true and decreed accordingly.

The next assignment of error is, that the c cree rendered by the Circuit Court is not jus fied by the law.

The decree rests solely on the ground alleg in the bill, of neglect of duty and mismana ment of the trust property. If these groun are sustained by the proof, the authorit are ample to justify the decree of remov For, where the acts or omissions of the trus are such as to show a want of reasonable fid ity, a court of equity will remove him. *Ex pa Phelps,* 9 Mod., 357; *Mayor of Coventry Atty-Gen.,* 7 Bro. P. C., 235; *Atty-Gen. Drummond,* 1 Dru. & W., 358; *Atty-Gen. Shore,* 7 Sim., 309 *n.; Ex parte Greenhous* Madd., 92; *Ex parte Reynolds,* 5 Ves., 707; *mens* v. *Caldwell,* 7 B. Mon., 171; *Johnson Simpson,* 9 Pa. St., 416; *Ex parte Potts,* 1 As 340; *Buchanan* v. *Hamilton,* 5 Ves., 722; *E son* v. *Ellison,* 6 Ves., 663; *Portsmouth* v. *lows,* 5 Madd., 450; *Lathrop* v. *Smalley,* 23 J. Eq., 192; *Hussey* v. *Coffin,* 1 Allen, 3 *Atty-Gen.* v. *Garrison,* 101 Mass., 223.

The averments of the bill sufficiently charge, and the proofs establish, neglect of duty and mismanagement of the trust estate. The charge of the bill, which is distinctly admitted by the answer, is, that the Probate Court found in the hands of the appellant, executor of John Cavender, [illegible] and belonging to said trust estate, the sum of $17,169.49, and ordered him to pay over that sum to himself as trustee. The averment of the bill is sufficient to charge, and the admission of the answer sufficient to prove, the receipt by the defendant, as trustee, of the sum of money mentioned. They are conclusive evidence of the fact. For when one person is to pay money and receive the same money, and nothing remains but to enter receipts and payments in their proper accounts accordingly, the law will consider that as done which ought to be done. Thus, where a sole executor sustains the twofold character of executor and guardian the law will adjudge the ward's proportion of the property in his hands to be in his hands in the capacity of guardian, after the time limited by law for the settlement of the estate whether the final account has been passed by the Orphan's Court or not. *Watkins* v. *State*, 2 Gill. & J., [illegible]. So, where the same person is executor of an estate and guardian of a distributee, and there is nothing to show in which capacity he holds funds after payment of debts and settlement of the estate, he shall be presumed to hold them as guardian. *State* v. *Hearst*, 12 Mo., 365. See also, *Johnson* v. *Johnson*, 2 Hill (S. C. Ch.), [illegible]; *Karr* v. *Karr*, 6 Dana, 3.

But the proof that the trust fund came to the hands of the trustee does not stop with the order and decree of the Probate Court finding the money in his hands as executor, and directing its payment to himself as trustee, for it appears that he made and filed in the Probate Court his receipt as trustee for the fund, and upon the strength of that receipt procured his discharge as executor. The record of the Probate Court, put in evidence, shows these facts. We have, therefore, the admission of record of the appellant, upon which the court of probate acted, at his instance, and upon the strength of which it made an order relieving him from liability as executor, and it is binding on him, and he cannot be heard in any controversy with the appellee to deny his admission that the fund came to his hands.

It remains to inquire whether the proof sustains the charge of neglect of duty and mismanagement of the trust funds.

Having taken possession of the trust money, it became the duty of the appellant to invest them as directed by the will, if it were possible to do so. The proof shows that it was possible. The appellant admits, under oath, that he has made no investments of the trust assets, and placed no funds in securities of any sort, or in bank, and set aside no annuities for the benefit of the *cestui que trust* or the trust estate. His own admissions show neglect of duty and mismanagement of the trust estate.

The neglect to invest constitutes of itself a breach of trust, and is ground for removal. [illegible] v. *Caldwell*, 7 B. Mon., 174; *Lathrop* v. [illegible], 22 N. J. Eq., 192.

The only defense set up in the answer of the appellant is a denial that he ever gave a receipt as trustee, or that he had been discharged as executor by the Probate Court, or that the trust fund ever came to his hands. As the facts thus denied are conclusively established by the evidence, the denial is an aggravation of the misconduct of the appellant. A trustee, into whose hands trust assets are shown [474] to have come, who not only fails to discharge any duty of the trust, but even denies that he has ever received the property, cannot successfully resist an application made to a court of equity for his removal.

The counsel for appellant say that they regret that the pleadings and evidence do not permit a full presentation of the case upon its merits. We cannot act on this vague intimation. There may be facts not disclosed which, if shown by the record, would entirely change the aspect of the case. But we must try the case as the record reveals it. Upon the cause, as presented, with no explanation vouchsafed by the appellant, it is difficult to conceive of a clearer case for the removal of a trustee and the appointment of another in his stead.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

MARY K. BURTON, *Plff. in Err.*, [474]

v.

WEST JERSEY FERRY COMPANY.

(See S. C., Reporter's ed., 474-477.)

Personal injuries — negligence — practice — instructions.

1. A general exception to a charge, not directing attention to particular portions objected to, raises no question for review by this court.
2. The mere failure of a steam ferry company to provide a seat for a passenger on its boat is not of itself proof of negligence.
3. Under the circumstances disclosed in this case, the jury would not have been justified in finding that proper care required the defendant to furnish seats sufficient to accommodate all passengers that its boat could safely carry, or such number of passengers as ordinarily traveled upon it.

[No. 242.]

Argued Apr. 9, 1885. Decided Apr. 20, 1885.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The history and facts of the case appear in the opinion of the court.

Messrs. **Jerome Carty, B. F. Clapp** and **Mayer Sulzberger,** for plaintiff in error.

Messrs. **Richard D. Dale** and **Samuel Dickson,** for defendant in error.

Mr. Justice **Harlan** delivered the opinion [475] of the court:

The plaintiff in error, who was plaintiff below, took passage at Camden, New Jersey, for Philadelphia, on a ferry-boat belonging to the defendant, a New Jersey Corporation engaged in the business of transporting passengers, animals and vehicles across the Deleware between those cities. On that trip the boat was un-

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NOTE.—*Appeal or error—exceptions—particularity—what sufficient—insufficiency of general exceptions.* See Moore v. Bank, 38 U. S. (13 Pet.), 302, *note.*

usually crowded with passengers. The river at the time was very full of ice, and it was difficult for the boat to get across and enter the ferry slip on the Philadelphia side. The wharf on that side was reached only after repeated efforts. In the attempt to land, the boat was driven against the bridge with such force as to throw the plaintiff and a number of other persons, all of whom were standing during the passage across the river, with great violence upon the floor. The fall caused serious and, perhaps, permanent injury to the plaintiff. In this action she claims damages from the defendant upon the ground that her injuries resulted from the careless and negligent management of the ferry-boat by its agents and servants. The plaintiff made a case entitling her to go to the jury upon the issue as to the defendant's negligence. But there was, also, proof tending to show that the striking of the boat against the wharf on the Philadelphia side occurred under peculiar circumstances, and could not, perhaps, have been avoided by any diligence upon the part of the agents of the defendant.

When the evidence was concluded, and after the parties submitted their requests for instructions, the court delivered its charge upon the whole case, reading to the jury the instructions asked by either party that were approved, and accompanying them with such observations, by way of explanation or qualifiaction, as it deemed necessary.

The third and fourth points submitted in behalf of plaintiff were overruled. They were as follows:

"Third. If the jury believe from the evidence that the defendants received the plaintiff as a passenger, and that they failed to provide her with a [476] seat, or that she was unable to obtain a seat by reason of the crowded condition of the boat, and while standing in the cabin she was, without any fault of her own, thrown down and injured by a sudden shock to the boat, then the defendants are guilty of negligence, and your verdict should be for the plaintiff.

"Fourth. If the jury believe from the evidence that the defendants received the plaintiff, a woman 67 years of age, as a passenger, and that they failed to provide her with a seat, or that she was unable to obtain a seat by reason of the crowded condition of the boat, and while standing in the cabin she was, without any fault of her own, thrown down and injured by a sudden shock to the boat, then the defendants were guilty of negligence, and your verdict should be for the plaintiff."

At the conclusion of the charge, the plaintiff, by counsel, excepted to the overruling of her third and fourth points, and, also, to "the charge and opinion" of the court. No other exceptions were taken.

1. The general exception to the charge did not direct the attention of the court to the particular portions of it to which the plaintiff objected. It, therefore, raises no question for review by this court. *Conn. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S., 250, 261 [Bk. 28, L. ed. 708], and auth·orities there cited.

2. The only question for determination relates to the refusal of the court to instruct the jury as indicated by the third and fourth points of the plaintiff, which involve substantially the same proposition. Those points were properly overruled. Under the theory of the case which they present, the jury—although the sudden shock to the boat, from which plaintiff's injuries immediately resulted, may have occurred without want of care or skill upon the part of the defendant's servants—would have be required to find for the plaintiff, if the defen ant failed to provide her with a seat, or if s was unable, by reason of the crowded conditi of the boat, to obtain one. In other word that the mere failure of the Company to p vide a seat for a passenger on its boat was, law and of itself, proof of negligence. It a peared in evidence that the boat was provid with seats; but it did not appear that a less nu ber was provided than was customary and s ficient for those who ordinarily preferred to seated while crossing in ferry-boats betwe Camden and Philadelphia. No circumstanc were disclosed that would have justified t jury in finding that a proper degree of ca upon the part of defendant, required it to p vide seats sufficient for the accommodation all the passengers that its boat could saf carry, or of such number of passengers as dinarily traveled upon it.

The judement is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U

JAMES B. EDMONDS ET AL., Comm sioners of the DISTRICT OF COLUMB *Appts.*,

v.

BALTIMORE AND POTOMAC RAI ROAD COMPANY.

(See S. C., Reporter's ed., 453-463.)

Washington City—right of Baltimore & P mac Railroad Company to use of streets, ject to control of Congress—construction statute.

1. The title to the streets of Washington is in United States, and the right to use them for other than the ordinary use of streets should ceed from Congress.

2. The Baltimore and Potomac Railroad Comp can occupy only such streets in the City of W ington as have been expressly designated by C gress for that purpose.

3. The said Company is without authority to c struct a lateral track from Maryland Avenue ac or along 14th Street to reach a freight depo square 253.

4. The said Company was not organized under general corporation law of the District of Colun and it derives no authority under that Act to the streets of the City of Washington.

5. The Maryland charter of the said Company not confer any power to use the streets of a cit an incident of its right to run to and from city.

[No. 1283.]

Argued Apr. 9, 1885. Decided Apr. 20, 1

APPEAL from the Supreme Court of District of Columbia.

The history and facts of the case appe the opinion of the court.

Mr. **A. G. Riddle,** for appellants.

Mr. **Enoch Totten,** for appellee:

It is the established law of this court whenever a statute authorizes the construc and operation of a railroad, the authority is cessarily implied to construct warehouses, tions and other works, and to construct tracks communicating between them and main line of the road.

Rock Creek v. *Strong*, 96 U. S., 276 (Bk. 2

[illegible] *R. R. Co.* v. *U. S.*, 93 U. S., 453 (Bk. 23, [illegible]; see, also, *Toll Bridge Co.* v. *R. R. Co.* [illegible] 454; *Black* v. *R. R. Co.*, 58 Pa. St., 249; [illegible] *Co.* v. *R. R. Co.*, 2 Harr. (N. J.), 314; [illegible] v. *R. R. Co.*, 94 Pa. St., 435; *R. Co.* v. [illegible], 16 Ohio St., 390; *R. R. Co.* v. *Kip*, 46 [illegible]; *Protsman* v. *R. R. Co.*, 9 Ind., 469; [illegible] v. *Municipality of N. O.*, 1 La. Ann., [illegible].

[illegible] the implied authority of a railroad company to construct its road on and over the public [illegible], see *Improvement Co.* v. *La Crosse Co.*, [illegible]; *R. Co.* v. *State*, 3 Ind., 421; *R. R. Co.* v. [illegible], 8 C. E. Green, 157; *Davis* v. *R. R.* [illegible], 94; *U. S.* v. *Bridge Co.*, 6 Mc[illegible].

[illegible] having reposed the power of selecting the site for the warehouse in the officers of the Company, and they having chosen this [illegible], it is just as firmly established as a terminus of the side track as if the Act itself had [illegible] fixed the location. This being true, [illegible] to lay the connecting side track follows from necessity.

[illegible] *R. R. Co.* v. *Hall*, 91 U. S., 356 (Bk. 23, L. ed. [illegible]; *Duncan* v. *R. R. Co.*, 94 Pa. St., 435; [illegible] v. *Adams*, 3 Head., 597; *R. R. Co.* v. [illegible] 38 Pa. St., 325; *People* v. *Brooklyn R. Co.*, [illegible]; Rorer, R. R., 489; *R. R. Co.* v. *R.* [illegible] N. J. Eq., 157; *Hughes* v. *R. R. Co.*, 18 [illegible], 106; *R. R. Co.* v. *Gas Light Co.*, 63 [illegible]; *R. R. Co.* v. *Dunbar*, 100 Ill., 110, [illegible] v. *Brownsville*, 45 Tex., 88; 10 Johns., [illegible].

[illegible] Justice Miller delivered the opinion of the court:

This is an appeal from the Supreme Court of the District of Columbia.

The Railroad Company has constructed its [illegible] from Baltimore through the District of Columbia and through the City of Washington to the Potomac River at Long Bridge, on which it [illegible] that river to the Virginia side. It has done this by virtue of several Acts of Congress granting the necessary authority to do so. At the Washington end of the bridge it has purchased and now owns one of the squares of the city and part of another, numbered, in the division of the city into streets, squares and [illegible] squares 233 and 267. These squares are [illegible] by Fourteenth street, running north and south, and square 267, on its south side, [illegible] on Maryland avenue, one of the streets of the city. At the junction of Maryland avenue whose course is nearly east and west, and Fourteenth street, there is a considerable space of ground made by Water street, which follows the bank of the river, and the other two streets, which is a public highway made by the union of all these streets at that point. A map or diagram found in the record, and which the reporter will copy, is necessary to a clear understanding of the controversy. [See next page.]

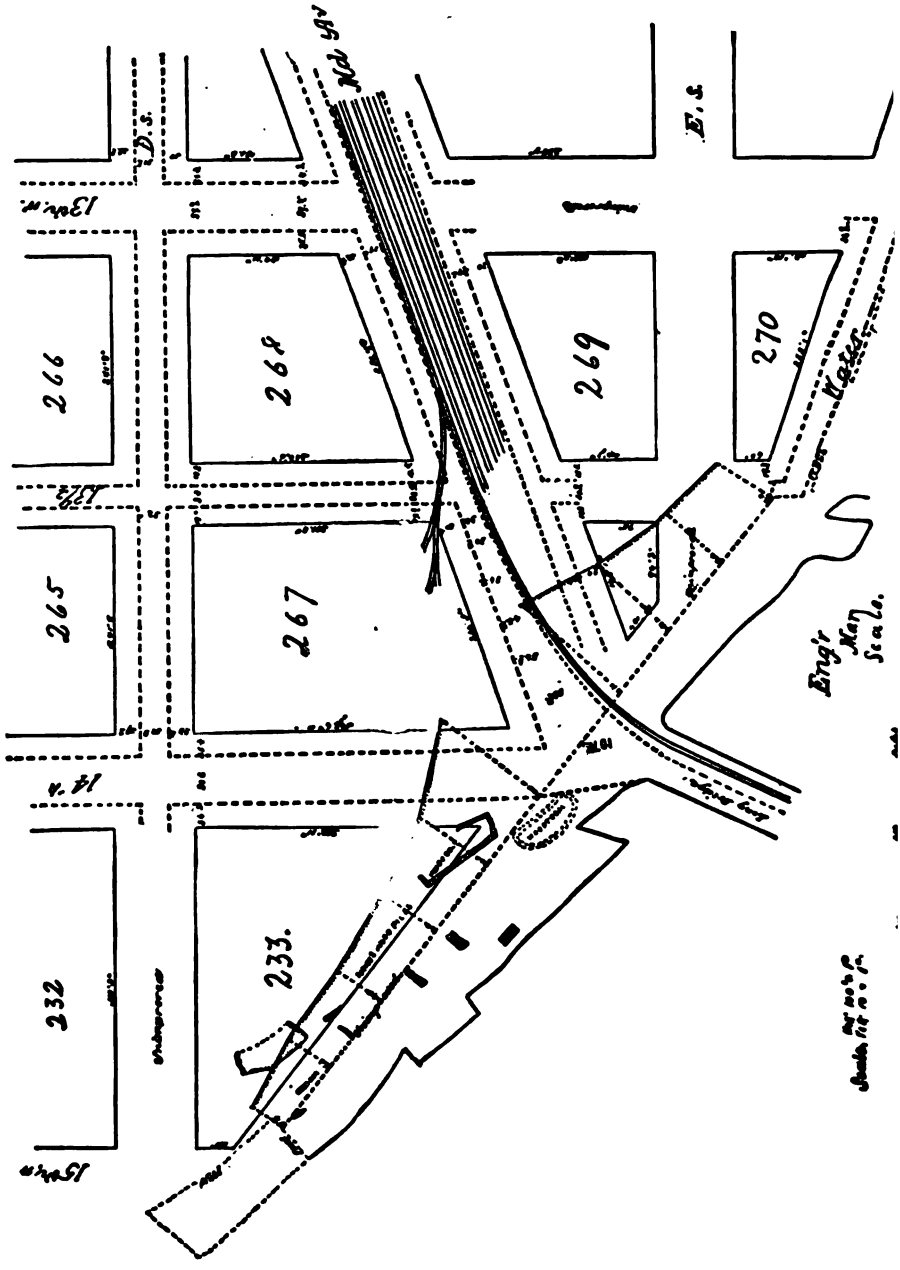
The Railroad Company alleges that its increased traffic requires in the City of Washington additional accommodations for receiving, storing and transferring freight, and that it has purchased the two squares mentioned for that [illegible], and that it intends to build a freight [illegible] on square 233, as being at once convenient for the Company and more out of the way of the travel, current business and residences of the citizens than any point within reasonable distance of the line of the road. As their road is at present located lawfully on Maryland avenue, along which it touches the city end of the bridge, this allegation is probably true.

In order, however, to reach square 233 with its trains, they must depart from Maryland avenue and cross square 267 and Fourteenth street, which lies between the two squares, or they must make a curve from the avenue around the south end of square 267, and reach square 233 by the use of the public highway made by the junction of Maryland avenue, Water street and Fourteenth street, and, in so doing, depart from Maryland avenue. The [455] Company gave notice, as required law, to appellants, who, as Commissioners of the District of Columbia, are charged with the care and protection of the streets and other highways of the city, that it intended to construct a lateral track, which, leaving its main track on Maryland avenue at a point near its intersection with Thirteenth street, should cross square 267 from its east to its west side, and then crossing Fourteenth street, would reach its projected depot on square 233. The Commissioners refused to consent to this, and, fearing it would be attempted without such consent, they guarded the way across the street by police force for some time.

In this condition of affairs, the Railroad [456] Company filed its bill in chancery in the Supreme Court of the District of Columbia, praying an injunction against the Commissoners, to prevent them from interfering with the exercise of the right which the Company claimed of laying its track across Fourteenth street, and that court granted an injunction as prayed.

The appeal of the Commissioners from this decree brings the matter in issue before us for review. Neither the pleadings in the case, nor the relief sought by the bill, nor the decree of the court, brings into question the right of the Company to purchase squares 233 and 267, nor the right to erect on either of these a warehouse for the storage of freight. Nor does the question arise of their right to locate at that place such a depot as their business requires, nor to use it as such, if they have the right of access to it by using the streets and highways of the city for that purpose. This court does not, therefore, consider those questions, because the only point raised by the record is the right of the Company to lay in or across the streets of the city their railroad track, and use it as a means of transit for its locomotives and cars, without any express authorization by Act of Congress, or the consent of any authority representing the City of Washington or the District of Columbia.

The assertion of the existence of such a right is, to say the least, somewhat novel. It is not known to any member of this court that any railroad company, whether its cars are propelled by steam or horse-power, has ever claimed to use the streets of an incorporated city or any part of them, without express authority from some legislative body, or the authorities of the city governmennt. It would be a strange grant of power which, authorizing a railroad company to enter or even pass through a city, should



leave to the company the selection, not only of its route into or through the city, but even the streets and highways over which its tracks should be laid, subject only to its sense of its own convenience and that of the people of the city. Nor does the decision of a court of justice, that the necessities of the Company demand the use of these streets, and that the cality of the depot to which the track lead selected with a due regard to the interest the whole city, make this claim of power the less remarkable. No judicial decisio cited in favor of such propositions.

The streets of Washington are largely

[illegible] railroad companies whose tracks occupy their surface. There are some four or five of these companies, and their cars are propelled by horse-power and not by steam. They are not only a great convenience to the citizens, but they have become almost a public necessity. But it is not believed that a foot of all these tracks over all these streets exists otherwise than by virtue of an Act of Congress directing specifically and minutely where this shall be done. And no power exists in one of these corporations to lay a track, however short, anywhere else.

The Railroad Company now asserting this right runs its cars from the east side of the city to the west, a distance of two miles or more, through a densely populated part of the city, over a track, the location of every foot of which is prescribed with minuteness by Acts of Congress. And its principal passenger depot, located several hundred yards from the main line of its road through the city, makes this deflection from that line solely by virtue of an express Act of Congress, passed to enable the Company to do so.

It is with these well-known facts before us showing the care with which Congress has reasonably exercised the power of granting, refusing and regulating the use of the streets of Washington for railroads, that we approach the examination of the statute or statutes which are supposed to grant the enlarged power claimed by the Baltimore and Potomac Company in this instance.

The first and most important of these is the Act of Congress of February 5, 1867, 14 Stat. at L., [illegible].

After reciting that it is represented that the Baltimore and Potomac Railroad Company, incorporated by an Act of the General Assembly of Maryland, passed May 6, 1853, is desirous to construct a lateral branch from its road in the District of Columbia, it is enacted that said Company shall be, and they are hereby authorized to extend into and within the District of Columbia, a lateral branch, such as the said Company shall construct or cause to be constructed, in a direction towards the said District, in connection with the railroad which they are about to locate and construct from the City of Baltimore to the Potomac River, in pursuance of their said Act of incorporation; and the said Baltimore and Potomac Railroad Company are hereby authorized to exercise the same powers, rights and privileges, and shall be subject to the same restrictions in the extension and construction of the said lateral railroad into and within the said District as they have exercise or are subject to, under and by virtue of their said charter or Act of incorporation, in the extension and construction of any railroad within the State of Maryland, and shall be entitled to the same rights, compensations, benefits and immunities, in the use of the said road, and in regard thereto, as are provided in their said charter, except the right to construct any lateral road or roads within the said District from the said lateral branch or [illegible] authorized, it being expressly understood that the said Baltimore and Potomac Railroad Company shall have power only to construct from the said Baltimore and Potomac Railroad one lateral road within the said District to some point or terminus within the City and County of Washington, to be determined in the manner hereinafter mentioned."

The third section of this Act, after describing the care with which the Company shall construct the road across any street or other way, adds: "But the said Company, in passing into the District aforesaid, and in constructing the said road within the same, shall enter the City of Washington at such place, and shall pass along such public street or alley to such point or terminus within said city, as may be allowed by Congress, upon presentation of survey and map of proposed location of said road; provided that the level of said location within the said city shall conform to the present graduation of the streets, unless Congress shall authorize a different level."

This provision of the original Act, under which the Baltimore and Potomac Railroad enters this city, has never been repealed or modified, as far as we are aware, and it fully asserts the purpose of Congress to retain in its own hands the right to the use of the streets of the city in regard to this Company and its road, as it has in regard to all others.

By another Act, passed March 18, 1869, 16 Stat. at L., 1, entitled as supplementary to the one above cited, it was declared "that said Company might enter the City of Washington with their railroad, and construct the same within the limits of said city on or by whichever one of the two routes herein designated the said Company may elect and determine; that is to say: [459]

"First. Beginning at the intersection of Boundary street and North Carolina avenue; thence along said North Carolina avenue to South D street, westwardly, to Virginia avenue; thence along Virginia avenue, northwestwardly, to the intersection of South C street and West Ninth street; or,

"Second. Beginning at some point on the northern shore of the Eastern Branch of the Potomac River, between South L and South M streets; thence westwardly between said streets to the intersection of Virginia avenue with South L and East Twelfth streets; thence along said Virginia avenue, northwestwardly, to South K street; thence along said South K street, westwardly, to South Fourth street; thence, by a line curving to the right, to the north bank of the canal; and thence along the said bank of the canal, northwestwardly, to Virginia avenue; thence along Virginia avenue, northwestwardly, to the intersection of South C and West Ninth streets."

Whether this was in accordance with a map or maps furnished by the Company we are not informed; probably it was. But this was wholly immaterial, as this supplemental statute was clearly made to *allow* the use of these streets as provided in section three of the original Act. By another Act, approved March 25, 1870, Congress authorized the Company to make some changes in the line of its road between Esta Fourth street and the terminus at the junction of C street south and Ninth street west, which change, however, is described with the same particularity as the routes above described, and by the same Act the time for the completion of the road was extended.

The next Act of Congress, approved June 21, 1870, 16 Stat. at L., 161, also entitled as

amendatory of the Act of July 5, 1867, authorizes the Company to extend its road from the terminus at Ninth street, "*by way of Maryland avenue, conforming to its grade, to the viaduct over the Potomac River at the City of Washington, known as the Long Bridge, and extend* their tracks over said bridge and connect with any railroads constructed, or that may hereafter be constructed, in the State of Virginia." The Act then delivers over Long Bridge to the Company for its use as a railroad bridge, with conditions requiring it to be kept in good repair, and open to free use as a public highway for all the people.

[460]

It is by virtue alone of the words of this statute, which we have cited in italics, that the road of the Company is anywhere near the bridge, or near the *locus in quo* of the present controversy. It requires a larger measure of liberality in construing grants of the sovereign, and especially grants for the use of the streets of a city for a railroad, than we are accustomed to, to discover in this any authority to depart from Maryland avenue on its way from Ninth street to the Long Bridge.

The Company, having its road well under way, needed a passenger depot for its business—a need much more important than its present need of an additional freight depot. It did not, however, attempt to establish one under its general powers, but made application to Congress, which authorized its construction, and in doing so described its location with great precision, and the streets along which the track must go, in departing from the right of way already granted.

This Act of March 3, 1871, required the assent of the municipal authorities of the City of Washington for the erection of the depot, and that assent was given by a joint resolution of the board of aldermen and common council on March 9, 1871. And so necessary did the Company deem the consent of Congress to this, or any other occupation of the streets or public property of the city, that it procured the passage of the Act of May 21, 1872, ratifying the action of the city authorities in the matter, and setting out with greater detail the direction of the lateral track to the passenger depot, and the streets over which it should go.

The title to the streets of Washington is in the United States, and not in the city, or in the owners of the adjacent lots. *Potomac S. B. Co.* v. *Upper Potomac Co.*, 109 U. S., 672 [Bk. 27, L. ed. 1070]. It is, therefore, eminently proper that the right to use them for any other than the ordinary use of streets should proceed from Congress; and when we consider the express reservation of the power to Congress to allow this use in the original grant to the Company, found in the third section of that Act, and the detail and precision with which every foot of the track or tracks of the road has been prescribed by Congress, and every change which expediency required has been previously authorized by Congress, we can see no place for the assertion of any right in the Company to make other tracks, or changes in location of those now existing without an Act giving the consent of that body.

[461]

In the face of these statutes it is hardly necessary to look into the language of the charter of the Company by the Legislature of Maryland to see if the powers thus conferred, which are said to be adopted by the Act of C gress, give this extraordinary power.

It is sufficient to say that we do not fin the Maryland charter of that Company power to use the streets of a city as an inci of its right to run to or from such city. T no such right is granted may be fairly infe from the fact that the track of this road for two miles under the City of Baltimore tunnel built for that purpose, which must l delayed the completion of the road tw three years, and cost a large sum of mo The Company certainly would not have this expensive underground roadway if thing in its charter authorized it to use the face streets of the city.

And if the construction which counsel upon that charter is sound, it is very ce that Congress did not intend extending power of the Company into the District o lumbia, and part with its own control o streets and highways of Washington City such a power is in conflict with the ex language of the Act, and with the con practice under it.

We are referred by counsel to the Re Statutes of the District of Columbia, ch 18, concerning Corporations. Clause 7 o chapter provides for the voluntary as tion of individuals into corporations for l ing railroads in the District. It grants corporations, when formed in compliance the rules there prescribed, all the usual p of such companies organized under State utes, and all that are necessary to the ope of a railroad, and the powers thus conferre in the main, very liberal.

There are two reasons, however, why provisions can give no aid to the Baltimo Potomac Company.

1. That Corporation is organized un special statute of the State of Maryland, a corporation of that State. The Act of gress of February 5, 1867, merely auth that Maryland Corporation *to extend its r* to the District of Columbia, and in defini powers which the Company should exer the District, it referred to and adopted, main, the Act of the State of Maryland ing the charter.

This was three years before the gene corporation law was enacted by Congres the Company has never organized unde law, or professed to be governed by it, serted itself to be a corporation of the D of Columbia. Whether it could do this it is unnecessary to decide, but it is very that the power conferred by that Act signed only for corporations organized it, and is not conferred on corporations by States of the Union, governed by th of those States.

2. But if this were not so, and if thi pany could exercise all the powers whi statute grants to corporations organized it, the statute itself shows, as all the leg by Congress has shown, both before an that that body never intended to part w right to designate the route of a railroad t the city, and on what streets its track be located, and which streets it shou This is plain from one of the closing

[illegible] of the Revised Statutes on that [illegible]:

[illegible] No railroad shall be built under [illegible] of this chapter until the *route* [illegible] of such road have been approved [illegible]."

[illegible] of the general law for the vol[illegible] of corporations for build[illegible] in the District of Columbia, ex[illegible] the same idea and the same purpose [illegible] three of the Act authorizing the [illegible] and Potomac Company to enter the [illegible], namely: to retain in the hands of [illegible] the absolute control of the use of the [illegible] of the city by any railroad company [illegible].

[illegible] of opinion that, when this Company [illegible] to depart in any direction from the line [illegible] track as prescribed for it by Acts [illegible], it must obtain permission to do so [illegible] body. And that Congress, and not [illegible] the Company, is the judge of the [illegible] or the necessity of such change, [illegible] the manner in which the public good [illegible] to be made and the safeguards which [illegible] accompany it.

[illegible] of the Supreme Court of the Dis[illegible] of Columbia is reversed, and the case re[illegible] with directions to dismiss the bill.

[illegible] Test:

[illegible] H. McKenney, Clerk, Sup. Court, U. S.

[illegible] NATIONAL BANK OF BOSTON, *Plff. in Err.*,

v.

GEORGE MIXTER.

([illegible] S. C., Reporter's ed., [illegible].)

[illegible] 1001, R. S.—mistake in name.

[illegible] required in cases by or against in[illegible] Banks when brought to this court [illegible] of the Comptroller of the Currency.

[illegible] record shows that the Comptroller [illegible] of error, a mistake in name is no [illegible].

[No. 1124.]

[illegible] Apr. [illegible], 1885. Decided Apr. 20, 1885.

[illegible] to the Circuit Court of the Unit[illegible] for the District of Massachusetts.

[illegible] to dismiss.

[illegible] sufficiently stated by the court.

[illegible] D. Ball, for defendant in [illegible] support of motion.

[illegible] A. A. Ranney, for plaintiff in error, [illegible].

[illegible] Justice Waite delivered the opin[illegible] of the court.

[illegible] is denied. Under section 1001 [illegible] Revised Statutes no bond for the prose[illegible] of the suit, or to answer in damages or [illegible] required on writs of error or appeals [illegible] or brought to this court by di[illegible] of the Comptroller of the Currency in [illegible] or against insolvent national banks, or [illegible] thereof. This is such a case.

[illegible] evidence in the record that [illegible] from the comptroller to the re[illegible] take out a writ of error in this [illegible] by mistake in one of the papers. Henry Mixter was named as the plaintiff instead of George Mixter.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

ATLANTIC PHOSPHATE COMPANY, *Plff. in Err.*,

v.

JOHN C. GRAFFLIN.

[492]

(See S. C., Reporter's ed., 492-501.)

Contracts—party making advances for purchase of goods for another, held to be the owner.

*A contract was made by A., of Charleston, with D., of Baltimore, for the sale and delivery, at Charleston, of 2,500 tons of kainit, to be shipped from August to October, 1880, at a fixed price, cash on delivery of each cargo. The kainit was to come from R., at Hamburg. D. procured G., for a commission paid him by D., to send to R. a credit, on London, for the amount of 2,500 tons of kainit in five cargoes, under which R. obtained the money. G. paid drafts, against the credit, to the amount of the cargoes. The declarations and invoices by R., presented before the consul at Hamburg, named G. as the consignee at Charleston; and the bills of landing made the cargoes deliverable, at Charleston, to G. or his assigns. These papers were sent to A., before any of the cargoes arrived, with an invoice for each cargo, in the shape of a bill, made out thus: A. bought of G., a cargo of kainit, shipped by such a vessel, such a quantity, such a price; and a power of attorney, under which A.'s agent, as attorney for G., entered the cargoes at the custom-house at Charleston, in February and March, 1881, as imported by G., and made oath that G. was the owner. A. received and accepted the cargoes. *Held*,

(1) G. was the owner of the cargoes, and sold and delivered them to A., to be paid for on delivery, free from any claim growing out of the contract of A. with D. or R., for any breach of that contract, as to the time of shipping the cargoes.

(2) A. was liable to G. for the price of the cargoes, with interest from their delivery.

[No. 256.]

Argued Apr. 16, 17, 1885. Decided May 4, 1885.

IN ERROR to the Circuit Court of the United States for the District of South Carolinia.

The history and facts of the case appear in the opinion of the court.

Messrs. **S. Lord** and **James Conner**, for plaintiff in error.

Messrs. **Charles Nephew West** and **James Lowndes**, for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court: [493]

This is an action at law, brought in the Circuit Court of the United States for the District of South Carolina, by John C. Grafflin against the Atlantic Phosphate Company, a South Carolina Corporation. The complaint sets forth as a first cause of action, that the defendant is indebted to the plaintiff in the sum of $2,792.60, with interest from February 24, 1881, "the same being due to the plaintiff for a cargo of kainit, sold and delivered by the plaintiff to the defendant," on that day, "at the special instance and request of the defendant." It sets forth four other like causes of action, for cargoes of kainit, amounting to $3,347.55, March 3, 1881; $1,743.37, March 15, 1881; $5,083.53, March 16, 1881; and $2,483.37, March 18, 1881. Bills of particulars are annexed, showing the ves-

*Head notes by *Mr. Justice* BLATCHFORD.

sels, quantities and prices. The total amount is $15,450.42; and there is added a cause of action for that sum, with interest, as money advanced, laid out and expended, by the plaintiff for the use of the defendant, at its special instance and request. The cargoes are stated to amount to 2,500 tons.

The answer contains a general denial of all the causes of action. It also avers a purchase by the defendant, in May, 1880, through one Dunan, of Baltimore, representing himself as agent of one Radde, of Hamburg, of 2,500 tons of kainit, to be shipped between August 1, 1880, and October 31, 1880; further purchases by it, afterwards, from the same parties, of 1,550 tons, for future shipment, all by January 1, 1881; the receipt by it of, and payment for, 1,080 tons on the 2,500 tons' contract; its receipt of the five cargoes sued for; and its willingness to pay for the cargoes according to the contracts therefor, subject to its claims for [494] damages for the nonperformance, by the vendors, of the contract of May, 1880, in that the cargoes were not shipped within the time and in the manner specified in the contract, but arrived when the business of the year was over, and when the goods were much depreciated in value; which damages, amounting to $9,586.62, it claims to recoup.

The answer also avers, that the defendant purchased the cargoes mentioned in the complaint, at Hamburg, under the contract, and received the same under the circumstances above set forth, and was, from the time of the shipment of the kainit, the owner thereof; that the invoices for all of the cargoes shipped by Radde to the defendant were in the name of Dunan; that, on January 25, 1881, Dunan requested the defendant to return his invoices and substitute similar ones in the name of Grafflin, and it did so, but it never made any new contract, in regard to any of the cargoes, with Grafflin; that it never received any notice of the assignment of the contract or cargoes to Grafflin; that, if Grafflin advanced money on the cargoes, he did so subject to the rights of the defendant under the contract, and was conversant with those rights; and that Grafflin was the real principal in the contract.

To the counterclaim so set up the plaintiff replied, alleging that he, and not Radde, owned the kainit; that it was sold and delivered to, and accepted and received by, the defendant, as the property of the plaintiff, free from the claim made for recoupment; and that he and the defendant never occupied any other relations than those of seller and buyer of the kainit, set forth in the complaint, at the prices agreed to be paid.

The case was tried before a jury, and resulted in a verdict for the plaintiff for the $15,450.42, with interest on the amount of each cargo from the date of its delivery; and there was a judgment accordingly, to review which the defendant brings this writ of error.

The bill of exceptions embodies all the evidence, by a stipulation between the parties, made in this court. There was no dispute as to any material question of fact. The transactions originated in the following letter, dated April 29, 1880, from Dunan, at Baltimore, to Pelzer, Rodgers & Co., at Charleston, they be- [495] ing the general agents there of the defendant: "Radde cables sell Atlantic 2,500 tons b quality Eagle Mine genuine raw kainit, gu anteed to test not below 24 per cent sulph of potash by the German chemist, Dr. Ul to be shipped during the summer and f months—say from August to October inc sive—for $7.50 per ton of 2,240 lbs. in taki Hamburg weights. The kainit to be delive at your Atlantic Phosphate Company's wha Ashley river, Port of Charleston, S. C. T price of $7.50 per ton includes cost, freight a insurance to your wharf. From the price, as quantity is large, I will rebate 10 cents per t Terms of payment, cash on delivery of e cargo." Pelzer, Rodgers & Co. replied, writing to Dunan, on May 10, 1880, as follo "We will take 2,500 tons of best kainit, as scribed by you, to test not less than 24 per c sulphate of potash, to be delivered at our wh on Ashley river, at seven dollars $\frac{50}{100}$ per ton 2,240 lbs."

To enable Radde to send the cargoes to defendant, the plaintiff, who resided in Ba more, at the request of Dunan, and for a co pensation of 1 per cent commission, paid him by Dunan, sent to Radde, at Hamburg credit with Brown, Shipley & Co., of Lond for the amount of five cargoes, under wh Radde drew on Brown, Shipley & Co., pay them their commission, and Brown, Shipley Co. drew on the plaintiff. They received shipping documents from Radde and sent th to the plaintiff, and he paid their drafts. directed them to ship the cargoes to Charlest The shipping documents consisted of bills lading, charter party, consular invoices for try at the custom-house, certificates of anal and weight in Hamburg, and memorandum voices. The declarations before the United St consul, at Hamburg, were made by Radde owner, and they named the plaintiff as the c signee at Charleston; and they and the consu certificates named Charleston as the inten port of entry. The invoices referred to in, annexed to, the consular certificates named plaintiff as the consignee. The bills of lading forth that the kainit was to be delivered at Port of Charleston, at the Atlantic Phosph Company's wharf, on Ashley River, "unto M C. Grafflin, or his assigns." The Hamburg larations and invoices and consular certific were presented by the plaintiff at the cust house at Baltimore, and he made oaths to tries, before a deputy collector at the cust house there that the goods were assigned to C. Grafflin, Charleston," and the papers v verified by the collector of customs at B more, and were passed by the cashier of toms at that custom-house. These papers the bills of lading, in this condition, for al cargoes (the bills of lading probably indo in blank by the plaintiff, though this is clear), were put by the plaintiff into the ha of Dunan, at Baltimore, and Dunan sent t all to Pelzer, Rodgers & Co., before Jan 25, 1881, with invoices made out in his (nan's) name, for the five cargoes in quest On that day, Dunan wrote to the compan follows: "Atlantic Phosphate Co., Cha ton, S. C. Gentlemen, I wish to withd all my invoices sent you with the docum for these cargoes, and substitute instead closed invoices from Mr. John C. Graf

[illegible] cargoes came out in his name, and [illegible] will please return to me my invoices, by re[illegible] and in remitting for these cargoes, please [illegible] name of John C. Grafflin, through me. [illegible] I will always furnish invoice in [illegible] in which the cargo comes for[illegible] I inclose you herewith Mr. John C. [illegible]'s invoices for the cargoes which are [illegible] forward, and for which you have [illegible]." In compliance with this re[illegible] the invoices which Dunan had sent were [illegible] to him by the defendant, and it re[illegible] the invoices from Grafflin. All this took [illegible] before any of the five cargoes arrived at [illegible]. The following is the form of one [illegible] invoices: "Baltimore, Janu[illegible] Atlantic Phosphate Co., Charles[illegible] bought of John C. Grafflin: A car[illegible] kainit, shipped per Batavia, Capt. [illegible] to Charleston, S. C., weighing 400 [illegible] at $7.50 per ton," etc. The total [illegible] these invoices was $14,450.42. At [illegible] Pelzer, Rodgers & Co. had in their [illegible] a power of attorney, dated August [illegible] executed by the plaintiff, appointing [illegible] of that firm, five in number, by [illegible] of them, his attorneys, to en[illegible] at the custom-house at Charles[illegible] merchandise which might thereafter be [illegible] by him, or which might arrive con[illegible] to him, or in which he might be inter[illegible] principal or otherwise. When the sev[illegible] arrived at Charleston, Mr. Ingles[illegible] of the firm of Pelzer, Rodgers & Co., [illegible] under this power of attorney, entered [illegible] custom-house there in the name of [illegible]. The entries described the mer[illegible] "imported by John C. Grafflin," and [illegible] "John C. Grafflin, per Thos. S. [illegible] Atty.," and Inglesby took the entry [illegible] of the owner, to the invoices and [illegible] of lading presented on entry, and in each [illegible] that, to the best of his knowledge, J. C. [illegible] was the owner of the goods "men[illegible] in the annexed entry."

[illegible] papers, the defendant received and [illegible] the cargoes and then refused to pay [illegible] for them. He had confidence in [illegible] responsibility of the defendant, [illegible], was willing to deliver the car[illegible] and waive any lien on them, and accept [illegible] as his debtor. The defendant did [illegible] not make any complaint as to the [illegible] of the kainit. No objection based on a [illegible] of the contract of May, 1880, as to the [illegible] of delivery, was made until after the [illegible] were received. The plaintiff, if [illegible] at the time of any such claim, could [illegible] the cargoes elsewhere. He bought [illegible], but he did not assume the contract, [illegible] under no obligation to fulfill it or to [illegible] the cargoes. But the defendant, in ac[illegible] the cargoes from him, on all the facts [illegible], as above set forth, entered into the [illegible] of purchaser of the cargoes from him, [illegible] for on delivery, without reference to [illegible] against Radde or Dunan for a breach [illegible] of May, 1880. It was admitted, [illegible] that the damages for such breach [illegible].

[illegible] of the trial, the defendant prayed [illegible] instructions to the jury, each of [illegible] was refused by the court, and to each

refusal the defendant excepted: "(1.) If, from the testimony, the jury believe that the Atlantic Company never requested Grafflin to sell them these cargoes, and that there was no agreement between Grafflin and the Atlantic Company for the sale by Grafflin, and the purchase by the Atlantic Company, of these cargoes, the action cannot be supported, and the verdict should be for the defendant. (2.) If, from the evidence, the jury are satisfied that the Atlantic Company purchased these cargoes from Radde, and that all that Grafflin did was to advance money to Radde or furnish a credit to him, and that he received the bills of lading from Radde as security for his advances, then Grafflin had only a special property, and his transfer of the bills of lading to the Atlantic Company was not a sale, and he cannot maintain an action for goods sold and delivered. (3.) To produce a change of property from the shipper to the consignee, it is essentially necessary that the goods should have been sent in consequence of some contract between the parties by which the one agreed to sell and the other to buy. (4.) If the jury believe that Grafflin was aware of the contract of sale made by Dunan for Radde to the Atlantic Company, and that the transfer of the bills of lading by Grafflin to the Atlantic Company was in pursuance of, and in execution of, that contract, then there was no sale by Grafflin to the Atlantic Company, and the plaintiff cannot recover. (5.) If Grafflin had a lien on these cargoes for his advances to Radde, and parted with the goods without any agreement by the Atlantic Company to pay his advances, he has lost his lien and must look to the party to whom he advanced, for his redress." [498]

The Circuit Court instructed the jury as follows: "If the jury find from the evidence, that the defendant, through Dunan, purchased from Radde, upon a contract made between Radde and the defendant, the kainit mentioned in the pleadings and evidence, and that the plaintiff made the advances to Radde for the purchase of the kainit, and had the bills of lading and invoices made out in his name as the proof of his ownership and the amount of his advances, and forwarded to Pelzer, Rodgers & Co. his power of attorney authorizing them to enter the said merchandise in his name as owner, they being the agents of the Atlantic Phosphate Company, and to deliver the same to the said Company, which acepted the merchandise, then the jury must find for the plaintiff the amount of the plaintiff's advances on the cargoes in suit, although they may find that Radde or Dunan did not faithfully perform the contract spoken of above, the claim of the defendant for damages, if any, being against them and not against the plaintiff." To this instruction the defendant excepted. [499]

The jury having come in with a verdict for the plaintiff for $15,450.42, with interest from the date of the delivery of each cargo, the defendant prayed the court to instruct the jury that interest was not due on open account. The court ruled that interest was due, and so instructed the jury, and the defendant excepted. The verdict was then rendered for $15,450.42, "with interest on the amount of each cargo from the date of delivery thereof, being five days after the date of entry," all objection to the form being waived.

The facts of the case, and the views before stated as to the relations of the parties, show that the propositions contended for by the defendant were properly rejected, and that there was no error in the instructions to the jury. Indeed, the court might properly have directed a verdict for the plaintiff. A contract of sale by Grafflin to the defendant, and of purchase by it from him, arose, in judgment of law, out of the undisputed facts. The plaintiff had become the owner of the goods. The defendant, by the acceptance of the cargoes under the documents, was estopped from treating him as other than owner. It abandoned, so far as the plaintiff was concerned, its relation with Dunan and Radde, and its claim for damages, and cannot now alter the position of the plaintiff to his detriment.

The "advances" spoken of in the instruction given were the same as the amount of the "invoices" there spoken of, made out in the name of the plaintiff. The amount of both was $15,450.42, and that was the amount of the recovery, being the sale price. There was no error in the form of the instruction, to the prejudice of the defendant.

There having been a contract of sale, by mutual assent, and the contract having been executed by the vendor, by the delivery of the goods, the liability of the vendee to pay for [500] them on delivery, in the absence of other terms, accrued, and the law raises an implied contract to pay interest from delivery, on the purchase money, which was liquidated by the terms of the invoices in the name of the plaintiff, received and retained by the defendant. Such is the rule of the general commercial law. *Dodge* v. *Perkins*, 9 Pick., 368, 388; *Foote* v. *Blanchard*, 6 Allen, 221; *Van Rensselaer* v. *Jewett*, 2 N. Y., 135; *Esterly* v. *Cole*, 3 N.Y., 502. The case is not one of an open running account, but is of the class where there is a stipulated term of credit, which has expired.

We do not find anything in the decisions in South Carolina which would forbid the allowance of interest in the present case. In *Rice* v. *Hancock*, 1 Harp. (S. C.), L., 393, in 1824, interest was disallowed on a book account for goods, because, although there was a special agreement to pay for the goods in cotton in sixty days, and otherwise to pay interest after sixty days, there was no count on the agreement. A like decision was made in *Schermerhorn* v. *Perman*, 2 Bailey, 178, in 1831. In *Lindsey* v. *Bland*, 2 Speer, 30, in 1843, on a count for negroes sold, but no count for interest, interest was allowed after twelve months, because a twelve months' note was to have been given. In *Ancrum* v. *Stone*, Id., 594, in 1844, the rule is stated, that interest is allowable on a liability to pay money, if the sum is certain, from the time when, by construction of law, the payment is demandable. In *Kennedy* v. *Barnwell*, 7 Rich., 124, in 1854, under a contract to pay a fixed sum for digging a canal, no time of payment being mentioned, interest was allowed from the completion of the work. In *Kyle* v. *R. R. Co.*, 10 Id., 382, in 1857, interest was allowed on the value of cotton lost by a common carrier, on the ground that the cotton was a cash article at the place of delivery, and its value was taken on a cash sale, as cash lost by the plaintiff, who was, therefore, entitled to interest on the value. In *Arnold* v. *House*, 12 S. C., 600, in 1879, and in *Childs* v *Frazee*, 15 Id., 612, in 1880, interest was recov ered against a purchaser of land for cash at judicial sale.

In the present case, the objection made the trial was not because of the want of a cour for interest, but because interest was "not du on an open account." The case was not or of an open account, in the sense of any rule to interest, and the holding of the Court, th interest was due, was correct.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U.

WILLIAM R. SCHOFIELD, *Plf. in Err*

v.

CHICAGO, MILWAUKEE AND ST PAUL RAILWAY COMPANY.

(See S. C., Reporter's ed., 615-619.)

Personal injuries — contributory negligence practice—when proper for court to direct ve dict for defendant.

*1. The doctrine laid down in Railroad Co. v. Hou ton, 95 U. S., 697, cited and applied to the facts this case.

2. Where a person, in a sleigh drawn by one hor on a wagon road, approaching a crossing of a ra road track with which he was familiar, could ha seen a coming train during its progress through distance of 70 rods from the crossing, if he h looked from a point at any distance within 600 fe from the crossing, and was struck by the train the crossing and injured, he was guilty of contri utory negligence, even though the train was n a regular one, and was running at a high rate speed, and did not stop at a depot 70 rods from t crossing in the direction from which the tra came, and did not blow a whistle or ring a bell t tween the depot and the crossing.

3. On these facts, it was proper for the trial cou to direct a verdict for the defendant.

[No. 263.]

Argued Apr. 17, 21, 1885. Decided May 4, 18

IN error to the Circuit Court of the Unit States for the District of Minnesota.

The history and facts of the case appear the opinion of the court.

Messrs. **S. L. Pierce** and John B. Sanbo for plaintiff in error.

Mr. **Chas. E. Flandrau**, for defendant error.

Mr. Justice **Blatchford** delivered the op ion of the court:

This is an action brought by William R. Sc field against the Chicago, Milwaukee and Paul Railway Company, in a State Court Minnesota, and removed by the defendant i the Circuit Court of the United States for District of Minnesota. It was tried befor jury, and, after the plaintiff had rested his ca the jury, under the instruction of the cou rendered a verdict for the defendant. T suit was one to recover damages for perso injuries to the plaintiff, caused by his be struck by a train running on the railroad of defendant, while the plaintiff, in a sleigh dra by one horse, was endeavoring to cross track, on the 13th of February, 1881, at N port, in Minnesota. The train was runn

*Head notes by *Mr. Justice* BLATCHFORD.

[illegible] on the east bank of the Mississippi River, through Newport, to St. Paul, about four [illegible] in the afternoon, in daylight, on Sunday. The track was straight from the crossing to a point 2,200 feet south of it, and the country was flat and open. The plaintiff was himself driving, with a companion in the sleigh, northerly direction, on a wagon road which ran in the same general course with the railroad, and to the west of it, and attempted to cross it from the west to the east, as the train approached from the south. The crossing was [illegible] mile to the north of the depot at Newport. Opposite the depot, the wagon road was 280 feet distant to the west of the depot. The plaintiff had a slow horse, and was following the beaten track in the snow. When he arrived at a point in the wagon road 600 feet from the crossing, he could there, and all the way from there till he reached the crossing, have an unobstructed view of the railroad track to the south, and of any train on it, from the crossing north to the depot; and, when he reached a point in the wagon road 33 feet from the crossing, he could have an unobstructed view to a considerable greater distance southward beyond the depot. The evidence shows, that, if the train had passed the depot when the plaintiff was at a point 600 feet, or any less number of feet from the crossing, he could not have failed to see the train, if he had looked for it; and that, if the train had not reached the depot, when the plaintiff arrived at a point 33 feet from the crossing, he could not at that point, or at any point in the 33 feet, have failed to see the train beyond and to the south of the depot, if he had looked for it. When the train passed the depot the plaintiff was at least 100 feet from the crossing. The train consisted of a locomotive engine and seven or eight cars. The engine reached at a point 4,200 feet south of the depot, and was the whistling place for that depot. The wind was blowing strongly from north to south. The man in company with the plaintiff was killed by the accident, as was the horse. The plaintiff resided in the neighborhood, and was familiar with the crossing. After the accident, the man, horse and sleigh were found on the west side of the railroad, showing that they had been struck as they were entering on the crossing. The train was not a regular one [illegible] was done at the time of the accident; was moving at a high rate of speed; it did not stop at the depot; and it gave no signal by sounding a whistle, or ringing a bell, after it passed the depot.

The ground upon which the circuit court directed a verdict for the defendant (2 McCrary, [illegible]) was, that the plaintiff, by his own showing, was guilty of contributory negligence, whatever negligence there may have been on the part of the defendant. Applying the test that, it would be the duty of the court, on the plaintiff's evidence, to set aside, as contrary to the evidence, a verdict for the defendant if given, the court had authority to direct a verdict for the defendant, it considered the case under the rules laid down in *Improvement Co.* v. *Munson*, 14 Wall., 442 [Bk. 24, L. ed. 867], and especially in *R. R. Co.* v. *Houston*, Id., 697 [Bk. 24, L. ed. 558], and arrived at the conclusions of law, that notwithstanding the fact that the train was not a regular one, nor the fact of its high rate of speed, excused the plaintiff from the duty of looking out for a train; that the fact that it did not stop at the depot could avail the plaintiff only on the view that, hearing a whistle from it, as it was south of the depot, he supposed it would stop there and so failed to look, but that, in such case, he would have been negligent, because it was not certain the train would stop at the depot, and he would have had warning that a train was approaching; that the neglect of the train to [618] blow a whistle or ring a bell between the depot and the crossing did not relieve the plaintiff from the duty of looking back, at least as far as the depot, before going on the track; and that, in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision, and of the fact that he was at least 100 feet from the crossing when the train passed the depot, and could then have seen it if he had looked, and have avoided the accident by stopping until it had passed by, he was negligent in not looking.

These conclusions of law approve themselves to our judgment, and are in accordance with the rules laid down in the cases referred to. In *R. R. Co.* v. *Houston*, it was said: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's *employés*, in these particulars, was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant." The court added, that an instruction to render a verdict for the defendant would have been proper.

These views concur with those laid down by the Supreme Court of Minnesota, in *Brown* v. *R. R. Co.*, 22 Minn., 165, and are in accord with the current of decisions in the courts of the States.

It is the settled law of this court, that, when the evidence given at the trial, with all the inferences which the jury could justifiably draw [619] from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Improvement Co.* v. *Munson*, 14 Wall., 442 [81 U. S., bk. 20, L. ed. 867]; *Pleasants* v. *Fant*, 22 Id., 116 [89 U. S., bk. 22, L. ed., 780]; *Herbert* v. *Butler*, 97 U.S. 319 [Bk. 24, L. ed. 958]; *Bowditch* v. *Boston*, 101 Id., 16 [Bk. 25, L. ed. 980]; *Griggs* v. *Houston*, 104 Id., 553 [Bk. 26, L. ed. 840]; *Randall* v. *R. R. Co.*, 109 Id. 478 [Bk. 27, L. ed. 1003]; *Anderson Co. Comrs.* v. *Beal*, 113 Id., 227 [Bk.

[illegible] Co., 16, 316 [illegible] Rule was rightly applied [illegible] Court in the present case.

[illegible] affirmed.

[illegible] Cir. Ct., Sup. Court, U. S.

[illegible]

[illegible] AND CLAIBORNE STREETS RAILROAD COMPANY, Garnishee, Plff. in Err.,

v.

JUDAH HART.

(See S. C. Reporter's ed., [illegible])

[illegible] of [illegible] petition; sufficiency of; [illegible] of oath to—jurisdiction by judgment [illegible] of New Orleans—practice—motion in [illegible] not reviewable on error.

[illegible] commenced in a State Court, No. [illegible] in the Circuit Court of the United [illegible] the next day, entitled in the suit as [illegible] by the attorneys, not sworn to, re[illegible] the suit as commenced, and asking for a [illegible] under subdivision 3 of § 639 of the Revised [illegible] stating facts showing a right to a re[illegible] under that subdivision, but also un[illegible] Act of March 3, 1875, 18 Stat. at L., 470, [illegible] by an affidavit, made by the plain[illegible] stating that "he is the plain[illegible] in the suit, as No. 4414, and giving its title, and [illegible] of the court, and alleging "that he has [illegible] believe, that, from preju[illegible] State Court." The State Court [illegible] the cause to be removed, and the Circuit [illegible] on motion of the defendant, to re[illegible]

Held:

1. The affidavit was sufficient for a removal under subdivision 3 of § 639;

2. The petition made out a case for a removal under the Act of 1875;

3. The absence of an oath to the petition was, at most, only an informality, which the defendant waived by not taking the objection on the motion to remand.

2. H., having obtained a money judgment against the City of New Orleans, in the Circuit Court of the United States for the Eastern District of Louisiana, filed in that court a supplemental petition and interrogatories, in accordance with the second paragraph of Article 246 of the Code of Practice of Louisiana, added by the Act of March 30, 1839, against a street railroad corporation, as a debtor to the city, praying that it be cited, as garnishee, and answer the interrogatories, and pay the judgment. The corporation was cited to answer, and did so, to the effect that it owed nothing to the city but some taxes. H. filed a traverse to the answers, in law and in fact, and it was tried before a jury, which found a verdict for the plaintiff, for a sum of money, on which judgment was rendered. Before it was signed, the corporation moved to expunge it and to arrest it, for specified reasons. The motion was overruled, a bill of exceptions was taken thereto, and judgment was signed. No bill of exceptions was taken in regard to the trial; Held, that the motion in arrest had no more effect than a motion for a new trial, and could not be reviewed on a writ of error.

3. The garnishment proceedings were authorized by § 916 of the Revised Statutes, being authorized by laws of Louisiana, in force when § 916, formerly § 8 of the Act of June 1, 1872, chap. 255, 17 Stat. at L., 197, was enacted.

4. The remedies supplementary to judgment, adopted by § 916, were those then provided by the laws of Louisiana in regard to judgments in suits of a like nature or class, and not the provisions of the Act of the Legislature of Louisiana, passed March 17, 1870, Sess. Laws of 1870, Extra Session, No. 5, p. 10, in regard to judgments against the City of New Orleans.

5. Questions not raised on the trial before the jury and saved by a bill of exceptions, cannot be considered by this court, on a writ of error.

[No. 283.]

Submitted Apr. 24, 1885. Decided May 4, 1885.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The history and facts of the case appear in the opinion of the court.

Mr. **Jas. R. Beckwith**, for plaintiff in error.

Messrs. **E. H. Farrar, E. Howard McCaleb** and **A. G. Brice**, for defendants in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

On the 3d of March, 1882, Judah Hart obtained a judgment, in the Circuit Court of the United States for the Eastern District of Louisiana, against the City of New Orleans, for $121,697.18, with five per cent per annum interest thereon until paid, and costs, in a suit commenced by him in the Civil District Court for the Parish of Orleans, and State of Louisiana against the city, to recover the amount of sundry debts due by the city, for labor done and services rendered, and specially specified which debts the creditors had assigned to him. The suit was removed into the Circuit Court of the United States by the plaintiff, and a motion made to that court to remand it was denied.

On March 15, 1882, the plaintiff filed in the Circuit Court a supplemental petition and interrogatories, in accordance with the second paragraph of Article 246 of the Code of Practice of Louisiana, added by the Act of March 30, 1839, averring that he had obtained a writ of fieri facias, in the suit in the Civil District Court, that the Canal and Claiborne Streets Railroad Company, a corporation created by the laws of Louisiana, was indebted to the city, and in execution of the writ, was in possession or [illegible] debtor, he had [illegible] the hands of [illegible] it be cited [illegible] the amount [illegible] creditor, he [illegible] the judgment [illegible] to whether [illegible] city or has [illegible] made on [illegible] garnishee, [illegible] the court [illegible] [illegible] interrogatories [illegible]

• Head notes by Mr. Justice BLATCHFORD.

[illegible]pany, made garnishee herein, now comes [illegible] court, and for answer to the interrogatories [illegible] by and through its president, E. [illegible] says.

[illegible] interrogatory. No; except taxes of [illegible] 1882.

[illegible] interrogatory. No; except taxes of the [illegible]

[illegible] interrogatory. No.

[illegible] for a full and correct statement of the [illegible] which the above answers are made, [illegible] further answering, says, that the [illegible] of the right of way of the said Canal [illegible] Claiborne Streets Railroad Company was [illegible] for and in consideration of a bonus [illegible] two sixteenths of a cent per passenger, pay[illegible] monthly; the rate of fare is five cents per [illegible]; that the total receipts of the Com[illegible] from 1st March, 1870, to 15th March, [illegible]:

For the year	1870	$118,515 20
" "	1871	152,098 75
" "	1872	144,378 05
" "	1873	136,656 60
" "	1874	115,625 40
" "	1875	100,095 95
" "	1876	96,101 60
" "	1877	89,701 90
" "	1878	90,205 20
" "	1879	89,267 25
" "	1880	95,269 45
" "	1881	98,591 70
" "	1882	20,889 60
		$1,347,891 65

[illegible] respondent further says, that the re[illegible] from the 16th March, 1872, to the 15th [illegible], 1882, amount to the sum of $1,046,-[illegible]

[illegible] respondent, further answering, says, [illegible] is informed and believes that the [illegible] was in lieu and place of the license; that [illegible] could not claim both; that it has [illegible] to demand the bonus, but has imposed a [illegible] the Company, and the Company has [illegible] in 1880, based on the receipts of [illegible] 1881, based on the receipts of 1880; and [illegible] 1882, based on the receipts of 1881, viz., [illegible] year, making in all $1,125, thereby [illegible] the Company from any obligation to [illegible] bonus for said years. And respondent [illegible] says, that he is informed and believes [illegible] any claim for the bonus based on the re[illegible] preceding years is prescribed.

[illegible] further swears, that the said [illegible] and Claiborne Streets Railroad Company [illegible] been garnisheed in the suits of *Myra* [illegible] *Samuel Smith, Subrogee*, v. *New* [illegible] No. 2,[illegible] of the U. S. Circuit Court, [illegible] *Parsons* v. *New Orleans*, No. 8,068 of [illegible] and that, should judgments be ren[illegible] against said Company, they will amount [illegible] than the Company can in any event [illegible]

[illegible] further says, that the Company [illegible] claim against the City of New Orleans for [illegible] caused by overflows in 1869, 1871 and [illegible] and against which it should have been [illegible] by the city; and that the amount due [illegible] and damages exceeds any amount which [illegible] be due for the bonus, if any was due.

For this and other reasons the city has not required the bonus.

On March 30, 1882, the plaintiff, according to the practice in Louisana, filed a traverse of the answers, and the court made an order, which set forth that, on motion of the plaintiff, and on suggesting to the court that the answers were false, and that the Corporation was indebted to the city in larger sums than stated in the answers, and that the plaintiff traversed the answers, in law and in fact, it was ordered that the Corporation show cause, on April 5, 1882, why the interrogatories should not be taken for confessed, and why judgment should not be rendered against it for the amount of the plaintiff's claim, with interest and costs. On March 31, 1882, a copy of this order was served on the Corporation.

On the 5th of April, 1882, a stipulation in writing between the plaintiff and the city was filed, agreeing that all sums paid by the Corporation should be deposited in the registry of the court, to await the decision whether the money was subject to seizure under the plaintiff's execution.

On the same day, the traverse to the answer came on for trial before a jury. The record states that, "after hearing the pleadings, the evidence and arguments of counsel, and receiving a charge from the court," the jury found a verdict for the plaintiff against the Corporation, as garnishee, "for the following sums," naming thirteen several sums, with interest on each, at 5 per cent per annum, from a specified date, being a total of $33,684.74, "with interest on the various sums from dates as above stated, until payment." On this verdict and in accordance with it, a judgment was, on the same day, rendered, that the corporation, garnishee, be condemned to pay to the plaintiff $33,684.74, with interest at the rate of 5 per cent per annum "on the following sums, from the following dates," specifying as in the verdict, until paid, with costs; and ordering that the amount, with interest, be deposited in the registry of the court, subject to the terms of the foregoing stipulation. The judgment was, on the 19th of April, 1882, amended *nunc pro tunc*, so as to order that the garnishee pay that amount, with interest, into the registry of the court, "subject to the rights of all parties concerned." The entire judgment was signed April 26, 1882. [659]

The Corporation made a motion for a new trial, which was refused on April 21, 1882. It also filed and made a motion, that the proposed judgment written up on the minutes and record, against it as garnishee, be expunged therefrom, and be never signed and made operative, and that any judgment by reason of the verdict be arrested, for ten specified reasons. This motion was overruled on April 26, 1882, and then the judgment was signed. To reverse this judgment the Corporation has brought a writ of error.

The record contains a bill of exceptions, which states that, at the same term at which all the foregoing proceedings took place, and before any final judgment against the Corporation, as garnishee, had been signed and become final, the Corporation made the motion in writing for arrest of the judgment, and both parties appeared, and the court overruled and

refused the motion, and the Corporation excepted to the ruling and judgment of the court in that particular.

It is assigned for error, that the Circuit Court never acquired jurisdiction of the original suit against the city. The petition by which the original suit was commenced in the State Court was filed November 4, 1881, and is marked No. 4,414. The citation was issued and served on the city on that day. The plaintiff's petition for removal is entitled in the suit as No. 4,414. It was filed November 5, 1881, and is signed by the attorneys for the plaintiff, and states that the suit was commenced about November——, 1881; "that your petitioner was, at the time of bringing said suit, and is now, a citizen of the State of New York, and a resident thereof"; and "that there is, and was at the time said suit was brought, a controversy therein between your petitioner, and the said defendant, the City of New Orleans, who is a citizen of the State [660] of Louisiana, and a resident thereof." It also states, that the removal is desired "in pursuance of the Act of Congress in that behalf provided, to wit: the Revised Statutes of the United States, § 639, subdivision 3"; and that the petitioner "has filed the affidavit required by the statute in such cases." The petition was accompanied by an affidavit, filed therewith, sworn to by the petitioner, in the City of New York, before a Commissioner for Louisiana, on the 25th of October, 1881, in which the petitioner stated that "he is the plaintiff in the case of *Hart* v. *New Orleans*, No. 4,414, Civil District Court, Parish of Orleans, State of Louisiana, and that he has reason to believe, and does believe, that, from prejudice and local influence, he will not be able to obtain justice in said State Court." The State Court, on consideration of the petition, affidavit and bond, made an order removing the cause. In the motion to remand the cause, made in the Circuit Court, by the city, one of the grounds of the motion, which was overruled, was, that there was no legal affidavit, because the suit named in it was filed ten days after the affidavit was made. This ground is urged here, but we do not regard it as of any force. The affidavit sufficiently identified the suit, and was, in this case, as effective for the purposes of the statute as if made after the suit was brought. Besides, the petition for removal made out a case for removal under § 2 of the Act of March 3, 1875, 18 Stat. at L., 470; and the reference to the prior statute did not impair the efficacy of the facts. *Removal Cases*, 100 U. S., 457, 471 [Bk. 25, L. ed. 593, 598]. The absence of an oath to the petition was, at most, only an informality, which could be and was waived by the city. It made no such objection in its motion to remand. This view is in accordance with the ruling in *Ayers* v. *Watson*, 113 U. S., 594, 598 [Bk. 28, L. ed. 1093], as to modal and formal matters, under section 3 of the Act. We have considered the question of removal because it goes to the jurisdiction of the Circuit Court, and is raised for our consideration by the record.

The verdict of the jury on the trial of the traverse to the answer was rendered April 5, 1882. No bill of exceptions was taken at the trial. The motion to expunge the proposed judgment, and to arrest any judgment on the [661] verdict, was not filed till April 21, 1882, and had no more effect than a motion for a ne trial, and, therefore, under our settled practic cannot be reviewed here, on this writ of erro although there is a bill of exceptions in regar to it.

It is contended that when the *fi. fa.* was i sued against the city, there was no law und which a *fi. fa.* could issue against the cit This point was not taken in the court belo It does not appear in the motion in arrest judgment, or in the bill of exceptions, or in t assignment of errors accompanying the writ error. It was a point which should have be raised and saved when the traverse to the a swer was tried before the jury. But this w not done. Still, as the garnishment proceedin were based on the *fi. fa.*, it is proper to sa that the proceedings in the case were warrant by section 916 of the Revised Statutes, whi provides as follows: "The party recovering judgment in any common-law cause, in any C cuit or District Court, shall be entitled to simil remedies upon the same, by execution or oth wise, to reach the property of the judgment de or, as are now provided in like causes by the la of the State in which such court is held, or any such laws hereafter enacted which may adopted by general rules of such Circuit or D trict Court; and such courts may, from time time, by general rules, adopt such State laws may hereafter be in force in such State in re tion to remedies upon judgments, as aforesa by execution or otherwise." That section of statute was considered by this court, in *Ex pa Boyd*, 105 U. S., 647 [Bk. 26, L. ed. 1200], a was held to apply to proceedings supplement to execution, to examine the judgment deb in regard to his property, under a judgm rendered in a common-law cause. We are a of opinion that it covers the proceedings had this case to reach the property of the ci Those proceedings were authorized by laws the State of Louisiana in force when § 6 of Act of June 1, 1872, chap. 255, 17 Stat. at 197, now § 916 of the Revised Statutes, enacted.

It is urged that, by § 2 of the Act of Legislature of Louisiana, passed March 17, 1 (Sess. Laws of 1870, Extra Session, Act No. p. 10), it was made unlawful to issue any of execution or *fieri facias*, from any of courts in Louisiana, against the City of N Orleans, to enforce the payment of any ju ment for money against that city. But we of opinion that the provisions of that spe Act, in reference to judgments against City of New Orleans, were adopted by sect 916. The meaning of that section is, that remedies, by execution or otherwise, on a ju ment in a common-law cause, in a Circuit Co shall be the same as were then provided by laws of the State in respect to judgment suits of a like nature or class. "Like cau is the expression. By article 641 of the Cod Practice of Louisiana, it was and is provi that, "When the judgment orders the payn of a sum of money, the party in whose fav is rendered may apply to the clerk and ob from him a writ of *fieri facias* against the p erty of his debtor." It is this provision, the garnishee proceedings consequent upo provided by the laws of Louisiana in respe judgments generally, of a like nature or c

[illegible] here in the present case, which the Act of Congress adopted as remedies for the judgment creditor, in a common-law cause, in the Circuit Court. And such has been the uniform [illegible] in the Circuit Court at New Orleans. [illegible] v. *Morris*, 8 Woods, 115; *Hart* v. [illegible] *Orleans*, 12 Fed. Rep., 292; *New Orleans* v. *Pickles*, decided by *Mr. Justice* [illegible], in 1879, unreported. The exception [illegible] by the State as to the City of New Orleans may be of force as to suits in the Courts of the State, but it is not an exception which [illegible] *propria vigore* in the Circuit Court.

The other assignments of error seek to raise two questions: that the debt of the Corporation to the city was part of its public revenues, and not subject to seizure or levy; that the city was not made a party to the garnishee proceedings; that the supplemental petition does not show that the debt to the city is not public property; that there was no issue raised to be tried by jury; that the character and origin of the [illegible] of the Corporation to the city were not shown to be such as would support the [illegible] against the Corporation; and that the [illegible] included in the verdict was improperly [illegible] and erroneously computed. These questions not having been raised on the trial before the jury, and saved by a bill of exceptions, cannot be considered by this court on a writ of error.

The proceedings of record appear to have been entirely regular, and in accordance with the statute and practice of Louisiana.

Judgment affirmed.

[illegible] Test:

James H. McKenney, Clerk, Sup. Court, U. S.

CHARLES STUART WURTS ET AL., *Plffs. in Err.*,

v.

ABEL HOAGLAND ET AL., Commissioners of Drainage, Etc.

(See S. C., Reporter's ed., 606-615.)

Constitutional law—due process of law—drainage act of New Jersey not unconstitutional.

The Statute of New Jersey of March 8, 1871, providing for the drainage of any tract of low or marsh land within the State, upon proceedings instituted by at least five owners of separate lots of land included in the tract, and not objected to by the owners of the greater part of the tract, and for assessment by commissioners, after notice and [illegible] of the expenses upon all the owners, does not deprive them of their property without due process of law, nor deny to them the equal protection of the laws, within the meaning of the Fourteenth Amendment of the Constitution of the United States.

[No. 193.]

Argued Nov. 20, 1885. *Decided May 4, 1885.*

IN ERROR to the Supreme Court of the State of New Jersey.

The history and facts of the case appear in the opinion of the court.

Dissenting opinion by Mr. Justice GRAY.

[illegible]—"*Due process of law.*" [illegible] v. Yerkes, 35 U. S., bk. 24, [illegible], *note.*

Messrs. **J. G. Shipman** and **Samuel Dickson**, for plaintiffs in error.

Mr. **Theo. Little**, for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court: [607]

This was a writ of error by the devisees of Mary V. Wurts to reverse a judgment confirming an assessment of Commissioners for the Drainage of Lands, under the Statute of New Jersey of March 8, 1871, the material provisions of which are as follows:

By section 1, "The Board of Managers of the Geological Survey, on the application of at least five owners of separate lots of land, included in any tract of land in this State which is subject to overflow from freshets, or which is usually in a low, marshy, boggy or wet condition," are authorized to examine the tract, and, if they deem it for the interest of the public and of the landowners to be affected thereby, then to make surveys, and decide upon and adopt a system of drainage, and report it to the Supreme Court of the State; and thereupon the court, upon reasonable notice published in a newspaper circulating in the county where the tract is, shall appoint three Commissioners to superintend and carry out the system of drainage so adopted and reported; "provided, that if, at the time fixed for such appointment of Commissioners, it shall appear to the court by the written remonstrance of the owners of a majority of the said low and wet lands, duly authenticated by affidavit, that they are opposed to the drainage thereof at the common expense, then the said court shall not appoint such commissioners."

By section 2, the Commissioners shall cause the tract to be drained in accordance with the general plan of the board of managers, and, after the completion of the work, report to the Supreme Court the expense thereof, together with a general description of the lands which, in their judgment, ought to contribute to the expense; notice of the report shall be published for four weeks, in order that any persons interested may examine the report, and file objections to it; if any such objections are filed within the four weeks, the Supreme Court shall determine upon the same in a summary manner, and, without further notice, make an order directing the Commissioners "to distribute and assess the amount of said expense, and interest, upon the lands contained within the territory reported by them originally, or as corrected by the Supreme Court, in proportion, as near as they can judge, to the benefit derived from said drainage by the several parcels of land to be assessed"; the assessment, when completed, [608] shall be deposited in some convenient place for inspection by the parties interested, and notice of the completion of the assessment and of the place where it is deposited, published for six weeks, designating a time and place when and where the Commissioners will meet to hear objections to the assessment; and the Commissioners, having heard and decided upon such objections as shall be made to them, shall proceed to complete their assessment and file it in the clerk's office of the Supreme Court, and notice of the filing shall be published for four weeks, after which, if no objections have been made to the assessment, it shall be confirmed by

the court; any objections filed within the four weeks the Supreme Court shall hear and determine in a summary manner, but "shall not reverse said assessment or any part thereof, except for some error in law, or in the principles of assessment, made or committed by said Commissioners"; if for any such cause the assessment or any part thereof shall be reversed, it shall be referred to the Commissioners to be corrected accordingly, and, when it shall have been corrected and filed, like proceedings shall be had, until the court shall finally confirm the assessment; and thereupon the Commissioners shall publish notice for four weeks, requiring the several owners or other parties interested in the lands assessed to pay their assessments.

By section 3, further provisions are made for collecting the assessment by demand on the owner of the lands assessed, and if he cannot be found, or neglects or refuses to pay, then by sale of his land for the least number of years that any person will take the same.

By section 5, the Commissioners may from time to time borrow the necessary moneys to carry on the work of draining the lands, and give their bonds as such Commissioners therefor, and pledge for the repayment thereof the assessment to be made as aforesaid.

By proceedings had in accordance with this statute, the Board of Managers of the Geological Survey, upon the application of more than [609] five owners of separate lots of land situated in the tract of land known as the Great Meadows on the Pequest River, examined and surveyed the entire tract, and reported a plan for draining it to the Supreme Court, and on November 15, 1872, three Commissioners were appointed to carry the plan into execution.

Pending the proceedings, on March 19, 1874, a supplemental statute was passed, by section 2 of which, "if the said commissioners, after having commenced the drainage of such tract and proceeded therewith, shall, before the drainage of the same shall be completed, be compelled to suspend the completion thereof, from any inability at that time to raise the money required therefor, they shall proceed to ascertain the tracts of land benefited or intended to be benefited by said drainage, and the relative proportions in which the said respective tracts have been or will be benefited thereby, and also the expenses incurred in said drainage, and as near as may be the additional expenses required for the completion thereof," and make and report to the court an assessment of such expenses.

In accordance with that provision of the Statute of 1874, the Commissioners, before completing the work, made and reported to the court an assessment based upon an estimate of contemplated benefits, which was, for that reason, upon objections filed by Mrs. Wurts, set aside by an order of the Supreme Court, affirmed by the Court of Errors. 10 Vroom, 433; 12 Id., 175.

On May 17, 1879, after the completion of the work, the Commissioners made a report to the court, pursuant to the Statute of 1871, showing the expense to have been $107,916.07. No objections to that report having been filed, after four weeks' notice, the court on June 23, ordered the Commissioners to distribute that sum "upon the lands mentioned in their said report, in proportion, as nearly as they can judge, to the benefit derived from said drainage by the several parcels of land to be assessed." The Commissioners made an assessment accordingly, the proportion of which on the lands of Mrs. Wurts was $13,347.84, and, after notice to and hearing of all parties who desired to object to the assessment, reported it to the Supreme Court, which directed it to be modified as to certain lands of other parties lying outside the original survey, and in other respects confirmed the assessment, notwithstanding objections made to it by the devisees of Mrs. Wurts; and its judgment was affirmed in the Court of Errors. 13 Vroom, 553; 14 Id., 456. The judgment of the Court of Errors was the final judgment in the case, and this writ of error was addressed to the Supreme Court because at the time of suing out the writ of error the record had been transmitted to that court and was in its possession. 105 U. S., 701 [Bk. 26, L. ed. 1109].

The error assigned was that "the Act of March 8, 1871, upon which the said judgment and proceedings are founded, violates the Constitution of the United States in this, that it deprives the plaintiffs in error of their property without due process of law, and denies to them the equal protection of the laws, and violates the first section of the Fourteenth Amendment to the Constitution of the United States."

General laws authorizing the drainage of tracts of swamp and low lands, by commissioners appointed upon proceedings instituted by some of the owners of the lands, and the assessment of the whole expense of the work upon all the lands within the tract in question, have long existed in the State of New Jersey, and have been sustained and acted on by her courts, under the Constitution of 1776, as well as under that of 1844. Stats. December 23, 1783, Wilson's Laws, 382; November 29, 1788, and November 24, 1792, Paterson's Laws, 84, 119; *Jones* v. *Lore*, 2 Pen., 1048; *Doremus* v. *Smith*, 1 South., 142; *Westcott* v. *Garrison*, 1 Halst., 132; *State* v. *Frank & Guisbert Creek Co.* 2 J. S. Green, 301; *State* v. *Newark*, 3 Dutch., 185, 194; *Berdan* v. *Drainage Co.*, 3 C. E. Green, 69; *Coster* v. *Tide Water Co.*, 3 Id., 54, 68, 518, 531; *State* v. *Blake*, 6 Vroom, 208, and 7 Id., 442; *Hoagland* v. *Wurts*, 12 Id., 175, 179.

In *State* v. *Newark*, 3 Dutch., 185, 194, the Supreme Court said: "Laws for the drainage or embanking of low grounds, and to provide for the expense, for the mere benefit of the proprietors, without reference to the public good, are to be classed, not under the taxing, but the police power of the government."

In *Coster* v. *Tide Water Co.*, 3 C. E. Green, 54, 518, the same view was strongly asserted in the Court of Chancery and in the Court of Errors. The point there decided was that a statute providing for the drainage of a large tract of land overflowed by tidewater, by a corporation chartered for the purpose, none of the members of which owned any lands within the tract, if it could be maintained as an exercise of the right of eminent domain for a public use, yet could not authorize an assessment on the owners of such lands for anything beyond the benefits conferred upon them. But the case was clearly and sharply distinguished from the case of the drainage of lands for the exclusive

[illegible] of the owners upon proceedings instituted by some of them.

Chancellor Zabriskie said: "But there is another branch of legislative power that may be referred to, as authorizing the taking of the lands required for the works to drain these meadows. It is the power of the government to prescribe public regulations for the better and more economical management of property of persons whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation, such as the power of regulating the building of party walls, making and maintaining partition fences and ditches, constructing ditches and sewers for the draining of uplands and marshes, which can more advantageously be drained by a common sewer or ditch. This is a well known legislative power, recognized and treated of by all jurisconsults and writers upon law through the civilized world; a branch of legislative power exercised by this State before and since the Revolution, and before and since the adoption of the present Constitution, and repeatedly recognized by our courts. The Legislature has power to regulate these subjects, either by general law, or by particular laws for certain localities or particular and defined tracts of land. When the Constitution vested the legislative power in the Senate and General Assembly, it conferred the power to make these public regulations as a well-understood part of that legislative power. * * * The principle of them all is, to make an improvement common to all concerned, at the common expense of all. And to effect this object, the Acts provide that the works to effect the drainage may be located on any part of the lands drained, paying the owner of the land thus occupied compensation for the damage by such use. So far private property is taken by them, further it is not. In none of them is the owner divested of his fee, and in most there is no appropriation in which it could be vested, and for all other purposes the title of the land remained in the owner. To effect such common drainage, power was in some cases given to conduct these drains through adjacent lands not owned, upon compensation. All this was an ancient and well known exercise of legislative power and may well be considered as included in the grant of legislative power in the Constitution." 3 C. E. Green, 68-71.

Chief Justice Beasley, in delivering the judgment of the Court of Errors, enforced the same distinction, saying: "This case, with regard to the grounds on which it rests, is to be distinguished from that class of proceedings by which meadows and other lands are drained on the application of the landowners themselves. In the present instance, the State is the sole owner and public necessity or convenience is the only justification of her intervention. But the regulations established by the legislative power whereby the owners of meadow-lands are compelled to submit to an equal burden of the expense incurred in their improvement, are rules of police of the same character as provisions concerning party walls and partition fences. To these cases, therefore, the principle upon which the decision of the present case rests is not to be extended." 3 C. E. Green, 531.

Our full and explicit statements have been since treated by the courts of New Jersey as finally establishing the constitutionality of such statutes.

In *State* v. *Blake*, 6 Vroom, 208, and 7 Id., 442, a statute authorizing a tract of swamps and marshlands to be drained by commissioners elected by the owners of the lands, and the entire expense assessed upon all the owners, was held to be constitutional, although no appeal was given from the assessment. In the Supreme Court it was said: "This branch of legislative power which regulates the construction of ditches and secures the drainage of meadows and marshy lands has been exercised so long, and is so fully recognized, that it is now too late to call it in question. It is clearly affirmed in the *Tide Water Co.* v. *Coster*, and cannot be opened to discussion." 6 Vroom, 211. And the Court of Errors, in a unanimous judgment, approved this statement of the Supreme Court, as well as that of Chief Justice Beasley, in *Coster* v. *Tide Water Co.*, above quoted. 7 Vroom, 447, 448. [313]

The constitutionality of the Statute of 1871, under which the proceedings in the case at bar were had, was upheld by the Supreme Court and the Court of Errors upon the ground of the previous decisions. *Re Lower Chatham Drainage*, 6 Vroom, 497, 501; *Re Pequest River Drainage*, 10 Id., 433, 434; 12 Id., 175, 179; 13 Id., 553, 554, and 14 Id., 456. The further suggestion made by the Supreme Court in 6 Vroom, 501, 506, and 10 Id., 434, that this statute could be maintained as a taking of private property for a public use, was disapproved by the Court of Errors in 12 Id., 178.

In *Kean* v. *Drainage Co.*, 16 Vroom, 91, cited for the plaintiffs in error, the statute that was held unconstitutional created a private corporation with power to drain lands without the consent or application of any of the owners; and the Supreme Court observed that in the opinions of the Court of Errors in the present case and in *Coster* v. *Tide Water Co.*, the distinction was clearly drawn between meadow drainage for the exclusive benefit of the owners to be done at their sole expense, and drainage undertaken by the public primarily as a matter of public concern, in which case the assessment upon landowners must be limited to benefits imparted. 16 Vroom, 94.

This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and lowlands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the Legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense. The case comes within the principle upon which [614]

this court upheld the validity of general mill Acts in *Head* v. *Amoskeag Manufacturing Co.*, 113 U. S., 9 [Bk. 28, L. ed. 89].

It is also well settled by the decisions of the courts of New Jersey that such proceedings are not within the provision of the Constitution of that State securing the right of trial by jury. New Jersey Constitution of 1776, art. 22; Constitution of 1844, art. 1, § 7; *Scudder* v. *Trenton Delaware Falls Co.*, Saxt., 694, 721–725; *Re Lower Chatham Drainage*, 7 Vroom, 442; *Howe* v. *Plainfield*, 8 Id., 145.

The Statute of 1871 is applicable to any tract of land within the State which is subject to overflow from freshets, or which is usually in low, marshy, boggy or wet condition. It is only upon the application of at least five owners of separate lots of land included in the tract that a plan of drainage can be adopted. All persons interested have opportunity by public notice to object to the appointment of commissioners to execute that plan, and no commissioners can be appointed against the remonstrance of the owners of the greater part of the lands. All persons interested have also opportunity by public notice to be heard before the court on the commissioners' report of the expense of the work, and of the lands which in their judgment ought to contribute; as well as before the commissioners, and, on any error
[615] in law or in the principles of assessment, before the court, upon the amount of the assessment.

As the statute is applicable to all lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the laws, nor been deprived of their property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States. *Barbier* v. *Connolly*, 113 U. S., 27, 31 [Bk. 28, L. ed. 923, 924]; *Walker* v. *Sauvinet*, 92 U. S., 90 [Bk. 23, L. ed. 678]; *Davidson* v. *New Orleans*, 96 U. S., 97 [Bk. 24, L. ed. 616]; *Hagar* v. *Reclamation District*, 111 U. S., 701 [Bk. 28, L. ed. 569].

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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523 BEECHER MANUFACTURING COMPANY, *Appt.*,

v.

AYWATER MANUFACTURING COMPANY ET AL.

(See S. C., Reporter's ed., 523, 524.)

Patent law—patentability.

The use in succession of two distinct pairs of dies, of well-known kinds, not combined in one machine nor co-operating to one result, but each pair doing by itself its own work, is not a patentable invention.

[No 224.]

Argued Apr. 23, 1885. Decided, May, 4, 1885.

APPEAL from the Circuit Court of the United States for the District of Connecticut.

Head note by Mr. Justice GRAY.

The history and facts of the case appear i the opinion of the court.

Messrs. **H. O. Platt** and **H. T. Fenton** for appellant.

Messrs. **J. M. Wilson, Geo. S. Prindl** and **Charles R. Ingersoll** for appellees.

Mr. Justice **Gray** delivered the opinion o the court:

This is an appeal form a decree for an in junction and damages for the infringement o a patent issued to Robert R. Miller, on Febru ary 22, 1870, and reissued to his assigns o May 6, 1879, for an improvement in dies fo forming the clip-arms of kingbolts for wagons 8 Fed. Rep. 608.

According to the description in the specifica tion, such bolts are made by taking an iron ro of suitable length, splitting it for about tw inches at one end, and turning the forks o arms outwards; then heating the rod, placin the body in a hole in a block or die grooved t receive the arms, and striking it with a plan faced upper die, so as to force the arms int and make them take the shape of the groove and afterwards placing it between two othe dies, which give the arms the proper bend, t fit them to the axletree of a wagon. With th subsequent shaping of the collar and stem o the bolt, this patent has nothing to do.

In the original patent, the patentee state that he did not claim either of the dies sep rately, and claimed only "the series of dies (designating them by letters) "for forming th clip-arms and wings of the lower ends o kingbolts for wagons, said dies being construc ed and operating substantially as herein show and described." In the reissue, he claimed: The first pair of dies, "constructed and com bined substantially as and for the purpos shown." 2. "The series of dies" (designate by letters) "for forming clip kingbolts, sub stantially as shown and described."

The first claim of the reissue is bad, not onl because it was for something the patentee ha expressly disclaimed in the original patent, bu because, as the evidence clearly shows, the was nothing new in the dies themselves.

The second claim of the reissue, like th single claim of the original patent, for the u in succession, or, in the patentee's phrase, "th series," of the two pairs of old dies, the o pair to shape the arms of the bolt, and the oth to give those arms the requisite curve, does n show any patentable invention. The two pai of dies were not combined in one machine, ar did not co-operate to one result. Each pair w used by itself, and might be so used at any di tance of time or place from the other; and the two were used at the same place and in in mediate succession of time, the result of the a tion of each was separate and distinct, and w in no way influenced or affected by the actio of the other. This was no combination th would sustain a patent. *Hailes* v. *Van Wa mer*, 20 Wall., 353 [87 U. S., bk. 22, L. e 241]; *Pickering* v. *McCullough*, 104 U. S., 3 [Bk. 26, L. ed. 749]; *Stephenson* v. *R. R. C* 114 U. S., 149 [*ante*, 58].

Decree reversed, and case remanded with dir tions to dismiss the bill.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U.

ARTHUR GEORGE BROWN, Admr. of CHARLES MACALESTER, Deceased, *Appt.*,

v.

STATE OF MARYLAND ET AL.

(See U. C., "*Macalester's Admr.* v. *Maryland*," Reporter's ed., 598-606.)

Chesapeake and Ohio Canal Company—rights of State of Maryland—injunction against general creditor to protect.

Under the Statutes of Maryland of 1834, chap. [illegible], chap. [illegible], chap. 396, and 1844, chap. 281, [illegible] the instruments executed pursuant to those [illegible], the tolls and revenues of the Chesapeake and Ohio Canal Company are mortgaged to the State of Maryland, to secure the repayment of [illegible] by the State to the company, and the [illegible] of dividends and interest on the stock subscribed for by the State; subject, in the first place, to the appropriation of so much of the tolls and revenues as is necessary to keep the canal in repair, to [illegible] the necessary supply of water, and to pay [illegible] of officers and annual expenses; and, in [illegible] place, to a mortgage to trustees to secure the payment of certain bonds of the company. [illegible] in equity of the State and of such [illegible], even before the State has taken possession under its mortgages, a general creditor of the company, who at the time of contracting his debt, [illegible] of the provisions of the statutes and of [illegible] mortgages, will be restrained from levying on money deposited by the company in a bank, and [illegible] such necessary expenses.

[No. 253.]

[illegible] Apr. 15, 16, 1885. *Decided May 4, 1885.*

APPEAL from the Circuit Court of the United States for the District of Maryland.

The history and facts of the case appear in the opinion of the court.

Mr. Stewart Brown and Arthur [illegible] Brown, for appellant.

Mr. Chas. J. M. Gwinn and Charles [illegible] Roberts, *Atty-Gen.*, for the State of Maryland, appellee.

Mr. Justice Gray delivered the opinion of the court:

This was an appeal from a decree in equity of the Circuit Court of the United States for the District of Maryland, restraining a judgment creditor of the Chesapeake and Ohio Canal Company from levying upon money deposited by the company in a bank in Baltimore. The case appeared by the record to be as follows:

The Chesapeake and Ohio Canal Company was incorporated, and constructed a canal from Georgetown in the District of Columbia to Cumberland in the State of Maryland, under Statutes of Virginia and Maryland of 1824, confirmed by the Act of Congress of March 3, 1825, [illegible] 4 Stat. at L., 101, 793-802.

Under the Statute of Maryland of 1834, chap. [illegible], the State of Maryland lent to the company [illegible] of $2,000,000, to be used in the construction of the canal; and the company, on [illegible], to secure the repayment of that [illegible], made to the State a mortgage [illegible] and singular the lands and tenements, [illegible], estates and securities, goods and [illegible], property and rights, now or at any time hereafter to be acquired, and the net tolls and revenues of the said company." No part of that [illegible], or of the interest accrued thereon, was ever paid.

Under the Statute of Maryland of 1835, chap. 395, the State subscribed and paid for 30,000 shares, and under the Statute of 1838, chap. 396, 13,750 shares, together constituting a majority of the stock in the company; first receiving from the company, as required by each statute, an instrument in writing under seal, by which the company guaranteed to the State the payment, out of the profits of the work, of 6 per cent yearly on the money paid to it by the State under that statute, until the clear annual profits of the canal should be more than sufficient to discharge the sums which the company should be liable to pay annually to the State, and should be adequate to a dividend of 6 per cent among its stockholders, and further agreed that thereafter the State should receive, upon the stock by it subscribed for, a proportional dividend upon the profits of the work as declared from time to time. The company never paid to the State any part of such dividends or interest. [600]

On May 15, 1839, the company, as required by the Statute of 1838, and to secure the payment to the State of interest for three years at the yearly rate of 5 per cent on stock issued by the State under that statute to the amount of $1,375,000, made another mortgage to the State of its lands and tenements, property and effects, as well as of its net tolls and revenue. No part of this interest was paid.

The Statute of Maryland of 1844, chap. 281, authorized the company to borrow money and issue its bonds to the amount of $1,700,000, to provide means for completing its canal to Cumberland, and contained the following provisions:

Sec. 2. "The bonds so issued as aforesaid shall appear on the face of the same to be preferred liens on the revenues of said company, according to the provisions of this Act, and with the assent of the said company, as is hereinafter provided for; the said bonds, without any preference or priority over each other on account of date, shall be preferred liens on the revenues and tolls that may accrue to the said company from the entire and every part of the canal and its works between Georgetown and Cumberland, which are hereby pledged and appropriated to the payment of the same, and the interest to accrue thereon, in the manner hereinafter mentioned: Provided, however, that this State shall in no case be bound or held responsible for the payment of said bonds, or the interest thereon: And provided further, that the president and directors of the said company shall, from time to time and at all times hereafter, have the privilege and authority to use and apply such portion of said revenues and tolls as in their opinion may be necessary to put and keep the said canal in good condition and repair for transportation, provide the requisite supply of water, and pay the salaries of officers and agents, and the current expenses of the said company."

Sec. 4. That the rights and liens of this State upon the revenues of the Chesapeake and Ohio Canal Company shall be held and considered as waived, deferred and postponed in favor of the bonds that may be issued under the aforegoing sections, so as to make the said bonds, and the interest to accrue thereon, preferred and absolute liens on said revenues, ac- [601]

[illegible] by Mr. Justice GRAY.

cording to the provisions of the second section of this Act, until said bonds and interest shall be fully paid.

Sec. 5. That semi-annually in each year, as the same shall be payable, said Chesapeake and Ohio Canal Company shall pay the interest on the bonds constituting preferred liens as aforesaid, to the party or parties respectively entitled thereto, or to their agent or agents authorized to receive the same; and as soon as the net revenues of said company, arising from the canal and its works between Georgetown and Cumberland as aforesaid, shall be more than sufficient to pay the interest that may become due and in arrear upon said bonds, with the costs of remittance and exchange, if there be any, and such further sum, not exceeding $5,000 annually, as may be necessary to pay the interest on the bonds or certificates of debt heretofore issued by said company to the creditors of the Potomac Company, for claims adjusted under the twelfth section of the charter of the Chesapeake and Ohio Canal Company; the said company shall annually pay to the Treasurer of the Western Shore of this State, who shall receive the same under the responsibilities of his office, the surplus net revenues as aforesaid, to such amount as may be necessary as an adequate sinking fund, not exceeding the sum of $25,000 a year, on an average of years, dating from the first day of January next after the completion of the canal to Cumberland; which sum or sums shall from time to time be invested by said treasurer, and be accumulated by him as a sinking fund to pay the principal of said bonds, until a sufficient amount is so paid and accumulated for that purpose.

Sec. 6. That the president and directors of the Chesapeake and Ohio Canal Company be, and they are hereby, authorized to execute any deed, mortgage or other instrument of writing, that may hereafter be deemed necessary or expedient to give the fullest effect to the aforegoing provisions.

[602] Sec. 7. That the Chesapeake and Ohio Canal Company shall execute to this State and deliver to the Treasurer of the Western Shore of Maryland a further mortgage on the said canal, its lands, tolls and revenues, subject to the liens and pledges by the aforegoing provisions of this Act made, created or authorized, as an additional security for the payment of the loan made by this State to the said company under the Act of December session, eighteen hundred and thirty-four, chapter two hundred and forty-one, and the interest due and in arrear and which hereafter may accrue thereon; which mortgage shall be submitted to the Attorney-General of this State, and be approved by him as sufficient in law."

On January 8, 1846, the company, pursuant to section 7 of that Statute, and as an additional security for the payment of the $2,000,000 before lent by the State of Maryland to the company, under the Statute of 1834, and interest, executed a mortgage of all its lands and tenements, its canal and appurtenances, "embracing the entire undertaking, and the tolls and revenues that may hereafter accrue," and all its property and rights; "subject, nevertheless, to all and singular the liens and pledges by the provisions of the before-mentioned Act of eighteen hundred and forty-four, chapter two hundred and eighty-one, made, created or auth ized, or that have been or may hereafter made, created, given or granted by the s Chesapeake and Ohio Canal Company, or t president and directors thereof, under or pursuance of the provisions of said A which said liens and pledges are in now to be lessened, impaired or interfered w by this deed, or by anything herein c tained; and subject also to all the other p visions of said Act."

On June 5, 1848, the company execute mortgage, reciting the last provision of the s ond section, as well as the provisions of fourth and sixth sections of the Act of 1844, a conveying to William W. Corcoran and othe trustees, "the revenues and tolls of the ent and every part of the canal and its works tween Georgetown and Cumberland," to cure, after the payment of debts existing thereafter contracted for repairs on the ca and providing the requisite supply of wat and for salaries and current expenses, first, payment of interest on the bonds issued by company under the Act of 1844; second, payment of interest to creditors of the Poton Company; third, the creation of a sinking fu for the redemption of those bonds; with further provisions "That so long as the s canal company shall comply with their agr ment by paying all the interest upon said bo as the same falls due, and by providing an equate sinking fund in the manner specified cording to the provisions of the said Act the final redemption of the said bonds, t shall retain the management of the canal its works, and collect and receive the reven and tolls; but if they fail to comply with th conditions from any cause except a deficie of revenue arising from a failure of busir without fault on the part of said compa said fault to be made to appear by the gran aforesaid, then the grantees may demand shall thereupon receive possession, and s appropriate the said tolls and revenues in manner hereinbefore provided."

In 1854, Charles Macalester, a citizen Pennsylvania, recovered in an action in the cuit Court of the United States for the Dist of Maryland, upon a debt not secured by of the aforesaid mortgages, a judgment $5,471.37 and costs. In 1867, Macalester l ing died, the appellant took out letters of ministration upon his estate in Maryland, became as such administrator plaintiff in action, and judgment was entered for against the company, and he in 1880 issue attachment upon that judgment, and cause to be laid in the hands of a bank in Baltim as garnishee upon moneys standing to the cr of the company on the books of the ba Those moneys were in the possession of bank on deposit, and were exclusively mad of the tolls and revenues received by the c pany in the course of its business, and were ficient to pay the judgment debt, interest costs, but were required to meet the neces expenses of putting and keeping the cana proper navigable condition, after paymen the salaries of officers, and supplying the cessary quantity of water for purposes of n gation.

In 1882, Macalester's administrator ha

applied to the court for a judgment of condemnation of so much of the moneys in the hands of the garnishee as would satisfy his judgment debt, interest and costs, bills in equity to restrain further proceedings by him were filed by the State of Maryland, and by the trustees under the mortgage of 1848, setting forth the facts above stated, and also alleging that Bankster and his administrator "had each notice, before acquiring any of their respective rights of action in the premises, of all the liens, charges and duties affecting the revenues, tolls and property of the said Chesapeake and Ohio Canal Company, and were especially charged with knowledge that such portions of the revenues and tolls of said Chesapeake and Ohio Canal Company, as were necessary to put and keep the canal of the said company in good condition and repair for transportation, provide the requisite supply of water, and pay the salaries of officers and agents of the said company, were dedicated and set apart to such purpose by contract with the State of Maryland, and were under said contract exclusively applicable to said purposes."

The administrator filed a demurrer to each bill which was overruled, and a final decree entered against him, and, upon his motion at the same term, the court ordered *nunc pro tunc* that the two suits be consolidated, "but so that the validity, force and effect of neither of said decrees shall be by this order affected or impaired." He then appealed to this court.

An ordinary mortgagee of real estate, who does not take possession under his mortgage, is not entitled to the rents and profits as against the mortgagor or his attaching creditors; and the same rule holds good in the case of a mortgage of a railroad, canal or bridge corporation of its tolls and revenues, which provides a mode in which the mortgagee shall take possession, and until that mode is availed of, leaves the tolls and revenues in the control of the mortgagor, to be disposed of as he sees fit. *R. R. Co. v. Cowdrey*, 11 Wall., 459 [78 U. S., bk. 20, L. ed. 208]; *Gilman v. Illinois & Miss. Telegraph Co.*, 91 U. S., 603 [Bk. 23, L. ed. 405]; *Judge Co. v. Heidelbach*, 94 U. S., 798 [Bk. 24, L. ed. 344].

But by the Statutes of the State of Maryland relating to the Chesapeake and Ohio Canal Company, and the mortgages executed pursuant to those statutes, the application of the tolls and revenues of the canal was not left to the disposal of the corporation.

The State of Maryland, regarding the construction and maintenance of the canal as an object of great importance and benefit to the public, had lent to the canal company large sums of money, and subscribed for a majority of its stock, and, to secure its loans and investments, had taken from the company mortgages upon the canal and all its tolls and revenues.

By the Statute of 1844, chap. 281, the State authorized the company, in order to obtain additional means, to issue bonds secured by mortgage to trustees of its net tolls and revenues; the State waived its own lien upon the gross revenues so far only as to subordinate it to the lien of that mortgage; subject to that lien, the State took a new mortgage as additional security for the repayment of its original loan to the company; and the statute, under and pursuant

to which these two mortgages were executed, and to which each was made subject, expressly provided that the company should have authority to use and apply so much of the gross tolls and revenues as might be necessary to keep the canal in repair, to provide the requisite supply of water, and to pay salaries and current expenses.

The necessary effect of this arrangement was for the promotion of the public object, as well as for the ultimate benefit of the mortgagees, to appropriate the tolls and revenues in the first instance to the payment of necessary repairs and expenses.

The debt of the judgment creditor in this case was a general debt of the company, and not a bond secured by the trust mortgage, nor a debt contracted for repairs, or salaries, or other current expenses. It is alleged in the bills and admitted by the demurrers, that the creditor at the time of contracting his debt, had notice of all the charges, liens and duties affecting the tolls and revenues, and especially of the provision by which they were appropriated, in the first instance, to the payment of necessary expenses. And the money of the corporation, which he seeks to apply to the payment of his debt, is needed for those expenses. [606]

It follows that the judgment creditor has no equity, and that the State of Maryland and the trustees for bondholders, whose security will be affected by the diversion of this money from its lawful object, are entitled to injunctions.

This conclusion accords with the adjudication of the Court of Appeals of Maryland in *Brady v. State*, 26 Md., 290, and with the opinions expressed by that court in earlier and later cases. *Boyd v. Chesapeake & O. Canal Co.*, 17 Md., 195; *Virginia v. Chesapeake & O. Canal Co.*, 32 Md., 501.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[587]

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, *Appt.*,

v.

BENJAMIN F. HAM ET AL.

(See S. C., Reporter's ed., 587-598.)

Railroads—consolidation—agreement as to old bonds—subsequent mortgages and foreclosure—rights of holders of unsecured bonds of one of the old companies.

*Four railroad corporations, whose roads formed a connecting line in Ohio, Indiana and Illinois, were consolidated, according to the statutes of those States, under an agreement in which the capital on the basis of which each entered into the consolidation was described as composed of the amount of its stock and of its mortgage bonds and other bonds, and it was agreed that all those bonds should, "as to the principal and interest thereof, as the same shall respectively fall due, be protected by the consolidated company, according to the true effect and meaning of the bonds." Two years afterwards, the consolidated company, to secure its own bonds payable at a later date than the old ones, executed a mortgage of all its property to trustees, which recited that it had been deemed for the interest of the corporation as well as for the in-

*Head note by *Mr. Justice* GRAY.

terest of all the various classes of existing bonds (which were specifically described) that the whole of them should be consolidated into one mortgage debt upon equitable principles; and provided that a sufficient amount of the new bonds should be retained "to retire, in such manner and upon such terms as the directors may from time to time prescribe," an equal amount of the old bonds. Six years later, the consolidated company made another mortgage to secure other bonds, for nonpayment of which it was afterwards foreclosed by sale of the whole property. *Held*, that the property was not subject to any lien in favor of bonds of one of the old companies, issued after the passage of the statutes authorizing the consolidation, unsecured by any mortgage or lien before the consolidation, and the holders of which had not exchanged or offered to exchange them for bonds of the consolidated company before the proceedings for foreclosure.

[No. 1118.]

Submitted Jan. 8, 1885. Decided May 4, 1885.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The history and facts of the case appear in the opinion of the court.

Messrs. **Wager Swayne, H. S. Greene** and **Abram Hendricks,** for appellant.

Mr. **Charles W. Hassler,** for appellees:

It is a well established principle that the property of a corporation is a trust fund liable for the debts due its creditors. It is equally well established that a corporation cannot denude itself of its property and thus deprive its creditors of their rights as against its property.

Mumma v. *Potomac Co.*, 8 Pet., 286; *R.R. Co.* v. *Howard*, 7 Wall., 392 (74 U. S., bk. 19, L. ed. 117); *Sawyer* v. *Hoag*, 17 Wall., 610 (84 U. S., bk. 21, L. ed. 731); *Sanger* v. *Upton*, 91 U. S., 56 (Bk. 23, L. ed. 220); *Scammon* v. *Kimball*, 92 U. S., 362 (Bk. 23, L. ed. 483); *Scovill* v. *Thayer*, 105 U. S., 143 (Bk. 26, L. ed. 968).

Equity will not permit a transfer of property without paying debts.

Ins. Co. v. *Trans. Co.*, 13 Fed. Rep., 516; *The Key City*, 14 Wall., 660 (81 U. S., bk. 20, L. ed. 898).

Equity does not permit *felo de se* by a corporation.

Broughton v. *Pensacola*, 93 U. S., 266 (Bk. 22, L. ed. 896); *Meriwether* v. *Garrett*, 102 U. S., 472 (Bk. 26, L. ed. 197); *Blair* v. *R. Co.*, 22 Fed. Rep., 36.

Creditors will be preferred to stockholders.

Ogilvie v. *Ins. Co.*, 22 How., 380 (63 U. S., bk. 16, L. ed. 349); *Upton* v. *Tribilcock*, 91 U. S., 45 (Bk. 23, L. ed. 203); *King* v. *R. Co.*, 2 Fed. Rep., 36.

The Indiana courts have held that the lien may be assigned with the debt.

Nichols v. *Glover*, 41 Ind., 24; *Johns* v. *Sewell*, 33 Ind., 1; *Wiseman* v. *Hutchison*, 20 Ind., 40; *Kern* v. *Haelerigg*, 11 Ind., 443.

And the courts of Ohio have held that this lien is not cut off excepting by the rights of a purchaser without notice.

White v. *Denman*, 1 Ohio St., 110; *Neil* v. *Kinney*, 11 Ohio St., 58.

The trust created by the consolidated mortgage in favor of the holders of equipment bonds was a valid and executed trust.

1 Perry, Trusts, §§ 98, 112, 248; *Martin* v. *Funk*, 75 N. Y., 134; *Train* v. *Gold*, 5 Pick., 384; *Ketchum* v. *St. Louis*, 101 U. S., 306 (Bk. 25, L. ed. 999).

Acceptance by the stockholders was not essential.

1 Perry, Trusts, §§ 593, 594, 602, and ca cited.

It could only be revoked by the full cons of all parties in interest.

1 Perry, Trusts, § 104, and cases cited; *M tin* v. *Funk, supra.*

A trustee cannot denude himself of his tr so as to cause the trust to fail.

Moyan v. *Hays*, 1 Johns. Ch., 339; *Diefend* v. *Spraker*, 10 N. Y., 246.

A purchaser with notice of equitable rig of another holds the property subject to su rights.

1 Perry, Trusts, §§ 217, 828; *Ketchum* v. *Louis, supra; Wormley* v. *Wormley*, 8 Wheat. 4

Knowledge of a fact is knowledge of its gal effect.

Wormley v. *Wormley*, 8 Wheat., 448; *Br* v. *Ware*, 15 Pet., 114.

Messrs. R. P. Ranney, Geo. F. Comstock, C. Sprague and John G. Milburn, counsel the plaintiff in a suit pending in the Supre Court of Ohio, involving the validity of t lien of the equipment bonds, were permitted the court, with consent of counsel, to file b'ef in support of the position of appellees

Mr. Justice **Gray** delivered the opinion the court:

This was a appeal from a decree in equi declaring certain bonds issued by the Tole and Wabash Railway Company to be a l upon property formerly owned by that co pany, and since transferred by it to the Tole Wabash and Western Railway Company, a c poration created by its consolidation with th other railroad corporations. 11 Biss., 510. T material facts appearing by the record were follows:

The Toledo and Wabash Railway Compa a corporation organized under the laws of States of Ohio and Indiana, owning a railr extending from Toledo in Ohio to Wabash Indiana—its property in Ohio being subject a first mortgage for $900,000, and a sec mortgage for $1,000,000, and its property in diana subject to a first mortgage for $2,500,0 and a second mortgage for $1,500,000—on 1 vember 2, 1862, executed and issued for va bonds to the amount of $600,000, styled "Equ ment Bonds," payable in New York on Ma 1883, with coupons attached for semi-annual terest at the yearly rate of 7 per cent; and c vertible at the option of the holder, at any t within five years, into common stock of company at par. The company paid inte on those bonds to May 1, 1865.

On May 29, 1865, no lien of any kind t existing in favor of "equipment bonds," Toledo and Wabash Railway Company three railroad corporations incorporated by States of Indiana and Illinois, whose ro formed a continuous line from Toledo to Mississippi River, entered into an agreemen consolidate their railroads, property and cap stock, and to become one corporation under name of the Toledo, Wabash and West Railway Company, with a capital stock $15,000,000, "upon the basis and condit hereinafter to be specified," the material p of which were as follows:

"The Toledo and Wabash Railway Comp

[illegible] into said consolidation on the following [illegible], viz.: Its capital is $10,000,000, composed [illegible] 1st mortgage bonds, $3,400,000; 2d [illegible] bonds, $2,500,000; convertible equip[illegible] bonds, $800,000; convertible preferred [illegible]; common stock, $2,500,000."

The basis on which each of the three other [illegible] "enters into said consolidation" [illegible] set forth in like manner, by which [illegible] of the three together appeared to be [illegible], composed of mortgage bonds, [illegible], and stock $2,686,000; and one of [illegible] corporations assigned to the consolidated [illegible] certain mortgage bonds, and agreed to [illegible] in cash the sum of $780,300, required [illegible] road in equal condition with the [illegible] and Wabash Railway.

"It is further agreed that the bonds and other [illegible] hereinabove specified, in the manner and [illegible] specified, and not otherwise pro[illegible] for in this agreement, shall, as to the prin[illegible] and interest thereof, as the same shall re[illegible] fall due, be protected by the said [illegible] company, according to the true [illegible] and effect of the instruments or bonds [illegible] such indebtedness of the several con[illegible] companies may be evidenced."

"The directors shall have power to issue any [illegible] and further bonds of said corporation to [illegible] amount that the indebtedness of the [illegible] company at any time shall not ex[illegible] the amount of the capital stock authorized [illegible] agreement, and they may secure the [illegible] issued by mortgage or other lien on [illegible] property of the consolidated company, or [illegible] thereof."

"The agreement of consolidation was ratified [illegible] directors and stockholders of all the [illegible], and the stockholders of the old com[illegible] became stockholders in the new one; [illegible] company came into possession of all [illegible] and property of the four old com[illegible], and received and distributed the earn[illegible]

"On February 1, 1867, the consolidated com[illegible] executed to trustees a mortgage of all its [illegible], property and franchises, to secure [illegible] to be issued by it, to the amount of [illegible], payable in forty years, with inter[illegible] at the yearly rate of 7 per cent, and convert[illegible] at the option of the holders, at any time [illegible] years, into common stock of the [illegible] at par. The mortgage recited the [illegible], and also contained the following [illegible]

"Whereas at the time of such consolidation [illegible] property of said various companies was sub[illegible] certain bonded debts, and the mortgages [illegible] by said several companies, or by other [illegible] corporations which, at the time of the [illegible] of said debts and mortgages, were the [illegible] of the property so consolidated; and [illegible] all the bonded debt of said company, [illegible] of the first part, including that secured by [illegible] mortgages, as well as that not secured by any [illegible], now amounts in the aggregate to the [illegible] $[illegible], besides interest; and where[illegible] said bonded debt, as it now exists, is repre[illegible] and made up as follows, viz.:" Then fol[illegible] a statement of the various classes of [illegible] bonds, above mentioned, amounting [illegible] to $[illegible]; the equipment bonds, [illegible] and bonds issued by the consolidated company, due April 1, 1871, $1,000,000; and the last two classes described as not secured by any mortgage.

"And whereas it has been deemed for the interest of the said party of the first part, as well as for the benefit of the holders of all said various classes of bonds, that the whole of the same should be consolidated into one and the same mortgage debt, upon equitable principles; and whereas the increasing freight business of the road of the party of the first part requires additional equipments to do the same; and whereas it has been deemed expedient for the preservation of the bridges on the line of said road that the same should be covered, and that additional depot accommodations should be obtained, and that the road through its entire length should be fenced; and whereas the expenses to be incurred for the above should be provided for by the creation of a new capital; and whereas for the purposes aforesaid, and for the objects herein stated, the said company, party of the first part, has resolved to make and issue its [591] bonds to the extent of $15,000,000, and to secure the payment of the same by a mortgage on its entire property; and that of the amount of said bonds to be made and issued thereon should be retained $13,800,000 to retire, in such manner and upon such terms as the directors of said company may from time to time prescribe, a like amount of the bonds of the various companies hereinabove enumerated and described and representing the aforesaid bonded debt, and that the balance of said bonds, to wit: $1,700,000 thereof, should be used to provide the said additional equipment and other improvements hereinabove mentioned, and for such additional purposes as the said directors may deem advisable."

Bonds to the amount of $2,700,000 only were issued under that mortgage; $1,700,000 for money borrowed, and $1,000,000 to retire the bonds of the consolidated company that became due April 1, 1871.

The consolidated company paid the interest on the equipment bonds until November 1, 1874, after which no payment was made of interest thereon.

On April 1, 1873, the consolidated company executed to the trustees under the mortgage of February 1, 1867, and in order "to give assurance to all persons whom it may in anywise concern that the said reserved bonds shall not, nor shall any or either of them, be used for any other purpose than the retiring of the said funded debt in some part thereof," a supplemental agreement, by which it covenanted with the trustees, and with all such parties, that it would not "make or issue, or attempt to make or issue, any of the remaining $12,800,000 aforesaid bonds secured by the said indenture of mortgage, except for the purpose of, and subsequent to or simultaneously with, the retiring of an equal amount of the balance remaining of the said funded debt."

On February 1, 1878, two months before the execution of the agreement of further assurance, the consolidated company made another mortgage to secure other bonds to be issued by the company to the amount of $5,000,000, payable in gold. Default having been made in the payment of interest on bonds so issued, proceedings for the foreclosure of that mortgage [592]

were instituted and a receiver appointed on February 22, 1875, and a decree was afterwards entered for the sale of the railroad, franchises and other property of the company, subject to the liens of all earlier mortgages, and without prejudice to any claim that might be made by the holders of the equipment bonds. Under that decree the property was sold and conveyed to the purchasers, who afterwards became the Wabash, St. Louis and Pacific Railway Company, the appellant in this case.

None of the equipment bonds were ever exchanged for bonds under the mortgage of 1867, nor did any holders of equipment bonds demand an exchange until after May 1, 1875.

The Statute of Ohio of April 10, 1856, in force at the time of the issue of the equipment bonds and of the consolidation in question, by section 1, made it lawful for any railroad company in Ohio to consolidate its capital stock with the capital stock of any railroad in an adjoining State, whenever their roads united so as to form a continuous line; by section 2, provided that the consolidation should be made by agreement of the directors of each company, "prescribing the terms and conditions thereof," and that such agreement, when ratified by the stockholders, should "be deemed and taken to be the agreement and act of consolidation of said companies"; and also contained the following provisions:

"Sec. 3. Upon the making and perfecting the agreement and Act, as provided in the preceding section, and filing the same, or a copy, with the Secretary of State, the several corporations, parties thereto, shall be deemed and taken to be one corporation, possessing within this State all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of such corporation of this State so consolidated."

"Sec. 5. Upon the election of the first board of directors of the corporation created by said agreement of consolidation and by the provisions of this Act, all and singular the rights, privileges and franchises of each of said corporations, parties to the same, and all the property, real, personal and mixed, and debts due on account of subscriptions of stock or other things in action, shall be deemed to be transferred and vested in such new corporation without further act or deed; and all property, all rights of way, and all other interests, shall be as effectually the property of the new corporation as they were of the former corporations, parties to said agreement; and the title to real estate, either by deed, gift, grant, or by appropriations under the laws of this State, shall not be deemed to revert or be impaired by reason of this Act; Provided, that all rights of creditors, and all liens upon the property of either of said corporations, shall be preserved unimpaired, and the respective corporations may be deemed to be in existence to preserve the same; and all debts, liabilities and duties of either of said companies shall henceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties had been contracted by it."

"Sec. 7. Suits may be brought and maintained against such new company in the courts of this State for all causes of action in the same manner as against other railroad companies in this State." 1 Swan & Critch. Stat., 327, 3

The Statute of Indiana in force at the sa time, upon the subject of consolidation, was follows:

"Any railroad company heretofore organiz under the general or special laws of this St shall have the power to intersect, join and u their railroad with any other railroad c structed or in progress of construction in t State, or in any adjoining State, at such po on the State line, or at any other point, as m be mutually agreed upon by said compani and such railroad companies are authori to merge and consolidate the stock of the spective companies, making one joint st company of the two railroads thus connect upon such terms as may be by them mutu agreed upon, in accordance with the laws of adjoining State with whose road or roads c nections are thus formed; *Provided*, their ch ters authorize said railroads to go to the St line, or to such point of intersection." St Feb. 23, 1853, §1; 1 Gavin & H. Stat., 526.

The only provision of the Statutes of Illin cited in argument, was the provision that "Su consolidation may take place whenever the s companies shall respectively agree upon terms and conditions of the same." Stat. F 28, 1854, chap. 9, § 2; 1 Gross. Stat., 537.

The claim of the holders of the equipm bond to a lien on the property of the Tole Wabash and Western Railway Company asserted upon several grounds:

1. It was contended that the property of Toledo and Wabash Railway Company wa trust fund for all its creditors, and that up the consolidation the Toledo, Wabash and W ern Railway Company took the property of Toledo and Wabash Railway Company charg with the payment of all its debts.

The property of a corporation is doubtles trust fund for the payment of its debts, in sense that when the corporation is lawfully d solved and all its business wound up, or wh it is insolvent, all its creditors are entitled equity to have their debts paid out of the c porate property before any distribution ther among the stockholders. It is also true in case of a corporation, as in that of a natu person, that any conveyance of property of debtor, without authority of law, and in fra of existing creditors, is void as against the Story, Eq. Jur., § 1252; *Curran* v. *Arkans* 15 How., 304; *Graham* v. *R. R. Co.*, 102 U. 148, 161 [Bk. 26, L. ed. 106, 111]; *R. R. Co. Howard*, 7 Wall., 392 [74 U. S., bk. 19, L. 117]; *Goodwin* v. *Cincinnati & Whitewater Ca Co.*, 18 Ohio St., 169.

But upon the consolidation, under expr authority of statute, of two or more solve corporations, the business of the old corpo tions is not wound up, nor their property questrated or distributed, but the very obje of the consolidation, and of the statutes whi permit it, is to continue the business of old corporations. Whether the old corporatio are dissolved into the new corporation, or continued in existence under a new name a with new powers, and whether, in either ca the consolidated company takes the proper of each of the old corporations charged with lien for the payment of the debts of that c poration, depend upon the terms of the agr

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[illegible] of consolidation, and of the statutes under [illegible] authority that consolidation is effected.

[illegible] the present case, before the consolidation, [illegible] lien of any kind existed in favor of the equipment bonds; and the consolidation was made under and pursuant to statutes of Ohio, [illegible] and Illinois, passed before the issue of [illegible] bonds, and to which the contract of the [illegible] was therefore subject.

[illegible] effect of the Ohio Consolidation Act [illegible] merge the old corporations into the new [illegible] which took their place, succeeded to their [illegible] and assumed their liabilities. *Shields* [illegible] 96 U. S., 319 [Bk. 24, L. ed., 357]; *R. R.* [illegible] *Georgia*, 98 U. S., 359 [Bk. 25, L. ed. 185]. [illegible] liabilities imposed by that statute upon the [illegible] corporation for the debts of the old ones, [illegible] same as theirs, neither greater nor less. [illegible] provision of section 5 that "all rights [illegible] and all liens upon the property of [illegible] of said corporations, shall be preserved [illegible] clearly distinguishes debts secured [illegible] from debts not so secured, and indicates [illegible] to create a new lien in favor of [illegible] who before had none, but simply [illegible] to each class of creditors the rights [illegible] to it before the consolidation. The [illegible] provisions of this section, that "the [illegible] corporations may be deemed to be in [illegible] to preserve the same," and that all [illegible] of either of the old companies shall [illegible] attach to the new corporation and [illegible] against it to the same extent as if [illegible] contracted them, lead to the same con[illegible].

The Statute of Indiana is less specific in its [illegible], but expressly authorizes railroad [illegible] within the State to consolidate with [illegible] companies in an adjoining State "in [illegible] with the laws of the adjoining [illegible]," and, as is well settled by decisions of [illegible] Supreme Court of Indiana, does not give [illegible] creditors of the old companies [illegible] precedence as against a subsequent [illegible] of the consolidated property. *Mc*[illegible] *v. Morrison*, 16 Ind., 172; *R. R. Co.* v. [illegible] 29 Ind., 465; *Paine* v. *R. R. Co.*, 31 Ind., [illegible]; *R. R. Co.* v. *Hendricks*, 41 Ind., 48. [illegible] was not suggested in argument that there [illegible] any material difference in the statutes of [illegible] upon the subject.

The court, therefore, concurs in opinion [illegible] the Circuit Court, that the mere fact of [illegible], under these statutes, did not [illegible] lien in favor of the equipment bonds.

[illegible] was next contended that the stipulation [illegible] agreement of consolidation that the [illegible] and debts therein specified of the former [illegible] shall "be protected by the said [illegible] company" created a lien in their [illegible]

[illegible] "as to the principal and interest [illegible] respectively fall due," and "according to the true meaning and effect" of the [illegible] or bonds which are the evidence [illegible] that it is stipulated that the [illegible] "be protected by the said consolidated company", and the stipulation covers [illegible] by mortgage as well as unsecured [illegible]. The agreement "to protect" referring [illegible] time of payment, and "the true meaning [illegible]" of the equipment bonds having been [illegible] to create only a personal and unsecured debt of one of the former companies, the words "shall be protected" must have the same meaning which they ordinarily have in promises of men of business "to protect" drafts or other debts, not made or contracted by themselves, that is to say, a personal obligation to see that they are paid at maturity.

3. It was further contended that, by the [597] transfer of the property of the Toledo and Wabash Railway Company to the consolidated corporation, and the enumeration of the equipment bonds in the basis on which the former company entered into the consolidation, those bonds were part of the consideration of the transfer, and that the case comes within the principle of a vendor's lien for unpaid purchase money.

But we are unable to perceive any analogy between the two cases. The doctrine of vendor's lien applies only to sales of real estate. The consolidation of the stock and property of several corporations into one was not a sale; and it did not affect real estate only, but included franchises and personal property.

4. The remaining question is whether the holders of the equipment bonds have acquired any lien under the provisions of the mortgage executed in 1867 by the consolidated company of all its franchises and property, to secure the payment of new bonds to be issued by that company.

It is true that the object of that mortgage, as appears by its recitals, was that the whole of the debts of the consolidated company, including the debts of either of the companies out of which it had been formed, whether secured by mortgage, or, as in the case of the equipment bonds, not secured at all, "should be consolidated into one and the same mortgage debt, upon equitable principles." The mortgage accordingly provided that $13,300,000 of the new bonds should be retained, in order "to retire, in such manner and upon such terms as the directors of said company may from time to time prescribe," a like amount of the earlier bonds.

But that mortgage secured only bonds issued under it, and those bonds were all to be payable in forty years from its date. The directors were authorized to exchange such bonds for existing bonds, and it is possible that any holders of existing bonds might have compelled such an exchange by seasonably applying for it. But the company could not compel any bondholder to accept, as a subsitute for the bonds which he held, new bonds payable at a later period. The equipment bonds were payable according to their terms in 1883, and the bonds issued under the new mortgage would not be payable until 1907. The holders of the equipment bonds [598] might prefer to hold without security their bonds payable in sixteen years, rather than to take instead bonds secured by mortgage, payable twenty-four years later. They took no steps to obtain such an exchange for more than eight years after the execution of the mortgage of 1867, nor until after the institution of proceedings to foreclose the subsequent mortgage, executed by the company in 1873, to secure the payment of a new issue of bonds. The lien created by the latter mortgage took precedence of any claims which were not already se-

[illegible] When the whole [illegible] company was sold [illegible] of the mort- [illegible] mortgages [illegible] property free [illegible] that the prop- [illegible] is not [illegible] holders of [illegible] Court, U. S. [illegible] Br., [illegible] Treasurer of [illegible] State of Vir- [illegible] of license [illegible] terms of the de- [illegible] v. Green- [illegible] remitting the [illegible] the Act of the [illegible] 14, 1882. [illegible] 1885. Decided May [illegible] Court of Appeals [illegible] of the case appear in [illegible]

[illegible] Royall, Daniel H. [illegible] Swayne, Wm. M. [illegible] Hornblower, for [illegible] Gen. of Virginia, [illegible] P. Morrick and A. H. Gar- [illegible] in error.

[illegible] Matthews delivered the opin- [illegible]

[illegible] in error filed his petition, on [illegible] in the Circuit Court of the City [illegible] against Greenhow, the defend- [illegible] Treasurer of the City of Richmond, [illegible] of a rule nisi, commanding the said [illegible] to show cause why a peremptory [illegible] should not be awarded to the plain- [illegible] commanding the said Treasurer to issue to [illegible] a certificate in writing stating [illegible] had made the deposit required by law [illegible] of his license tax, as a sample mer- [illegible] in said city. The petition set forth that [illegible] under made in payment of this deposit con- [illegible] of coupons cut from bonds issued by the State of Virginia, and, by contract with the State therein declared, receivable in payment of all taxes, debts, demands and dues to the State, and that the tender was refused by the Treasurer, and a certificate of deposit withheld, because the 112th section of an Act of the General Assembly of Virginia, approved March 15, 1884, for the purpose of assessing taxes on persons, property, and incomes and licenses, requires that all license taxes shall be paid in gold or silver coin, United States treasury notes, or [illegible] bank notes, and not in coupons, and [illegible] another Act of the General Assembly of t[illegible] State, approved March 7, 1884, to regulate t[illegible] granting of licenses, likewise forbids the pa[illegible] ment of license taxes in coupons.

The alternative writ prayed for was deni[illegible] by the Circuit Court of the City of Richmon[illegible] and, on a petition for a writ of error, its jud[illegible] ment dismissing the petition therefor was [illegible] firmed by the Supreme Court of Appeals of t[illegible] State.

This being a case in which, by *mandam*[illegible] the plaintiff in error seeks to compel the offic[illegible] of the State of Virginia specifically to rece[illegible] coupons instead of money in payment of lice[illegible] taxes, it comes within the exact terms of the [illegible] cision of a majority of this court in *Antoni* [illegible] *Greenhow*, 107 U. S., 769 [Bk. 27, L. ed., 46[illegible] according to which the plaintiff in error is [illegible] mitted to the remedy provided by the Act [illegible] January 14, 1882, entitled "An Act to Prev[illegible] Frauds upon the Commonwealth and the Ho[illegible] ers of Her Securities in the Collection and I[illegible] bursement of Revenues."

The judgment of the Supreme Court of App[illegible] of Virginia is therefore affirmed.

Mr. Justice **Field** and *Mr. Justice* **Harl[illegible]** adhere to the views expressed in their diss[illegible] ing opinions in *Antoni* v. *Greenhow*, but t[illegible] agree that the principles announced by the [illegible] jority in that case, if applied to the pres[illegible] case, require an affirmance of the judgm[illegible] below.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, [illegible]

STEPHEN B. STURGES, *Plf. in Err*[illegible]

v.

MERCHANT CARTER, Treasurer of R[illegible] land County, Ohio, Successor in Offic[illegible] JOHN A. LEE, Treasurer.

(S. C., Reporter's ed., 511-523.)

Constitutional law—Constitution of Ohio—[illegible] remedy for existing right, not retroacti[illegible] taxation; exemption from.

1. The subpoena of a taxpayer to appear be[illegible] the auditor to give information of all prop[illegible] within his knowledge, not returned for taxa[illegible] and notification while in attendance of the [illegible] tor's purpose to increase the amount so retur[illegible] is a substantial compliance with sec. 2782, R. [illegible] Ohio, requiring the auditor to notify the taxp[illegible] of his purpose to make such increase.

2. The Act of the Legislature of Ohio of Apr[illegible] 1873, providing for the correction of the return[illegible] property for taxation previously made, is no[illegible] troactive under sec. 28, art. 2, of the Constitu[illegible] of that State. It merely gave the State a new [illegible] edy for an existing right.

3. Exemption from taxation must be expr[illegible] in clear and unmistakable terms and canno[illegible] shown by doubtful or ambiguous language.

4. Certificates of stock of a foreign corpor[illegible] held by a citizen of Ohio are taxable in that S[illegible] though a tax is also imposed on the propert[illegible] such corporation situated in the State.

5. Where the record discloses no error in re[illegible] to the amount of the judgment, this court [illegible] sumes the amount correct.

[No. 217.]

Submitted Mar. 31, 1885. Decided May 4, [illegible]

NOTE.—*Retrospective statutes; when valid.* [illegible] Co. v. Baldwin, 111 U. S., 1, bk. 28, 381, *note.*

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio.

The history and facts appear in the [illegible] of the case by *Mr. Justice* **Woods**:

This was an action brought by John A. Lee, [illegible] of Richland County, in the State of [illegible] against Stephen B. Sturges to recover taxes [illegible] for the years, 1874, 1875, 1876 and 1877, [illegible] shares of stock of the value of $100,000 [illegible] Western Union Telegraph Company, [illegible] certain credits and investments owned by [illegible] who during those years was a citizen of [illegible] residing in the City of Mansfield, in said [illegible]. The amount of the taxes sued for was [illegible] with the penalty thereon of 10 per [illegible], amounting to $1,077.68, making a total [illegible] $[illegible].54.50. The controversy in this case [illegible] only to the taxes on the stock of the [illegible] company.

Before the trial, the term of office of Lee, the [illegible] plaintiff, expired, and Merchant Car[illegible] his successor in office, was substituted as [illegible] in his stead. The parties waived a [illegible] by jury and submitted the case to the [illegible] upon the issues of facts as well as of law.

The court made a special finding of facts, [illegible] which it appeared as follows:

For ten years before the commencement of [illegible] the defendant was a citizen of said [illegible] for the years 1874, 1875, 1876 and 1877 [illegible] returns in accordance with law, pur[illegible] to contain full and accurate lists of [illegible] personal property subject to taxation; [illegible] were received and acted upon as [illegible] correct until the 23d June, 1878, when [illegible] auditor caused defendant to be sub[illegible] to appear *instanter* before him at his [illegible] to give information, pursuant to the [illegible] in that case provided, of all property [illegible] knowledge which had not been duly [illegible] for taxation. The defendant accord[illegible] appeared and submitted to an examina[illegible]. While undergoing examination the au[illegible] exhibited to him a list of judgments and [illegible] in his favor not included in his tax [illegible] and then and there told him that, un[illegible] the advice of the auditor of State, he felt [illegible] to make a supplemental assess[illegible] against him for the four years named, of [illegible] property which he owned during that [illegible], which was subject to taxation in said [illegible] and not included in his returns; called [illegible] attention to the statute under which [illegible] to proceed; and requested such ex[illegible] as he might deem it proper to make. [illegible] thereupon made such explanations [illegible] to offer.

This was the only notice given by the audi[illegible] the defendant, of his intention to assess [illegible] all personal property owned by him [illegible] said period and not included in his tax [illegible].

The auditor then proceeded to assess the de[illegible] on $[illegible] of stock in the Western [illegible] Telegraph Company for each of the [illegible] 1874, 1875, 1876 and 1877, and entered [illegible] as a supplemental tax duplicate, and [illegible] the same to the county treasurer for [illegible].

The defendant owned the telegraph stock so [illegible] during the four years aforesaid, and [illegible] had not been included in his returns for taxation, nor had he been theretofore charged with or paid any tax on the same.

The Western Union Telegraph Company was organized under the laws of New York; it had a paid-up capital of $41,000,000; most of its property was situated outside of Ohio; it owns 4,950 miles of telegraph wires, with the chemicals and office furniture used in connection therewith, in Ohio, all which for ten years past it had regularly returned for taxation, and paid thereon from $10,000 to $15,000 per annum of tax to the State of Ohio.

From the findings of fact, the court deduced the following among other conclusions of law:

"The auditor's said supplemental assessment was authorized, and is regular and valid, and under the Statutes of Ohio, as constructed by the courts of the State, the defendant is liable in this action for the amounts assessed on his Western Union Telegraph stock, and judgment will therefore be rendered against him for the tax so assessed thereon, with the damages prescribed by statute, and interest and costs."

The court thereupon rendered judgment against Sturges for $10,727.65, "the sum so as aforesaid found to be due;" and thereupon Sturges sued out the present writ of error to reverse that judgment.

Messrs. **Albert G. Riddle, C. H. Scribner, Henry E. Davis** and **James E. Padgett,** plaintiff in error.

Messrs. **John W. Jenner** and **Andrew Squire,** for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court: [515]

The first contention of the plaintiff in error is, that the court erred in holding that the notice given to him by the auditor of Richland County was sufficient, under the Statutes of Ohio, to authorize the assessment of the additional taxes, and in admitting evidence of what was said by the auditor to the plaintiff in error when the latter was under examination.

Section 2782 of the Revised Statutes of Ohio, originally section 34 of the Act of April 5, 1859 (Swan & Critch. Stat. 1452) provides, in substance, that if the county auditor shall have reason to believe that any person has given to the assessor a false statement of his personal property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, which are by law subject to taxation, or that the assessor has made an erroneous return of any such property, he shall proceed, at any time before the final settlement with the county treasurer, to charge such person on the duplicate with the proper amount of taxes, and to enable him to do this, he is authorized to issue compulsory process and require the attendance of any person "whom he might suppose to have a knowledge of the articles or value of the personal property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, and examine such person or persons on oath in relation to such statement or return; and it shall be the duty of the auditor in all such cases to notify every such person, before making the entry on the tax list and duplicate, that he may have an opportunity of showing that his statement or return of the assessor was correct. And the county auditor shall in all such cases file in his office a

statement of the facts or evidence on which he made such correction." These provisions of the statute have been in force ever since April 5, 1859.

The findings of the fact show that the plaintiff in error was subpœnaed to appear before the auditor to give information of all property within his knowledge which had not been returned for taxation, and that, while in attendance before the auditor, he was informed by the latter of his purpose to increase the amount of the property returned by him for taxation. This was a substantial compliance with the statute, which required the auditor to notify the taxpayer, before making the entry of such increase on the tax list and duplicate, of his purpose to do so, so that he might have an opportunity of showing that his statement or the return of the assessor was correct. The subpœna served on the plaintiff in error and the conduct of the auditor under it gave him the opportunity to which the statute entitled him.

[516] But the plaintiff in error contends that, beside service of the subpœna requiring him to attend upon the auditor and give testimony in relation to property not returned for taxation, he was entitled to written notice before the auditor could make an entry on the tax list of any additional property omitted in his returns. The statute does not require any notice in writing except the compulsory process of subpœna to be served upon the person called to attend and testify. But if any further notice was required, it was waived by the plaintiff in error.

The finding of the Circuit Court shows that he appeared and submitted to an examination touching the correctness of his returns; that the auditor told him during such examination that as auditor he was required by his duty to make a supplemental assessment against him of the property which he had not included in his returns for the four years mentioned in the findings of the court, and requested him to make such explanations of his returns as he thought proper; and that he did make such as he chose. It does not appear that he complained that he had not received notice of the purpose of the auditor to increase the assessment of his property, or that the notice was not in writing, or that it was too short, or that he asked further time for consideration, or to take the advice of counsel, or to produce further evidence. From all that appears by the record, there was no surprise; he had opportunity to establish the correctness of the tax returns, and to show the auditor that he was not liable to an additional assessment. He cannot, therefore, complain of want of notice.

The plaintiff in error next insists that the law of 1878, by which the auditor assumed to correct the returns of the plaintiff in error for the years from 1874 to 1877 inclusive, and place his omitted property on the tax list, was retroactive, and therefore forbidden by section 28 of article 2 of the Constitution of Ohio, which declares that "The General Assembly shall have no power to pass retroactive laws."

Before the passage of the Act of 1878, the law of Ohio, section 1 of the Act of April 5, 1859 (vol. 46, p. 175, Laws of Ohio; vol. 2, [517] Swan & Critch. R. S. of Ohio, p. 1438), provided that all property whether real or personal, in the State, all moneys, credits, investments in bonds, stocks, etc., of persons residing ther in, should be subject to taxation and entered o the list of taxable property for that purpose; an section 6 of the same Act required the owner t make out and deliver to the assessor a statemer under oath of all the personal property, m neys, investments in bonds or stocks, required t be listed for taxation. This was the law in forc during the years for which the taxes sued fc were assessed and levied, and it is still in forc

Section 34 of the Act of April 5, 1859, re-e acted as section 2782 of the Revised Statutes Ohio of 1880, authorized as we have stated, t county auditor, in case he believed any persc had made a false return of his personal prope ty, investment in bonds or stocks, to proceed any time before the final settlement with t county treasurer, which was required to made annually, to correct the return and char such person on the duplicate with the prop amount of taxes. By section 1 of a suppl mentary Act passed March 29, 1861 (vol. 58, 47, Laws of Ohio), it was provided that if a person whose duty it was to make a return property for taxation should make a false retur the auditor should ascertain the true amount the taxable property that such person ought have returned, and add thereto fifty p centum on the amount so ascertained, a the amount so ascertained with the fifty p centum should be entered on the duplicate f taxation. These enactments continued in for until the Act of May 11, 1878, when they w amended by section 48 of that Act by addi the following clause: "And the inquiry and c rections provided for in this and the next s tion may go as far back as the same can traced, not exceeding the four years next pr to the year in which the inquiries and corr tions are made; but as to former years no pen ty shall be added and only simple taxes shou be claimed." Laws of Ohio, 1878, tit. 13, 456; Rev. Stat. of Ohio of 1880, § 2781. As t Act took effect upon its passage, it authoriz the auditor, in any future corrections and justments of taxes due, to extend his inquir back for a period of four years. It did not quire him to wait four years after its passa before he could give it full effect.

It is this amendment of April 11, 1878, whi the plaintiff in error insists is retroactive, beca it authorizes the auditor to go back for a peri of four years to correct false returns; where before its passage he could not for that purp go behind his annual settlement with the tr surer.

The complaint is not that the auditor w required to add fifty per centum to the value the omitted property, for the old law thorized him to do that, provided he did before his annual settlement with the cou treasurer and the new law authorized him make the addition of fifty per centum for current year only, so that in this respect new law did not change the old; but that it not competent for the Legislature to go beh the annual adjustments made of the taxes the auditor with the taxpayer; that if the St had wrongfully assessed too much, the citi was barred, and if the citizen had listed little the State was barred, and that legislat which undertook to open these adjustme was retroactive.

[illegible] instance, this contention is that a tax-[illegible] has been evading the payment of [illegible] due from him by making false re-[illegible] shield himself behind the annual set-[illegible] made by the auditor with the treasurer, [illegible] such as returns were assumed to be true, [illegible] the Legislature can pass no Act by [illegible] the falsity of the returns can for a limited [illegible] (in this case four years) be exposed, and [illegible] payment of the taxes enforced—in other [illegible] that the taxpayer has a vested right [illegible] fruits of his false returns. Such a [illegible] cannot be sustained. *Foster* v. *Ele-[illegible]*, 16 Mass., 245.

[illegible] common, no right of the taxpayer was [illegible] by the Act of 1878. His investments in [illegible] and stocks were subject to taxation; the [illegible] upon such investments were due to the [illegible] and the Act of 1878 merely provided a [illegible] by which the taxes might be assessed [illegible] in spite of the annual settlements [illegible] by the auditor. It gave a new remedy to [illegible] for enforcing a right which it had all [illegible] possessed, namely: the right to the [illegible] property liable to taxation.

[illegible] Act is not a retroactive law within [illegible] of the Constitution of Ohio. In the [illegible] v. *Wheeler*, 2 Gall., 139, *Mr. Justice* [illegible] defines a retroactive, or, as he calls [illegible] law: "Upon principle, every [illegible] which takes away or impairs vested [illegible] required under existing laws, or creates [illegible] obligation, imposes a new duty, or at-[illegible] new disability, in respect to transac-[illegible] considerations already past, must be [illegible] retrospective." The Act of 1878 took [illegible] vested right of the taxpayer; it im-[illegible] upon him no new duty or obligation, [illegible] him to no new disability in refer-[illegible] past transactions. The definition of [illegible] was adopted by the Supreme [illegible] Ohio in *Rairden* v. *Holden*, 15 Ohio [illegible] when construing the clause in the Con-[illegible] of Ohio now under consideration. Ap-[illegible] that definition, it is clear the provision [illegible] Act of May 11, 1878, complained of, is [illegible] to the objection that it is forbidden [illegible] Constitution of the State. See also, [illegible] v. *Purcell*, 11 Ohio St., 641; *Green* [illegible] v. *Campbell*, 16 Ohio St., 11; *State* [illegible] *Township*, 20 Ohio St., 362; [illegible] 4 N. H., 16; *Clark* v. *Clark*, 10 [illegible] v. *Greenlaw*, 11 *Id.*, 200. [illegible] cited are conclusive against the [illegible] that the legislation under review is [illegible]

[illegible] in error next insists that the [illegible] erred in deciding that certificates [illegible] of capital stock in the Western Union [illegible] Company, held by him, were taxable [illegible] of Ohio

[illegible] 2 of article 12 of the Constitution of [illegible] "Laws shall be passed taxing [illegible] rule all moneys, credits, invest-[illegible] bonds, stocks, joint stock companies, [illegible]

[illegible] effect to this provision the Act of [illegible] Rev. Stat. Swan & Critch., 1438), [illegible] "An Act for the Assessment of All [illegible] in This State," etc., was passed. It [illegible] by the first section of this Act as [illegible] "All property, whether real or per-[illegible] in this State, all moneys, credits, invest-[illegible]

ments in bonds, stocks, joint stock companies or otherwise, of persons residing therein, * * * except such as is hereinafter expressly exempted, shall be subject to taxation, and such property, moneys, credits, investments in bonds, [520] stocks, joint stock companies, or otherwise, or the value thereof, shall be entered on the list of taxable property for that purpose." By section 2 of the same Act it was enacted as follows: "That the term investment in stocks, when ever used in this Act, shall be held to mean and include all moneys invested * * * in any association, corporation, joint stock company, or otherwise, the stock or capital of which is or may be divided into shares, which are transferable by each owner without the consent of the the other partners or stockholders, for taxation of which no special provision is made by this Act, held by persons residing in this State, either for themselves or as guardians, trustees, or agents."

There was no special provision for the taxation of such property as the shares held by the plaintiff in error in the Western Union Telegraph Company. It is plain, therefore, that, under the Act of April 5, 1859, the shares of stock held by the plaintiff in error were taxable in the State of Ohio, unless they were expressly exempted. The plaintiff in error relies upon an exemption contained in the ninth subdivision of the third section of the Act, which is as follows: "9th. Each individual in this State may hold exempt from taxation personal property of any description, of which such individual is the actual owner, not exceeding fifty dollars in value; * * * no person shall be required to include in his statement, as a part of the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, which he is required to list, any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this State." Rev. Stat. Swan & Critch., 1441.

Section 59 of the same Act provides that "No person shall be required to list for taxation any certificate of the capital stock of any company, the capital stock of which is taxed in the name of the company."

As the findings of the Circuit Court show that a part of the property of the Western Union Telegraph Company was in the State of Ohio, and that it paid taxes on the same to the State, the plaintiff in error insists that the shares [521] of stock held by him in the company were exempted from taxation by the clauses of the Act of April 5, 1859, which we have quoted.

This contention cannot be sustained. The law taxes the shares of the plaintiff in error unless they are "expressly exempted." The burden is on him to show an express exemption.

There is no exemption unless the payment by the Western Union Telegraph Company of the tax imposed on its property situated in the State, and which the findings of fact made by the Circuit Court show was but a small part of its whole property, relieves from taxation its shares held by a resident of the State.

It may be conceded that generally, the capital or the capital stock of a corporation is its property. *Bank Tax Case*, 2 Wall., 200 [69 U. S., bk. 17, L. ed. 793]; *Nat. Bank* v. *Common-*

wealth, 9 Wall., 353 [76 U. S., bk. 19, L. ed. 701]. But the shares held by the stockholders are distinct from the capital stock of the corporation, and the taxation of both is not necessarily double taxation. *Farrington* v. *Tennessee*, 95 U. S., 679 [Bk. 24, L. ed., 558]; *Dewing* v. *Perdicaries*, 96 U. S., 193 [Bk. 24, L. ed., 654]; *Bradley* v. *Bauder*, 36 Ohio St., 28. The claim, therefore, of the plaintiff in error is to the exemption of a certain class of his property from taxation. But it has been repeatedly held by this court that an exemption from taxation must be expressed in clear and unmistakable terms and cannot be shown by doubtful or ambiguous language. *Providence Bank* v. *Billings*, 4 Pet., 514; *Gilfillan* v. *Canal Co.*, 109 U. S., 401 [Bk. 27, L. ed. 977].

The case therefore depends upon the construction of the statute. The Supreme Court of Ohio has decided that shares owned by a resident of Ohio in a foreign corporation, none of whose capital was taxed in Ohio, but all of it in the State where the corporation had its home, was taxable in Ohio. *Bradley* v. *Bauder* [*supra*]. The controversy on this part of the case is, therefore, reduced to the question, whether the Legislature has clearly and unmistakably expressed the purpose in the Act under consideration to exempt from taxation shares in a foreign corporation owned by residents of Ohio, when but a small part of the property of the company was subject to taxation in Ohio.

[522]

The exemption from taxation of investments in stocks, provided by the statute, applies only to shares of those corporations which are required to return their capital and property for taxation in the State. *Jones* v. *Davis*, 35 Ohio St., 474. This clearly means those corporations which are required to return all, or substantially all their capital and property. There is no rule of interpretation by which the statute can be held to apply to corporations who list only a small part of their property for taxation in Ohio. If the Legislature had intended to allow an exemption in such a case, it could and would have expressed that purpose by words not admitting of doubt. As the shares of the plaintiff in error in the Western Union Telegraph Company were not only not expressly, but not even by fair implication, exempted from taxation, we are of opinion that the tax complained of was authorized by law.

Lastly, complaint is made that the Circuit Court erred in rendering judgment for the penalty and interest upon the additional taxes assessed against the plaintiff in error. .

The judgment of the Circuit Court was for $10,727.65, which is less than the taxes demanded in the petition without either interest or penalty. The findings of fact do not show the rate of taxation for any one of the four years for which the taxes were recovered, and it is impossible for us to say that anything was included in the judgment but the simple taxes. It is true that the court said in its conclusion of law that judgment would be rendered for the tax, with the damages prescribed by statute, and interest and costs.

But we have not been referred to any statute which gives damages in this class of cases, and there is nothing in the findings to show that anything was actually included in the judgment, either for damages or interest. The amount of the judgment was based upon the assessment of the property of the plaintiff in error made by the auditor, a sworn public officer. Therefore the burden is on the plaintiff in error to show by the record that the court rendered judgment for an amount not authorized by law. This he has failed to do.

Under the circumstances, we must presume that the judgment of the Circuit Court, in respect to its amount, as well as in other respects was right, unless the contrary is shown. *Venetress* v. *Smith*, 10 Pet., 161; *Townsend* v. *Jameson*, 7 How., 714; *The Ship Potomac*, 2 Black 581 [67 U. S., bk. 17, L. ed. 263].

We find no error in the record.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY, *Plff. in Err.*,

v.

GEORGE DELAMORE, J. R. ALCEE GAUTHREAUX, Civil Sheriff, *et al.*

(See S. C., Reporter's ed., 501-511.)

Jurisdiction — review of judgments of State Courts—bankruptcy of corporation—sale of franchises sustained.

1. This court has jurisdiction to review the judgment of a State Court against the validity of a title claimed under a sale in bankruptcy.

2. The jurisdiction of the bankruptcy court to adjudicate a railroad company bankrupt and to administer its property, under the Bankruptcy Act, is settled by the decisions of the Circuit Courts and this court is unwilling at this late date to re-examine the question.

3. The authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale, and to transfer them, with the corporeal property of the company, to the purchaser.

4. Where the franchises of a railroad corporation essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property, upon the bankruptcy of the company, carries the franchises, and they may be sold and passed to the purchaser at the bankruptcy sale.

5. There is nothing in the nature of a corporate franchise under the law of Louisiana, which forbids its transfer with the other property of the corporation.

[No. 252.]

Argued Apr. 15, 1885. Decided May 4, 1885.

IN ERROR to the Supreme Court of the State of Louisiana

The history and facts of the case appear in the

Statement by *Mr. Justice* **Woods:**

This is a writ of error to bring under review a decree of the Supreme Court of Louisiana reversing a decree of the Fifth District Court for the Parish of Orleans.

The facts, as they appeared from the plea-

NOTE.—*Mortgages—power of corporation to mortgage its property and franchises.* M. & L. R. R. Co. v. Berry., 112 U. S., 609, bk. 26, 837, *note*; Chesapeake & O. Ry. Co. v. Miller, *ante*, 176, *note*.

[illegible] evidence, were as follows: The Canal [illegible] City Park and Lake Shore Railroad Company was a corporation organized under the [illegible] law of the State of Louisiana. By an ordinance of the City of New Orleans, number [illegible] 2,384, administration series, dated August [illegible] the city granted to the corporation [illegible] the right of way from the neutral [illegible] in Basin Street, by certain other designated streets, and along the embankment on the [illegible] side of the Orleans Canal to the lake [illegible] the terminus and the entire route being [illegible] the city limits. The route upon which the road was to be built was subsequently modified by ordinance numbered 2,548, administration series, dated March 25, 1874. The company constructed and used a railroad upon the right of way so granted. In the year 1876, [illegible] a petition in bankruptcy filed by Edward [illegible] Burgess and another, the railroad company was adjudicated bankrupt by the District Court of the United States for the District of Louisiana. Besides other property and assets surrendered by the bankrupt, were "the railroad [illegible] and singular, built in pursuance of the charter of the said company, and the various grants and privileges conferred upon said company by the City of New Orleans, * * * including the road bed of main tracks and [illegible] and all rights and appurtenances of [illegible] railroad tracks, as well as rights of way [illegible] attached, * * * and all the franchises and appurtenances" of said company.

On November 29, 1876, the assignee in bankruptcy applied to the bankruptcy court for an order to sell the property above described, and the assets of the company, free and clear of all incumbrances, and on May 19, 1877, the court made the order prayed for, and directed a sale to be made on the following terms: "One third cash and the balance on one and two years credit, to be secured by mortgage on the property sold." On July 14, 1877, the property was sold by the special master appointed by the court to Thomas H. Handy. The sale was afterwards confirmed by the court, and a deed made by the master to the purchaser for the [illegible] and "all the right of way, powers, privileges, immunities and franchises conferred and granted by the City of New Orleans to the Canal Street, City Park and Lake Railroad Company" by the ordinances above mentioned. At the same time, and by the same act, Handy gave a mortgage on the property conveyed to him to secure his notes given for two thirds of the purchase money. The mortgage contained a [illegible] *alienando*.

On January 31, 1878, a new railroad company was organized, under authority of the general railroad law of Louisiana, bearing the same name, to wit: the "Canal Street, City Park and Lake Railroad Company," and having the same objects and purposes as the company which had been adjudicated bankrupt. The new company Handy, on August 16, 1878, conveyed by public Act the property hereinbefore described, purchased by him at the bankruptcy sale of the original Canal Street, City Park and Lake Shore Railroad Company, and the purchaser assumed the mortgage of Handy and his agreement to pay the balance due from him as the purchaser of the property.

[illegible] the conveyance, the City of New Orleans, by an ordinance numbered 4,528, administration series, dated May 22, 1878, had granted to the second Canal Street, City Park and Lake Railroad Company the right of way upon which to lay a railroad through and on the same streets and along the same route as had been previously granted by ordinance to the first Canal Street City Park and Lake Railroad Company.

Both Handy and the railroad company to which he sold the property, made default in the payment of the mortgage debt, and at the suit of Elizabeth Strathman and another, holders of one of the mortgage notes made by Handy, a writ of seizure and sale was issued, and the property described in and covered by the mortgage was seized and sold to Moses Schwartz & Brother, and afterwards conveyed to them by the sheriff, by deed dated April 4, 1879.

In the meantime, on March 31, 1879, the present plaintiff, the New Orleans, Spanish Fort and Lake Railroad Company, had been organized under the general law of the State for the organization of corporations, and on April 9, 1879, Schwartz & Brother sold and conveyed to the last named Railroad Company the railroad, "with all and singular the right of way, powers, privileges and immunities and franchises conferred and granted by the City of New Orleans to the Canal Street, City Park and Lake Railroad Company" by the ordinance of August 5, 1873, as amended by the ordinance of March 24, 1874, being the same property bought by Schwartz & Brother at the mortgage sale. [50

On November 15, 1879, George Delamore, one of the defendants, recovered a judgment in the Fifth District Court for the Parish of Orleans for $5,720 against the Canal Street, City Park and Lake Railroad Company, being the second company above mentioned organized under that name. Delamore, on the 11th day of November, 1879, caused execution to issue on this judgment, which, on the 18th of November, the Sheriff for the Parish of Orleans levied on a certain frame building or structure known as "the pavilion," being on the Bayou St. John, at or near the entrance thereto into the Lake Pontchartrain, and also on "all and singular the right of way, the powers, privileges, immunities and franchises conferred and granted by the City of New Orleans to the Canal Street, City Park and Lake Railroad Company, under and by virtue of an ordinance of the City of New Orleans, being No. 4,528 of the administration series adopted by the Common Council of the City of New Orleans on the 21st of May, 1878."

Thereupon the plaintiff, the New Orleans, Spanish Fort and Lake Railroad Company, filed the bill in this case in the Fifth District Court for the Parish of Orleans against Delamore and the Sheriff, the prayer of which was for a writ of injunction against the defendants to restrain them from advertising or selling, or offering for sale, the property so levied on, as above stated. The Fifth District Court allowed the injunction as prayed for, but on final hearing so modified it as only to restrain the seizure and sale of the rights and franchises enjoyed by the plaintiff which it acquired from Moses Schwartz, and decreed that the plaintiff be quieted in the enjoyment and possession of the

[illegible] order of the bankruptcy co[illegible]
[illegible] the mortgaged property of the ba[illegible]
[illegible] free of incumbrances. The c[illegible]
[illegible] and decisive of the jurisdiction
[illegible] the present appeal.

We therefore proceed to consider the m[illegible]
[illegible] the case. They are involved in the [illegible]
[illegible] whether the right of way and fr[illegible]
[illegible] granted by the City of New Orleans [illegible]
[illegible] Canal Street, City Park and Lake R[illegible]
[illegible] Company passed by the sale thereof m[illegible]
[illegible] pursuance of the decree of the bankrupt[illegible]
[illegible] court.

The jurisdiction of the bankruptcy court [illegible] adjudicate a railroad company bankrupt and [illegible] administer its property under the Bankrupt A[illegible] has been sustained by several Circuit Cou[illegible] of the United States. *Adams* v. *Boston*, [illegible] *E. R. R. Co.*, 1 Holmes, 30; *Sweatt* v. *Bost*[illegible] *H. & E. R. R. Co.*, 5 N. Bk. Reg., 234; [illegible] *& Chatt. R. R. Co.* v. *Jones*, 5 N. Bk. Reg., [illegible] *Winter* v. *The Iowa, etc., R. R. Co.*, 2 Di[illegible] 487. No Circuit Court before which the qu[illegible] tion has been brought has denied the jurisd[illegible] tion. As they were the courts of last res[illegible] upon this question, and valuable rights m[illegible] depend upon their judgments upon this poi[illegible] we think the question should be considered [illegible] settled by the authorities cited, and are unv[illegible] ling at this late day to re-examine it, especia[illegible] as we have no jurisdiction to do so, except [illegible] collateral proceeding like the present.

The plaintiff contends that the right of w[illegible] with the franchise to build and use a railr[illegible] thereon for profit, was surrendered by the ba[illegible] rupt corporation as a part of its property, [illegible] was sold to Handy at the bankruptcy sale, [illegible] was subsequently acquired by it by mean[illegible] the claim of title above set forth. It is not [illegible] tended in this case that Handy acquire[illegible] franchise to be a corporation or any other [illegible] chise except those just mentioned by virt[illegible] his purchase at the bankruptcy sale.

On the other hand, it is contended by t[illegible] fendant that the right of way and the fra[illegible] to build and use a railroad thereon rever[illegible] the City of New Orleans when the ra[illegible] company was adjudicated bankrupt, an[illegible] all that was surrendered in bankruptcy [illegible] railroad company and sold at the bank[illegible] sale or the mortgage sale, was the railroa[illegible] out right of way or other franchise.

The contention of the defendant, if su[illegible] would entirely destroy the value of th[illegible] erty as a railroad. For it is plain that [illegible] part, if not all the line, of the railroa[illegible] upon the streets and public grounds of [illegible] If, therefore, the franchise of the rig[illegible] copy the streets and public grounds [illegible] railroad track did not pass to the pur[illegible] the bankruptcy sale, then all that he[illegible] his purchase was a lot of ties and [illegible] which he could be compelled at any [illegible] the order of the city authorities, to re[illegible] the law be as contended by the defend[illegible] ror, a judicial sale of the railroad an[illegible] chise would be the destruction of b[illegible]

The ground upon which this view [illegible] fendant is based is that the franchis[illegible] road corporation are inalienable in [illegible] In passing upon this question it is n[illegible] bear in mind the distinction betwee[illegible] eral classes of railroad franchises.

stated by *Mr. Justice* Curtis in the case of *Hall* v. *Sullivan R. R. Co.*, 21 Law Rep., 138, where he said: "The franchise to be a corporation is therefore not a subject of sale and transfer unless the law by some positive provision made it so and pointed out the modes in which such sale and transfer may be effected. But the franchise to build, own and manage a railroad and to take tolls thereon are not necessarily separate rights. They are capable of existing and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable."

The same subject was considered by this court in the case of *Morgan* v. *Louisiana*, 93 U. S. 217 [Bk. 23, L. ed. 860], where it was said that exemption from taxation was a right personal to the railroad corporation to which it was granted, and did not pass upon a sale of its property and franchises. *Mr. Justice* Field, who delivered the opinion of the court, distinguished such an immunity from taxation from those rights, privileges and immunities which, strictly speaking, are the franchises of a railroad company. He said: "The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its works and road would be of little value. * * * They are positive rights and privileges without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of these. The former may be conveyed to the purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction."

We are of opinion that those franchises which in the case just cited are described as necessary to the use and enjoyment of the property of a railroad company are assignable in Louisiana, and that there is no warrant in the jurisprudence of that State for holding the contrary.

That the quality of being transferable attaches to such franchises of a railroad as are essential to its use and enjoyment by the company is conclusively shown by section 2396 of the Revised Statutes of Louisiana (Act of 1856, p. 135), which was in force when the first Canal street, City Park and Lake Railroad Company was organized, and has been in force ever since. That section provides as follows: "In addition to the powers conferred by law upon railroad companies, any railroad company established under the laws of this State may borrow, from time to time, such sum of money as may be required for the construction or repairs of any railroad, and for this purpose may issue bonds, or other obligations secured by mortgage, upon its franchises and all the property of said company."

The authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale and to transfer them with the corporeal property of the company to the purchaser. It could not be held that, when a mortgage on a railroad and its franchises was authorized by law, the attempt of the mortgagor to enforce the mortgage would destroy the main value of the property by the destruction of its franchises.

Since the passage of the Act of 1856, the Supreme Court of Louisiana has recognized the validity of the transfer to individuals, of those rights and franchises of a railroad company without which the road could not be successfully used.

In the case of *Chaffee* v. *Ludeling*, 27 La. Ann., 607, it was declared that the defendants, by their purchase at sheriff's sale of the property of the Vicksburg, Shreveport and Texas Railroad Company, a Louisiana corporation, acquired "the privileges and franchise of the corporation, its powers to operate the railroad. The sheriff's sale made them the owners of the road, its right of way, its property, its franchise, but did not and could not make them a corporation. * * * This sale conveyed to them the rights and property of that company; it made them joint owners thereof."*

There is, therefore, nothing in the nature of a corporate franchise under the law of Louisiana which forbids its transfer with the other property of the corporation.

And such must be the conclusion whenever a railroad company is authorized by law to mortgage its tangible property and franchises. [510] When there has been a judicial sale of railroad property under a mortgage authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the railroad passed to the purchasers. This was assumed to be the law by the opinion of this court pronounced by *Mr. Justice* Matthews in the case of *Memphis R. R. Co.* v. *Commissioners*, 112 U. S., 609 [Bk. 28, L. ed. 837], when it was said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchasers at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it and the franchise of maintaining and operating it as such." See also, *Hall* v. *Sullivan R. R. Co.*, 21 Law Rep., 135; *Galveston R. R. Co.* v. *Cowdrey*, 11 Wall., 459 [78 U. S., bk. 20, L. ed. 199].

It follows that if the franchises of a railroad corporation essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property, upon the bankruptcy of the company, carries the franchises, and they may be sold and passed to the purchaser at the bankruptcy sale.

The plaintiff, therefore, by virtue of the bankruptcy sale, and the subsequent mortgage sale and the several mesne conveyances mentioned, acquired with the tangible property of the original Canal Street, City Park and Lake Railroad Company the franchise granted by the City of New Orleans to lay its track over the streets and public grounds designated in the ordinance of August 6, 1873, and the amendatory ordinance of March 24, 1874. This right of way so vested could not be affected by the ordinance of the City of New Orleans to grant a similar right of way over the same streets and route to the second Canal Street, City Park and Lake Railroad Company, and

*The sale in this case was made by virtue of a writ of seizure and sale issued upon a mortgage executed by the Railroad Company upon its property and franchises to secure its bonds. See Jackson v. Ludeling, 99 U. S., 513 [Bk. 25, L. ed. 460].

the acceptance of the grant by the latter railroad company; for, as it was not in the power of the city to repeal the grant to the first company by an ordinance passed expressly for that purpose, it could not do so by any indirect or roundabout method.

The defendants are seeking to sell, upon execution, the right of way which the City of New [511] Orleans, by its ordinance No. 4,523, dated May 21, 1878, attempted to grant to the second Canal Street, City Park and Lake Railroad Company, and which had already been granted to the first company of that name. In substance and in effect the right of way seized by the sheriff at the instance of Delamore, is the right of way owned by and in possession of the plaintiff, and forms a part of its property, giving value, and necessary to the use and enjoyment of the residue. The property thus seized in execution is claimed by the plaintiff, who is a third person, not a party to the judgment on which the execution is issued. This is the case provided for by articles 395, 396, 397 and 399 of the Code of Practice, and it is under these articles that the present suit is brought and justified. We think the injunction granted by the Fifth District Court restraining the sale of the right of way and franchises of the plaintiff should not have been dissolved.

So much of the decree of the Supreme Court of Louisiana as was appealed from in this case is, therefore, reversed, and the cause is remanded to that court, with instructions to render a decree enjoining and restraining the defendants from advertising or selling or offering for sale, upon the execution described in the bill, the right of way and franchises granted by the City of New Orleans to the Canal Street, City Park and Lake Railroad Company by ordinance No. 4,523, administration series, dated May 21, 1878.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—115 U. S., 534.

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[555] PETER O. STRANG ET AL., *Plffs. in Err.*,

v.

AMARIAH H. BRADNER ET AL.

(See S. C., Reporter's ed., 555-562.)

Bankruptcy—force of term "fraud"—discharge does not bar claim for damages on account of fraud—partnership.

*1. The rule reaffirmed that the term "fraud" in the clause defining the debts from which a bankrupt is not relieved by a discharge under the Bankrupt Act, means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, not implied fraud, which may exist without bad faith.

2. A claim against a bankrupt for damages on account of fraud of deceit practiced by him, is not discharged by proceedings in bankruptcy; nor is a a debt, created by his fraud, discharged, even where it was proved against his estate, and a dividend thereon received on account.

3. If, in the conduct of partnership business, and with reference thereto, one partner makes false or fradulent misrepresentations of fact to the injury of innocent parsons dealing with him, as representing the firm, and without notice of any limitations upon his general authority as agent for the partnership, his partners cannot escape pecuniary responsibility therefor upon the ground that the misrepresentations were made without their knowledge; especially where the firm appropriates the fruits of the fraudulent conduct of such partner.

[No. 246.]

Argued April 13, 1885. Decided May 4, 1885.

IN ERROR to the Supreme Court of New York.

This action was brought in the court below by the defendants in error, to recover certain amounts paid by them to take up certain accommodation notes alleged to have been fraudulently procured from them by the defendants.

The answer set up the discharge in bankruptcy of two of the defendants, as a bar.

The trial resulted in a verdict and judgment for the plaintiffs for $17,517.86. This judgment was affirmed, on appeal, by the court below, in General Term, and by the Court of Appeals, the record being then remitted to the court below. Whereupon the defendant sued out this writ of error.

The facts of the case are stated by the court.

Messrs. **George H. Forster** and *W. G. De Forest,* for plaintiffs in error.

Messrs. **William F. Cogswell** and *James Wood,* for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

On the 1st day of June, 1877, each of the appellants, who were defendants below, received from the District Court of the United States for the Southern District of New York his discharge from all debts and demands, which, by the Revised Statutes of the United States, title *Bankruptcy,* were made provable against his estate, and which existed on the 3d day of July, 1875—other than such debts as were by law excepted from the operation of a discharge in bankruptcy. The statute excepts from the operation of a discharge any "debt created by the fraud or embezzlement of a bankrupt, or by defalcation as a public officer, or while acting in a fiduciary capacity; but the debt may be proved, and the dividend thereon shall be payment on account of such debt." R. S. 5117. To this action, brought by appellees against appellants upon a cause of action accruing prior to July 3, 1875, the latter made defense, in part, upon the ground that their respective discharges in bankruptcy relieved them from all liability to plaintiffs. In the Supreme Court of New York there was a verdict and judgment in favor of the plaintiffs for the sum of $17,517.86. That judgment having been affirmed in the Court of Appeals, the question to be determined upon this writ of error is whether the claim or demand of the plaintiffs is one from which they were relieved by the discharges in bankruptcy. If the debt was of that character, the judgment below must be reversed; otherwise, affirmed.

The evidence before the jury tended to establish the following facts: That for some years prior to June, 1875, the plaintiffs were doing business in the City of Rochester, New York as partners, under the style of Lowery & Bradner, while during the same period the defendants were engaged in business in the City of New York, under the style of Strang & Holland Bros.; that the special business of plaintiffs was the purchase of wool, which they forwarded

*Head notes by *Mr. Justice* HARLAN.

[illegible] defendants, as commission merchants, to [illegible] account, that plaintiffs, for the accommodation of defendants, often furnished them with promissory notes, for the purpose of enabling them to carry on business; that the defendants took care of these notes, paying the same at maturity out of the proceeds of the property consigned, and with money remitted to the plaintiffs; that in the transactions between the parties the plaintiffs were credited with these notes, with the proceeds of property sold on their account, and with money remitted to them, and were charged with the amounts paid to take up the notes; that on or about March 1, 1873, the defendants requested the plaintiffs to furnish them with four promissory notes of about $4,000 each, to enable them to raise money thereon, and to be credited to them on their account, in accordance with a course of business existing between the parties—such notes to be of odd amounts and made up of different dates before the time they were transmitted to the defendants, so that they might appear to be given for real indebtedness; in pursuance to that request, the plaintiffs made and transmitted to defendants their four promissory notes, for $4,325.50, $4,326.25, $4,327.15 and $4,327.15, each at four months, respectively, on the 1st, 9th, 15th and 16th days of February, 1875, and each payable at the plaintiffs at the office of the defendants, in the City of New York, and indorsed by the defendants; and that, on or about April 4, 1875, they represented to plaintiffs that his firm did not need, nor been able to use, those notes, because they were made payable at their office, and requested plaintiffs to lend them four other notes of the same amount, payable at the Metropolitan National Bank, in New York City, to be used in the place of those dated in February.

There was also evidence tending to prove that the plaintiffs, relying upon the representation that the February notes had not been used, and that the defendants desired other notes to be used in their place, executed and delivered to them four other promissory notes, each at four months, for $4,850, $4,951.25, $4,860.30, and $4,870 respectively, dated 13th, 14th, 16th, and 18th of March, 1875, payable four months after date to their own order at the Metropolitan National Bank, New York, and by them indorsed; that, at the time defendants requested and received with the notes last described, they had, in fact, discounted and put in circulation the February notes, whereby the plaintiffs as makers and indorsers, were compelled to pay the same to the holders; that when they applied for the March notes, the defendants knew that they were insolvent, but that this was not known to plaintiffs; that he made false representations and procured said notes with the intent to defraud the plaintiffs; and that the latter was compelled to pay such part of those notes as amounted, principal and interest, to the sum for which they obtained judgment below.

As to the money transactions made by Strang to Bradner and Bradner there was no active participation by his partners, the Messrs. Holland. It was proven that the proceeds of the notes obtained from plaintiffs, as well as the proceeds of the February notes, all went into the business of Strang & Holland Brothers.

The present suit, brought to recover a judgment for the amount plaintiffs were compelled to pay to *bona fide* holders of the March notes, proceeds upon the ground that the appellees have sustained damages by reason of the false and fraudulent representations made by Strang, on behalf of his firm, whereby the appellees were induced to execute and deliver to that firm the four notes dated in March, 1875. Is that claim for damages of the class from which the bankrupts were relieved by their respective discharges in bankruptcy? [559]

In *Neal* v. *Clark*, 95 U. S., 709 [Bk. 24, L. ed. 587], it was held that, looking to the object of Congress in enacting a general law by which the honest citizen might be relieved from the burden of hopeless insolvency, the term "fraud," in the clause defining the debts from which a bankrupt is not relieved by a discharge under the Bankrupt Act, should be construed to mean positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality. This principle was affirmed in the recent case of *Hennequin* v. *Clews*, 111 U. S., 682 [Bk. 28, L. ed. 568], where will be found a reference to the leading cases in this country and in England. Under this rule it is impossible to avoid the conclusion that the debt in question was created by positive fraud upon the part of Strang, representing his firm, if it be true—and the jury proceeded upon the ground that such was the fact—that he procured the notes, dated in March, by representing that the February notes had not been and could not be used by his firm, and that they desired other notes, so drawn as to be readily negotiated, to take their place, when, in fact, the February notes had been previously put into circulation by the firm, and had then become obligations upon which the appellees were liable to the holders. There is no pretense in the evidence that the course of business between Strang & Holland Bros. and the plaintiffs would have entitled the former to obtain the March notes, so long as those dated in February were outstanding obligations against the latter. Hence the necessity of deluding the plaintiffs by the false representation that the February notes had not been negotiated at the time the notes in question were obtained.

That representation—as the jury, in effect, found—was made with the intent to deceive the plaintiffs in reference to the actual state of things, and to induce them to do what defendants knew they would not otherwise have done, or been asked to do. If Strang's conduct does not constitute positive fraud, or fraud in fact, involving intentional wrong, it is difficult to conceive what circumstances would have amounted to fraud of that character. [560]

It is contended, however, that as Strang & Holland Bros. were under a legal obligation, apart from any responsibility for the alleged fraudulent representations by Strang, to protect the plaintiffs against liability on the notes dated in March, the latter could have made a claim against the estates of the several bankrupts, for such amounts as they were compelled to pay on account of their being accommodation makers and indorsers; consequently, it is argued, the defendants are released, by their

respective discharges in bankruptcy, from the present claim for damages. To this proposition there are two answers: 1. While the plaintiffs might have based their claim entirely upon the legal obligation of defendants to take up the notes at their respective maturities, they were not bound to waive their right to proceed against the defendants for damages on account of fraud in procuring their execution. This action is brought to recover damages for the deceit practiced upon plaintiffs. The claim here asserted is not one from which the bankrupts are protected by their discharges; for, it is not a claim provable against their estates in bankruptcy. R. S. §§ 5067–5072, 5117–5119. 2. But had the plaintiffs waived their right to claim damages specifically for the deceit practiced upon them, and made a claim against the estate of the bankrupts based wholly upon their legal obligation to save plaintiffs harmless on account of their being the makers and indorsers of the notes in question, or if the present action had been based upon that obligation, and not upon the fraud committed by defendants, it would not follow that the defendants would be protected by their discharges in bankruptcy; for, the statute expressly declares that a discharge is subject, even in respect of claims provable in bankruptcy, to the limitation that no *debt created by the fraud* of the bankrupt shall be discharged by the proceedings in bankruptcy, and that *a debt so created* may be proved, and the dividend thereon shall be a payment *on account of such debt*. R. S. §§ 5117–5119. It is, therefore, clear that, whether the claim asserted by plaintiffs is regarded as one arising out of the deceit or fraud of the defendants, or as a debt created by their fraud, the discharges in bankruptcy do not constitute a defense.

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The only other question to be determined is, whether the defendants, John B. Holland and Joseph Holland, can be held liable for the false and fraudulent representations of their partner, it being conceded that they were not made by their direction nor with their knowledge. Whether this action be regarded as one to recover damages for the deceit practiced upon the plaintiffs, or as one to recover the amount of a debt created by fraud upon the part of Strang, we are of opinion that his fraud is to be imputed, for the purposes of the action, to all the members of his firm. The transaction between him and the plaintiffs is to be deemed a partnership transaction because, in addition to his representation that the notes were for the benefit of his firm, he had, by virtue of his agency for the partnership and as between the firm and those dealing with it in good faith, authority to negotiate for promissory notes and other securities for its use. Each partner was the agent and representative of the firm with reference to all business within the scope of the partnership. And if, in the conduct of partnership business and with reference thereto, one partner makes false or fraudulent misrepresentations of fact to the injury of innocent persons who deal with him as representing the firm, and without notice of any limitations upon his general authority, his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge. This is especially so when, as in the case before us, the partners, who were not themselves guilty of wrong, r ceived and appropriated the fruits of the frau ulent conduct of their associate in busines *Stockwell* v. *United States*, 13 Wall., 547–b [U. S., bk. 20, L. ed. 495]; Story, Part., § 1, 120–3, 107–8, 166, 168; *Chester* v. *Dickerso* 54 N.Y., 1; *Locke* v. *Stearns*, 1 Met., 560; *throp* v. *Adams*, 133 Mass., 471; *Blight* v. *Tobi* 7 Mon., 617; *Durant* v. *Rogers*, 87 Ill., 508; Colly Part. (Wood's ed.), §§ 446, 449, 450; Lind., Pa (Ewell's ed.), § 302.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.

Ex Parte:

IN THE MATTER OF LOUIS REGGEL, *Ap*

(See S. C., Reporter's ed., 642–653.)

Surrender of fugitives from justice—duty executive of State or Territory—sufficiency indictment—habeas corpus.

*1. The statute requiring the surrender of a fugit from justice, found in one of the Territories, to State in which he stands charged with treason, ony, or other crime, embraces every offense kno to the laws of the demanding State, including r demeanors.

2. Each State has the right to prescribe the fo of pleading and process to be observed in her cou in both civil and criminal cases, subject only those provisions of the national Constitution signed for the protection of life, liberty and pr erty in all the States of the Union; consequently a case involving the surrender, under the Act Congress, of a fugitive from justice, it may not objected that the indictment is not framed acco ing to the technical rules of criminal pleading, it conforms substantially to the laws of the manding State.

3. Upon the executive of the State or Territo in which the accused was found rests the respon bility of determining whether he is a fugitive fr the justice of the demanding State. But the Act Congress does not direct or authorize his surrend unless it is made to appear that he is, in fact, a gitive form justice.

4. If the determining of that fact, upon pr before the executive of the State where the alle fugitive is found, is subject to the judicial revi upon *habeas corpus*, the accused, being in custo under his warrant—which recites the requisition the demanding State, accompanied by an authe tic indictment, charging him substantially as quired by her laws with a specific crime commit within her jurisdiction—should not be discharg because, in the judgment of the court, the pr showing that he was a fugitive from justice n not be as full as might properly have been requir

[No. 250.]

Submitted Apr. 15, 1885. Decided May 4, 18

APPEAL from the Third Judicial Distr of the Territory of Utah.

The history and facts of the case fully pear in the

Statement by *Mr. Justice* **Harlan:**

This is an appeal from the judgment u *habeas corpus* of the Third Judicial Distr Court of Utah, remanding the appellant to custody of the Marshal of the United States, whom he had been arrested.

The arrest was made under the authority a warrant of the Governor of Utah, which cited that it had been represented by the G ernor of Pennsylvania, that Louis Reggel st charged in that Commonwealth with the cri

*Head notes by *Mr. Justice* HARLAN.

of obtaining goods by false pretenses from Daniel Myers and Charles Goodman; that he had fled from the justice of that Commonwealth, and had taken refuge in the Territory of Utah. It then proceeded:

"And whereas said representation and demand are accompanied by an indictment found against said fugitive by the grand inquest of the said State of Pennsylvania inquiring for the City and County of Philadelphia, in and before the Court of Quarter Sessions of the Peace for the said City and County of Philadelphia, March Sessions, 1862, whereby said Louis Reggel is charged with the said crime, and an affidavit taken before a notary public of said State showing said Reggel's flight from said State to and refuge in said Territory, and also the statute laws of said State defining and making said acts of said Reggel a crime, and which said indictment, affidavit and laws are certified by said Governor of Pennsylvania to be duly authenticated: You are, therefore, required to arrest the said Louis Reggel," etc.

The evidence laid before the Governor of Utah was entirely documentary, and embraced the following papers:

1. The requisition, in the customary form, of the Governor of Pennsylvania, requesting the apprehension of Reggel, and his delivery to the agent of Pennsylvania, and to which was annexed a copy of the indictment, and other papers certified by him to be authentic.

2. A duly certified copy of the indictment referred to in the foregoing requisition, as follows:

"In the Court of Quarter Sessions of the Peace for the City and County of Philadelphia. March Sessions, 1862.

City and County of Philadelphia, ss.

The grand inquest of the Commonwealth of Pennsylvania, inquiring for the City and County of Philadelphia, upon their respective oaths and affirmations, do present Louis Reggel, late of said county, on the thirteenth day of August, in the year of our Lord one thousand eight hundred and sixty-one, at the county aforesaid, and within the jurisdiction of this court, unlawfully and wilfully meaning and intending to cheat and defraud Daniel Myers and Charles Goodman of their goods, chattels, and property, unlawfully did falsely and designedly pretend to the said Daniel Myers and Charles Goodman, that he, the said Louis Reggel, was then and there the owner in his own right of a large stock of goods in his business as merchant at Salt Lake City, in the Territory of Utah, of the value of $35,000, and that he did not then and there owe to any person a single dollar on account of said goods and merchandise, or for money borrowed; and also then and there unlawfully, falsely and designedly pretend to the said Daniel Myers and Charles Goodman that he was then and there the owner in his own right of a certain lot of ground, containing thereon a store building, wherein he carried on his business, at Salt Lake City, in the Territory of Utah; and that he was then and there the owner in his own right of a certain other lot of ground, containing thereon a certain dwelling house, wherein he then and there resided, at Salt Lake City, in the Territory of Utah; and the said Louis Reggel, then and there unlawfully and falsely pretended to said Daniel Myers and Charles Goodman that said two houses and two lots were then and there together of the value of $40,000, and that said two lots and their improvements were then and there free from all incumbrances; whereas in truth and in fact the said Louis Reggel was not then and there the owner in his own right of goods and merchandise in his business of merchant, at Salt Lake City, in the Territory of Utah, all paid for and free of debt, for money borrowed, the said Louis Reggel being then and there in the possession of and owner of a stock of goods and merchandise in his business at Salt Lake City, in the Territory of Utah of the value of [illegible], instead of the value of $35,000, as [illegible] and there unlawfully, falsely and designedly [illegible] by him, the said Louis Reggel; and the said Louis Reggel, was then and there indebted in the sum of $[illegible] to the banking house of McCor[illegible] Company, at Salt Lake City, in the Territory of Utah, for money drawn from said banking house; and whereas in truth and in fact the said Louis Reggel was not then and there the owner in his own right of a certain lot of ground, containing thereon a store building, wherein he then and there carried on his business at Salt Lake City, in the Territory of Utah, and a certain other lot of ground, containing thereon a dwelling house, wherein he then and there resided, at Salt Lake City, aforesaid, together of the value of $40,000, clear of all incumbrances; that the said two lots of ground and the improvements and appurtenances thereunto belonging, were by the said Louis Reggel, on the fourteenth day of January, in the year of our Lord one thousand eight hundred and eighty, by deed duly recorded in the office for the recording of deeds for Salt Lake County, in the Territory of Utah, granted, sold, conveyed and confirmed unto Robert Harkness and L. R. Jones, of said Salt Lake City, in the Territory of Utah, and the title to the said two lots of ground and improvements and appurtenances thereunto belonging, was, at the time of the making of said unlawful, false and fraudulent pretenses by the said Louis Reggel, at the county aforesaid, in the said Robert Harkness and the said L. R. Jones, and not in the said Louis Reggel; and the said Louis Reggel then and there well knew the said pretenses to be unlawful, fraudulent and false. Whereupon the said Daniel Myers and Charles Goodman, believing the said false representations and pretenses then and there made by the said Louis Reggel, sold and delivered to the said Louis Reggel, on a credit of four months [here follows a description and statement of the value of said goods, chattels and property alleged to have been obtained under false pretenses]; which said goods and chattels and property the said Louis Reggel did then and there unlawfully obtain from the said Daniel Myers and Charles Goodman, with intent to cheat and defraud the said Daniel Myers and Charles Goodman, to the great damage of the said Daniel Myers and Charles Goodman, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

George S. Graham,
District Attorney."

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3. Duly certified copies of certain provisions of the penal laws of Pennsylvania, as follows:

"Every indictment shall be deemed and adjudged sufficient and good in law which charges the crime substantially in the language of the Act of the Assembly prohibiting the crime and prescribing the punishment, if any such there be, or, if at common law so plainly that the nature of the offense charged may be easily understood by the jury, every objection to any indictment for any formal defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn, and not afterward; and every court before whom any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by the clerk or other officer of the court, and thereupon the trial shall proceed as if no such defect appeared. 1 Bright. Purd. Dig. 347-8; Act of March 31, 1860.

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"If any person shall by any false pretense obtain the signature of any person to any written instrument, or shall obtain from any other person any other chattel, money, or valuable security, with intent to cheat and defraud any person of the same, every such offender shall be guilty of a misdemeanor, and on conviction be sentenced to pay a fine not exceeding $500 and undergo an imprisonment not exceeding three years; *Provided, always*, That if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts." *Ibid.* 347-8; Act of March 31, 1860.

4. An affidavit by Frederich Gentner, as follows:

"Commonwealth of Penna. vs. Louis Reggel.

Frederick Gentner, being duly sworn according to law, deposes and says: The grand jury of the March Sessions of the City and County of Philadel-

phia found a true bill of indictment against Louis Reggel, charging him with the crime of false pretenses, and that the said Louis Reggel is a fugitive from justice, and now in Salt Lake City, Utah Territory.

Frederick Gentner.

Sworn to and subscribed to, this 10th day of April, A. D. 1882.

Seal of Court Quarter Sessions, County Philadelphia. } Allison Hennessey, per Clerk.

Endorsed: Commonwealth vs. Louis Reggel.

[648] The foregoing constituted the evidence submitted to the Governor of Utah, on which his warrant for the arrest of appellant was granted.

From the order denying the application of the petitioner to be discharged and remanding him to the custody of the marshal, an appeal was allowed and perfected — the petitioner, pending the appeal, being placed under bond to surrender himself in execution of the judgment, if it should be affirmed, modified, or dismissed, and obey all orders made herein by this court.

Mr. **Arthur Brown,** for appellant:

The action of the Governor in issuing his warrant, upon the requisition of another governor, for the surrender of a person charged with the commission of a crime, is subject to review at the inquiry upon a writ of *habeas corpus.*

People v. *Bradg*, 56 N. Y., 182; *Ex parte Smith*, 3 McLean, 131; *Jones* v. *Leonard*, 50 Iowa, 106; *Davis's Case*, 122 Mass., 324; *In re Greenough*, 31 Vt., 279; *Manchester Case*, 5 Cal., 237; *Ex parte Pfitzer*, 28 Ind. 450. See also *Robb* v. *Connolly*, 111 U. S., 624 (Bk. 26, L. ed. 541).

The Governor has not jurisdiction to incarcerate a citizen without proof that he has actually been within, and committed by actual presence a crime in, another State.

Hurd, Hab. Corp., 606, 609, 612, 615, and cases cited; *Ex parte Pfitzer, supra; Kingsbury's Case*, 106 Mass., 223; *Jones* v. *Leonard, supra.*

The affidavit in this case is a mere nullity. An affidavit without a venue is a nullity.

Thompson v. *Burhans*, 61 N. Y., 63; *Lane* v. *Moree*, 6 How. Pr., 394; *Cook* v. *Staats*, 18 Barb., 407.

The paper purporting to be an indictment in this case does not set forth any crime.

Commonwealth v. *Strain*, 10 Met., 521; *Enders* v. *People*, 20 Mich., 233; *Commonwealth* v. *Goddard*, 4 Allen, 312; *State* v. *Philbrick*, 31 Me., 401; *State* v. *Orois*, 13 Ind., 669; *Jones* v. *State*, 50 Ind., 473; *Keller* v. *State*, 51 Ind., 111.

(No opposing counsel appeared.)

[648] *Mr. Justice* **Harlan** delivered the opinion of the court:

This case arises under sections 5278 and 5279 of the Revised Statutes of the United States, which provide:

"§ 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs and expenses incurred in the apprehending, securing and transporting such fugitive to the State or Territory making such demand shall be paid by such State or Territory.

"§ 5279. Any agent who receives the fugitive into his custody shall be empowered to transport him to the State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than $500, or imprisoned not more than one year." 1 Stat. at L., chap. 7, §§ 1, 2.

It is not necessary to consider the question suggested by counsel as to the right of the Governor of the Territory to have withheld the papers upon which he based his warrant for the arrest of the accused; for, the record shows that the requisition and the accompanying papers from the Governor of Pennsylvania constituted the evidence upon which he acted, and were submitted to the court to which the writ of *habeas corpus* was returned.

Under the Act of Congress, it became the duty of the Governor of Utah to cause the arrest of Reggel, and his delivery to the agent appointed to receive him, when it appeared:

That the demand by the executive authority of Pennsylvania was accompanied by a copy of an indictment, or affidavit made before a magistrate, charging Reggel with having committed treason, felony, or other crime within that State and certified as authentic by her Governor.

That the person demanded was a fugitive from justice.

The first of these conditions was met by the production to the Governor of Utah of the indictment, duly certified as authentic, of the grand jury of the Court of Quarter Sessions of the Peace for the City and County of Philadelphia, Pennsylvania, wherein the accused was charged with having committed the crime of obtaining by false pretenses certain goods with the intent to cheat and defraud the person therein named; which offense, as was made to appear from the statutes of that Commonwealth (a copy of which, duly certified as authentic, accompanied the indictment), is a misdemeanor under the laws of Pennsylvania, punishable by a fine not exceeding $500, and imprisonment not exceeding three years.

It was objected in the court of original jurisdiction, that there could be no valid requisition based upon an indictment for an offense less than a felony. This view is erroneous. It was declared in *Kentucky* v. *Dennison*, 24 How., 66 [65 U. S., bk. 16, L. ed. 726], that the words "treason, felony, or other crime" in section 2 of article I. of the Constitution includes every offense, from the highest to the lowest, known to the law of the State from which the accused had fled, including misdemeanors. It was there said by *Chief Justice* Taney, speaking for the whole court, that, looking to the words of the Constitution, "To the obvious policy and necessity of this provision to preserve harmony between the States, and order and law within their respective borders, and to its early adoption by the Colonies, and then by the Confederated States whose mutual interest it was to give each other aid and support whenever

[illegible] the conclusion is irresistible, that [illegible] compact engrafted in the Constitution in[illegible], and was intended to include, every of[illegible] made punishable by the law of the State [illegible] which it was committed." It is within the [illegible] of each State, except as her authority [illegible] limited by the Constitution of the [illegible] States, to declare what shall be offenses [illegible] her laws, and citizens of other States, [illegible] within her jurisdiction, are subject to [illegible] laws. In recognition of this right, so re[illegible] to the States, the words of the clause in [illegible] to fugitives from justice were made [illegible] comprehensive to include every of[illegible] against the laws of the demanding State, [illegible] exception as to the nature of the crime.

Although the constitutional provision in [illegible] does not, in terms, refer to fugitives [illegible] the justice of any State, who may be [illegible] in one of the Territories of the United [illegible] the Act of Congress has equal applica[illegible] in that class of cases, and the words "trea[illegible], [illegible], or other crime," must receive the [illegible] interpretation, when the demand for the [illegible] is made, under that Act, upon the [illegible] of a Territory, as when made upon [illegible] executive authority of one of the States of [illegible].

Another proposition advanced in behalf of [illegible] is, that the indictment which accom[illegible] the requisition does not sufficiently [illegible] the commission of any crime; of which [illegible] was the duty of the Governor of Utah to [illegible], and which the court may not ig[illegible] in determining whether the appellant is [illegible] in custody. In connection with this [illegible] counsel discusses, in the light of [illegible] cases, the general question as to [illegible] authority of a court of the State or Terri[illegible] in which the fugitive is found, to dis[illegible] him from arrest, whenever, in its judg[illegible], the indictment, according to the technical [illegible] of criminal pleading, is defective in its [illegible] of the crime charged. It is sufficient [illegible] purposes of the present case to say that, [illegible] laws of Pennsylvania, every indictment [illegible] deemed and adjudged sufficient and [illegible] law which charges the crime sub[illegible] in the language of the Act of Assem[illegible] prohibiting its commission and prescribing [illegible] therefor, or, if at common law, [illegible] that the nature of the offense charged [illegible] understood by the jury; and [illegible] indictment, which accompanied the [illegible] of the Governor of Pennsylvania, [illegible] the crime substantially in the lan[illegible] of her statute. That Commonwealth [illegible] to establish the forms of pleadings [illegible] to be observed in her own courts, [illegible] civil and criminal cases, subject only to [illegible] provisions of the Constitution of the [illegible] States involving the protection of life, [illegible] and property in all the States of the [illegible].

The only question remaining to be considered, [illegible] to the alleged want of competent evi[illegible] before the Governor of Utah, at the time [illegible] the warrant of arrest, to prove that [illegible] appellant was a fugitive from the justice of [illegible]. Undoubtedly, the Act of Con[illegible] did not impose upon the executive au[illegible] of the Territory the duty of surrender[illegible] the appellant, unless it was made to appear in some proper way that he was a fugitive from justice. In other words, the appellant was entitled, under the Act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the Territory was not required, by the Act of Congress, to cause the arrest of appellant, and his delivery to the agent appointed by [652] the Governor of Pennsylvania, without proof of the fact that he was a fugitive from justice, is, in our judgment, clear from the language of that Act. Any other interpretation would lead to the conclusion that the mere requisition by the Executive of the demanding State, accompanied by the copy of an indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the Executive of the State or Territory where the accused is found, the duty of surrendering him, although he may be satisfied, from incontestable proof, that the accused had, in fact, never been in the demanding State, and, therefore, could not be said to have fled from its justice. Upon the Executive of the State in which the accused is found, rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding State. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding State.

Did it sufficiently appear that the appellant was, as represented by the executive authority of Pennsylvania, a fugitive from the justice of that Commonwealth? We are not justified by the record before us in saying that the Governor of Utah should have held the evidence inadequate to establish that fact. The warrant of arrest refers to an affidavit taken before a notary public of Pennsylvania showing Reggel's flight from that Commonwealth. There was no such affidavit; but the reference, manifestly, was to the affidavit made by Frederick Gentner, which recited the finding by the grand jury of the City and County of Philadelphia, of a true bill of indictment charging Reggel with "the crime of false pretenses," and stating that he "is a fugitive from justice," and was then in Salt Lake City, Utah Territory. This is sworn to, and is attested by the seal of the Court of Quarter Sessions—the court in which the prosecution is pending. It is not entirely clear from the record, as presented to us, what is the official character of the person before whom the affidavit was made. The reasonable inference is, that the affidavit was made in the court where [653] the prosecution is pending, and that it is one of the papers accompanying the requisition of the Governor of Pennsylvania, and which he certified to be authentic.

It is contended that Gentner's affidavit that Reggel is a fugitive from justice is the statement of legal conclusion, and is materially defective in not setting out the facts upon which that conclusion rested. Although that statement presents, in some aspects of it, a ques-

tion of law, we cannot say that the Governor of Utah erred in regarding it as the statement of a fact, and as sufficient evidence that appellant had fled from the State in which he stood charged with the commission of a particular crime, on a named day, at the City and County of Philadelphia; especially, as no opposing evidence was brought to his attention. If the determination of that fact by the Governor of Utah upon evidence introduced before him is subject to judicial review, upon *habeas corpus*, the accused, in custody under his warrant—which recites the demand of the Governor of Pennsylvania, accompanied by an authentic indictment charging him, substantially in the language of her statutes, with a specific crime committed within her limits—should not be discharged merely because, in the judgment of the court, the evidence as to his being a fugitive from justice was not as full as might properly have been required, or because it was so meager as, perhaps, to admit of a conclusion different from that reached by him. In the present case, the proof before the Governor of Utah may be deemed sufficient to make a *prima facie* case against the appellant as a fugitive from justice within the meaning of the Act of Congress.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—116 U. S., 96.

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[619] UNITED STATES, *Appt.*,

v.

RICHARD R. CORSON.

(See S. C., Reporter's ed., 619-622.)

Dismissal of army officer—effect of revocation of order.

*1. An officer of the army dismissed from the service during the recent civil war, by order of the President, could not be restored to his position merely by a subsequent revocation of that order.

2. The vacancy so created can only be filled by a new appointment, by and with the advice and consent of the Senate; unless it occurred in the recess of that body, in which case the President could have granted a commission to expire at the end of its next succeeding session.

[No. 266.]

Submitted Apr. 22, 1885. Decided May 4, 1885.

APPEAL from the Court of Claims.

The history and facts of the case appear in the opinion of the court.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for appellant.

Mr. **A. S. Worthington,** for appellee.

[619] *Mr. Justice* **Harlan** delivered the opinion of the court:

This is an appeal from a judgment of the Court of Claims in favor of appellee for the sum of $538—$328 of which represents his claim for pay as captain and assistant quartermaster of volunteers from March 27, 1865, to June 9, 1865, and $210, his claim for pay allowed by [620] the Acts of March 3, 1865, chap. 81, § 4, 13 Stat. at L., 497, and July 16, 1866, chap. 181, 14 Stat. at L., 94; the first of which Acts provides that all officers of volunteers in commission at its date, below the rank of brigadier-general who should continue in the military service t the close of the war, should be entitled to r ceive, upon being mustered out of the servic three months' pay proper; and the last of whic extended the provisions of the first Act to a officers of volunteers below the rank of brig dier-general, who were in the service on Marc 3, 1865, and whose resignations were present and accepted, or who were mustered out at the own request, or otherwise honorably discharge from the service after the 9th of April, 1865.

The facts are: Appellee enlisted as a privat soldier in the military service of the Unite States, in August, 1861. Having been pr moted from time to time, he was commissione prior to March 27, 1865, as captain and assis ant quartermaster of volunteers. His servic was continuous from August, 1861, to Marc 27, 1865, on which day he was, by order President Lincoln, dismissed the service. B on June 9, 1865, an order was issued by Pres dent Johnson revoking the order of dismissa and restoring him to his former position. B an order issued from the War Department u der date of June 19, 1865, he was assigned duty as division quartermaster of the 1st Div sion, 1st Army Corps, with the temporary ranl pay and emoluments of major in the Quarte master's Department under the Act of July 1864. He held the latter position until Octob 7, 1865, when he was honorably mustered o of the service of the United States.

It does not appear that there was any attemp between March 27, 1865, and June 9, 1865, fill the vacancy by another appointment.

In *Blake* v. *U. S.*, 103 U. S., 231 [Bk. 26, ed. 462], it was said that "From the organiz tion of the government, under the present Co stitution, to the commencement of the rece war for the suppression of the rebellion, t power of the President, in the absence of st utory regulations, to dismiss from the servi an officer of the army or navy was not que tioned in any adjudged case, or by any depa ment of the government." See also *McElra* v. *U. S.*, 456 [Bk. 26, L. ed. 189]; *Keyes* v. *S.*, 109 U. S., 339 [Bk. 27, L. ed. 956]. B the seventeenth section of the Act of July 1 1862, chap. 200, 12 Stat. at L., 596, authori and requests the President to dismiss and d charge from the military service, either in t army, navy, marine corps, or volunteer forc any officer for any cause which, in his jud ment, either rendered such officer unsuital for, or whose dismission would promote, t public service. In accordance with these d cisions, it must be held that that Act, if n simply declaratory of the long established la invested the President with authority to ma the order of March 27, 1865, dismissing app lee from the service of the United States. restriction or limitation was imposed upon authority, in that regard, until the passage the Act of July 13, 1866, chap. 176, 14 Stat. L., 92, repealing the seventeenth section of t Act of July 17, 1862, and by which, also, was declared that "No officer in the military naval service shall, in time of peace, be d missed from the service, except upon and pursuance of a sentence of court-martial to t effect, or in commutation thereof." That A did not go into effective operation, throughc

* Head notes by *Mr. Justice* HARLAN.

the chair of the United States, until August 20, 1866; for not until that day was the war against the rebellion recognized by the President and Congress as having finally ceased in every part of the Union. *McElrath* v. *U. S.*, 102 U. S. 426-439 [Bk. 26, L. ed. 191].

In view of these adjudications, it is not to be doubted that the effect of the order of March 27, 1865, dismissing appellee from the service, was to sever his relations with the army. Thenceforward and until, in some lawful way, reappointed, he was disconnected from that branch of the public service as completely as if he had never been an officer of the army. So that, his right to pay, as captain and assistant quartermaster of volunteers, from the date of his dismissal from the service by President Lincoln to the date of the order of President Johnson, depends entirely upon the question whether an officer of the army, once lawfully dismissed from the service, can regain his position and become entitled to its emoluments by means of a subsequent order revoking the order of dismissal and restoring him to his former position.

This question must be answered in the negative upon the authority of *Mimmack* v. *U. S.*, 97 U. S. 426 [Bk. 24, L. ed. 1069]. The death of the incumbent could not more certainly have made a vacancy than was created by President Lincoln's order of dismissal from the service. And such vacancy could only have been filled by a new and original appointment, to which, by the Constitution, the advice and consent of the Senate were necessary; unless the vacancy happened in the recess of that body, in which case the President could have granted a commission, to expire at the end of its next succeeding session. Const., art. II., § 2.

It results that, as the appellee was dismissed from the army during the recent war by a valid order of the President, and as he was not reappointed in the mode prescribed by law, he was not entitled, as an officer of the army, to the pay allowed by statute for the period in question.

The judgment is reversed and the cause remanded, with directions to dismiss the petition.

Reversed.

Test copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MARTINSBURG AND POTOMAC RAILROAD COMPANY, *Plff. in Err.*,

v.

JAMES MARCH.

(See S. C., Reporter's ed., 549-555.)

Contract for construction of railroad—determination, by engineer, of questions relating to its execution—when conclusive.

In a contract for the construction of a railroad provided that the company's engineer should, in all cases, determine questions relating to its execution, including the quantity of the several kinds of work to be done, and the compensation earned by the contractor at the rates specified; that his estimate should be final and conclusive; and that "whenever the work shall be completely performed on the part of the contractor, and the said engineer shall certify the same in writing under his hand, together with his estimate aforesaid, the said company shall pay to said contractor, in current notes, the sum which according to this contract shall be due." *Held*, That in the absence of fraud, or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the parties.

[No. 272.]

Argued Apr. 24, 1885. Decided May 4, 1885.

IN ERROR to the District Court of the United States for the District of West Virginia.

This action was brought in the court below, by the defendant in error, to recover the amount alleged to be due on a contract for the construction of a certain section of a railroad.

The defendant filed a general demurrer which was overruled by the court. The defendant then filed special pleas and the case was tried by a jury. The trial resulted in a verdict for the plaintiff for $56,407.31, including interest. On a motion for a new trial the court held that the verdict was excessive. The plaintiff then remitted $13,475.97 of the principal sum and the court rendered judgment for $28,000, with interest from March 1, 1873, and costs. Whereupon the defendant sued out this writ of error.

The facts of the case are sufficiently stated by the court.

Messrs. **Wayne MacVeagh** and *Charles J. Faulkner*, for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court: [550]

This case is within the principles announced in *Kihlberg* v. *U. S.*, 97 U. S., 398 [Bk. 24, L. ed. 1106], and *Sweeney* v. *U. S.*, 109 U. S., 618 [Bk. 27, L. ed. 1053].

Kihlberg sued the United States upon a contract for the transportation of military, Indian, and government stores and supplies from points on the Kansas Pacific Railway to posts and stations in certain States and Territories. The contract provided for payment for transportation "in all cases according to the distance [551] from the place of departure to that of delivery, the distance to be ascertained and fixed by the chief quartermaster of the District of New Mexico, and in no case to exceed the distance by the usual and customary route." One of the issues in that case was as to the authority of that officer to fix, conclusively for the parties, the distances which should govern in the settlement of the contractor's accounts for transportation. There was neither allegation nor proof of fraud or bad faith upon the part of that officer in his discharge of the duty imposed upon him by the mutual assent of the parties. This court said: "In the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government."

This principle was affirmed and applied in *Sweeney's Case*, in which he sought to recover from the United States the price of a wall built by him around a national cemetery. The contract provided that the wall should be received and become the property of the United States, after an officer or civil engineer, to be designat-

ed by the government to inspect the work, should certify that it was in all respects such as the contractor agreed to construct. The officer designated for that purpose refused to so certify, on the ground that neither the material nor the workmanship was such as the contract required. As the officer exercised an honest judgment in making his inspections, and as there was, on his part, neither fraud nor such gross mistake as implied bad faith, it was adjudged that the contractor had no cause of action, on the contract, against the United States.

Those decisions control the determination of the claim arising out of the contract here in suit, whereby the defendant in error, who was plaintiff below, covenanted and agreed that he would furnish all the material required—which should be sound, durable, and of good quality, and approved by the Company's chief engineer —and perform all the labor necessary to construct and finish, in every respect, in the most substantial and workmanlike manner, the grading and masonry of a certain section of the Martinsburg and Potomac Railroad.

The contract provides that, to prevent all disputes, the engineer of the Company "shall, in all cases, determine" the quantity of the several kinds of work to be paid for under the con-
[552] tract, and the amount of compensation that the appellee should earn at the rates therein specified; that he "shall, in all cases," decide every question which can or may arise relative to the execution of the contract, and "his estimate shall be final and conclusive"; that in order to enable the contractor to prosecute the work advantageously, the engineer "shall make an estimate from time to time, not oftener than once per month, as the work progresses, of the work done," for which the Company "will pay in current money within twenty per cent of the amount of said estimate on presentation"; that, in calculating the quantity of masonry, walling, and excavation, the most rigid geometrical rules should be applied, any custom to the contrary notwithstanding; and that "whenever this contract shall be wholly completed on the part of the said contractor, *and the said engineer shall have certified the same*, they [the Company] will pay for said work" the prices in the contract named.

These stipulations were emphasized by this additional provision in the agreement:

"And it is further agreed that whenever the contract shall be completely performed on the part of the contractor, *and the said engineer shall certify the same in writing under his hand, together with his estimate aforesaid*, the said Company shall, within thirty days *after the receipt of said certificate*, pay to the said contractor, in current notes, the sum which according to this contract shall be due."

The plaintiff in his declaration, which is in *assumpsit*, sets out the written contract in full, and counts especially upon its various provisions. The other count is the ordinary one of *indebitatus assumpsit*. A general demurrer by the Company to the whole declaration and to each count, was overruled. This action of the court below cannot be upheld without disregarding the express conditions of the written agreement; for, it does not appear from the declaration that the engineer ever certified in writing the complete performance of the con tract by the plaintiff, together with an estimat of the work done, and the amount of compensa tion due him according to the prices establishe by the parties. Until after the expiration o thirty days from the receipt of such a certificate the Company did not, by the terms of the agree ment, come under a liability to pay the plaintif the balance, if any, due to him under the co tract. Nor does the declaration state any fact entitling him to sue the Company, on the co tract, in the absence of such a certificate by th engineer, whose determination was made b the parties final or conclusive. And upon th supposition that the engineer made such a ce tificate as that provided by the contract, the is no allegation that entitled the plaintiff to g behind it; for, there is no averment that the e gineer had been guilty of fraud, or had mad such gross mistake in his estimates as necess rily implied bad faith; or had failed to exerci an honest judgment in discharging the du imposed upon him. The first count of the de laration was, therefore, defective for the wa of proper averments showing plaintiff's right sue on the contract, and the demurrer to th count should have been sustained.

As, for this reason, the case must be reman ed for a new trial, it is proper to say that, the declaration had been good on demurrer, should have been compelled to reverse the jud ment for errors in the instructions given to t jury. Several instructions were asked by t defendant embodying the general propositi that the final estimate of the engineer was to taken as conclusive, unless it appeared fro the evidence that, in respect thereto, he is gu ty of fraud or intentional misconduct. The instructions were modified by the court by ad ing after the words "fraud or intentional m conduct" the words "or gross mistake." T modification was well calculated to mislead t jury, for they were not informed that the mista must have been so gross, or of such a natu as necessarily implied bad faith upon the p of the engineer. We are to presume from t terms of the contract that both parties cons ered the possibility of disputes arising betwe them in reference to the execution of the c tract. And it is to be presumed that in th minds was the possibility that the engin might err in his determination of such matte Consequently, to the end that the interests neither party should be put in peril by c putes as to any of the matters covered by th agreement, or in reference to the quantity of work to be done under it, or the compensat which the plaintiff might be entitled to mand, it was expressly stipulated that the gineer's determination should be final and c clusive. Neither party reserved the righ revise that determination for mere errors mistakes upon his part. They chose to r his estimates, and to rely upon their rig which the law presumes they did not intend waive, to demand that the engineer should at all times, and in respect of every ma submitted to his determination, exercise an h est judgment, and commit no such mistakes under all the circumstances, would imply faith.

There is one other error in the instruction which it is proper to call attention. The cont

provided that for "bridge masonry" the contractors should receive $7.50 per perch of twenty-five cubic feet. In reference to certain pier masonry, for which plaintiff charged, in his account, $14 per perch, the court instructed the jury as follows:

"The jury are instructed that in respect to the item of 'pier masonry,' and the charge of $14 per perch therefor by the plaintiff, as shown in his estimate or bill of particulars, that if they find that the defendant's chief engineer ordered such masonry to be made, and saw and inspected or examined the same after its completion, and considered the same in his final estimate, and therein treated the same 'pier masonry' as 'bridge masonry,' to be paid for by the defendant at the price of $7.50 per perch, under the terms of the contract, then such determination and judgment of the engineer is final and binding on the plaintiff, unless the jury find that the price and value of the masonry fixed and returned by the engineer was inadequate and unjust to the contractor, in which event the jury may presume fraud, and disregard the price fixed by the engineer in his final estimate."

This instruction, to which defendant excepted, was clearly erroneous; for, if the masonry was of the class described in the contract as bridge masonry, or if the parties by subsequent agreement, express or implied, authorized it to be put in that class—the determination of which questions might be controlled by special circumstances not appearing on the face of the agreement—then the estimate of the engineer upon the basis of the contract price, was conclusive, unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith. The test was not whether the price and value of the masonry fixed and returned by the engineer was inadequate and unjust. Much less did the jury have the right to presume fraud and disregard the engineer's estimate, merely because the price, upon which the parties originally agreed for bridge masonry, proved to be inadequate and unjust; for that would have enabled them to make for the parties a contract which they did not themselves choose to make.

Without expressing an opinion upon other questions, of a subordinate character, discussed in the brief of the defendant's counsel, and which may not arise upon another trial, the judgment is reversed, and the case remanded with directions to set aside the verdict and grant a new trial, and for such further proceedings as may be consistent with this opinion.

Reversed.

Trans. copy. Test:

[illegible] H. McKenney, Clerk, Sup. Court, U. S.

[illegible] S. BROWN ET AL., *Plffs. in Err.*,

v.

[illegible] D. HOUSTON, State Tax Collector, and ALLEN JUMEL, State Auditor.

(See S. C., Reporter's ed., [illegible].)

Constitutional law—state taxation of imports and exports, of products of other States—regulation of interstate commerce—how far power to [illegible] in Congress.

1. The term "imports" as used in that clause in the Constitution which declare that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports," does not refer to articles carried from one State to another, but only to articles imported from foreign countries into the United States.

2. A duty on exports must either be a duty levied on goods as a condition or by reason of their exportation, or at least a direct tax or duty on goods which are intended for exportation. Where a general tax is laid on all property alike, it cannot be construed as a duty on exports when falling upon goods not then intended for exportation, though they should happen to be exported afterwards.

3. The power of Congress to regulate commerce among the States, is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation. No State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction.

4. So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that that commerce shall be free and untrammeled; and any regulation of the subject by the States is repugnant to such freedom.

5. Coal, sent by the owners in Pennsylvania to their agents in New Orleans, to be there sold for their account, upon its arrival, becomes a part of the general mass of property of Louisiana, and is subject to taxation in common with all other property, and in precisely the same manner. The fact that some of it is subsequently sold for exportation does not alter the case.

6. Woodruff v. Parham, Bk. 19, p. 382, affirmed.

[No. 23.]

Argued Apr. 3, 1884. Decided May 4, 1885.

IN ERROR to the Supreme Court of the State of Louisiana.

The petition in this case was filed in the Civil District Court for the Parish of Orleans, by the plaintiffs in error, to restrain the defendants from the collection of certain taxes alleged to have been illegally assessed.

Upon the final hearing the court entered a judgment dismissing the petition. This judgment having been affirmed, on appeal, by the court below (33 La. Ann., 843), the plaintiffs sued out this writ of error.

The facts of the case are stated by the court.

Messrs. **Charles W. Hornor** and **Joseph P. Hornor**, for plaintiffs in error.

No counsel appeared for defendants in error.

Mr. Justice **Bradley** delivered the opinion of the court: [623]

This suit was brought by the plaintiffs in error in the Civil District Court for the Parish of Orleans, State of Louisiana, 30th December, 1880, to enjoin the defendant, Houston, from seizing and selling a certain lot of coal belonging to the plaintiffs, situated in New Orleans. They alleged in their petition that they were residents and did business in Pittsburg, State of Pennsylvania; that Houston, State Tax Collector of the upper district of the Parish of Orleans, had officially notified Brown & Jones, the agents of the plaintiffs in New Orleans, that they (Brown & Jones) were indebted to the State of Louisiana in the sum of $352.80, state tax for the year 1880 upon a certain lot of Pittsburg coal, assessed as their property, and valued at $58,800; that they (Brown & Jones) were delinquents for said tax, and that he, said Tax Collector, was about to seize, advertise and sell said coal to pay said tax, as would appear by a

copy of the notice annexed to the petition. The
[624] plaintiffs alleged that they were not indebted to the State of Louisiana for said tax; that they were the sole owners of the coal, and were not liable for any tax thereon, having paid all taxes legally due for the year 1880 on said coal in Pennsylvania; and that the said coal was simply under the care of Brown & Jones as the agents of the plaintiffs in New Orleans, for sale. They further allege that said coal was mined in Pennsylvania, and was exported from said State and imported into the State of Louisiana as their property, and was then, at the time of the petition, and had always remained, in its original condition, and never had been or become mixed or incorporated with other property in the State of Louisiana. That when said assessment was made, the said coal was afloat in the Mississippi River in the Parish of Orleans, in the original condition in which it was exported from Pennsylvania; and the agents, Brown & Jones, notified the board of assessors of the parish that the coal did not belong to them, but to the plaintiffs, and was held as before stated, and was not subject to taxation, and protested against the assessment for that purpose. The plaintiffs averred that the assessment of the tax and any attempt to collect the same were illegal and oppressive, and contrary to the Constitution of the United States, article I, section 8, paragraphs 1 and 3, and section 10, paragraph 2; they therefore prayed an injunction to prevent the seizure and sale of the coal, which, upon giving the requisite bond, was granted.

The notice of assessment, referred to in the petition and annexed thereto, was as follows:

"Office State Tax Collector, Upper District
Parish of Orleans, No. 24 Union Street,
New Orleans, Dec. 20, 1880.

To Brown & Jones, *Gravier and Charles Street.*

Sir: You are hereby officially notified, in conformity with the provisions of Act No. 77 of 1880, that the state taxes assessed to you on movable property in this parish, which amount to the sum of $852.80 (the aggregate assessed
[625] value of such property being $58,800), fell due and should have been paid in full on or before the first day of the current month; that you became a delinquent for said taxes on such first day of December; that after the expiration of twenty days from the date of this notice, I, as tax collector of the upper district of the Parish of Orleans, will advertise for sale the movable property on which the said taxes are due in the manner provided by law for judicial sales; that at the principal front door of the court-house, where the Civil District Court of said parish is held, I will sell within the legal hours for judicial sales, for cash and without appraisement, such portion of the said movable property as you shall point out and deliver to me, and in case you shall not point out sufficient property that I will at once and without further delay sell for cash without appraisement the least quantity of said movable property which any bidder will buy for the amount of taxes asessed upon movable property, with interest and costs.

Respectfully, yours,
J. D. Houston,
State Tax Collector, Upper District Parish of Orleans."

The defendant answered with a general denial, but admitting the assessment of the ta and the intention to sell the property for pay ment thereof.

The plaintiffs, to sustain the allegations o their petition, produced two witnesses. Georg F. Rootes testified that he was the general agen and manager of the business of Brown & Jone in New Orleans; that when the assessment com plained of was made, the firm had paid the stat taxes due upon their capital stock, and had pai state and city licenses to do business for tha year; that, at the time of the assessment of th tax in question, the coal upon which it was levie was in the hands of Brown & Jones, as agent for the plaintiffs, for sale, having just arrive from Pittsburg, Pennsylvania, by flatboat and was on said boats in which it arrived an afloat on the Mississippi River; that it was hel by Brown & Jones to be sold for account of th plaintiffs by the boatload, and that since the more than half of it had been exported fro this country on foreign steamships and the ba ance of it sold into the interior of the State f plantation use by the flatboat load. Samu S. Brown, one of the plaintiffs, testified that th plaintiffs were the owners of the coal in que tion; that it was mined in plaintiffs' mine Allegheny County, Pennsylvania; that a tax two or more mills was paid on it in Pennsy vania as state tax thereon, in the year 1880, b ing the tax of 1880: that a tax was also paid it to the County of Allegheny for the year 188 that it was shipped from Pittsburg, Pennsy vania, in 1880, and was received in New O leans in its original condition and in its origin packages, and still owned by the plaintiffs. N other proof was offered in the case.

The Louisiana Statute of April 9, 1880, A No. 77, under which the assessment was mad provided as follows:

"Section 1. That for the calendar year 188 and for each and every succeeding calend year, there are hereby levied annual taxe amounting in the aggregate to six mills on t dollar of the assessed valuation hereafter to made of all property situated within the State Louisiana, except such as is expressly exempt from taxation by the (State) Constitution."

The exemptions from taxation under t Constitution of Louisiana do not affect t question.

Upon the case as thus made the District Co of the parish dissolved the injunction and d missed the suit. On appeal to the Supre Court of Louisiana, this judgment was affirm and the case is now here by writ of error the judgment of the Supreme Court.

The following errors have been assigned:

"The lower court erred in holding:

1st. That the tax in question did not viol article 4, section 2, clause 1, of the Fede Constitution.

2d. That it did not violate article 1, secti 8, clause 3, of the same instrument.

3d. That it did not violate article 1, secti 10, clause 2, of the same instrument."

The clauses here referred to are these:

1. "The citizens of each State shall be titled to all privileges and immunities of c zens in the several States.

2. "The Congress shall have power to re late commerce with foreign nations, and amo the several States, and with the Indian trib

1. "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The constitutional questions here presented were argued in the Supreme Court of Louisiana, and in what manner the subject was viewed by that court may be seen by the following extract from its opinion, filed as part of the record. The court said:

"First. This Act [Act No. 77 of 1880] does not in its terms discriminate against the products of other States or the property of the citizens of other States, but subjects all property liable to taxation found within the State, whether of its own citizens or citizens of other States, whether imported from other States or produced here, to the same rate of taxation. * * *

"Second. The coal in question was taxed in common with all other property found within the State. We held in the case of *New Orleans Gaslight Company* v. *Hart*, recently decided by us, not yet reported, * that the clause in the Federal Constitution giving to Congress the power to regulate commerce with foreign nations and among the States had no immediate relation to or necessary connection with the taxing power of the State. Every tax upon property, it is true, may affect more or less the operations of commerce, by diminishing the profits to be derived from the subjects of commerce, but it does not for that reason amount to a regulation of commerce within the meaning of the Federal Constitution, and such is the doctrine laid down by the Supreme Court of the United States. [See for an *R. R. Gross Receipts*] 15 Wall., 284 U. S., bk. 21, L. ed. 167].

"Third. This tax cannot be regarded as a duty or impost levied by the State on imports. To give such a construction to it, and to recognize the alleged prohibition contended for, would create an exemption for all goods and merchandise and property of every kind and description brought into the State for sale or use, and by such construction destroy a main source of revenue to the State. As we had occasion to show in the case referred to, the word 'imports' used in the Constitution has been construed to refer not to property brought or imported from other States of the Union, but solely to imports from foreign countries. *Woodruff* v. *Parham*, 8 Wall., 123 [75 U. S., bk. 19, L. ed. 382]; *Pervear* v. *Commonwealth*, 5 Wall., 479 [72 U. S., bk. 18, L. ed. 608]".

In approaching the consideration of the case we will first take up the last objection raised by the plaintiffs in error, namely: that the tax was a duty on imports and exports.

"It was decided by this court in the case of *Woodruff* v. *Parham* [*supra*], that the term 'imports' as used in that clause of the Constitution which declares that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports," does not refer to articles carried from one State into another, but only to articles imported from foreign countries into the United States. In that case the City of Mobile had by ordinance, passed in pursuance of its charter, authorized the collection of a tax on real and personal estate, sales at auction, and sales of merchandise, capital employed in business and income within the city. Woodruff and others were auctioneers and were taxed under this ordinance for sales at auction made by them, including sales of goods, the product of other States than Alabama, received by them as consignees and agents, and sold in the original and unbroken packages; but as the ordinance made no discrimination between sales at auction of goods produced in Alabama and goods produced in other States, the court held that the tax was not unconstitutional. A contrary result must have been reached under the ruling in *Brown* v. *Maryland*, 12 Wheat., 449, if the constitutional prohibition referred to had been held to include imports from other States as well as imports from foreign countries; for, at the time the tax was laid, the condition of the goods, in reference to their introduction into the State, was precisely the same in one case as in the other. This court, however, after an elaborate examination of the question, held that the terms "imports" and "exports" in the clause under consideration had reference to goods brought from or carried to foreign countries alone, and not to goods transported from one State to another. [629]

It is unnecessary, therefore, to consider further the question raised by the plaintiffs in error under their third assignment of errors, so far forth as it is based on the assumption that the tax complained of was an impost or duty on imports. The other assumption made under that assignment, that some of the coal was afterwards exported, and that the tax complained of was therefore *pro tanto* a duty on exports, is equally untenable. When the petition was filed the coal was lying in New Orleans, in the hands of Brown & Jones, for sale. The petition states this in so many words, and Rootes testifies the same thing, and adds that it was to be sold by the flatboat load. He also adds that at the time of his examination more than half of it had been exported to foreign countries; but he probably means that it had been sold to steamers sailing to foreign ports for use on the same, and had only been exported in that way. The complainants were not exporters; they did not hold the coal at New Orleans for exportation, but for sale there. Being in New Orleans, and held there on sale, without reference to the destination, or use which the purchasers might wish to make of it, it was taxed in the hands of the owners (or their agents) like all other property in the city, six mills on the dollar. If after this, and after being sold, the purchaser thought proper to put it on board of a steamer bound to foreign parts, that did not alter the character of the taxation so as to convert it from a general tax to a duty on exports. When taxed it was not held with the intent or for the purpose of exportation, but with the intent and for the purpose of sale there, in New Orleans. A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine. But certainly, where a general tax is laid on all property alike, it cannot be

* The judgment in this case was reversed by this court in Hart v. New Orleans, 112 U. S., 69 [Bk. 28, L. ed. 659].

[630] construed as a duty on exports when falling upon goods not then intended for exportation, though they should happen to be exported afterwards. This is the most that can be said of the goods in question, and we are therefore of opinion that the tax was not a duty on exports any more than it was a duty on imports, within the meaning of those terms in the clause under consideration.

But in holding with the decision in *Woodruff* v. *Parham* [*supra*], that goods carried from one State to another are not imports or exports within the meaning of the clause which prohibits a State from laying any impost or duty on imports or exports, we do not mean to be understood as holding that a State may levy import or export duties on goods imported from or exported to another State. We only mean to say that the clause in question does not prohibit it. Whether the laying of such duties by a State would not violate some other provision of the Constitution, that, for example, which gives to Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes, is a different question. This brings us to the consideration of the second assignment of error, which is founded on the clause referred to.

The power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power; if, in the absence of Congressional action, the States may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, etc., still, according to the rule laid down in *Cooley* v. *Board of Wardens*, 12 How., 319, the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction. All laws and regula-
[631] tions are restrictive of natural freedom to some extent, and where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it hereby indicates its will that that commerce shall be free and untrammeled; and any regulation of the subject by the States is repugnant to such freedom. This has frequently been laid down as law in the judgments of this court. In *Welton* v. *Missouri*, 91 U. S., 282 [Bk. 23, L. ed. 850], *Mr. Justice* Field, speaking for the court, said: "The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled." This was said in a case where the plaintiff in error had been convicted of selling goods without a license under a law of the Sta of Missouri, which prohibited any person fro dealing as a peddler without license, and whic declared that a peddler was one dealing in goo or wares "not the growth, produce or ma ufacture of this State [Missouri], by going fro place to place to sell the same." To the san purport, and on the same subject generally, s *Gibbons* v. *Ogden*, 9 Wheat., 209; *License Cas* 5 How., 575, 592, 594, 600, 605; *Passeng Cases*, 7 How., 407, 414, 419, 445, 462–46 *Crandall* v. *Nevada*, 6 Wall., 35, 41–49 [73 U S., bk. 18, L. ed. 745, 746–749]; *Paul* v. *Vi ginia*, 8 Wall., 168, 182–184 [75 U. S., bk. 1 L. ed. 357, 361]; *Ward* v. *Maryland*, 12 Wal 418, 430, 431 [79 U. S., bk. 20, L. ed. 449, 453 *State Tax on Railway Receipts*, 15 Wall., 293 [U. S., bk. 21, L. ed. 167]; *The Lottawanna*, Wall., 581 [88 U. S., bk. 22, L. ed. 664]; *He derson* v. *Mayor of N. Y.*, 92 U. S., 259 [B 23, L. ed. 543]; *Sherlock* v. *Alling*, 93 U. S., [Bk. 23, L. ed. 819]; *R. R. Co.* v. *Husen*, 95 S., 465 [Bk. 24, L. ed. 527]; *Cook* v. *Penns vania*, 97 U. S., 566 [Bk. 24, L. ed. 1015]; *G* v. *Baltimore*, 100 U. S., 434 [Bk. 25, L. ed. 74 *Tiernan* v. *Rinker*, 102 U. S., 123 [Bk. 26, ed. 103]; *Packet Co.* v. *Catlettsburg*, 105 U. 559 [Bk. 26, L. ed. 1169]; *Transportation Co. Parkersburg*, 107 U. S., 701 [Bk. 27, L. ed. 58 and see *Moran* v. *New Orleans*, 112 U. S., [Bk. 28, L. ed. 653].

In the case of *R. R. Co.* v. *Husen* [Bk. L. ed. 529], in which another law of t State of Missouri came up for consideratio which declared that no Texas, Mexican Indian cattle should be driven, or otherw conveyed into the State between the first of M and first of November, unless carried throu the State in cars, without being unloaded, t court, through *Mr. Justice* Strong, said: " seems hardly necessary to argue at length th unless the statute can be justified as a legitim exercise of the police power of the State, it i usurpation of the power vested exclusively Congress. It is a plain regulation of interst commerce, a regulation extending to prohi tion. Whatever may be the power of a St over commerce that is completely internal can no more prohibit or regulate that which interstate than it can that which is with forei nations." In short, it may be laid down as settled doctrine of this court, at this day, th State can no more regulate or impede comme among the several States than it can regulate impede commerce with foreign nations.

This being the recognized law, the questi then arises whether the assessment of the tax question amounted to any interference with restriction upon the free introduction of plaintiffs' coal from the State of Pennsylva into the State of Louisiana, and the free dispo of the same in commerce in the latter State; other words, whether the tax amounted to a r ulation of, or restriction upon, commerce am the States; or only to an exercise of local ministration under the general taxing pow which, though it may incidentally affect subjects of commerce, is entirely within power of the State until Congress shall see fi interfere and make express regulations on subject.

As to the character and mode of the ass ment, little need be added to what has alre

[illegible] and. It was not a tax imposed upon the [illegible] a foreign product, or as the product of another State than Louisiana, nor a tax imposed [illegible] of the coal being imported or brought [illegible] Louisiana, nor a tax imposed whilst it was [illegible] of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of use, for final disposal or use, and was a commodity in the market of New Orleans. It might remain in that condition for a year or two [illegible] or only for a day. It had become a part of the general mass of property in the State, and [illegible] it was taxed for the current year (1880), [illegible] other property in the City of New Orleans [illegible]. Under the law, it could not be taxed [illegible] until the following year. It was subject to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner [illegible] such goods were treated.

It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale. Take the City of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital—provided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other States? Of course the assessment should be a general one, and not discriminative between goods of different States. The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a violation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But if, after their arrival within the State—that being their place of destination for use or trade—of other kinds, they are subjected to a general tax and alike on all property within the city, we fail to see how such a taxing can be deemed a violation of commerce which would have the objectionable effect referred to.

We do not mean to say that if a tax collector should be stationed at every ferry and railroad depot in the City of New York, charged with the duty of collecting a tax on every wagon-load or carload of produce and merchandise brought into the city, that it would not be a regulation of and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other States. We think it would be, and that it would be an encroachment upon the exclusive powers of Congress. It would be very different from the tax laid on auction sales of all property indiscriminately, as in the case of *Woodruff* v. *Parham* [*supra*], which had no relation to the movement of goods from one State to another. It would be very different from a tax laid, as in the present case, on property which had reached its destination, and had become part of the general mass of property of the city, and which was only taxed as a part of that general mass in common with all other property in the city, and in precisely the same manner.

When Congress shall see fit to make a regulation on the subject of property transported from one State to another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the State. In the present case we see no such conflict, either in the law itself or in the proceedings which have been had under it and sustained by the state tribunals, nor any conflict with the general rule that a State cannot pass a law which shall interfere with the unrestricted freedom of commerce between the States.

In our opinion, therefore, the second assignment of error is untenable.

The only remaining assignment of error to be considered is, that the tax in question violated that clause of the fourth article of the Constitution which declares that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." As the applicability of this objection did not occur to us upon reading the record of the case, we [635] have carefully examined the brief of the plaintiffs' counsel for light on the subject, but so far as we can understand, the point is not urged. We are certainly unable to see how, or in what respect, any equality of privileges as citizens has been denied to the plaintiffs by the imposition of the tax. Their property was only taxed like that of all other persons, whether citizens of Louisiana or of any other State or country. Not the slightest discrimination was made.

The judgment of the Supreme Court of Louisiana is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—116 U. S., 455, 527; 117 U. S., 49.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, *Plff. in Err.*, [635]

v.

DANIEL W. FORD.

(See S. C., Reporter's ed., 635–642.)

Removal of causes—suit in State Court on judgment recovered in Federal Court—petition, allegations of.

1. In a suit in a court of New York against a corporation of that State upon a judgment recovered

NOTE.—*Removal of causes under Act of 1875—citizenship.* See Meyer v. Delaware, etc., Co., 100 U. S., bk. 25, 598, *note*.

in the Circuit Court of the United States for the Northern District of Ohio, merely alleging in a petition for removal, that the defendant was not an inhabitant of Ohio, and was not found there, and was not personally served with process by itself or its officers, was not sufficient to raise a defense, under § 739, R. S., of want of jurisdiction in the Circuit Court, without also negativing service of process on an agent of the defendant in Ohio and the actual appearance of the defendant to the suit.

2. Want of jurisdiction, set up to avoid a judgment, must be shown with the greatest certainty.

3. The mere fact that a suit in a State Court is brought on a judgment recovered in a Federal Court does not entitle the defendant to removal.

4. The colorable transfer of a right of action from a person against whom the defendant would have a right of removal, to one against whom he has no such right, and made to deprive the Federal Court of jurisdiction, is not a ground for removal; but such a transfer is a matter of defense to the action.

[No. 105.]

Argued Nov. 26, 1884. Decided May 4, 1885.

IN ERROR to the Supreme Court of the State of New York.

This action was brought in the court below, by the defendant in error, on a judgment against the defendant in the Circuit Court of the United States for the Northern District of Ohio.

Before the commencement of the trial, the defendant filed a petition for the removal of the cause into the Circuit Court of the United States for the Northern District of New York. The court refused to remove the cause and proceeded with the trial, which resulted in a verdict and judgment for the plaintiff for $3,573.44, including costs.

The judgment was affirmed, on successive appeals, by the court below at General Term, and by the Court of Appeals, which court remitted the record to the court below. Whereupon the defendant sued out this writ of error.

The facts of the case are stated by the court.

Mr. **Esek Cowen,** for defendant in error.

Messrs. **Edwin B. Smith,** *Stephen G. Clarke* and *William Stanley*, for plaintiff in error.

[636] *Mr. Justice* **Bradley** delivered the opinion of the court:

This was an action brought in the Supreme Court of New York by Daniel W. Ford, the defendant in error, against the Provident Savings Life Assurance Company (the plaintiff in error) on a judgment recovered by one Charles Cochran against said Company in the Circuit Court of the United States for the Northern District of Ohio, and assigned by Cochran to the plaintiff, Ford. The complaint contained, amongst others, the following averments, to wit: "That heretofore and on or about the 12th day of December, 1876, one Charles Cochran, then a resident of the State of Ohio, in due form of law, commenced an action in the United States Circuit Court for the Northern District of Ohio against the defendant in this action, praying for a judgment against said defendant for $20,000 damages; that the defendant in said action and herein duly appeared in said action and answered the petition or complaint of said Cochran, and after trial had of the issues thus joined, at which the defendant therein and herein duly appeared, judgment was duly directed, and, subsequently, and on or about the 10th day of October, 1878, was duly entered and docketed in the office of the clerk of said United States Circuit Court for the said Northern District of Ohio, in favor of the said complainant, Cochran, and against the said The Provident Savings Life Assurance Society of New York, the defendant therein and herein, for the sum of $3,305.45 damages and costs.

This plaintiff further alleges that on or about the 30th day of November, 1878, the said Charles Cochran, the complainant in said action and the then lawful holder and owner of said judgment, duly assigned and transferred to this plaintiff the said judgment, together with all his rights and claims thereunder and the interest due thereon.

The defendant, in answer to the complaint, admitted that Cochran had taken some proceedings in the Circuit Court of the United States for the Northern District of Ohio, praying for judgment against the defendant; but averred that there was never any personal service of process, summons or petition upon the defendant; and denied any knowledge of the recovery of any judgment as alleged in the complaint, or that Cochran had assigned the alleged judgment to Ford.

The cause came on for trial in February, 1879, but before the trial commenced the defendant presented a petition for the removal of the cause to the Circuit Court of the United States for the Northern District of New York, accompanied by a bond, which was approved by the court. The petition was as follows, to wit:

"Supreme Court, Rensselaer County.
Daniel W. Ford
against
The Provident Savings Life Assurance Society of New York.

"To said Supreme Court: Your petitioner respectfully shows to this honorable court that i is the defendant in the above action, and a cor poration duly incorporated under the laws o the State of New York, located and having it place of business in the City of New York, an was such corporation during all the times here inafter mentioned, and was never organized o incorporated under any law of the State o Ohio; that the above action is brought to re cover the amount of a judgment alleged to hav been obtained against your petitioner in th State of Ohio, by one Charles Cochran, on th 10th day of October, 1878, in the Circuit Cou of the United States for the Northern Distric of Ohio, for the sum of $3,305.45; that sai Cochran then resided and still resides in th State of Ohio; that this action is brought upo an alleged assignment of said judgment to th plaintiff above named by said Cochran, and now pending and undetermined; that the ma ter in dispute exceeds, exclusive of costs, th sum or value of $500, and involves questio arising under the laws of the United States, wit: under section 739 of the Revised Statut of the United States. Said section forbids 'A suit to be brought by any original process b fore either of the United States Courts again an inhabitant of the United States in any oth district than that of which he is an inhabita or in which he shall be found at the time serving the writ.' And your petitioner ave that the said suit in Ohio was by original pr ess, but that the said process was never serv personally upon the defendant in said action Ohio, or upon any of its officers, nor was defendant ever an inhabitant of Ohio or fou

[illegible] as your petitioner verily believes, said circuit court never acquired jurisdiction, and said judgment is invalid and void, and that such want of personal service as aforesaid is alleged in the answer in the present action, and that the trial of this action will necessarily involve the construction and effect of the said law of the United States, to wit: the 789th section of the said United States Revised Statutes.

Secondly. And your petitioner further says, and is informed and verily believes, that the plaintiff in this action is not the real party in interest therein, but that said Cochran is the real party in interest, and that said alleged assignment is merely colorable; that it was made without any consideration and merely for the purpose of prosecuting and collecting said judgment for the benefit of said Cochran, and to avoid the necessity of said Cochran's giving security for costs as a nonresident of this State, and to embarrass, and, if possible, prevent the transfer of the action to the United States Courts, and that the controversy in this action is in reality not a substance between the defendant and the said Charles Cochran, who are citizens of different States, to wit: the defendant is in law a citizen of New York, and said Cochran a citizen of Ohio."

The petition then concluded with the proffer of a bond and a prayer for removal of the cause in the usual form. The court refused to remove the cause, and the trial proceeded and resulted in a verdict and judgment for the plaintiff, which judgment is brought here by the present writ of error.

The question for our consideration is, whether upon the petition as presented, and the pleadings as they then stood, the application for removal should have been granted.

The first ground of removal set forth in the petition was, in effect, that the defendant had a defense arising under section 789 of the Revised Statutes of the United States, which defense was that the judgment sued on was absolutely void for want of jurisdiction in the court, because that section forbids any suit to be brought by any original process before either of the United States Courts against an inhabitant of the United States in any other district than that of which he is an inhabitant, or in which he shall be found at the time of serving the writ; and it is averred that the suit was by original process and that said process was never served personally upon the defendant in Ohio (the defendant being a New York corporation) or upon any of its officers there, and that the defendant was never an inhabitant of Ohio.

The allegation of a defense under the section referred to is clearly evasive and inconsequential. It is not necessary that a corporation should be an inhabitant of a State, or should be found therein, or should be personally served with process through its officers, in order that the Circuit Court of the United States sitting in that State may have jurisdiction of a personal suit against it. It is well known that corporations of the character of the defendant, desirous of doing business in a State other than that in which they have their domicil, are generally required to have an agent therein to receive service of process for them. This is exacted as a condition of their doing business in such State, and such a corporation differs from an ordinary "inhabitant" of a State, as that term is used in said section 789. This mode of acquiring personal jurisdiction of a foreign corporation applies to the Federal Courts as well as to the State Courts. See *Ex parte Shollenberger*, 96 U. S., 369 [Bk. 24, L. ed. 853]. Again, jurisdiction may also be acquired by the actual appearance of such a corporation to a suit brought against it in the United States Circuit Court. So that merely alleging that the defendant was not an inhabitant of Ohio, and was not found there, and was not personally served with process by itself or its officers, was not sufficient to raise a defense under section 789 of want of jurisdiction in the Circuit Court, without also negativing service of process on an agent of the defendant in Ohio and the actual appearance of the defendant to the suit; for, want of jurisdiction set up to avoid a judgment must be shown with the greatest certainty. The petition of removal is very careful not to negative these important contingencies, and that, in the face of the allegation of the complaint that the defendant did appear to the suit, and did answer the petition and appear at the trial. Hence we say that the allegation of a defense under the statute is clearly evasive and inconsequential, and we are not at all surprised to find that when the record of the Ohio suit was produced it showed that the defendant's agent was served with process, and that the defendant did actually appear to the suit and answer the petition, and did appear at and contest the trial, which lasted for a fortnight.

Reading the petition for removal, therefore, in the light of the pleadings on file when it was presented, we are satisfied that the first ground of removal set out therein was insufficient.

The second ground was, in effect, that the assignment of the judgment by Cochran to Ford was colorable merely, and that the real party in interest was Cochran, who was a citizen of Ohio, and as to whom the defendant, being a citizen of New York, was entitled to removal of the cause, and should not be deprived of its right by the fraudulent assignment. The plain answer to this position is, that the action was nevertheless Ford's, and as against him there was no right of removal. If he was a mere tool of Cochran, and if the latter was the person really interested in the cause, the action could not have been sustained; for the Code of Procedure of New York declares, that "every action must be prosecuted in the name of the real party in interest," except in a few cases not including this, and not alone in New York, but anywhere, if it could be shown that the assignment was fraudulent as against the defendant, it would be void, and this fact would be a defense to the action brought by the assignee. We know of no instance where the want of consideration in a transfer, or a colorable transfer, of a right of action from a person against whom the defendant would have a right of removal to a person against whom he would not have such a right, has been held a good ground for removing a cause from a State to a Federal Court. Where an assignment of a cause of action is colorably made for the purpose of giving jurisdiction to the United States Court, the fifth section of the Act of Congress of March 3, 1875, relating to removals, has now given to the Circuit Court power to dismiss or

remand the cause at any time when the fact is made to appear. And by analogy of this law, it may, perhaps, be a good defense to an action in a State Court, to show that a colorable assignment has been made to deprive the United States Court of jurisdiction but, as before said, it would be a defense to the action, and not a ground of removing that cause into the Federal Court. We think, therefore, the second ground of removal was also insufficient.

It is suggested, however, that a suit on a judgment recovered in a United States Court is necessarily a suit arising under the laws of the United States, as much so as if the plaintiff or defendant were a corporation of the United States; and hence that such a suit is removable under the Act of March 3, 1875.

It is observable that the removal of the cause was not claimed on any such broad ground as this; but so far as the character of the case was concerned, only on the ground that the defendant had a defense under section 739 of the Revised Statutes, specifying what the defense was; and we have already shown that that ground of removal, as stated in the petition, was insufficient. But, conceding that the defendant is now entitled to take its position on the broader ground referred to, is it tenable and sufficient for the purpose?

What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being [642] the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified), distinctly involving the laws of the United States—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States.

These considerations show a wide distinction, as it seems to us, between the case of a suit merely on a judgment of a United States Court, and that of a suit by or against a United States corporation; which latter, according to the masterly analysis of *Chief Justice* Marshall in *Osborn* v. *Bank*, 9 Wheat., 738, is pervaded from its origin to its close by United States law and United States authority.

Without pursuing the subject further, we conclude with expressing our opinion, that this last ground of removal, like those already considered, was insufficient.

The judgment of the Supreme Court of New York is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—115 U. S., 267.

FORT LEAVENWORTH RAILROAD COMPANY, *Plff. in Err.*,

v.

PERCIVAL G. LOWE, Sheriff of the COUNTY OF LEAVENWORTH.

(See S. C., Reporter's ed., 525-542.)

Constitutional law—jurisdiction over lands within a State, occupied by the United States—when exclusive in United States—conditional grant to United States.

1. The legislative power of Congress is exclusiv over lands within a State purchased with its con sent by the United States for a constitutional pur pose.

2. Where the United States acquires lands withi a State in any other way than by purchase with i consent, forts, arsenals or other public building erected thereon for the use of the General Govern ment, as instrumentalities for the execution of i powers, will be free from any such interference an jurisdiction of the State as would destroy or impa their effective use for the purposes designed. Bu when not used as such instrumentalities, the legi lative power of the State over the places acquire will be as full and complete as over any other place within its limits.

3. The cession of lands by a State to the Unite States may be upon such conditions as the Stat may see fit to annex not inconsistent with the fre and effective use of such lands for the purposes i tended.

4. After the admission of the State of Kansas th United States retained only the rights of an ord nary proprietor in the Fort Leavenworth Militar Reservation; except as an instrument for the ex cution of the powers of the General Governmen that part of the tract, which was actually used as fort or military post, was beyond such control o the State, by taxation or otherwise, as would defea its use for those purposes. The clause of the Act o the Legislature of Kansas of February 23, 1875, ce cede jurisdiction over said Reservation to th United States, saving to the State "the right to ta railroad, bridge and other corporations, their fra chises and property, on said Reservation" is vali and a tax upon a railroad paid to the State canno be recovered back.

[No. 243.]

Argued Apr. 9, 10, 1885. Decided May 4, 188

IN ERROR to the Supreme Court of th State of Kansas.

This action was brought in the District Cou of Leavenworth, Kansas, by the plaintiff i error, to recover certain taxes paid under an a leged illegal assessment upon property situate within the Fort Leavenworth Military Reserv tion. The court rendered judgment on demu rer, for the defendant. This judgment havin been affirmed, on error, by the court below, th plaintiff sued out this writ of error.

The facts of the case are stated by the cour

Messrs. **E. E. Cook,** *Thos. F. Withrow* an *M. A. Low*, for plaintiff in error.

Mr. **W. Hallett Phillips,** for defenda in error.

Mr. Justice **Field** delivered the opinion the court:

The plaintiff, a Corporation organized und the laws of Kansas, was in 1880, and has ev since been, the owner of a railroad in the Re ervation of the United States in that Stat known as the Fort Leavenworth Military Re ervation. In that year its track, right of wa franchises, road bed, telegraph line and instr ments connected therewith on the Reservatio

was assessed by the board of assessors of the State and a tax of $394.40 levied thereon, which was paid by the Railroad Company under protest, in order to prevent a sale of the property. The present action is brought to recover back the money thus paid, on the ground that the property, being entirely within the Reservation, was exempt from assessment and taxation by the State.

The land constituting the Reservation was part of the territory acquired in 1803 by cession from France, and, until the formation of the State of Kansas and her admission into the Union, the United States possessed the rights of a proprietor, and had political dominion and sovereignty over it. For many years before that admission it had been reserved from sale by the proper authorities of the United States for military purposes, and occupied by them as a military post. The jurisdiction of the United States over it during this time was necessarily exclusive. But in 1861 Kansas was admitted into the Union upon an equal footing with the original States, that is, with the same rights of political dominion and sovereignty, subject like them only to the Constitution of the United States. Congress might undoubtedly, upon such admission, have stipulated for retention of the political authority, dominion and legislative power of the United States over the Reservation, so long as it should be used for military purposes by the Government; that is, it could have excepted the place from the jurisdiction of Kansas, as one needed for the uses of the General Government. But from some cause, inadvertence perhaps, or overconfidence that a cession of such jurisdiction could be had whenever desired, no such stipulation or exception was made. The United States, therefore, retained after the admission of the State, only the rights of an ordinary proprietor; except as an instrument for the execution of the powers of the General Government, that part of the land which was actually used for a fort or military post was beyond such control of the State, by taxation or otherwise, as would defeat its use for those purposes. So far as the land constituting the Reservation was not used for military purposes, the possession of the United States was only that of an individual proprietor. The State could have exercised, with reference to it, the same authority and jurisdiction which she could have exercised over other property held by private parties. This limit to the jurisdiction of the United States was called to the attention of the government in 1871. In April of that year the Secretary of War addressed a communication to the Attorney-General, inclosing papers touching the Reservation, and submitting for his official opinion the question, whether, under the Constitution, the reservation of the land for a site as a military post and for public buildings took it out of the operation of the law of March 3, 1859, 11 Stat. at L. 430, and, if so, what action would be required on the part of the Executive or Congress to restore the land to the exclusive jurisdiction of the United States. The Attorney-General replied that the Act admitting Kansas as a State into the Union had the effect to release from federal jurisdiction all the territory within the boundaries of the new State, excepting only that of the Indians having treaties with the United States, which provided that without their consent such territory should not be subject to state jurisdiction, and the Reservation was not within this exception; and that to restore Federal jurisdiction over the land included in the Reservation, it would be necessary to obtain from the State of Kansas a cession of jurisdiction, which he had no doubt would upon application be readily granted by the State Legislature. 14 Ops. Attys-Gen., 88. It does not appear from the record before us that such application was ever made; but, on the 22d of February, 1875, the Legislature of the State passed an Act entitled "An Act to Cede Jurisdiction to the United States over the Territory of the Fort Leavenworth Military Reservation," the first section of which is as follows: [528]

"That exclusive jurisdiction be, and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth Reservation in said State, as declared from time to time by the President of the United States, saving, however, to the said State the right to serve civil or criminal process within said Reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of said cession and Reservation; and saving further to said State the right to tax railroad, bridge, and other corporations, their franchises and property, on said Reservation." Laws of Kansas of 1875, p. 95.

The question as to the right of the plaintiff to recover back the taxes paid depends upon the validity and effect of the last saving clause in this Act. As we have said, there is no evidence before us that any application was made by the United States for this legislation, but, as it conferred a benefit, the acceptance of the Act is to be presumed in the absence of any dissent on their part. The contention of the plaintiff is that the Act of cession operated under the Constitution to vest in the United States exclusive jurisdiction over the Reservation, and that the last saving clause, being inconsistent with that result, is to be rejected. The Constitution provides that "Congress shall have power to *exercise exclusive legislation in all cases whatsoever* over such district (not exceeding ten miles square), as may, by cession of particular States and the acceptance of Congress, become the seat of the Goverment of the United States, and *to exercise like authority* over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Art. 1, § 8.

The necessity of complete jurisdiction over the place which should be selected as the seat of government was obvious to the framers of the Constitution. Unless it were conferred, the deliberations of Congress might in times of excitement be exposed to interruptions without adequate means of protection; its members and the officers of the government be subjected to insult and intimidation, and the public archives be in danger of destruction. The Federalist, in support of this clause in the Constitution, in addition to these reasons, urged that "a dependence of the members of the General Government on the State comprehending the seat [529]

of the government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy." No. 43.

The necessity of supreme legislative authority over the seat of government was forcibly impressed upon the members of the Constitutional Convention by occurrences which took place near the close of the Revolutionary War. At that time, while Congress was in session in Philadelphia, it was surrounded and insulted by a body of mutineers of the Continental Army. In giving an account of this proceeding, Mr. Rawle, in his treatise on the Constitution, says of the action of Congress: "It applied to the executive authority of Pennsylvania for defense; but, under the ill-conceived Constitution of the State at that time, the executive power was vested in a council, consisting of thirteen members, and they possessed or exhibited so little energy, and such apparent intimidation, that the Congress indignantly removed to New Jersey, whose inhabitants welcomed it with promises of defending it. It remained for some time at Princeton without being again insulted, till, for the sake of greater convenience, it adjourned to Annapolis. The general dissatisfaction with the proceedings of the executive authority of Pennsylvania, and the degrading spectacle of a fugitive Congress, suggested the remedial provisions now under consideration." Rawle, p. 113. Of this proceeding *Mr. Justice* Story remarks: "If such a lesson could have been lost upon the people, it would have been as humiliating to their intelligence as it would have been offensive to their honor." 2 Story, Com. Const., § 1219.

[530] Upon the second part of the clause in question, giving power to "exercise like authority," that is, of exclusive legislation "over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," the Federalist observes that the necessity of this authority is not less evident. "The public money expended on such places," it adds, "and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated by requiring the concurrence of the States concerned in every such establishment." "The power," says *Mr. Justice* Story, repeating the substance of Mr. Madison's language, "is wholly unexceptionable, since it can only be exercised at the will of the State, and therefore it is placed beyond all reasonable scruple."

This power of exclusive legislation is to be exercised, as thus seen, over places purchased, by consent of the Legislatures of the States in which they are situated, for the specific purposes enumerated. It would seem to have been the opinion of the framers of the Constitution that, without the consent of the States, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings for the defens of the country, or the discharge of other dutie devolving upon it, and the consent of the State in which they were situated was obtained fo their acquisition, such consent should carr with it political dominion and legislative au thority over them. Purchase with such co sent was the only mode then thought of for th acquisition by the General Government of tit to lands in the States. Since the adoption the Constitution this view has not generally pr vailed. Such consent has not always been ob tained, nor supposed necessary, for the purcha by the General Government of lands within th States. If any doubt has ever existed as to i power thus to acquire lands within the State it has not had sufficient strength to create an effective dissent from the general opinion. Th consent of the States to the purchase of lan within them for the special purposes named i however, essential, under the Constitution, the transfer to the General Government, wi the title, of political jurisdiction and dominio Where lands are acquired without such consen the possession of the United States, unless p litical jurisdiction be ceded to them in some oth way, is simply that of an ordinary proprieto The property in that case, unless used as means to carry out the purposes of the gover ment, is subject to the legislative authority a control of the States equally with the proper of private individuals.

But not only by direct purchase have t United States been able to acquire lands th needed without the consent of the States, b it has been held that they possess the right eminent domain within the States, using th terms, not as expressing the ultimate domini or title to property, but as indicating the ri to take private property for public uses wh needed to execute the powers conferred by t Constitution; and that the General Governm is not dependent upon the caprice of individu or the will of State Legislatures in the acqu tion of such lands as may be required for full and effective exercise of its powe This doctrine was authoritatively declared *Kohl* v. *U. S.*, 91 U. S., 367 [Bk. 23, L. 449]. All the judges of the court agreed in possession by the General Government of t right, although there was a difference of op ion whether provision for the exercise of right had been made in that case. The co after observing that lands in the States are ne ed for forts, armories and arsenals, for na yards and light-houses, for custom-houses court houses, and for other public uses, sa "If the right to acquire property for such may be made a barren right by the unwilli ness of property holders to sell, or by the act of a State prohibiting a sale to the Federal G ernment, the constitutional grants of power r be rendered nugatory, and the government is pendent for its practical existence upon the of a State, or even upon that of a private citiz The right to acquire property in this way condemnation, may be exerted either thro tribunals expressly designated by Congress by resort to tribunals of the State in which property is situated, with her consent for purpose. Such consent will always be sumed in the absence of express prohibi *U. S.* v. *Jones*, 109 U.S., 513, 519 [Bk. 27, L

Matter of Petition of U. S., 96 N.

besides these modes of acquisition, the United States acquired, on the adoption of the Constitution, an immense domain lying north and west of the Ohio River, acquired as the result of the Revolutionary War from Great Britain, by cessions from Virginia, Massachusetts and Connecticut; and since the adoption of the Constitution, they have, by cession from foreign nations, come into the ownership of a territory still larger, lying between the Mississippi River and the Pacific Ocean, and out of these territories several States have been formed and admitted into the Union. The proprietorship of the United States in large tracts of land within these States has remained after their admission. There has been, therefore, no necessity for them to purchase or to condemn lands within these States, for forts, arsenals, and other public buildings, unless they had disposed of what they afterwards needed. Having the land they have usually reserved certain portions of their lands from sale or other disposition for the uses of the government.

The brief statement as to the different modes in which the United States have acquired title to lands upon which public buildings have been erected will serve to explain the nature of their jurisdiction over such places, and the consistency with each other of decisions on the subject by federal and state tribunals, and of opinions of the Attorneys-General.

When the title is acquired by purchase by consent of the Legislatures of the States, the United States jurisdiction is exclusive of all state authority. This follows from the declaration of the Constitution that Congress shall have "like authority over such places as it has over the District which is the seat of government; that is, the power of "exclusive legislation in all cases whatsoever." Broader or clearer language could not be used to exclude all other authorities than that of Congress; and that no other authority can be exercised over them has been the uniform opinion of federal and state tribunals and of the Attorneys-General.

The reservation which has usually accompanied the consent of the States that civil and criminal process of the state courts may be served on the places purchased, is not considered as interfering in any respect with the Sovereignty of the United States over them; but is intended to prevent them from becoming an asylum for fugitives from justice. And Congress by statute passed in 1795, declared that exclusion from the States of the jurisdiction of places where light-houses, beacons, buoys, or public piers were or might be erected, with such reservations, should be deemed sufficient for the support and erection of such structures, and if no such reservation had been made, or a sufficient reservation for those purposes should be omitted, civil and criminal process issued under the authority of the State or of the United States might be served and executed within them. 1 Stat. at L., 436, chap. 40.

Thus in *U. S. v. Cornell*, 2 Mas., 60, it was held by Mr. Justice Story, that the purchase of land by the United States for public purposes, within the limits of a State, did not of itself oust the jurisdiction or sovereignty of the State over the lands purchased; but that the purchase must be by consent of the Legislature of the State, and then the jurisdiction of the United States under the Constitution became exclusive. In that case the defendant was indicted for murder committed in Fort Adams, in Newport Harbor Rhode Island. The place had been purchased by the United States with the consent of the State, to which was added the reservation mentioned, as to the service of civil and criminal process within it. The main questions presented for decision were, whether the sole and exclusive jurisdiction over the place vested in the United States without a formal Act of cession, and whether the reservation as to service of process made the jurisdiction concurrent with that of the State. The first question was answered, as above, that the purchase by consent gave the exclusive jurisdiction; and, as to the second question, the court said: "In its terms, it certainly does not contain any reservation of concurrent jurisdiction or legislation. It provides only that civil [534] and criminal process issued under the authority of the State, which must, of course, be for acts done within and cognizable by the State, may be executed within the ceded lands, notwithstanding the cession. Not a word is said from which we can infer that it was intended that the State should have a right to punish for acts done within the ceded lands. The whole apparent object is answered by considering the clause as meant to prevent these lands from becoming a sanctuary for fugitives from justice for acts done within the acknowledged jurisdiction of the State. Now, there is nothing incompatible with the exclusive sovereignty or jurisdiction of one State that it should permit another State in such cases to execute its process within its limits. And a cession of exclusive jurisdiction may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession, and as an agreement of the new sovereign to permit its free exercise, as *quoad hoc* his own process. This is the light in which clauses of this nature (which are very frequent in grants made by the States to the United States) have been received by this court on various occasions on which the subject has been heretofore brought before it for consideration, and it is the same light in which it has also been received by a very learned state court. In our judgment it comports entirely with the apparent intention of the parties, and gives effect to Acts which might otherwise, perhaps, be construed entirely nugatory. For it may well be doubted whether Congress is, by the terms of the Constitution, at liberty to purchase lands for forts, dock-yards, etc., with the consent of the State Legislature, where such consent is so qualified that it will not justify the exclusive legislation of Congress there. It may well be doubted if such consent be not utterly void. *Ut res magis valeat quam pereat*, we are bound to give the present Act a different construction if it may reasonably be done; and we have not the least hesitation in declaring that the true interpretation of the present proviso leaves the sole and exclusive jurisdiction of Fort Adams in the United States."

The case referred to in which the subject [535] was considered by a learned state court is that of *Commonwealth* v. *Clary*, 8 Mass., 72. There

the Supreme Court of Massachusetts held that the courts of the Commonwealth could not take cognizance of offenses committed upon lands in the Town of Springfield purchased with the consent of the Commonwealth by the United States for the purpose of erecting arsenals upon them. That was the case of a prosecution against the defendant for selling spirituous liquors on the land without a license, contrary to a statute of the State. But the court held that the law had no operation within the lands mentioned. "The territory," it said, "on which the offense charged is agreed to have been committed is the territory of the United States, over which the Congress have exclusive power of legislation." It added, that "the assent of the Commonwealth to the purchase of this territory by the United States had this condition annexed to it, that civil and criminal process might be served therein by the officers of the Commonwealth. This condition was made with a view to prevent the territory from becoming a sanctuary for debtors and criminals; and from the subsequent assent of the United States to the said condition, evidenced by their making the purchase, it results that the officers of the Commonwealth, in executing such process, act under the authority of the United States. No offenses committed within that territory are committed against the laws of this Commonwealth, nor can such offenses be punishable by the courts of the Commonwealth unless the Congress of the United States should give to the said courts jurisdiction thereof." In *Mitchell* v. *Tibbets*, before the same court, years afterwards, 17 Pick., 298, it was held that a vessel employed in transporting stone from Maine to the navy-yard in Charlestown, Mass., a place purchased by the United States with the consent of the State, was not employed in transporting stone within the Commonwealth, and therefore committed no offense in disregarding a statute making certain requirements of vessels thus employed. The court said that to bring a vessel within the description of the statute, she must be employed in landing stone at, or taking stone from, some place in the Commonwealth, and that the law of Massachusetts did not extend to and operate within the territory ceded, adopting the principle of its previous decision in 8 Massachusetts.

[536] In March, 1841, the House of Representatives of Massachusetts requested of the Justices of the Supreme Judicial Court of that State their opinion whether persons residing on lands in that State purchased by or ceded to the United States for navy-yards, arsenals, dock-yards, forts, lighthouses, hospitals and armories, were entitled to the benefits of the state common schools for their children in the towns where such lands were located; and the Justices replied that, "where the general consent of the Commonwealth is given to the purchase of territory by the United States for forts and dock-yards, and where there is no other condition or reservation in the Act granting such consent, but that of a concurrent jurisdiction of the State for the service of civil process and criminal process against persons charged with crimes committed out of such territory, the Government of the United States has the sole and exclusive jurisdiction over such territory for all purposes of legislation and jurisprudence, with the single exception expressed; and consequently that no persons are amenable to the laws of the Commonwealth for crimes and offenses committed within said territory; and that persons residing within the same do not acquire the civil and political privileges, nor do they become subject to the civil duties and obligations, of inhabitants of the towns within which such territory is situated." And accordingly they were of opinion that persons residing on such lands were not entitled to the benefit of the common schools for their children in the towns in which such lands were situated. 1 Met., 580.

In *Sinks* v. *Reese*, 19 Ohio St., 306, the question came before the Supreme Court of Ohio as to the effect of a proviso in the Act of that State, ceding to the United States its jurisdiction over lands within her limits for the purposes of a National Asylum for Disabled Volunteer Soldiers, which was, that nothing in the Act should be construed to prevent the officers, employees and inmates of the asylum, who were qualified voters of the State, from exercising the right of suffrage at all township, county and state elections in the township in which the National Asylum should be located. And it was held that, upon the purchase of the territory by the United States, with the consent of the Legislature of the State, the General Government became invested with exclusive jurisdiction over it and its appurtenances in all cases whatsoever; and that the inmates of such asylum resident within the territory, being within such exclusive jurisdiction, were not residents of the State so as to entitle them to vote, within the meaning of the Constitution, which conferred the elective franchise upon its residents alone.

To the same effect have been the opinions of the Attorney-General, when called for by the head of one of the departments. Thus, in the case of the Armory at Harper's Ferry, in Virginia, the question arose whether officers of the Army, or other persons, residing in the limits of the armory, the lands composing which had been purchased by consent of the State, were liable to taxation by her. The consent had been accompanied by a cession of jurisdiction with a declaration that the State retained concurrent jurisdiction with the United States over the place, so far as it could consistently with the Acts giving consent to the purchase and ceding jurisdiction; and that its courts, magistrates, and officers might take such cognizance, execute such processes, and discharge such other legal functions within it as might not be incompatible with the true intent and meaning of those Acts. The question having been submitted to the Attorney-General, he replied that the sole object and effect of the reservation was to prevent the place from becoming a sanctuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the State, and that in other respects the exterritoriality of the armory at Harper's Ferry was complete, in so as regards the State; that the persons in the employment of the United States, actually residing in the limits of the armory, did not possess the civil and political rights of citizens of the State, nor were they subject to the tax

other obligations of such citizens. 6 Ops. Attys-Gen., [illegible]. See also the case of *New York Postoffice Site*, 10 Id., 35.

These authorities are sufficient to support the proposition which follows naturally from the language of the Constitution, that no other legislative power than that of Congress can be exercised over lands within a State purchased by the United States with her consent for one of the purposes designated; and that such consent under the Constitution operates to exclude all other legislative authority.

But with reference to lands owned by the United States, acquired by purchase without the consent of the State, or by cessions from other governments, the case is different. Story, in his Commentaries on the Constitution, says: "If there has been no cession by the State of the place, although it has been constantly occupied and used under purchase, or otherwise, by the United States for a fort or arsenal, or other constitutional purpose, the state jurisdiction still remains complete and perfect;" and in support of this statement he refers to *People* v. [illegible], 17 Johns., 225. In that case the land on which Fort Niagara was erected, in New York, never having been ceded by the State to the United States, it was adjudged that the courts of the State had jurisdiction of crimes or offenses against the laws of the State committed within the fort or its precincts, although it had been garrisoned by the troops of the United States and held by them since its surrender by Great Britain, pursuant to the Treaties of 1793 and 1794. In deciding the case, the court said that the possession of the post by the United States must be considered as a possession for the State, not in derogation of her right. Observing that it regarded it as a fundamental principle that the rights of sovereignty were not to be taken away by implication. "If the United States," the court added, "had the right of exclusive legislation over the Fortress of Niagara they would have also exclusive jurisdiction; but we are of opinion that the right of exclusive legislation within the territorial limits of any State can be acquired by the United States only in the mode pointed out in the Constitution, by purchase, *by consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.* The [illegible] of that provision is that the State shall freely cede the particular place to the United States for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously by disseisin of the State; [illegible] it be acquired by mere occupancy, with the implied or tacit consent of the State, when such occupancy is for the purpose [illegible]."

Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the use of the General Government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the General Government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits.

As already stated, the land constituting the Fort Leavenworth Military Reservation was not purchased, but was owned by the United States by cession from France many years before Kansas became a State; and whatever political sovereignty and dominion the United States had over the place comes from the cession of the State since her admission into the Union. It not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the State might see fit to annex, not inconsistent with the free and effective use of the fort as a military post.

In the recent case of *Fort Porter Military Reservation*, the opinion of the Attorney-General was in conformity with this view of the law. On the 28th of February, 1842, the Legislature of New York authorized the commissioners of its land-office to cede to the United States the title to certain land belonging to the State within her limits, "for military purposes, reserving a free and uninterrupted use and control in the canal commissioners of all that may be necessary for canal and harbor purposes." Under this Act the title was conveyed to the United States. The Act also ceded to them jurisdiction over the land. In 1880, the superintendent [540] of public works of New York, upon whom the duties of canal commissioner were devolved, informed the Secretary of War that the interests of the State required that the land, or a portion of it, should be occupied by her for canal purposes, claiming the right to thus occupy it under the reservation in the Act of cession. The opinion of the Attorney-General was, therefore, requested as to the authority of the Secretary of War to permit the State, under these considerations, to use so much of the land as would not interfere with its use for military purposes. The Attorney-General replied that the United States, under the grant, held the land for military purposes, and that the reservation in favor of the State could be deemed valid only so far as it was not repugnant to the grant; that, hence, the right of the State to occupy and use the premises for canal or harbor purposes must be regarded as limited or restricted by the purposes of the grant; that, when such use and occupation would defeat or interfere with those purposes, the right of the State did not exist; but, when they would not interfere with those purposes, the State was entitled to use so much of the land as might be necessary for her canal and harbor purposes. 16 Ops. Attys-Gen., 592.

We are here met with the objection that the Legislature of a State has no power to cede away her jurisdiction and legislative power over any portion of her territory, except as such cession follows under the Constitution from her consent to a purchase by the United States for some one of the purposes mentioned. If this were so it would not aid the Railroad Company; the

jurisdiction of the State would then remain as it previously existed. But aside from this consideration, it is undoubtedly true that the State, whether represented by her Legislature, or through a convention specially called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country, without the concurrence of the General Government. The jurisdiction of the United States extends over all the territory within the States, and, therefore, their authority must be obtained, as well as that of the State within which the [541] territory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country. And so when questions arose as to the northeastern boundary, in Maine, between Great Britian and the United States, and negotiations were in progress for a treaty to settle the boundary, it was deemed necessary on the part of our government to secure the cooperation and concurrence of Maine, so far as such settlement might involve a cession of her sovereignty and jurisdiction as well as title to territory claimed by her, and of Massachusetts, so far as it might involve a cession of title to lands held by her. Both Maine and Massachusetts appointed commissioners to act with the Secretary of State, and after much negotiation the claims of the two States were adjusted, and the disputed questions of boundary settled. The commissioners of Maine were appointed by her Legislature; and those of Massachusetts by her Governor under authority of an Act of her Legislature. It was not deemed necessary to call a convention of the people in either of them to give to the commissioners the requisite authority to act effectively for their respective States. 5 Webster's Works, 99; 6 *Id.* 273.

In their relation to the General Government, the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the General Government are essentially different from those of the State, they are not those of a different country; and the two, the State and General Government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution. It is for the protection and interests of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other building for public uses are constructed within the States. As instrumentalities for the execution of the powers of the General Government, they are, as already said, exempt from such control of the States as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdictiyn by the State would be desirable, we do not [542] preceive any objection to its grant by the Legislature of the State. Such cession is really as much for the benefit of the State as it is for the benefit of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the State.

The Military Reservation of Fort Leavenworth was not, as already said, acquired by pur chase with the consent of Kansas. And he cession of jurisdiction is not of exclusive legis lative authority over the land, except so far a that may be necessary for its use as a militar post; and it is not contended that the savin clause in the Act of cession interferes wit such use. There is, therefore, no constitutio al prohibition against the enforcement of th clause. The right of the State to subject th railroad property to taxation exists as befor the cession. The invalidity of the tax levie not being asserted on any other ground tha the supposed exclusive jurisdiction of the Uni ed States over the Reservation, notwithstan ing the saving clause, *the judgment of the cou below must be affirmed. Ordered accordingly.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U.

CHICAGO, ROCK ISLAND AND PACIFI RAILWAY COMPANY, *Plff. in Err.*,

v.

WILLIAM McGLINN.

(See S. C., Reporter's ed., 542-547.)

Fort Leavenworth Military Reservation—m nicipal law of Kansas, not abrogated by cessi of, to the United States.

1. The Act of Kansas purporting to cede to t United States exclusive jurisdiction over the Fo Leavenworth Military Reservation is a valid cessi within the requirements of the Constitution.

2. It is a general rule of public law recognized a acted upon by the United States, that whenev political jurisdiction and legislative power ov any territory are transferred from one nation sovereign, municipal laws continue in force un abrogated by the new government or sovereig While there is a wide difference between a cessi of political jurisdiction from one nation to anott and a cession to the United States by a State, of leg lative power over a particular tract, for a spec purpose of the General Government, the princi which controls as to laws in existence at the tim the same in both.

3. The preceding case of the *F. L. R. R. Co. Lowe*, applied.

[No. 262.]

Argued Apr. 17, 1885. Decided May, 4, 18

IN ERROR to the Supreme Court of State of Kansas.

The history and facts of the case appear the opinion of the court. See also the prec ing case of *F. L. R. R. Co.* v. *Lowe*, p. 264.

Messrs. **Edward E. Cook, Thos. Withrow** and **M. A. Low**, for plaintiff in ror.

Mr. **W. Hallett Phillips**, for defend in error.

Mr. Justice **Field** delivered the opinion court:

This case comes here from the Supre Court of the State of Kansas. It is an act for the value of a cow alleged to have b killed by the engine and cars of the Chica Rock Island and Pacific Railway Compan corporation doing business in the County Leavenworth, in that State. It was brough a State District Court, and submitted for d sion upon an agreed statement of facts, in

[illegible] that on the 10th of February, [illegible], the property of the plaintiff, of the [illegible] of $25, strayed upon the railroad of the defendant at a point within the limits of the Fort Leavenworth Military Reservation in that county of State, where the road was not inclosed [illegible], and was there struck and killed by [illegible] passing along the road; that the Reservation is the one referred to in the Act of the [illegible] of the State, of February, 22, 1875; that a demand upon the defendant for the $25 was made by the plaintiff more than thirty days after the action was brought; and that, if the plaintiff was entitled to recover attorney's fees, [illegible] would be a reasonable fee.

The action was founded upon a Statute of Kansas of March 9, 1874, entitled "An Act Relating to Killing or Wounding Stock by Railroads" which makes every railway company in the State liable to the owner for the full value of cattle killed, and in damages for cattle wounded by its engine and cars or in any other manner in operating its railway. It provides that if the railway company fails for thirty days after demand by the owner to pay to him the [illegible] of the animal killed, or damages for an animal wounded, he may sue and recover double, together with a reasonable attorney's fee for the prosecution of the action. It further provides that it shall not apply to any railway company, the road of which is inclosed with a [illegible] lawful fence, to prevent the animal from being on the road. Laws of Kansas, 1874, [illegible].

On the 22d of February, 1875, the Legislature of Kansas passed an Act ceding to the United States jurisdiction over the Reservation, the first section of which is as follows: "That exclusive jurisdiction be, and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States Military Reservation, known as the Fort Leavenworth Reservation, in said State, as now or from time to time by the President of the United States; saving, however, to the said State the right to serve civil or criminal process within said Reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of such cession or Reservation; and saving further to said State the right to tax railroad, bridge and other corporations, their franchises and property on said Reservation." Laws of Kansas, 1875, [illegible].

The district court gave judgment for the plaintiff, assessing his damages at $45, an amount which was made by estimating the value of the cow killed at $25, and the attorney's fee at $20, these sums having been agreed upon by the parties. The case was carried to the Supreme Court of the State, where the judgment was affirmed, that court holding that the Act of Kansas, relating to the killing and wounding of stock by railroads, continued to be in force within the limits of the Reservation, as it had not been abrogated by Congress, and was not inconsistent with the existing laws of the United States. In so holding the court assumed, for the purposes of the case, without, however, adjudicating the fact that the Act ceding jurisdiction to the United States over the Reservation was valid, and that the United States had legally accepted the cession. To review this judgment the case is brought here.

Two questions are presented for our determination: one, whether the Act of Kansas purporting to cede to the United States exclusive jurisdiction over the Reservation is a valid cession within the requirements of the Constitution; the other, if such cession of jurisdiction is valid, did the Act of Kansas relating to the killing or wounding of stock by railroads continue in force afterwards within the limits of the Reservation?

It can hardly be the design of counsel for the Railroad Company to contend that the Act of cession to the United States is wholly invalid, for, in that event, the jurisdiction of the State would remain unimpaired, and her statute would be enforceable within the limits of the Reservation equally as in any other part of the State. What we suppose counsel desires to maintain is, that the Act of cession confers exclusive jurisdiction over the territory, and that any limitations upon it in the Act must therefore be rejected as repugnant to the grant.

This point was involved in the case of *Fort Leavenworth R.R. Co.* v. *Lowe* [*ante*, 264], decided herewith. We there held, that a building on a tract of land owned by the United States used as a fort, or for other public purposes of the Federal Government, is exempted, as an instrumentality of the government, from any such control or interference by the State as will defeat or embarrass its effective use for those purposes. But, in order that the United States may possess exclusive legislative power over the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the State. This is the only mode prescribed by the Federal Constitution for their acquisition of exclusive legislative power over it. When such legislative power is acquired in any other way, as by an express Act ceding it, its cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended. We also held that it is competent for the Legislature of a State to cede exclusive jurisdiction over places needed by the General Government in the execution of its powers, the use of the places being, in fact, as much for the people of the State as for the people of the United States generally, and such jurisdiction necessarily ending when the places cease to be used for those purposes. [546]

Upon the second question the contention of the Railroad Company is that the Act of Kansas became inoperative within the Reservation upon the cession to the United States of exclusive jurisdiction over it. We are clear that this contention cannot be maintained. It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before,

and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances and regulations in conflict with the political character, institutions and Constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct [547] action of the new government, they are altered or repealed. *Amer. Ins. Co.* v. *Canter*, 1 Pet., 542; Halleck, Int. Law, chap. 34, § 14.

The counsel for the Railroad Company does not controvert this general rule in cases of cession of political jurisdiction by one nation to another, but contends that it has no application to a mere cession of jurisdiction over a small piece of territory having no organized government or municipality within its limits; and argues upon the assumption that there was no organized government within the limits of Fort Leavenworth. In this assumption he is mistaken. The government of the State of Kansas extended over the Reservation, and its legislation was operative therein, except so far as the use of the land as an instrumentality of the General Government may have excepted it from such legislation. In other respects, the law of the State prevailed. There was a railroad running through it when the State ceded jurisdiction to the United States. The law of the State, making the railroad liable for killing or wounding cattle by its cars and engines where it had no fence to keep such cattle off the road, was as necessary to the safety of cattle after the cession as before, and was no more abrogated by the mere fact of cession than regulations as to the crossing of highways by the railroad cars, and the ringing of bells as a warning to others of their approach.

It is true there is a wide difference between a cession of political jurisdiction from one nation to another and a cession to the United States by a State, of legislative power over a particular tract, for a special purpose of the General Government; but the principle which controls as to laws in existence at the time is the same in both. The liability of the Railroad Company for the killing of the cow did not depend upon the place where the animal was killed, but upon the neglect of the Company to inclose the road with a fence which would have prevented the cow from straying upon it. The law of Kansas on the subject, in our opinion, remained in force after the cession, it being in no respect inconsistent with any law of the United States, and never having been changed or abrogated. *Th judgment is accordingly affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.

WILLIAM ALLING, Surviving Partner the Firm of SAMUEL A. BELDEN & Co *Appt.*,

v.

UNITED STATES.

(See S. C., Reporter's ed., 562-564.)

Jurisdiction of Court of Claims—sec. 1066, R. —awards under Treaty with Mexico.

1. The Court of Claims has no jurisdiction o claim against the United States for moneys ceived from Mexico under the Convention Treaty of July 4, 1868, it being a claim founded and growing out of a treaty with a foreign nat within § 1066, R. S.

2. The Act of June 18, 1878, confers authority the Secretary of State to distribute the awa made by the Commission organized under Treaty.

3. Great Western Ins. Co. v. U. S., Bk. 28, 687, Frelinghuysen v. Key, *Id.* 71, affirmed.

[No. 219.]

Submitted Apr. 1, 1885. Decided May 4, 18

APPEAL from the Court of Claims.

The history and facts of the case app in the opinion of the court.

Messrs. **Charles W. Hornor, W. L. I Gary** and *Nathaniel Wilson*, for appellant

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, appellee.

Mr. Justice **Miller** delivered the opinio the court:

This is an appeal from the Court of Clai

Belden and Co., having a claim for sei and confiscation of goods by the Mexic during or shortly after the Mexican war, ferred their claim to the United States presentation to the Mexican Government. goods having been imported into Matam while that city was in the possession of American forces, on which Belden & Co. paid duties to the amount of $18,847, the U ed States refunded this sum to Belden & and took an assignment *pro tanto* of their cl against Mexico.

By the Convention or Treaty of July 4, 1 between Mexico and the United States, 15 S at L., 679, a commission was organized fo adjustment of the claims of the citizens of respective countries against the governme the other for injuries to persons and prope

To this commission Belden & Co.'s c was submitted by the United States, an award was, that the Mexican Governm should pay to the United States, on accou this claim, the sum of $53,099.25, of which United States might retain out of this g award the sum of $35,920.81, on accou the tax which it had refunded to Belden & and its interest.

An Act of Congress provided that the d bution of the money received by the U

[illegible] under all the awards made by this commission should be distributed under the order of the Secretary of State.

[illegible] in this case having received the [illegible] specifically awarded to them, appealed to the Secretary for the whole or a part of the sum [illegible] duties which was awarded to the [illegible] States under the assignment of Belden [illegible] This was refused, and this suit is brought [illegible] the claim

[illegible] clearly a claim founded on and growing [illegible] of a treaty with a foreign nation, within the provisions of section 1066 of the Revised [illegible]. It is in all respects like the case of [illegible] *Western Ins. Co.* v. *U. S.*, 112 U. S., [illegible] [Bk. 28, L. ed. 687], which holds that the [illegible] of Claims had no jurisdiction by reason of that section.

That was a case of a claim submitted to the United States for reclamation against Great Britain. A treaty between the two powers provided, as in the present case, for an arbitration, under which the claim was allowed and paid to the United States. On appeal from the Court of Claims we decided that it was, within the meaning of section 1066 of this Revision, "a claim *growing out of and dependent* on a treaty stipulation entered into with a foreign government" of which that court could not entertain jurisdiction.

The present case is stronger than that, because the Act of Congress of June 18, 1878, 20 Stat. at L., 144, confers on the Secretary of State the authority to distribute these awards among the several claimants. *Frelinghuysen* v. *Key*, 110 U. S., 63 [Bk. 28, L. ed. 71]. Not only is the Court of Claims forbidden to entertain jurisdiction of this claim, but the Secretary of State is by law authorized and directed to do what has to be done for claimants, without further litigation.

It is apparent from the record that the Court of Claims entertained jurisdiction of the case and decided against the claimants on the merits. As that court had no such authority, *its judgment must be reversed, with direction to dismiss the petition for want of jurisdiction.*

[illegible] Test:
James H. McKenney, Clerk, Sup. Court, U. S.

RICHMOND MINING COMPANY OF NEVADA, *Plff. in Err.*,

v.

E. H. ROSE ET AL.

(See S. C. Reporter's ed., 576–587.)

Mining claim including more than 200 feet—right of discoverer—patent granted pending a litigation, effect of.

1. A mining claim, which includes more than two [illegible] feet, and does not affect rights already acquired, is void only as to the excess.

2. The right of a locator to hold more than 200 [illegible], as discoverer, will be sustained for the years, though there was a mistake as to the discovery of a new vein or lode, no one having [illegible] at the time the claim was made.

3. When a contest arises under § 2326, R. S., all proceedings are stayed in the Land Department until the controversy is settled by a court of competent jurisdiction, or the adverse claim is [illegible]. Delay in the proceedings in court does not amount to a waiver, and a patent issued pending such proceedings is void as to the adverse party.

4. A patent obtained pending a litigation by the defendant, for a new claim affecting the subject matter of the litigation, cannot be set up against the plaintiff. The validity of such patent must abide the result of the litigation.

5. An objection cannot be raised here which has been waived in the court below.

6. The decision of a state court as to what constitutes the commencement of a suit in that court, not presenting a federal question, is not reviewable here.

[No. 248.]

Argued Apr. 13, 14, 1885. Decided May 4, 1885.

IN ERROR to the Supreme Court of the State of Nevada.

The history and facts of the case appear in the opinion of the court. The locations of the claims in question appear from the accompanying map which is reproduced from the transcript.

Messrs. **Walter H. Smith** and **Thos. Wren**, for plaintiff in error.

Messrs. **A. B. Browne, C. J. Hillyer, A. T. Britton** and **J. H. McGowan**, for defendants in error.

Mr. Justice **Miller** delivered the opinion of the court: [578]

This is a writ of error to the Supreme Court of Nevada.

The case presents a conflict of mining claims.

The contest began in the State District Court for the County of Eureka, Nevada, by defendants in error filing in that court, as plaintiffs, a petition against the Richmond Mining Company. To save repetition and confusion, the parties will be mentioned in this opinion as they are throughout the record, and as they actually were in the state courts, namely: Rose and others as plaintiffs, and the Richmond Mining Company as defendant.

This petition or complaint was filed October 24, 1873. A demurrer was filed to it by the defendant November 1, and an answer November 26.

The complaint alleged that plaintiffs were, and ever since January 20, 1872, had been, the owners of the Uncle Sam mining claim, ledge, lode and deposit of mineral-bearing rock in the Eureka Mining District, County of Eureka, and State of Nevada, on the western slope of "Ruby Hill." A minute description of the claim is then given, with courses and distances with reference to the shaft.

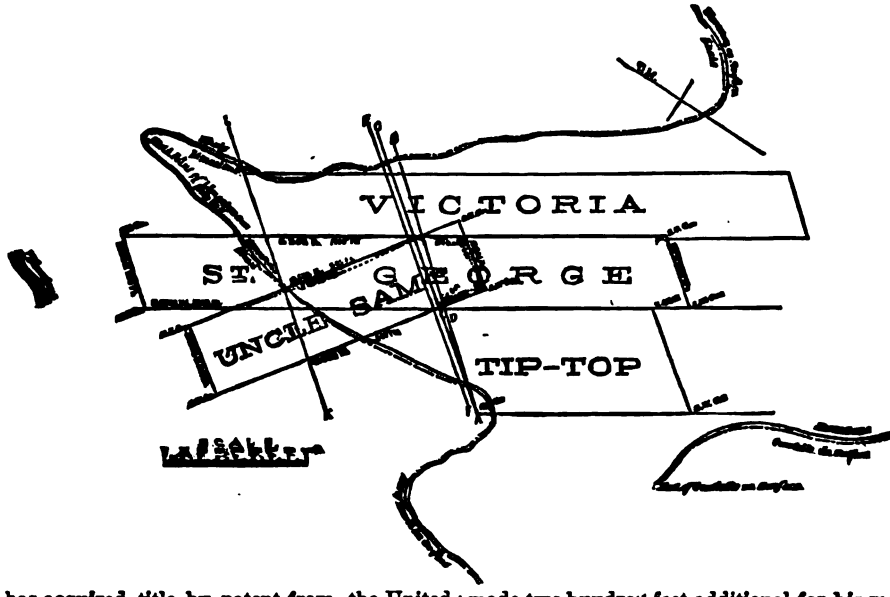
It is then alleged that the defendant, unjustly and adversely to plaintiffs, claims an estate in fee in said premises, and has filed in the United States Land-Office an application for a patent thereto, under the name of the St. George ledge and mine. Plaintiffs, therefore, pray judgment that defendant be barred from all estate or interest in the premises, or any part thereof, or any right of possession.

The answer of defendant, filed November 26, 1873, denies any claim to plaintiffs' location, except as it is covered by their claim, the St. George, which does cover a small part of it.

As to so much of plaintiffs' claim as is covered by the St. George it asserts a superior right.

The next pleading is an amended answer of the defendant, which sets out the fact, that since the commencement of the suit defendant [579]

[577]



has acquired title by patent from the United States to all that portion of the mining ground in controversy, covered by the application for the patent for the St. George claim. This amended answer was filed April 20, 1881, which is seven years and a half after the first or original answer.

In September, 1881, the case was tried before the court without a jury and a judgment was rendered, from which plaintiffs appealed to the Supreme Court. That court modified the judgment of the court below materially in favor of plaintiffs, and to that judgment the Richmond Mining Company, the defendant below, prosecutes this writ of error.

The judge of the District Court of the State made a full finding of the facts in the case on which he rendered judgment, and on those facts the case was heard and decided in the Supreme Court of the State, and so it must be here.

According to this finding, the plaintiffs sunk their shaft on a mineral lode, staked and marked out their claim, gave due notice of it, and did the necessary work on it to perfect their right to the mine. In all this they were prior in point of time to the operations of defendant on their St. George claim. It may, therefore, be assumed that unless some of the objections to the claim of plaintiffs set up by defendant are valid, the judgment of the state court must stand.

We shall examine these objections in such order as seems convenient.

1. The one much, if not chiefly, relied on is that the claim covers eight hundred lineal feet of the lode; when, there being only three locators, both by the Act of Congress and the local laws of that mining district, only two hundred feet could be appropriated to each locator, and, therefore, this excess of two hundred feet over the six hundred, which these three could locate, renders the whole claim void. The law, however, allowed to each locator, who was the discoverer of the vein on which the location was made, two hundred feet additional for his mer as discoverer.

We hardly think it needs discussion to d cide that the inclusion of a larger number lineal feet than two hundred renders a loc tion, otherwise valid, totally void. This ma occur, and often must occur, by accident of t surveyor, or other innocent mistake, where the exists no intention to claim more than the tw hundred feet. Must the whole claim be ma void by this mistake, which may injure no on and was without design to violate the law?

We can see no reason, in justice or in t nature of the transaction, why the excess m not be rejected, and the claim be held good f the remainder, unless it interferes with righ previously acquired. It appears by the fac found that one hundred and forty feet of t east end of plaintiffs' location is lost to them the superior right of the Tip-Top claim, lea ing only sixty feet of excess; and this, if were necessary, might be excluded by the go ernment at the other or western end of t claim when it comes to issue the patent; whi would leave plaintiffs only the six hundred fe in one body, in regular form. This also wou interfere with no prior rights, and would gi plaintiffs the benefit of their claim to the e tent of two hundred feet for each locator.

But, if it were necessary, we should ag with the Supreme Court of Nevada, that Ro one of the plaintiffs, was entitled to an ad tional two hundred feet, as discoverer of t vein on which the claim is located. At t time this location was made, there were ma claims asserted for veins discovered in Ru Hill, and most of the claimants believed t they were in each instance the discoverer o new vein or lode. Rose entertained the sa belief when he made his claim, and, therefo asserted his right to two hundred additio feet along *this* vein as discoverer.

It was supposed, some five or six years af this and after Rose and his companies spent their money and labor in developing th

[illegible] that the whole Ruby Hill deposit was [illegible] or lode of great width, and it has [illegible] in the *Eureka Case*, 4 Sawy., 302, that, [illegible] there were many small, detached fis[illegible] or veins, distinct from each other, com[illegible] this zone, it is, within the meaning of [illegible] Act of Congress concerning locations, to be [illegible] as one lode or vein.

[illegible] Rose, or his vendor, Phillips, was the [illegible] of this vein within the lode, and [illegible] asserted in good faith his right to an ad[illegible] two hundred feet.

We do not see any reason, within the spirit [illegible] law, where the claim as discoverer in[illegible] to one at the time it is made, and it has [illegible] made in good faith in reliance on the ac[illegible] discovery of one of these constituent veins, [illegible] for five years before knowledge [illegible] mistake, it should not justify the claim [illegible] two hundred feet as discoverer.

The next objection to be noticed is that [illegible] should have held that the patent ob[illegible] by defendant from the United States, [illegible] covered all that defendant claimed, [illegible] prevail, as it conveyed the legal title.

This proposition goes to the merits of the [illegible], and, if sound, covers the field of contro[illegible]. Its soundness depends on the statutes [illegible] United States, and mainly on sections [illegible] of the Act of Congress of May 10, [illegible] Stat. at L., 92, which are embodied [illegible] Revised Statutes in sections 2325 and [illegible]

By the first of these sections the applicant [illegible] patent for a mining claim is required to [illegible] with his application the evidence of his right [illegible], and the register is to cause a publication [illegible] application to be made for sixty days, [illegible] which time any adverse claimant to any [illegible] of the location described in this application [illegible] required to give notice of contest by filing a [illegible] in the land-office.

No question is raised in this case that de[illegible] had his claim properly, and plaintiffs [illegible] the protest within the sixty days; and as [illegible] controversy arises out of the subsequent [illegible] under the next section, that is [illegible] here in full:

"When an adverse claim is filed during the [illegible] of publication, it shall be upon oath of [illegible] or persons making the same, and [illegible] the nature, boundaries and extent of [illegible] adverse claim, and all proceedings, except [illegible] publication of notice and making and filing [illegible] affidavit thereof, shall be stayed until [illegible] controversy shall have been settled or de[illegible] by a court of competent jurisdiction, or [illegible] adverse claim waived. It shall be the duty [illegible] the adverse claimant, within thirty days [illegible] filing his claim, to commence proceedings [illegible] a court of competent jurisdiction, to de[illegible] the question of the right of possession, [illegible] prosecute the same with reasonable dili[illegible] to final judgment; and a failure so to do [illegible] be a waiver of his adverse claim. After [illegible] judgment shall have been rendered, the [illegible] entitled to the possession of the claim, or [illegible] portion thereof, may, without giving fur[illegible] notice, file a certified copy of the judgment [illegible] with the register of the land-office, together [illegible] the certificate of the Surveyor-General, [illegible] the requisite amount of labor has been ex[illegible] or improvements made thereon, and the description required in other cases, and shall pay to the receiver $5 per acre for his claim, together with the proper fees; whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land-Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the Surveyor-General, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land-Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

Under this provision plaintiffs filed with the register, on the 24th of September, 1873, their protest, to which no objection is perceived. On October 21 their complaint was filed in the proper court of Nevada in support of their protest. But they did not pay any docket fee, nor any other fee, and no fees were paid by them until August, 1874.

It is argued that, by reason of the failure to pay these fees within the time required by the Statute of Nevada, the court acquired no jurisdiction of the case until after the thirty days within which, by the foregoing section, the action was to be commenced; and also that, because no process to appear was issued or served on the defendants within thirty days, the whole proceeding is void. [583]

There are several sufficient answers to these suggestions.

1. We do not doubt that within the meaning of the Act of Congress the plaintiffs did *commence proceedings* by filing their complaint on the 21st of October, eight days inside of the thirty days which it allowed.

2. Defendants, having demurred within a few days after this commencement of the suit, and answered and gone to trial without raising this objection in the proper time, cannot be permitted to do it now.

3. What constitutes the commencement of an action in a state court being matter of state law, the decision of that court on this point is not a federal question, and is not therefore reviewable here.

These propositions also answer the objection of non-payment of fees to the State, which is purely a matter of state concern, and if it could in any manner avail the defendant it must have been by motion at the time, and before demurring or answering to the merits.

It may also be added that, as the clerk paid the fees into the county treasury in due time, it became simply a matter of debtor and creditor between him and plaintiffs.

A question of more difficulty arises out of the facts, that, after the answer of defendant in 1873, the cause was put on the calendar for trial, but no trial was had for several terms by reason of negotiations for a settlement of the controversy; and the last order for continuance

was had in March Term, 1874, on motion of counsel for defendant. In September, 1876, the defendant produced before the register and receiver of the land-office, the certificate of the clerk of the court to the effect that this action had not been placed upon the trial calendar, nor any proceedings been had thereon from the March Term, 1874, to the date of the certificate.

The section already cited, regulating the proceedings in this class of cases, enacts that, after the protest shall have been duly filed in the land-office, "all proceedings, except the publication of notice, and making and filing of the affidavit [584] thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." The land officer to whom the defendant presented this certificate of the clerk, holding it to be sufficient evidence that "the adverse claim had been waived," proceeded to prepare the necessary papers on which the Commissioner issued the patent, whose effect is now under consideration.

It must be admitted that, if the land officer had the right, while this action was pending in the courts, never dismissed, and yet undecided, to determine that plaintiff's claim, adverse to defendants, had been waived, and to resume action in the case on that decision, the court was in error in holding the patent void as to the interfering claims. For, though the court of first jurisdiction finds facts sufficient to show that this delay was not the fault of plaintiffs, and in no way implied a waver of their claim, these facts could only be shown, probably, in some proceeding directly to impeach the patent, or set it aside. At all events, if the Land Department had any right to decide that there was a waiver while the action was still pending and undecided, the presumption that it decided rightly must be conclusive in an action at law, and if this action is of that character it must be conclusive here. Whether this patent can be thus impeached under the course of proceedings in the Nebraska courts, we need not inquire here, for we are of opinion that the land officers had no such power.

Looking at the scheme which this statute presents, and which relates solely to securing patents for mining claims, it is apparent that the law intended, in every instance where there was a possibility that one of these claims conflicted with another, to give opportunity to have the conflict decided by a judicial tribunal before the rights of the parties were foreclosed or embarrassed by the issue of a patent to either claimant. The wisdom of this is apparent when we consider its effect upon the value of the patent, which is thereby rendered conclusive as to all rights which could have been asserted in this proceeding, and that it enabled this to be done in the form of an action in a court of the vicinage, where the witness could be produced, and a jury, largely of miners, could pass upon [585] the rights of the parties, under instruction as to the law from the court.

It is in full accord with this purpose that the law should declare, as it does, that when this contest is inaugurated the land officers shall proceed no further until the court has decided, and that they shall then be governed by that decision; to which end a copy of the record is to be filed in their office. They have no further act of judgment to exercise. If the court de cides for one party or the other, the Land De partment is bound by the decision. If it decide that neither party has established a right to th mine or any part of it, this is equally bindin as the case then stands. With all this these of ficers have no right to interfere. After the de cision they are governed by it. Before th decision, once the proceeding is initiated, thei function is suspended.

What, then, is meant by the phrase, "all pro ceedings shall be stayed until the controvers is settled or decided by a court of competen jurisdiction, or the adverse claim waived"?

We can imagine several ways in which it ca be shown that the adverse claim is waived with out invading the jurisdiction of the court whil the case is still pending. One of these woul be the production of an instrument signed b the contestant, and duly authenticated, that h had sold his interest to the other party, or ha abandoned his claim and his contest. Or, sinc the Act says that all proceedings shall be staye in the land-office from the *filing of the adver claim*, and not from the commencement of th action in the court, within thirty days, such d lay of thirty days is made, by the statute, co clusive of a waiver. A filing in the records c the court, by the plaintiff, of a plea that he aba dons his cause or waives his claim, might a thorize the land-office to proceed.

But all these are very far removed from th assumption by that officer that, because the have been delays in the court, plaintiff h waived his claim. It is for the court, while has jurisdiction of the case, that is, until it decided or dismissed, to pass upon the rights the parties—to decide whether either party h lost his right by laches or failure to proce with diligence, and to act accordingly. If d fendant in this case was dissatisfied with th delay, he had all the remedies usual in cour in such cases. A motion to dismiss for wa of prosecution would have relieved him if h was entitled to treat the case as abandoned. C he could, in all the ordinary ways, require th plaintiff to go to trial or show good cause f continuance.

But, while all this was in the hands of th court, with full power to do what was nece sary to establish judicially the rights of the pa ties, the land-office could not resume control the case upon the idea which might be the entertained of an implied waiver of the clai from delay in the court.

It had no power over the case, and its actio and its patent, so far as it affects the rights plaintiffs, are void. The rejection of the paten as influencing the judgment of the court, w not therefore an error.

3. Another error is assigned, growing out the fact that the defendant, during the tin this litigation was pending, located anoth claim, called the Victoria, on this lode, outsi of and parallel with the St. George. Witho notice to plaintiffs, and with no opposition, th procured a patent for this claim, and set it against plaintiffs on the trial of this action.

It is insisted that, though this claim does n come on the surface in conflict with the Un Sam location, it is in the same vein, and giv the right to pursue that vein under the Un Sam claim, and, being a patent about whi

[illegible] was no contest, it must prevail in this [illegible].

[illegible] without deciding the question of their [illegible] to pursue the vein under ground as against [illegible] prior valid location, by reason of the earlier [illegible] of patent, we concur with the Supreme [illegible] that the right to that part of this very [illegible] being in contest between these parties in [illegible] to the Uncle Sam and the St. George [illegible], the decision of this controversy cannot [illegible] rendered nugatory by the introduction of a [illegible] claim by one of the parties, whose claim [illegible] from the government for this same loca[illegible] initiated while this litigation is go[illegible]. The parties were all in court. The [illegible] matter was before the court. The [illegible] to be decided was the right to the con[illegible] claims to this lode. This was within [illegible] jurisdiction of the court, and any patent is[illegible] to one, or the other, or both these parties, [illegible] this proceeding, for this property, must [illegible] back to the date of their claims, and over[illegible] the new patent. This result cannot be de[illegible] by producing this new patent to destroy [illegible]. The claim was initiated by a party to this [illegible] *pendente lite*, and must abide the result of [illegible] litigation in this case.

These are the principles which control the de[illegible] of the case. There may be others sug[illegible] by counsel which are not here specially [illegible], but they are not deemed sufficient to [illegible] the result.

The judgment of the Supreme Court of Nevada [illegible] *affirmed.*

[illegible] copy. Test:

James H. McKenney, Clerk, Su[illegible] Court, U. S.

PHILIP S. WALES, *Appt.*,

v.

WILLIAM C. WHITNEY, Secretary of the Navy.

(See S. C., Reporter's ed., 564-575.)

Habeas corpus, when a proper remedy—actual imprisonment, or the present means of enforcing it necessary.

[illegible] The writ of habeas corpus is not a writ of error. [illegible] is to enable the court to inquire whether [illegible] petitioner is restrained of his liberty, and, if so, [illegible] such restraint is unlawful.

[illegible] The Acts of Congress concerning this writ con[illegible] a proceeding against some person who [illegible] the immediate custody of the party detained, [illegible] the power to produce the body of such party [illegible] the court or judge, that he may be liberated, [illegible] sufficient reason is shown for his detention.

[illegible] Neither the Supreme Court of the District of [illegible], nor this court, has any appellate juris[illegible] over a naval court-martial, nor over of[illegible] which such a court has power to try.

[illegible] Something more than moral restraint is necessary [illegible] make a case for habeas corpus. There must [illegible] imprisonment, or the present means of en[illegible].

[illegible] The record in this case does not present such a [illegible] as to call for discharge by a writ [illegible] corpus.

[illegible] The court does not now decide whether the [illegible] to which the petitioner is required to an[illegible] before the naval court-martial are within the [illegible] of which such a court has jurisdiction.

[No. 1303.]

[illegible] Apr. 21, 22, 1885. *Decided May 4, 1885.*

APPEAL from the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court.

Messrs. **J. M. Wilson, F. P. B. Sands** and *S. Shellabarger*, for appellant.

Mr. **John S. Blair**, for appellee.

Mr. Justice **Miller** delivered the opinion of the court: [565]

This is an appeal from a judgment of the Supreme Court of the District of Columbia, which refused to make an order on a writ of *habeas corpus* relieving appellant from the custody of the appellee, who, it is alleged, held the appellant in restraint of his liberty, unlawfully.

Upon the decision of the Supreme Court of the District, adverse to petitioner, an application for an original writ of *habeas corpus* was made to this court by counsel for appellant; but, on a suggestion from the court that an Act of Congress, at its session just closed, had restored the appellate jurisdiction of this court in *habeas corpus* cases over decisions of the Circuit Courts, and that this necessarily included jurisdiction over similar judgments of the Supreme [566] Court of the District of Columbia, counsel, on due consideration, withdrew their application, and, appealing from the judgment of that court, bring here the record of it for review.

Section 846 of the Revised Statutes of the District of Columbia, which makes the jurisdiction of this court over judgments and decrees of the Circuit Courts of the United States the measure of its jurisdiction (except as regards the sum in controversy) over judgments and decrees of the Supreme Court of the District in similar cases, justifies the exercise of our appellate jurisdiction of the present case.

The original petition for the writ was addressed to *Mr. Justice* Cox of the Supreme Court of the District, and alleged that on the 2d day of March, 1885, the petitioner was arrested and imprisoned, and ever since had so remained in arrest and imprisonment and restrained of his liberty in the District of Columbia, illegally. The petition sets out an order of the Secretary of the Navy, under which this restraint is exercised, which order is in the following terms:

"Washington, February 28, 1885.

Sir: Transmitted herewith you will receive charges, with specifications, preferred against you by the department.

A general court-martial has been ordered to convene in rooms numbered 32 and 33, at the Navy Department, Washington, D. C., at 12 o'clock, noon, on Monday, the 9th proximo, at which time and place you will appear and report yourself to Rear Admiral Edward Simpson, United States Navy, the presiding officer of the court, for trial. The Judge Advocate will summon such witnesses as you may require for your defense.

You are hereby placed under arrest, and you will confine yourself to the limits of the City of Washington.

Very respectfully,
Wm. E. Chandler,
Secretary of the Navy.

Medical Director
Philip S. Wales,
U. S. N., Washington, D. C." [567]

It also makes an exhibit to the petition, a copy of the charges and specifications accompanying this order. It is unnecessary to say more of

these charges at present than that they relate to derelictions of duty on the part of the appellant while he was Surgeon-General of the Navy and as such had charge of the Bureau of Medicine and Surgery in the Navy Department, which office he held from August 20, 1879, to January 26, 1884. He had therefore ceased to be Surgeon-General, and was in the exercise of his functions as Medical Director of the Navy, when this order was served on him.

Judge Cox issued the writ directed to William C. Whitney, Secretary of the Navy, who had become such by succession to Secretary Chandler. To this writ Secretary Whitney made return, stating the action of Secretary Chandler and the history of the appellant's connection with the Navy since he was appointed Medical Inspector in June, 1878; the charges preferred against him as Chief of the Bureau of Medicine and Surgery, and the order of arrest of Secretary Chandler, and closes his return as follows:

"Your respondent respectfully submits that the said Philip S. Wales is not now, nor was at the time of issuing the annexed writ, in the custody or possession of, or confined or restrained of his liberty by, your respondent, other than as appears by the papers marked A, B, and C. attached hereto and made part of this return, and that the cause of such detention, if any there be, is fully shown in said exhibits.

And your respondent further answers that neither he nor anyone by his authority has exercised any physical restraint over the said Philip S. Wales before or since the issue of said writ.

[568] Your respondent further answers that by virtue of his office as Secretary of the Navy the said Philip S. Wales, being a Medical Director in the Navy, was, at the time of the issuing of the said writ, and has since continually been, in the power of your respondent so far as the statutes of the United States and the regulations of the Navy, not inconsistent therewith, have vested him with authority over the said Philip S. Wales.

Your respondent further says that he knows of no obstacle or impediment to prevent the said Philip S. Wales from being present before your honor at the time and place fixed in the said writ; but in order to comply with the order of your honor and under and by virtue of his authority as Secretary of the Navy, he has ordered the said Philip S. Wales to be present at the time and place so fixed. Wherefore the said William C. Whitney, Secretary of the Navy, has here, before your honorable court, the body of the said Philip S. Wales, together with the said writ, as therein he is commanded. W. C. Whitney,

Secretary of the Navy."

To this return the petitioner, by his counsel, demurred, when, on this demurrer and after motion of the respondent to discharge the writ, *Mr. Justice* Cox certified the case into the court in General Term. That court, after full hearing and due consideration, made the following order:

"*Habeas Corpus. Ex relatione* Philip S. Wales—No. 15,780.

This cause coming on for hearing, and having been argued by counsel and duly considered, it is, this 14th day of April, 1885, ordered and adjudged that the petition be dismissed with costs, the court being of opinion that th relator has not been, nor is he at this present, de prived of his personal liberty by order of th Secretary of the Navy set out in the petition.

By the court: A. Wylie."

It is from this order that the present appea is taken.

The only other matter apparent in the recor necessary to be stated at this time is, that th court-martial referred to in the order of arres was duly appointed, assembled and organized and that appellant appeared before it, and, a his request, it has been adjourned, from tim to time, to await the result of these proceeding in *habeas corpus*.

Two questions have been elaborately argue before us, namely:

1. Does the return of the Secretary of th Navy to the writ and its accompanying exhibi show such restraint of the liberty of the pet tioner by that officer as justifies the use of th writ of *habeas corpus?*

2. If there is a restraint, which, in its cha acter, demands the issue of the writ, are th charges for which the petitioner is required t answer before the naval court-martial of th class of which such a court has jurisdiction?

The latter is a question of importance, ar not free from difficulty, since its solution r quires the court to decide whether the Surgeo General of the Navy, as Chief of the Bureau Medicine and Surgery in the Department of th Navy, under the immediate supervision of th Secretary, is liable for any failure to perfor his duties as Surgeon-General, to be tri by a military court, under the Articles of W governing the Navy, or has a right for such c fenses to be tried alone by the civil courts, ar according to the law for offenses not mi tary. Is he, in that character, in the civil military service of the United States? The d ficulty of stating the question shows the er barrassment attending its decision.

The other question, however, has preceden both because it is the one on which the court the District decided it, and because, if the was no such restraint, whether legal or illeg as to call for the use of the writ, there is no c casion to inquire into its cause.

It is obvious that petitioner is under no phy cal restraint. He walks the streets of Wa ington with no one to hinder his movemen just as he did before the Secretary's order w served on him. It is not stated as a fact in t record, but it is a fair inference from all th is found in it, that, as Medical Director, he w residing in Washington and performing th the duties of his office. It is beyond disp that the Secretary of the Navy had a right direct him to reside in the city in performa of these duties. If he had been somewh else the Secretary could have ordered him Washington as Medical Director, and in or to leave Washington lawfully he would h to obtain leave of absence. He must, in su case, remain here until otherwise ordered or p mitted. It is not easy to see how he is under restraint of his personal liberty by the order arrest, which he was not under before. Nor it be believed that, if this order had made reference to a trial on charges against him bef a court-martial, he would have felt any restr whatever, though it had directed him to rem

in the city until further orders. If the order had directed him so to remain and act as a member of such court, can any one believe he would have set himself a prisoner, entitled to the benefit of a writ of *habeas corpus*?

On the other hand, there is an obvious motive on the part of the petitioner for construing the order as making him a prisoner in the custody of the Secretary.

That motive is to have himself brought before a civil court, which, on inquiry into the cause of his imprisonment, may decide that the charge with which the Secretary charges him is not of a military character, is not one of which a naval court-martial can entertain jurisdiction, and, releasing him from the restraint of the order of arrest, it would incidentally release him from the power of that court.

But neither the Supreme Court of the District nor this court has any appellate jurisdiction over the naval court-martial, nor over offenses which such a court has power to try. Neither of these courts is authorized to interfere with the performance of its duty, by way of a writ of prohibition or any order of that nature. The civil courts can relieve a person from imprisonment under order of such court only by writ of *habeas corpus*, and then only when it is made apparent that it proceeds without jurisdiction. If there is no restraint, there is no right in the civil court to interfere. Its power then extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judgment of the military court. Whatever effect the decision of the court may have on the proceedings, orders or judgments of the military court, is incidental to the order releasing the prisioner. Of course if there is no prisoner to release, if there is no custody to be discharged, if there is no such restraint as requires relief, then the civil court has no power to interfere with the military court or other tribunal over which it has by law no appellate jurisdiction.

The writ of *habeas corpus* is not a writ of error, though in some cases in which the court having it has appellate power over the court by whose order the petitioner is held in custody, it may be used with the writ of *certiorari* for that purpose. In such case, however, as in one before us it is not a writ of error. Its purpose is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but dismiss the writ. If there is such restraint, the court can then inquire into the cause of it, and if the alleged cause be unlawful it must then discharge the prisoner.

There is no very satisfactory definition to be found in the adjudged cases, of the character of the restraint or imprisonment suffered by a party applying for the writ of *habeas corpus*, which is necessary to sustain the writ. This can hardly be expected from the variety of restraints for which it is used to give relief. Confinement under civil and criminal process may be released. Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a mad-house, as well as those under military control, may all become proper subjects of relief by the writ of *habeas corpus*. Obviously, the extent and character of the restraint which justifies the writ must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed.

In the case of a man in the military or naval service, where he is, whether as an officer or a private, always more or less subject in his movements, by the very necessity of military rule and subordination, to the orders of his superior officer, it should be made clear that some unusual restraint upon his liberty of personal movement exists to justify the issue of the writ; otherwise every order of the superior officer directing the movements of his subordinate, which necessarily to some extent curtails his freedom of will, may be held to be a restraint of his liberty, and the party so ordered may seek relief from obedience by means of a writ of *habeas corpus*.

Something more than moral restraint is necessary to make a case for *habeas corpus*. There must be actual confinement or the present means of enforcing it. The class of cases in which a sheriff or other officer, with a writ in his hands for the arrest of a person whom he is required to take into custody, to whom the person to be arrested submits without force being applied, comes under this definition. The officer has the authority to arrest and the power to enforce it. If the party named in the writ resists or attempts to resist, the officer can summon bystanders to his assistance, and may himself use personal violence. Here the force is imminent and the party is in presence of it. It is physical power which controls him, though not called into demonstrative action. [572]

It is said in argument that such is the power exercised over the appellant under the order of the Secretary of the Navy. But this is, we think, a mistake. If Dr. Wales had chosen to disobey this order, he had nothing to do but take the next or any subsequent train from the city and leave it. There was no one at hand to hinder him. And though it is said that a file of marines or some proper officer could have been sent to arrest and bring him back, this could only be done by another order of the Secretary, and would be another arrest, and a real imprisonment under another and distinct order. Here would be a real restraint of liberty, quite different from the first. The fear of this latter proceeding, which may or may not keep Dr. Wales within the limits of the city, is a moral restraint which concerns his own convenience, and in regard to which he exercises his own will.

The present case bears a strong analogy to *Dodge's Case* in 6 Martin (La.), 569. It appeared there that the party who sued out the writ had been committed to jail on execution for debt, and having given the usual bond by which he and his sureties were bound to pay the debt if he left the prison bounds, he was admitted to the privilege of those bounds. The plaintiff in execution failing to pay the fees necessary to the support of the prisoner, the latter sued out a writ of *habeas corpus*.

That eminent jurist, *Chief Justice* Martin, said, on appeal to the Supreme Court: "It appears to us that the writ of *habeas corpus* was improperly resorted to. The appellee was under no physical restraint, and there was no necessity to recur to a court or judge to cause any [573]

moral restraint to cease. The sheriff did not retain him, since he had admitted him to the benefit of the bounds; the doors of the jail were not closed on him, and if he was detained it was not by the sheriff or jailer. If his was a moral restraint it could not be an illegal one. The object of the appellee was not to obtain the removal of an illegal restraint from a judge, but the declaration of the court that the plaintiffs in execution had by their neglect lost the right of detaining him. A judgment declaring such neglect, and pronouncing on the consequences of it, was what the appellee had in view." The judgment awarding the writ was reversed. The analogy to the case before us is striking.

A very similar case was passed upon by the Supreme Court of Pennsylvania in *Republica* v. *Arnold*, 3 Yeates, 263. A party who had been indicted for arson, and had given bail for his appearance to answer the indictment, applied, while out under bail, to be discharged by writ of *habeas corpus*, on the ground of delay in the prosecution. The court held that the Statute of Pennsylvania, which was a re-enactment of the *Habeas Corpus* Act of 31 Charles II., chap. 2, spoke of persons committed or detained, and clearly did not apply to a person out on bail. And *Mr. Justice* Yeates very pertinently inquires "Would not a *habeas corpus* directed to the bail of a supposed offender be perfectly novel?" And Smith, *J.*, said that the inclination of his mind was that *habeas corpus* could lie to the bail.

In a note to the cases of *Rex* v. *Dawes*, 1 Burr., 686 and *Rex* v. *Kessel*, 1 Burrow, 638, the same principle is stated, though by whom the note is made noes not appear. Both these persons were brought before *Lord* Mansfield, in the King's Bench, on a rule against the commisioners to enforce an Act of Parliament to increase the army. In both cases the ground on which the discharge was asked was, that they were illegally pressed into the service. *Lord* Mansfield discharged one because his statement was found to be correct, and refused the other because his statement was not true.

The note to the report, apparently in explanation of the fact that they were not brought [574] before the court by writ of *habeas corpus*, and that no objection was taken to the rule by the commissioner, says: "Neither of these could have brought a *habeas corpus;* neither of them was in custody. Dawes had deserted and absconded, and Kessel had been made a corporal. No objection was made by the commissioner to the propriety of the method adopted." *Chief Baron* Comyn cites the cases as showing that the parties could not bring *habeas corpus*, because they were not in custody. 4 Comyn, Dig. 813, *Habeas Corpus B.*

While the Acts of Congress concerning this writ are not decisive, perhaps, as to what is a restraint of liberty, they are evidently framed in their provisions for proceedings in such cases on the idea of the existence of some actual restraint. Section 754, Revised Statutes, says the application for the writ must set forth "in whose custody he (the petitioner) is detained, and by virtue of what claim or authority, if known"; section 755, that "the writ must be directed to the person in whose custody the party is"; section 757, that this person shall certify to the court of justice before whom the writ is returnable the true cause of the detention; and by section 758 he is required "at the same time to bring the body of the party before the judge who granted the writ."

All these provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary.

In case of a person who is going at large, with no one controlling or watching him, or detaining him, his body cannot be produced by the person to whom the writ is directed, unless by consent of the alleged prisoner, or by his capture and forcible traduction into the presence of the court.

The record in the present case shows that no such thing was done. The Secretary denies that Wales is in his custody, and he does not produce his body; but Wales, on the direction of the Secretary, appears without any compulsion, and reports himself to the court and to *Justice* Cox as he did to the court-martial.

We concur with the Supreme Court of the District in the opinion that the record does not present such a case of restraint of personal liberty as to call for discharge by a writ of *habeas corpus*.

In thus deciding we are not leaving the appellant without remedy if his counsel are right in believing the court-martial has no jurisdiction of the offense of which he is charged. He can make that objection to that court before trial. He can make it before judgment after the facts are all before that court. He can make it before the reviewing tribunal.

If that court finds him guilty, and imposes imprisonment as a part of a sentence, he can then have a writ to relieve him of that imprisonment. If he should be deprived of office, he can sue for his pay and have the question of the jurisdiction of the court which made such an order inquired into in that suit. If his pay is stopped, in whole or in part, he can do the same thing. In all these modes he can have relief if the court is without jurisdiction, and the inquiry into that jurisdiction will be more satisfactory after the court shall have decided on the nature of the offense for which it punished him, than it can before. And this manner of relief is more in accord with the orderly administration of justice and the delicate relation of the two classes of courts, civil and military than the assumption in advance by the one court that the other will exercise a jurisdiction which does not belong to it.

The judgment of the Supreme Court of the District of Columbia is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—115 U. S., 497, 500; 116 U. S., 177.

Ex Parte:

[illegible] THE MATTER OF ELLIS G. HUGHES, Petitioner.

(See S. C., Reporter's ed., 548.)

Costs, taxation of.

[illegible] original proceeding in this court for a writ of mandamus, the docket fee and disbursements for printing objections in the nature of pleadings are [illegible] costs. Disbursements for printing briefs [illegible] cannot be included.

[No. 8, Orig.]

[illegible] Apr. 20, 1885. *Decided May 4, 1885.*

[illegible] for a writ of *mandamus*.

[illegible] to tax, as costs, (1) a docket fee, and [illegible] disbursements of respondent for printing [illegible] of counsel, and objections to filing a reply [illegible] to the return of the respondent.

[illegible] the report of the opinion in this case [illegible] the merits, see *ante*, 134.

[illegible] J. H. Dolph, for respondent, in support of motion.

[illegible] John H. Mitchell, *contra*.

[illegible] Chief Justice Waite delivered the opinion of the court:

[illegible] never been the practice of this court, [illegible] brought before it under its appellate [illegible], to tax, as costs, disbursements by [illegible] or parties for printing briefs. We see [illegible] for adopting a different rule in cases [illegible] our original jurisdiction.

[illegible] proceeding in this court, under its original [illegible], against a judge of an inferior court [illegible] United States to obtain a writ of *man*[illegible] requiring him to proceed in a cause [illegible] in court before him, is a civil cause, [illegible] a docket fee is, therefore, taxable in favor [illegible] attorney of the prevailing party, as part [illegible] costs. The objections to the filing of the [illegible] in the nature of pleadings in the [illegible]. The disbursements for printing such [illegible] are therefore taxable, as costs of [illegible] the record.

[illegible], *so far as it relates to the printing of* [illegible] *is denied, but in all other respects granted.*

[illegible] copy. Test:

[illegible] H. McKenney, Clerk, Sup. Court, U. S.

[illegible] TENNESSEE BOND CASES.

[illegible] AMORY STEVENS ET AL., *Appts.*

v.

[illegible] AND CHARLESTON RAILROAD COMPANY ET AL. No. 42.

Calvin Amory Stevens *et al.*, *Appts.*,

v.

[illegible] Clarksville and Louisville Railroad Company *et al.* No 43.

Calvin Amory Stevens *et al.*, *Appts.*,

v.

[illegible] Nashville and Great Southern Railroad Company. No. 44.

Calvin Amory Stevens, *Appt.*,

v.

[illegible] St. Louis and New Orleans Railroad Company *et al.* No. 163.

Calvin Amory Stevens *et al.*, *Appts.*,

v.

Mississippi and Tennesee Railroad Company. No. 164.

Calvin Amory Stevens *et al.*, *Appts.*,

v.

Mobile and Ohio Railroad Company *et al.* No. 165.

Appeals from the Circuit Court of the United States for the Western District of Tennessee.

CALVIN AMORY STEVENS ET AL., *Appts.*, [664]

v.

LOUISVILLE, NASHVILLE and GREAT SOUTHERN RAILROAD COMPANY. No. 45.

Calvin Amory Stevens *et al.*, *Appts.*,

v.

Nashville and Northwestern Railroad Company *et al.* No. 46.

Calvin Amory Stevens, *Appt.*,

v.

Nashville and Decatur Railroad Company *et al.* No. 47.

Calvin Amory Stevens, *Appt.*,

v.

Nashville and Decatur Railroad Company *et al.* No. 48.

Calvin Amory Stevens *et al.*, *Appts.*,

v.

McMinnville and Manchester Railroad Company *et al.* No. 49.

Calvin Amory Stevens *et al.*, *Appts.*,

v.

Nashville and Chattanooga Railroad Company *et al.* No. 50.

Calvin Amory Stevens *et al.*, *Appts.*,

v.

Winchester and Alabama Railroad Company *et al.* No. 51.

Appeals from the Circuit Court of the United States for the Middle District of Tennessee.

CALVIN AMORY STEVENS *et al.*, *Appts.*,

v.

THE CINCINNATI, CUMBERLAND GAP and CHARLESTON RAILROAD COMPANY *et al.* No. 52.

Calvin Amory Stevens *et al.*, *Appts.*,

v.

Knoxville and Kentucky Railroad Company *et al.* No. 53.

Calvin Amory Stevens *et al.*, *Appts.*,

v.

East Tennessee, Virgina and Georgia Railroad Company. No. 54.

Calvin Amory Stevens *et al.*, *Appts.*,

v.

East Tennessee, Virginia and Georgia Railroad Company. No. 55.

Appeals from the Circuit Court of the United States for the Eastern District of Tennessee.

(See S. C., "*Tennessee Bond Cases*," Reporter's ed., 663-705.)

Tennessee internal improvement bonds—holders not entitled to benefit of mortgages taken by the State—construction of statutes.

1. The statutory lien with which the State of Tennessee was invested, upon the issue of its bonds to railroad companies under the Internal Improvement Act of February 11, 1852, and the several Acts amendatory thereof, was created solely for the security of the State. Under the Acts creating said lien, the holders of the bonds are not entitled to its benefit.

2. When a State lends its own bonds, taking back security for their payment, the presumption is strong that it intends by means of such security to indemnify itself against loss by reason of the loan of its credit, rather than to protect those who may afterwards become holders of such bonds against the consequences of its own repudiation or inability to pay. In this case this presumption is supported by express provisions of the legislation under which the bonds were issued and by which the lien was created.

3. Hand v. S. C. R. Co., 12 S. C., 314, and The Sinking Fund Cases, bk. 25, L. ed., 725, distinguished.

Argued Oct. 23, 24, 27, 28, 29, 30, 1884. Decided May 4, 1885.

The history and facts of the cases fully appear in the opinion of the court.

The argument in these cases was exhaustive, twenty-one briefs being filed, which contained over eighteen hundred printed pages. Only a few of the main points and authorities of the counsel for appellants can be here given.

Messrs. **George Hoadley, Wager Swayne, Edward L. Andrews, John C. F. Gardner, Edgar M. Johnson, Edward Colston and W. S. Pierce, Jr.**, for appellants.

Mr. Charles O'Connor, also of counsel for appellants, died before the hearing in this court. He took part in the argument in the court below.

I. The object of the Act was to indemnify the State by payment to the creditor.

The contract written in the law, and which the statutory lien secures, is payment, not indemnity.

See Brandt, Sur. & Guar., § 177, p. 255.

Rice v. *Southgate*, 16 Gray, 142; *Planters' Bk.* v. *Douglass*, 2 Head, 699; *Wicker* v. *Hoppock*, 6 Wall., 99 (73 U. S., bk. 18, L. ed. 753); *Port* v. *Jackson*, 17 Johns., 239.

II. Sovereignty does not protect the State. A State, otherwise sovereign, when entering into commercial relations of this kind occupies a position legally indentical with that of any trader or other private person.

Moodalay v. *Morton*, 1 Bro. Ch., 471; *Sav. Fund Soc.* v. *Philadelphia*, 31 Pa. St., 175; *U. S. Bk.* v. *Planter's Bk.*, 9 Wheat., 904; *Floyd Acceptances*, 7 Wall., 666 (74 U. S., bk. 19, L. ed. 169); *U. S.* v. *R. R. Co.*, 98 U. S., 613 (Bk. 25, L. ed. 154); *White* v. *R. R. Co.*, 7 Heisk., 546.

The State is, in this case, at least so far as the railroad companies are concerned, a surety.

"When property of any kind is mortgaged or pledged by the owner to answer for the debt, default or miscarriage, of another person, such property occupies the position of a surety or guarantor, and anything which would discharge an individual surety or guarantor who was personally liable, will, under similar circumstances, discharge such property."

Brandt, Sur. & Guar., § 21; *Robinson* v. *Gee*, 1 Ves. 251; *Bowker* v. *Bull*, 1 Sim. (N. S.), 29; *Lord Harberton* v. *Bennett*, Beatty, 386; *Rowan* v. *Mfg. Co.*, 33 Conn., 1; *Barnes* v. *Mott*, 64 N. Y., 397; *Hoy* v. *Bramhall*, 19 N. J. Eq., 563; *Hill* v. *Witmer*, 2 Phila., 72; *Lowry* v. *McKinney*, 68 Pa. St., 294; *White* v. *Ault*, 1 Ga., 551; *Ryan* v. *Trustees of Shawneetown*, 1 Ill., 20; *Christner* v. *Brown*, 16 Iowa, 130.

It by no means follows that, because the State is not liable on its bonds, the companies are free from responsibility under the statutory mortgages.

R. R. Co. v. *Schutte*, 103 U. S., 118 (Bk. 26, L. ed. 327).

A promise made by A to B, to pay C, may be sued upon directly by C against A.

Moore v. *Stovall*, 2 Lea, 543; *Hendrick* v. *Lindsay*, 93 U. S., 143 (Bk. 23, L. ed. 853); Pom., Rem., § 139.

It matters not that the contract is embodied in or required by a statute.

Furman v. *Nichol*, 8 Wall. (75 U. S., bk. 19, L. ed. 370); *Keith* v. *Clark*, 97 U. S., 454 (Bk. 24, L. ed. 1077); *Woodruff* v. *Trapnall*, 10 How., 190; *Curran* v. *Arkansas*, 15 How., 304.

But here the bondholder is in direct legal privity, both with the company, the promisor, and the State, the promisee or mortgagee.

Furman v. *Nichol, supra; Miller* v. *Billingsly*, 41 Ind., 489; *Bassett* v. *Hughes*, 43 Wis., 319; *Trimble* v. *Strother*, 25 Ohio St., 3; *Halsey* v. *Reed*, 9 Paige, 446; *Blyer* v. *Mallholland*, 2 Sandf. Ch., 478; *Marsh* v. *Pike*, 10 Paige, 595; *Hartley* v. *Harrison*, 24 N. Y., 1; *Price* v *Trusdell*, 28 N. J. Eq., 200; *Anthony* v. *Herman*, 14 Kan., 494; *Schmucker* v. *Sibley*, 13 Kan., 104; *Opdyke* v. *R. R. Co.*, 3 Dill., 1; *Bagaley* v. *Waters*, 7 Ohio St., 359; *Rabberman* v. *Wiskamp*, 54 Ill., 179; *Wilson* v. *Bevans*, 51 Ill., 232; *Bird* v. *Lanius*, 7 Ind., 615; *Martin* v. *Wilson*, 80 Ind., 240; *Helms* v. *Kearns*, 7 Ind., 124.

The Railroad Companies are the principal debtors.

In the Circuit Court it was much insisted that the contract of lien must necessarily be treated as one between the State and the company, because it related to "the payment of a debt in which the party is x, an unknown quantity."

The answer to this is furnished by the cases already cited of *Curran* v. *Arkansas*, *Woodruff* v. *Trapnall*, *Furman* v. *Nichol* and *Keith* v. *Clark*.

III. A mortgage to a surety, conditioned to pay the creditor, creates a trust for the creditor.

In such cases mortgagor and mortgagee cannot, without the consent of the creditor, release the surety to his disadvantage.

Breedlove v. *Summerville*, 3 Yerg., 257; *Lessey* v. *McDearmon*, 5 Cold., 392; *Saylors* v. *Saylors*, 3 Tenn., 525; Brandt, Sur. & Guar., § 9; *Moses* v. *Murgatroyd*, 1 Johns. Ch., 119; *Chancellor* Kent; *Price* v. *Trusdell*, 28 N. J. Eq., 204; *Ware* v. *Otis*, 3 Greenl., 387; *Paris* v. *Ellis*, 26 Vt., 308; *Eastman* v. *Foster*, 8 Met., 19; *Hand* v. *Hand*, 1 Paige, 329; *Curtis* v. *Tyler*, 9 Paige, 432; *Kramer and Rahm's Appeal*, 37 Pa. St., 79; *Boyd* v. *Parker*, 43 Md., 182; *Robertson* v. *Colvin*, 3 Gratt. 358; *Carpenter* v. *Boyd*, 1 Miss., 28; *Ross* v. *Wilson*, 7 Sm. & M. 1; *Osborn* v. *Noble*, 46 Miss., 449.

Private rights do not perish because a State [illegible] her duty as trustee.

[illegible] v. *Bk. of U. S.*, 9 Wheat., 738; *Davis* v. [illegible], 16 Wall., 203 (83 U. S., bk. 21, L. ed. [illegible]); *Tenny* v. *R. R. Co.*, 2 Woods, 606.

It is a familiar principle of federal law, that [illegible] whose absence is complained of is an indispensable party, the federal court will proceed to a decree without him.

Papy v. *Hook*, 7 Wall., 431 (74 U. S., bk. 19, L. ed. [illegible]); *Oler* v. *Gallagher*, 93 U. S., 204 (bk. [illegible], L. ed. [illegible]); *Hotel Co.* v. *Wade*, 97 U. S. (bk. 24, L. ed. 919).

Mr. Wm. M. Ramsey, for John B. Smith, trustee of the L. N. & G. S. R. R. Co., the M. C. & L. R. R. Co. and the M. & O. R. R. Co., appellees.

Mr. John A. Campbell, for the M. & O. R. R. Co., the C. St. L. & N. O. R. R. Co. and the Ill. Cent. R. R. Co., appellees.

Mr. P. Hamilton, for the M. & O. R. R. Co. et al., appellees.

Mr. Chas. P. Southmayd, for the E. Tenn., Va. & Ga. R. R. Co., the C. C. G. & [illegible] R. R. Co. and the M. & C. R. R. Co., appellees.

Mr. D. H. Poston and *W. K. Poston*, for the M. & C. R. R. Co. and the E. Tenn., Va. & Ga. R. R. Co., appellees.

Mr. L. W. Humes, *W. Y. C. Humes* and *Jno. J. Heiskell*, for the M. & C. R. R. Co., appellee.

Mr. Wm. H. Baxter, for the K. & Ky. R. R. Co. and the K. & O. R. R. Co., appellees.

Mr. E. Baxter and *Russell Houston*, for the L. N. & G. S. R. R. Co., the N. & C. R. R. Co. and the M. C. & L. R. R. Co., appellees.

Mr. Edward H. East, for the N. & C. R. R. Co., the N. & N. W. R. R. Co., the [illegible] & M. R. R. Co. and the W. & Ala. R. R. Co., appellees.

Mr. George Brown, *James T. Shields* and *John K. Shields*, for the E. Tenn., Va. & Ga. R. R. Co., appellee.

Mr. James Pentress, for the C. St. L. R. R. & I. C. R. R. Co., appellee.

Mr. R. L. Russell, for the M. & O. R. R. Co., appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

These suits are brought by the holders of unsold bonds of the State of Tennessee, issued to certain railroad companies under the Act of January 11, 1852, "to establish a system of railroad improvements," to enforce the lien which was vested in the State by that Act, on the property of the companies respectively, as security for the payment of the bonds and the accruing interest thereon. The sections of the Act on which the rights of the parties depend are 1, 2, 3, 4, 5, 6, 7, 10, 12, 13 and 14. These are as follows:

"Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That whenever the East Tennessee and Virginia Railroad Company shall have procured *bona fide* subscriptions for the capital stock in said company to an amount sufficient to grade, bridge and prepare for the iron rails the whole extent of the main trunk line proposed to be constructed by said company, and it shall be shown by said company to the Governor of the State that said subscriptions are good and solvent, and whenever said company shall have graded, bridged, and shall have ready to put down the necessary timbers for the reception of rails, and fully prepared a section of thirty miles of said road at either terminus, in a good and substantial manner, with good materials, for putting on the iron rails and equipments, and the Governor shall be notified of these facts, and that said section, or any part thereof, is not subject to any lien whatever, other than those created in favor of the State by the Acts of 1851–2, by the written affidavit of the the chief engineers and president of said company, together with the written affidavit of a competent engineer by him appointed, at the cost of the company, to examine said section, then said Governor shall issue to said company *coupon* bonds of the State of Tennessee, to an amount not exceeding eight thousand dollars per mile on said section, and on no other condition, which bonds shall be payable at such place in the United States as the president of the company may designate, bearing an interest of *six per centum per annum*, payable semi-annually, and not having more than forty nor less than thirty years to mature. [660]

Sec. 2. *Be it enacted*, That the bonds before specified shall not be used by said company for any other purpose than for procuring the iron rails, chairs, spikes and equipments for said section of said road, and for putting down said iron rails; and the Governor shall not issue the same unless upon the affidavit of said president, and a resolution of a majority of the board of directors for the time being, that said bonds shall not be used for any other purpose than for procuring the said iron rails, chairs, spikes and equipments for said section, and for putting down said iron rails; and the Governor shall have power to appoint a commissioner to act under oath, in conjunction with said president, in negotiating said bonds for the purposes aforesaid, and to act in any other matters pertaining to said company, where the interest of the State, in the opinion of the Governor, may require it.

Sec. 3. *Be it enacted*, That so soon as the bonds of the State shall have been issued for the first section of the road as aforesaid, they shall constitute a lien upon said section so prepared as aforesaid, including the road-bed, right of way, grading, bridges and masonry, upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes and equipments, when purchased and delivered; and the State of Tennessee, upon the issuance of said bonds, and by virtue of the same, shall be invested with said lien or mortgage without a deed from the company, for the payment by said company of said bonds, with the interest thereon as the same becomes due. [667]

Sec. 4. *Be it enacted*, That when said company shall have prepared as aforesaid a second section, or any additional number of sections, of twenty miles each of said road, connecting with a section already completed for the iron rails, chairs, spikes and equipments, as provided in the first section of this Act, and the Governor shall be notified of the facts as before provided, he shall, in like manner, issue to said company

like bonds of the State of Tennessee, to an equal amount with that before issued under the first section of this Act, for each and every section of twenty miles of said road so prepared as aforesaid, but upon the terms and conditions hereinbefore provided; and upon the issuance of the said bonds the State of Tennessee shall be invested with a like mortgage or lien without a deed from said company, upon said stock, and upon said first and additional section or sections of said road so prepared, upon the rails and equipments put, or to be put, upon the same, for the payment of said bonds and the accruing interest thereon; *Provided*, That if the last section of said road shall be less than twenty miles, or if the railroad proposed to be constructed by any company hereinafter specified shall be less than thirty miles in extent, bonds of the State shall be issued for such section or such railroad as may be less than thirty miles in extent for an amount in proportion to the distance, as provided in this Act, but upon the same terms and conditions in all respects as required in regard to the bonds to be issued for the other sections of said road. And when the whole of said road shall be completed the State of Tennessee shall be invested with a lien, without a [668] deed from the company, upon the entire road, including the stock, right of way, grading, bridging, masonry, iron rails, spikes, chairs, and the whole superstructure and equipments, and all the property owned by the company as incident to or necessary for its business, and all depots and depot stations, for the payment of all of said bonds issued to the company as provided in this Act, and for the interest accruing on said bonds. And after the governor shall have issued bonds for the first section of the road, it shall not be lawful for the said company to give, create or convey to any person or persons, or body corporate whatever, any lien, incumbrance or mortgage of any kind which shall have priority over, or come in conflict with, the lien of the State herein secured, and any such lien, incumbrance or mortgage shall be null and void as against said lien or mortgage of the State, and the said lien or mortgage of the State shall have priority over all other claims existing or to exist against said company.

Sec. 5. *Be it enacted*, That it shall be the duty of said company to deposit in the Bank of Tennessee, at Nashville, at least fifteen days before the interest becomes due, from time to time, upon said bonds issued as aforesaid, an amount sufficient to pay such interest, including exchange and necessary commissions, or satisfactory evidence that said interest has been paid or provided for; and if said company fail to deposit said interest as aforesaid, or furnish the evidence aforesaid, it shall be the duty of the comptroller to report that fact to the Governor, and the Governor shall immediately appoint some suitable person or persons, at the expense of the company, to take possession and control of said railroad, and all the assets thereof, and manage the same and receive the rents, issues, profits and dividends thereof, whose duty it shall be to give bond and security to the State of Tennessee, in such penalty as the Governor may require, for the faithful discharge of his or their duty as receiver or receivers, to receive said rents, issues, profits and dividends, and pay over the same under the direction of the Governor, toward th liquidation of such unpaid interest. And i said company fail or refuse to deliver up sai road to the person or persons so appointed b the Governor, the person so appointed shall r port that fact to the Governor, who shall forth with issue his warrant, directed to the sherif of the counties through which said road sha run, commanding them to take possession c said road, fixtures and equipments, and every thing pertaining thereto, and place the said r ceiver in full and complete possession of th same, and said receiver so appointed shall co tinue in the possession of said road, fixtures an equipments, and run the same, and manage th entire road, until a sufficient sum shall be rea ized, exclusive of the costs and expenses inc dent to said proceedings, to pay off and di charge the interest as aforesaid, due on sa bonds; which being done, the receiver sha surrender said road and fixtures and equi ments to said company. The comptroller sha from time to time settle the accounts with th receiver, and the balance shall be deposited the treasury of the State. The comptroller authorized, and it is made his duty, upon h warrant to draw from the treasury any sum money necessary to meet the interest on su bonds, as may not be provided for by the co pany, as provided for in this Act, and the com troller shall report thereof to the General Asse bly from time to time.

Sec. 6. *Be it enacted*, That if said compa shall fail or refuse to pay any of said bonds wh they fall due, it shall be the duty of the Gov nor to notify the Attorney-General of the distr in which is situated the place of business of sa company, of the fact; and thereupon said Att ney-General shall forthwith file a bill agai said company, in the name of the State of Te nessee, in the Chancery or Circuit Court of t county in which is situated said place of bu ness, setting forth the facts; and thereupon sa court shall make all such orders and decrees said cause as may be deemed necessary by t court, to secure the payment of said bonds, wi the interest thereon, and to indemnify the St of Tennessee against any loss on account of t issuance of said bonds, by ordering the sa railroad to be placed in the hands of a recei ordering the sale of said road, and all the pro erty and assets attached thereto or belonging said company or in such other manner as t court may deem best for the interest of t State.

Sec. 7. *Be it enacted*, That at the end of fi years after the completion of said road, sa company shall set apart *one per centum per a num* upon the amount of bonds issued to t company, and shall use the same in the p chase of bonds of the State of Tennessee, whi bonds the company shall pay into the treasu of the State, after assigning them to the Go ernor, and for which the Governor shall gi said company a receipt, and as between t State and said company, the bonds so paid shall be a credit on the bonds issued to t company; and bonds so paid in, and the int est accruing thereon, from time to time, sh be held and used by the State as a sinking fu for the payment of the bonds issued to t company; and should said company repurch

[illegible] of the bonds issued to it under the provi[illegible] of this Act, they shall be a credit as afore[illegible] and canceled. And should said company [illegible] comply with the provisions of this sec[illegible] shall be proceeded against, as provided [illegible] in fifth section of this Act.

[illegible] 11. *Be it enacted*, That the provisions [illegible] Act shall extend to and embrace the Chat[illegible] Harrison, Georgetown and Charles[illegible] Railroad Company, the Nashville and [illegible] Railroad Company, the Louis[illegible] and Nashville Railroad Company, the [illegible] Railroad Company, the McMinn[illegible] and Manchester Railroad Company, the [illegible] and Charleston Railroad Company, [illegible] Nashville and Southern Railroad Company, [illegible] and Ohio Railroad Company, the [illegible] and Memphis Railroad Company, the [illegible] and Cincinnati Railroad Company, [illegible] East Tennessee and Georgia Railroad Com[illegible] Memphis, Clarksville and Louisville [illegible] Company, and the Winchester and [illegible] Railroad Company, so far as the main [illegible] to be constructed by said companies [illegible] the limits of this State, and not other[illegible] said companies shall have all the [illegible] and privileges and be subject to all the [illegible] and liabilities contained in this Act.

[illegible] 12. *Be it enacted*, That the State of Ten[illegible] expressly reserves the right to enact by [illegible] thereof, hereafter, all such laws [illegible] be deemed necessary to protect the in[illegible] of the State, and to secure the State [illegible] any loss in consequence of the issuance [illegible] under the provisions of this Act; but [illegible] manner as not to impair the vested [illegible] of the stockholders of the companies.

[illegible] 13. *Be it enacted*, That it shall be the [illegible] of the Governor, from time to time, when [illegible] shall be reliable information given to him [illegible] any railroad company shall have fraudu[illegible] obtained the issuance of bonds of the [illegible] shall have obtained any of said bonds [illegible] to the provisions of this Act, he shall [illegible] the Attorney-General of this State, whose [illegible] shall be forthwith to institute, in the [illegible] of the State, a suit in the Circuit or [illegible] Court of the county of the place of [illegible] of the company, setting forth the facts. [illegible] when the fact shall satisfactorily appear [illegible] that any of said bonds shall have [illegible] fraudulently obtained, or obtained con[illegible] to the true intent, meaning and provisions [illegible] Act, then, and in such case, the court [illegible] order, adjudge and decree, that said road [illegible] in the State, with all the property and [illegible] of said company, or a sufficiency thereof, [illegible] to sold, and the proceeds shall be paid [illegible] the treasury, and it shall be the duty of [illegible] immediately to vest the same in [illegible] creating a sinking fund, as provided [illegible] in the seventh section of this Act. And [illegible] company shall forfeit all rights and privi[illegible] under the provisions of this Act, and the [illegible] thereof shall be individually liable [illegible] the payment of the bonds so fraudulently [illegible] by such company, and for all other [illegible] that may fall upon the State in conse[illegible] of the commission of any other fraud [illegible] such company, excepting such stockholders [illegible] to the said court that they were ignorant of or opposed to the perpetration of such frauds by the company.

Sec. 14. *Be it enacted*, That in the event any of the roads, fixtures or property belonging to any of said roads shall be sold under the provisions of this Act, it shall be the duty of the governor to appoint an agent for the State, who shall attend said sale and protect the interests of the State, and shall, if necessary to protect said interest, buy in said road or property, in the name of the State; and in case said agent shall purchase said road for the State, the Governor shall appoint a receiver, who shall take possession of said road and property, and use the same as provided for in the fifth section [672] of this Act, and said receiver shall settle with the comptroller semi-annually until the next meeting of the General Assembly."

On the 21st of February, 1852, an Act was passed providing for the identification of the bonds to be issued to the several companies under the Act of February 11, the material parts of which are secs. 7, 8 and 9, as follows:

"Sec. 7. *Be it further enacted*, That the different internal improvement companies, to whom the bonds of the State may be lent under the different Acts of the present Legislature, shall pay the expenses of engraving and preparing the same.

Sec. 8. *Be it enacted*, That the Governor of the State shall cause to be engraved and printed the bonds which may be issued under the Acts of the present General Assembly, as a loan made to internal improvement companies, and the said bonds shall bear date on the first day of January prior to their issuance, and the coupons thereto shall be payable on the first days of January and July of each year.

Sec. 9. *Be it enacted*, That the coupons shall be signed and numbered by the comptroller, and the bonds shall be countersigned, sealed and numbered by the Secretary of State, and upon delivering said bonds to the company authorized to receive the same, the Secretary of State shall take a receipt, reciting the number, date, and amount of said bonds, in a well bound book to be deposited in his office, and the comptroller and Secretary of State shall each be entitled to receive twenty-five cents for each bond so prepared, to be paid by the party receiving the said bond."

By sections 5 and 6 of an Act of February 21, 1856, the sinking fund provisions of the Act of 1852 were changed as follows:

"Sec. 5. *Be it further enacted*, That it shall be the duty of the several railroad companies in this State, who have received, or may hereafter receive, bonds of the State, or the indorsement of their bonds by the State to aid in the construction of their several roads, under the provisions of the Act of 1851-1852, and the Acts amendatory thereto, at the expiration of five years from the issuance or indorsement of their [673] said several bonds, annually to set apart and pay over to the treasurer of the State two per cent per annum upon all bonds which have been or may hereafter be issued or indorsed as aforesaid, as a sinking fund for the ultimate redemption of the bonds issued or indorsed as aforesaid; which sinking fund, when paid over, the Governor, comptroller of the treasury, and president of the Bank of Tennessee shall invest

in the bonds of the State, and reinvest all accruing interest in like securities; and they are hereby constituted a board of commissioners for the management, government, and control of said sinking fund.

Sec. 6. *Be it further enacted*, That should any of said railroad companies fail, or refuse to comply with the provisions of the fifth section of this Act, it shall be the duty of the Governor forthwith to notify the Attorney-General of the district in which is situated the place of business of said company failing or refusing as aforesaid, of the fact; and thereupon the Attorney-General shall immediately proceed against said company to collect said sinking fund, in the manner prescribed in the sixth section of an Act entitled 'An Act to Establish a System of Internal Improvements in this State,' passed February 11, 1852."

By another Act, passed March 20, 1860, the same provisions were further amended as follows:

"Sec. 1. *Be it enacted by the General Assembly of Tennessee*, That the money or bonds that have heretofore or may be paid by the cities or railroad companies in this State to the sinking fund commissioners by the 1st of January, 1860, together with the accruing interest thereon to that date, shall be passed directly to the credit of the party having so paid the same, and be a release to said party for that amount on the debt due by them to the State of Tennessee.

Sec. 2. Said bonds shall all be canceled by said commissioners, and, if indorsed bonds of any railroad company, shall be canceled as hereinafter provided for the cancellation of state bonds, and shall be delivered over to said company or corporation, taking the president's of said company, or the officers' of said company receipt for the same, which receipt shall be filed and the copy of the same placed upon a book which the said commissioners shall keep [674] for that purpose. If state bonds, they shall be canceled and filed in the office of the Secretary of State as hereinafter provided.

Sec. 3. That after the first day of January, 1860, all railroad companies or city corporations who have or may hereafter receive the bonds of the State, or its indorsement of their own bonds under the general internal improvement law of this State, or any other law, shall be required to pay two and one half per cent per annum as a sinking fund on the amount of the bonds so issued or indorsed by the State for said company or corporation, to be paid in equal installments on the first days of April and October, five years after the date of said bonds, and annually thereafter.

Sec. 4. All bonds issued during any one year shall be dated on the first day of January of that year.

Sec. 5. Said companies or corporations may pay said sinking fund in cash or in the like character of bonds that may have been issued or indorsed by the State for said company, at their face or par value.

Sec. 6. If paid in money, the commissioners shall invest it immediately in the bonds of the State, and shall have the same canceled and filed as heretofore provided. Such bonds are to be of the same character as those issued to such company or corporation.

Sec. 7. The sinking fund, when paid, in all cases shall be passed directly to the credit c said company or corporation, and be a release t said company or corporation from that amoun due by them to the State. The commissioner shall issue a receipt to each company or corpo ration for such payment, retaining a duplicat in a well bound book kept for that purpose.

Sec. 8. Each and every railroad company c city corporation shall provide the interest sem annually, as now provided by law, on th amount of bonds unpaid at the time said inte est falls due, and not on the original amou issued to or indorsed by the State for said con pany as heretofore provided.

Sec. 9. The comptroller of the State sha keep a regular account against each compar or corporation, charging them with the amou of bonds originally issued to or indorsed f said company or corporation by the State, ar crediting them by the amount of sinking fu paid, and shall furnish the treasurer of state statement of the amount due by each compa or corporation on the first of June and Dece ber of each year, that he may know how mu interest each company or corporation has to pa

Sec. 10. The commissioners of the sinki fund shall cancel all bonds of the State as so as paid in or purchased, by cutting out the Go ernor's and Secretary of State's names, and defacing each coupon that it cannot by pos bility be used or circulated, and shall file t same in the Secretary of State's office.

Sec. 11. This law shall be in full force fr and after its passage, and shall repeal all la in conflict with it, but shall not be so constru as *otherwise* to affect any law on the subject the sinking fund or the payment of interest d on state or indorsed bonds."

Under these statutes state bonds were fr time to time issued to the several enumera railroad companies in the following form:

"$1,000. $1,0

No. United States of America. No

Know all men by these presents: That State of Tennessee acknowledges to owe to , or order, One Thousand Doll of the lawful money of the United States America, which the said State promises to in the City of New York, on the day , 18 , with interest thereon, at rate of six per cent per annum, according the tenor, and upon the presentation of the c pons hereunto attached. For the payment said sums of money and the interest there at the times and places and in the manner af said, the faith of the said State of Tennesse irrevocably pledged, this bond being issue pursuance and by authority of an Act of General Assembly of said State, passed Fe ary 11th, 1852, to establish a system of Inte Improvements in said State.

In testimony whereof and in pursuance of Acts aforesaid, I , G ernor of the State of Tennessee, have here subscribed my name officially, and caused same to be countersigned by the Secretar State, with the great seal of the State affi [ ] Done at the Executive Departm at the City of Nashville, this day of , 18

To which was attached the following f of coupon:

"30. The Treasurer of the State of Treasurer.

will pay the bearer Thirty Dollars, in the City of New York, on the first day of January, [illegible] being the semi-annual interest then falling due on bond No. . J. C. Suttrell, 30 *Comptroller.*"

Upon the issue of the bonds, receipts were [illegible] by the companies respectively, in the [illegible] required by the statute, in a well bound [illegible] deposited in the office of the Secretary of State. The bonds, after their delivery, were [illegible] in the market by the respective companies, [illegible] in conjunction with the state commissioner, and [illegible] proceeds used in the way contemplated by [illegible] Act.

No complaint is now made of any default on [illegible] of the several companies whose roads [illegible] involved in these suits prior to the late civil war. After the beginning of the war, however, but few payments were made, and various expedients were resorted to, from time [illegible] for relieving the companies from their [illegible]. In 1866, another Act was [illegible] authorizing a further issue of state [illegible], under which some of the bonds em[illegible] in these suits were put out. In this Act [illegible] provisions as to the lien for the security of [illegible] payment of the bonds was substantially the [illegible] as in the Act of 1852. None of these de[illegible], however, accomplished the purpose the [illegible] had in view, and on the 25th of February, [illegible] "An Act to Liquidate the State Debt, [illegible] in Aid of Railroad Companies in [illegible] State of Tennessee" was passed. That Act [illegible] as follows.

"Whereas, under the general internal im[illegible] laws of the State, passed from time [illegible], aid has been granted to various rail[illegible] companies by the loaning of the six per [illegible] bonds of the State, to enable said com[illegible] to lay, equip, build and bridge, and for [illegible] purposes, which is now secured to the [illegible] by a first mortgage or lien on the fran[illegible], property and fixtures of respective rail[illegible] companies; and

"Whereas, it is desirable for the general wel[illegible] of the State that the State shall be reim[illegible] such amounts as have been advanced to [illegible] railroad companies, as fast as may [illegible], therefore,

"Section 1. *Be it enacted by the General As[illegible] of the State of Tennessee*, That the re[illegible] railroad companies, or either of them [illegible] indebtedness to the State, are [illegible] authorized to repay any amount of the [illegible] of such indebtedness as they have re[illegible] in the bonds of the State, in [illegible] and at such times as may be prac[illegible]. *Provided, however*, That nothing in this [illegible] be so construed as to release said rail[illegible] companies from any lien which the State [illegible] on the same for any unpaid interest [illegible] said bonds of the State authorized [illegible] by this Act.

"Sec. 2. *Be it further enacted*, That any rail[illegible] company or companies repaying any in[illegible] to the State under the provisions [illegible] Act, are authorized to issue bonds of [illegible] and denomination with the bonds [illegible] paid and delivered up for cancella[illegible] as hereinafter provided, which said rail[illegible] bonds, so issued in lieu of any equal [illegible] of state bonds, shall be certified to by [illegible] and entered in a book to be kept for that purpose, with date, number and amount, and shall be a lien, *pro rata* in amount and of equal validity and effect with the unretired part of the State indebtedness upon such railroad, and all its property, franchises, fixtures and material.

Sec. 3. *Be it further enacted*, That in order to facilitate the railroad companies that may wish to avail themselves of the provisions of this Act in repaying the indebtedness due to the State respectively, they, or any of them, are hereby authorized to consolidate their property, [678] in whole or in part, with other railroad companies, and issue bonds and stock as provided for in the second section of this Act, and may adopt the corporate franchise of either of the roads as the stockholders may elect; and each railroad company paying its indebtedness, and such railroad companies as may consolidate under the provisions of this Act, are hereby authorized to determine, by a vote of the stockholders of said company or consolidated companies, the number of directors of such company, and elect the same under the new organization, and that the said directors, so elected, shall, according to the by-laws and rules of said corporation, elect one of their number president of said company.

Sec. 4. *Be it further enacted*, That the comptroller of the State shall receive from the railroad companies, or any of them, bonds of the State in such amounts as may be presented, and cancel the same in the presence of the officer or agent of the railroad company paying them in, and execute to the said railroad company or companies duplicate receipts for the amount and number of said bonds so paid in; and it shall further be the duty of the comptroller to certify on the bonds of any railroad company or companies repaying indebtedness due to the State, that the same has been paid, and that the so certified [bonds] are secured by first mortgage; *Provided*, That said railroad companies shall liquidate their indebtedness prior to the maturity of the bonds that have caused said indebtedness; and be it further provided, that said bonds, when executed by the respective railroad companies, or either of them, shall be deposited with the comptroller of the State, whose duty it shall be to deliver said bonds, or any number of them, to the president and directors of the company, on the deposit by said president and directors or authorized agent of an equal amount of the six per cent bonds of the State of Tennessee, with unpaid coupons attached; and the company's first mortgage bonds, authorized to be issued by this Act, shall have no validity or value except the comptroller's certificate is affixed on the face of each bond, that said bond is executed, and issued and by virtue of law taken the place of a bond of the State and is the first mortgage bond.

Sec. 5. *Be it further enacted*, That the comptroller shall be entitled to a fee of one dollar on each thousand dollars of the bonds certified as aforesaid, to be paid by the railroad company for which the same is done; and it shall be lawful for the comptroller to discharge the duties imposed by this Act, by and through an agent in the City of New York; and all the provisions of this Act shall attach to and become a part of the charter of any railroad company or companies acting under it. [679]

Sec. 6. *Be it further enacted*, That by and with the consent of the board of directors of any railroad company in this State under the general improvement law passed the 11th of February, 1852, and all the amendments thereto, that any person or corporation may, by paying the indebtedness of such railroad company to the State in the bonds of the State, as provided for by law, be, and they are hereby substituted and entitled to all the liens against said company for the payment of said debt that the State had or has by law, and the Governor and Secretary of State shall give such party or parties paying such indebtedness a certificate showing the facts, which shall be evidence against said company of such indebtedness to said individuals or corporations.

Sec. 7. *Be it further enacted*, That any person or persons may, with the consent and approbation of any railroad company, which is indebted to, and for which the State of Tennessee holds a lien, pay the said debt, so far as the State is concerned, in the bonds of the State, or any coupons of bonds at par, and the person or persons so paying the debt of any railroad company with the consent of such railroad company, shall, upon filing with the treasurer of this State the written assent of said railroad company, under the corporate seal of said railroad company, be entitled to have and hold all the lien or liens which the State of Tennessee had or has upon said railroad or its property, and shall have the same right to enforce the same which the State of Tennessee had, the object and intent being to place the person or persons so paying with the consent of said railroad company in the same position and with the same rights which the State of Tennessee had previous to and before the said payment, and with full power to enforce the same.

Sec. 8. *Be it further enacted*, That any person or persons who may, with the consent and approbation of any railroad company, pay any part or portion of the indebtedness of such company, as provided in sec. —, shall have, hold, and [be] subrogated in all the rights, privileges, and lien or liens of the State, to the extent of, and in proportion to, the amount of such indebtedness, with the same rights and privileges the State now has, to the extent of such payment or payments; *Provided*, The passage of this Act shall not decrease the lien of the State upon any railroad of the State until the entire claim of the State is fully liquidated, or affect the interest of the present bondholders of the State; *Provided*, That railroad companies which have issued second mortgage bonds, availing themselves of the provisions of this Act, shall file with the comptroller bonds of the same series as those loaned to such company, for which the State holds a first mortgage lien; *Provided*, The bonds to be issued by the company, under the provisions of this Act, shall not have a longer time to run than the bonds of the State thus released and canceled.

[680]

Sec. 9. *Be it further enacted*, That this Act shall take effect from and after its passage."

At the next session of the General Assembly, January 20, 1870, this Act was amended as follows:

"An Act for the Payment of the State Debt.

Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That an Act en tled 'An Act to Liquidate the State Debt, Co tracted in Aid of Railroad Companies in the Su of Tennessee,' passed February 25, 1862, b and the same is hereby amended so as to allo any railroad company which may be indebt to the State by reason of the bonds of the Su loaned to said railroad company, to pay into t State, in liquidation of the principal of said debtedness, any of the legally issued six p cent bonds of the State of Tennessee outstan ing, without regard to series or number; a such payment shall, to the extent made, b full and perfect discharge of the lien which t State holds upon the property of such railro company, held by virtue of the bonds of t State issued to such railroad company, whet they be the same bonds or the same series bonds issued to said company under the A passed February 11, 1852, and Acts amendat thereof, or not.

Sec. 2. *Be it further enacted*, That railro companies issuing their own mortgage bo under the provisions of the Act which thi intended to amend, be allowed to fix the rate interest which the said bonds of the railro company are to bear, and all laws in conf are hereby repealed; *Provided*, That when s railroad companies owe interest already d coupons past due shall be taken by the co troller or treasurer in discharge of such ind edness for interest.

Sec. 3. *Be it further enacted*, That when company, under the provisions of this Act, s pay into the treasury of the State bonds wh have been issued by the State to said compa the said bonds shall be canceled; but should company, in discharge of its own debts, into the treasury any bonds that were issue other companies that may still be indebte the State, such bonds so paid in shall no canceled, but shall be held by the State as chased bonds, retaining a lien for the State u the road to which said bonds were origin issued until the debt of said road to the S shall be fully discharged, when the bond held shall be canceled; *Provided*, That the visions of this Act shall not be so construe to allow the payment and satisfaction of d created by bonds issued by the State, and u which the State is secondarily liable, nor to payment of the sinking fund, now require law, of the railroad companies of this S

Sec. 4. *Be it further enacted*, That this shall take effect from and after its passage

Under these statutes the companies w roads are involved in the present suits ag the Memphis and Charleston Railroad C pany, the Louisville, Nashville and C Southern Railroad Company, the Nashville Decatur Railroad Company, the Nash Chattanooga and St. Louis Railroad Comp the East Tennessee, Virginia and Georgia road Company, the Chicago, St. Louis and Orleans Railroad Company, the Memphis Tennessee Railroad Company, and the M and Ohio Railroad Company, by the use of stitution bonds or otherwise, obtained fro State a discharge of the liens upon their erty under the Act of February 11, 1852 the Acts amendatory thereof, so far as the had the right to execute such a discharge doing so, however, they used, to some e

other state bonds than those which were issued to them originally under the provisions of the Act. The bonds, so issued and not returned to the State, constitute the causes of action on which these suits are brought against the companies above named.

To provide for cases where the companies failed to meet their obligations to the State under the Act of 1852, and did not comply with the provisions of the Acts of 1869 and 1870, an Act of December 21, 1870, was passed, in which after reciting as follows: "Whereas, in the recent attempt to sell the State's interest in said roads, various legal questions arose, presenting serious obstacles to a sale under the Act of 1870, which it is deemed expedient and necessary to obviate before the interest of the State in said roads shall be again offered for sale; and whereas, by the Act of 1852, chap. 151, § 12, the right is expressly reserved to the State to enact all such laws in the future as should be deemed necessary to protect the interest of the State, and to secure the State against any loss in consequence of the issuance of bonds under the provisions of said Act, in such manner as not to impair the vested rights of stockholders of the companies,"—provision was made for a summary proceeding to foreclose the lien vested in the State, under the Act of 1852 and the several mandatory Acts, by filing a bill in equity, in the Court of Chancery at Nashville, against the delinquent companies, to obtain a decree for the sale of the interest of the State in their property. In the Act it was provided, that the purchase money might "be discharged in any of the outstanding legal bonds of the State," and that, upon the sale of any of the franchises of either of the companies, "all the rights, privileges and immunities appertaining to the franchises so sold under its Act of incorporation and the amendments thereto, and the general improvement law of the State, and Acts amendatory thereof, shall be transferred to and vest in such purchaser, and the purchaser shall hold said franchises subject to all liens and liabilities in favor of the State, as now provided by law, against the railroad companies."

Under the provisions of this Act the liens on the roads involved in the suits against the Memphis, Clarksville and Louisville Railroad Company, the Nashville and Northwestern Railroad Company, the McMinnville and Manchester Railroad Company, the Winchester and Alabama Railroad Company, the Cincinnati, Cumberland Gap and Charleston Railroad Company, and the Knoxville and Kentucky Railroad Company were all foreclosed, and the property sold under decrees which reserved the rights the State referred to in the statute, "as shall be necessary to secure the purchase money to accrue, and the other rights of the State under the decree in this cause and the said Act of the Legislature." Payments of the purchase money were made in bonds of the State of Tennessee without distinction. Bonds of the State issued to the companies that constructed the railroad roads, not taken up at these sales of forfeiture by the State, are the causes of action in the suits against the last named companies, and the defendants in those suits claim the property under the purchases at the foreclosure sales, free of all liens in favor of the State or its bondholders.

The Circuit Courts dismissed the bills in all the suits, and these appeals were taken from the several decrees to that effect.

The question which lies at the foundation of all these suits is, whether the statutory lien with which the State of Tennessee was invested, upon the issue of its bonds to railroad companies [685] under the Internal Improvement Act of February 11, 1852, and the several Acts amendatory thereof, bound the property of the company to which the issue was made for the payment of the bonds so issued, and the interest thereon, to the several holders thereof, or only to the State; for, if to the State alone, it is conceded the lien has been discharged, and is no longer operative. The precise point of the inquiry is, for whose benefit the lien was created? Was it the State, or the bondholders, or both the State and the bondholders?

The lien which was vested in the State was as security for the payment by the company of "all of said bonds issued to the company, as provided in this Act, and for the interest accruing on said bonds." This is the language of the provision for the final lien which was to attach, on the completion of the whole road, to "all the property owned by the company, as incident to, or necessary for, its business." Sec. 4. To whom this payment was to be made is nowhere stated in express terms. In the absence of anything to the contrary, the implication would undoubtedly be that it must be to the holder of the bond, as he was the person to whom the bond, as a bond, was payable; but if, on an examination of the whole statute in the light of surrounding circumstances, and interpreting it with reference to the subject matter of the legislation, it appears that the intention was to secure only a payment to the State of the debt incurred by the company on the loan of the bonds, there is nothing in the language employed to express the legislative will which necessarily extends the operation of the statute beyond what [686] is required to give effect to such an intention. It may be that the Legislature used the phrase "payment of the bonds and the accruing interest thereon" to express the idea of "payment to the State for the bonds," and, if it did, the statutory lien will stand only as security for such a payment.

The liability of the companies to the bondholders, if any there be, rests alone on the statute, which contemplated loans by the State of its own bonds to the several companies in aid of the public works they were respectively engaged in constructing. The bonds were to be "coupon bonds of the State of Tennessee." This implies state bonds with coupons for interest attached, in the ordinary form then in use, whereby the faith of a State of the United States was pledged for their payment. Such must have been the understanding of all parties at the time, for the bonds actually issued were of that kind, and on their face bound only the State. The law made no provision for naming, either in or upon a bond, the particular company in whose favor it was issued. Neither did the bonds themselves, as issued, contain, by indorsement or otherwise, any obligation whatever on the part of the companies. They were state bonds, pure and simple, "issued in pursuance and by authority of an Act of the General Assembly of said State, passed

February 11, 1852." They were not even made payable to the companies to which they were respectively issued, but went on the market as coupon bonds of the State of Tennessee, payable to the bearer thereof, and apparently nothing else. In this form they were bought and sold by dealers and investors in public securities. So that the point to be determined, from an examination of the statute, is, whether a State, when lending its own bonds and taking back security for their payment, intended to protect those who might afterwards become the holders of the bonds against the consequences of its own repudiation or inability to pay, or only to indemnify itself against loss by reason of the loan of its credit to those who were engaged in constructing its great works of internal improvement. To say the least, the strong presumption is that, in such a transaction, the purpose [687] of a State would be to protect itself, and not to secure its own pledge of faith to the bondholders by a mortgage from those to whom its credit was loaned.

Such being the subject matter of the legislation, we proceed to inquire what the payment was which the State intended to secure by the statutory lien with which it was to be invested. It was to be a payment. This implies a debt from him who pays to him who is to receive, and that when the payment is complete the debt will be discharged. It is not claimed that a borrowing company was to incur two debts by accepting a loan under the statute, one to the State and the other to those who might become the purchasers or holders of the borrowed bonds. The obligation was to pay the bonds once, not twice, and the payment was to be made at the time and in the way provided by the law. Who, then, became the creditor of the borrowing company when it incurred its debt for the borrowed bonds? Was it the State or the bondholders?

Much stress was laid in the argument on the provision in § 3, "that so soon as the bonds of the State shall be issued * * * they shall constitute a lien," etc.; and it was insisted that, as the bond constitutes the lien, and the lien is but an incident of the debt, the lien must continue and follow the bond in the hands of the holder thereof until it is finally paid and taken up by the company. From this it was argued that the bondholder must be the creditor, within the meaning of the statute, and that a payment would not be complete so as to discharge the debt of the company until it was made to him.

Similar language was used in a statute of South Carolina, passed December 20, 1856, to aid in the construction of the Charleston and Savannah Railroad, under which the State guaranteed, by indorsement, the bonds of the railroad company, and it was provided "that so soon as any such bonds shall have been indorsed as aforesaid * * * they shall constitute a lien," etc. This, it was held by the Supreme Court of that State in *Hand* v. *R. R. Co.*, 12 S. C., 314, vested in the State a lien, not merely for its own protection against the guaranty, but also for the [688] better security of the bonds themselves into whosesoever hands they might fall. But, as this court had occasion to say in *R. R. Cos.* v. *Schutte*, 103 U. S., 140 [Bk. 26, L. ed. 335], "Contracts created by, or entered into under, the authority of statutes, are to be interpreted according to the language used in each particular case to ex press the obligation assumed. * * * Every sta ute, like every contract, must be read by itsel and it no more follows that one statutory co tract is like another, than that one ordinary co tract means what another does. * * * It must b determined from the language used in each pa ticular case, what has been done, or agreed t be done, in that case." Under the South Car lina Statute the primary liability for the pa ment of the bonds to the respective holde thereof rested on the company, and the Sta was bound only as surety. This was shown c the face of the bonds themselves, and the la guage of the statute was, therefore, to be co strued with that as the subject matter of t legislation, that is to say, a guaranty by t State of the obligations of the railroad compan Here the State is the primary obligor, and t legislation is with reference to a loan of sta bonds, on which the railroad companies are no way to appear as bound. The liability the companies grows out of the borrowing state bonds, to be sold in the market as sta bonds, and apparently nothing but state bon The loans were to be by the State to the co panies, and the object was to secure the pa ment of the loans. It may well be that t same language, when applied to one class of curity means one thing, and when applied another class something else. The questi now is, what does it mean in this case?

The fact which establishes the lien is the iss of bonds by the State to a company; that is say, the delivery of bonds by the State to a co pany under the contract of loan. The lien taches as soon as the delivery is complete, a when there is no obligation on the part of company to the holders for the payment of bonds, because the company is itself the hold and there can be no obligation of payment itself to itself. But the delivery of the bo by the State to, and their acceptance by, a co pany, created at once an obligation on the p of the company to pay the loan, or, what is same thing, pay the bonds to the State. T it was the purpose of the statute to secure performance of this obligation on the par the company is shown by the fact, that, fr the moment of the delivery of the first bon the company, and before the bond could negotiated by a sale or transfer to a third p son, a lien was vested in the State by the v act of delivery, upon all the property of the c pany then acquired, or thereafter to be acqui superior to any other lien or incumbrance wh could be created by the company afterwa This is the express provision of the last p graph in § 4; and while it is said once in entire Act that the bonds shall constitute lien, it is repeated again and again that, u the issue of the bonds, the State shall be vested with a lien, etc. The only place whe is stated that the bonds shall constitute a is that in which provision is made for the i on the completion of the first section of th miles, and, before the sentence in which expression appears is completed, it is decl that the lien is to vest "upon the issuan the bonds, and by virtue of the same." when the whole road is completed, and the is established on all the property owned by company as incident to, and necessary fo

[illegible] of the bonds issued to it under the provi[illegible] of this Act, they shall be a credit as afore[illegible] and cancelled. And should said company [illegible] to comply with the provisions of this sec[illegible] shall be proceeded against, as provided [illegible] in the fifth section of this Act.

[illegible] *Be it enacted*, That the provisions [illegible] Act shall extend to and embrace the Chat[illegible] Harrison, Georgetown and Charles[illegible] Railroad Company, the Nashville and [illegible] Railroad Company, the Louis[illegible] and Nashville Railroad Company, the [illegible] Railroad Company, the McMinn[illegible] and Manchester Railroad Company, the [illegible] and Charleston Railroad Company, [illegible] and Southern Railroad Company, [illegible] and Ohio Railroad Company, the [illegible] and Memphis Railroad Company, the [illegible] and Cincinnati Railroad Company, [illegible] East Tennessee and Georgia Railroad Com[illegible] the Memphis, Clarksville and Louisville [illegible] Company, and the Winchester and [illegible] Railroad Company, so far as the main [illegible] to be constructed by said companies [illegible] the limits of this State, and not other[illegible] said companies shall have all the [illegible] and privileges and be subject to all the [illegible] and liabilities contained in this Act.

[illegible] *Be it enacted*, That the State of Ten[illegible] expressly reserves the right to enact by [illegible] thereof, hereafter, all such laws [illegible] deemed necessary to protect the in[illegible] of the State, and to secure the State [illegible] any loss in consequence of the issuance [illegible] under the provisions of this Act; but [illegible] manner as not to impair the vested [illegible] of the stockholders of the companies.

[illegible] *Be it enacted*, That it shall be the [illegible] of the Governor, from time to time, when [illegible] shall be reliable information given to him [illegible] any railroad company shall have fraudu[illegible] obtained the issuance of bonds of the [illegible] shall have obtained any of said bonds [illegible] the provisions of this Act, he shall [illegible] the Attorney-General of this State, whose [illegible] shall be forthwith to institute, in the [illegible] of the State, a suit in the Circuit or [illegible] Court of the county of the place of [illegible] of the company, setting forth the facts. [illegible] that the fact shall satisfactorily appear [illegible] that any of said bonds shall have [illegible] fraudulently obtained, or obtained con[illegible] to the true intent, meaning and provisions [illegible] Act, then, and in such case, the court [illegible] order, adjudge and decree, that said road [illegible] the State, with all the property and [illegible] of said company, or a sufficiency thereof, [illegible] be sold, and the proceeds shall be paid [illegible] the treasury, and it shall be the duty of [illegible] immediately to vest the same in [illegible] creating a sinking fund, as provided [illegible] the seventh section of this Act. And [illegible] company shall forfeit all rights and privi[illegible] under the provisions of this Act, and the [illegible] thereof shall be individually liable [illegible] the payment of the bonds so fraudulently [illegible] by such company, and for all other [illegible] that may fall upon the State in conse[illegible] of the commission of any other fraud [illegible] such company, excepting such stockholders [illegible] to the said court that they were ignorant of or opposed to the perpetration of such frauds by the company.

Sec. 14. *Be it enacted*, That in the event any of the roads, fixtures or property belonging to any of said roads shall be sold under the provisions of this Act, it shall be the duty of the governor to appoint an agent for the State, who shall attend said sale and protect the interests of the State, and shall, if necessary to protect said interest, buy in said road or property, in the name of the State; and in case said agent shall purchase said road for the State, the Governor shall appoint a receiver, who shall take possession of said road and property, and use the same as provided for in the fifth section [672] of this Act, and said receiver shall settle with the comptroller semi-annually until the next meeting of the General Assembly."

On the 21st of February, 1852, an Act was passed providing for the identification of the bonds to be issued to the several companies under the Act of February 11, the material parts of which are secs. 7, 8 and 9, as follows:

"Sec. 7. *Be it further enacted*, That the different internal improvement companies, to whom the bonds of the State may be lent under the different Acts of the present Legislature, shall pay the expenses of engraving and preparing the same.

Sec. 8. *Be it enacted*, That the Governor of the State shall cause to be engraved and printed the bonds which may be issued under the Acts of the present General Assembly, as a loan made to internal improvement companies, and the said bonds shall bear date on the first day of January prior to their issuance, and the coupons thereto shall be payable on the first days of January and July of each year.

Sec. 9. *Be it enacted*, That the coupons shall be signed and numbered by the comptroller, and the bonds shall be countersigned, sealed and numbered by the Secretary of State, and upon delivering said bonds to the company authorized to receive the same, the Secretary of State shall take a receipt, reciting the number, date, and amount of said bonds, in a well bound book to be deposited in his office, and the comptroller and Secretary of State shall each be entitled to receive twenty-five cents for each bond so prepared, to be paid by the party receiving the said bond."

By sections 5 and 6 of an Act of February 21, 1856, the sinking fund provisions of the Act of 1852 were changed as follows:

"Sec. 5. *Be it further enacted*, That it shall be the duty of the several railroad companies in this State, who have received, or may hereafter receive, bonds of the State, or the indorsement of their bonds by the State to aid in the construction of their several roads, under the provisions of the Act of 1851-1852, and the Acts amendatory thereto, at the expiration of five years from the issuance or indorsement of their [673] said several bonds, annually to set apart and pay over to the treasurer of the State two per cent per annum upon all bonds which have been or may hereafter be issued or indorsed as aforesaid, as a sinking fund for the ultimate redemption of the bonds issued or indorsed as aforesaid; which sinking fund, when paid over, the Governor, comptroller of the treasury, and president of the Bank of Tennessee shall invest

was accepted and kept as and for state funds. Neither the bank nor the State was bound, either to the companies or to the bondholders, to use the deposits made by a particular company to pay the interest on bonds issued to that company. The bank is nowhere made by the law the agent of the company. It was to take, keep, and pay out according to law, for the State, all moneys deposited or set apart for the liquidation of accruing interest. If the deposits made by the various companies were not enough for that purpose, it was the duty of the comptroller to draw from the treasury, on his own official warrant, a sufficient amount to make up the deficiency. No special provision was made in the statute as to the way in which coupon holders were to be paid. That was all left to be determined by such regulations as might from time to time be adopted for the government of state officers and state agencies in the payment of state debts. The money, when deposited, became at once the money of the State, and was in no way thereafter subject to the control of the depositor. When used to pay [693] maturing interest, it was paid by, and on behalf of, the State, through its own agencies, to redeem its own pledges of faith to the holders of its own obligations. The company performed its whole duty to the State when it deposited in bank, subject to the control of the State, a sufficient amount of money to meet the interest which was to accrue on the ttate obligations fifteen days thereafter, and the expenses incident to such payment. It is true an option was given the company to pay the interest instead of making the deposit, but this was clearly intended for the convenience of the company, and not because of any obligation the company was supposed to be under to the bondholders. Payment, therefore, by a company, into the bank, of a sufficient amount of money to enable the State to meet its accruing interest, was, and was intended by the Legislature to be, not only *a* payment of the interest on the bonds by the company, but *the* payment, and *the only* payment, of interest the lien created by the statute was to secure. To hold otherwise would be to decide that the Legislature, while providing for a loan of the bonds of the State to corporations engaged in works of internal improvement, required the corporations to secure by liens on their own property, not only the payment to the State of the interest on the loan, but also the redemption by the State of its own pledges of faith to the future holders of the state bonds that were lent. Certainly no such construction will be given to the statute unless it is imperatively demanded; and when provision is made in express terms for a payment to the State, no second payment of the same debt will be presumed to have been in the contemplation of the parties, in the absence of some positive requirement to the contrary. The lien must be held to be for the security of the payment which is expressly provided for and no other.

But the correctness of this view of the statute is made still more apparent by another important provision of the same section 5, to the effect that if a company failed to deposit the interest at the time required, or furnish the necessary evidence that payment of the interest had been made or otherwise provided for, the Governor should appoint a receiver to take possession, and run and manage the railroad of the company until a sufficient sum was realized from the earnings to discharge such "unpaid interest." The failure of a company to make its deposit did not relieve the State from the obligation to keep its faith and pay the interest to its bondholders at maturity. Consequently, the "unpaid interest" here referred to must have been the interest for which a deposit had not been made, and this clearly implies that the deposit was the payment which the lien was intended to secure. Interest on the lent bonds deposited for was paid, within the meaning of the statute, and that not deposited for was unpaid. A receiver was to be appointed, and possession taken, only when there was default on the part of the company in making its deposit. Nonpayment of interest by the State, after the deposit, created no such default. As the statutory remedy for the enforcement of the statutory lien must be presumed to have been intended to be commensurate with the lien itself, and this remedy was confined to cases of default in making deposits, there cannot be a doubt that it was the understanding of the Legislature that a deposit for interest was a payment of interest on the bonds, so far as the company was concerned, and released the company as well as its property from all further liability to the State, or to any one else, which had been assumed for interest. The pledge of state faith for the performance of all state obligations under the Act constituted the only security of the bondholders for the prompt payment of the interest due to them. The lien on the property of the companies stood only as security for the payment of the interest on the bonds to the State.

2. As to the principal. This is provided for in three ways: 1, by the establishment of a sinking fund; 2, by foreclosure if the company failed to pay the bonds at maturity; and 3, by foreclosure and proceedings against guilty stockholders, before maturity, if an issue of bonds was obtained by fraud, or contrary to the provision of the Act.

The sinking fund was first established by section 7 of the original Act, which required each company, at the end of five years after the completion of its road, to set apart annually one per centum of the amount of bonds issued to such company, and use it in the purchase of bonds of the State of Tennessee, which bonds the company was to *pay* into the treasury of the State, taking a receipt therefor, and, as between the State and the company, the bonds so *paid in* were to be a credit on the bonds issued. The bonds paid in, and the accruing interest thereon, were to be held and used by the State as a sinking fund for the payment of the bonds issued to the company. If in this way a company repurchased and paid in any of the bonds issued to it, they were to be canceled. Should a company fail to comply with these provisions it was to be proceeded against, as in section 5, for a failure to pay, or deposit for, interest. This provision was changed by the Act of 18[illegible] so as to increase the annual payments to two per cent on the amount of the issue of bonds and to require them to be made in money, and to begin at the end of five years after the date of the several issues. The money, when pa

in the treasury, was to be invested by a board of sinking fund commissioners in bonds of the State, and all accruing interest was to be reinvested in like securities. If a company failed to comply with these provisions of the amending Act, it was to be proceeded against as for a default in the payment of the bonds at maturity under section 6 of the Act of 1852. Under the statutes of 1852 and 1856 the companies were not released from their obligations to provide semi-annually for the payment of the accruing interest on the entire issue of bonds. That was still to be kept up, notwithstanding the debt of the company to the State had been reduced by the annual payments required by section 7.

By the Act of 1860 other changes were made, which increased the amount of annual payments to two and one half per cent, on the original issues, and allowed them to be made in money or in bonds of a like character with those issued to the company, at their face value. If paid in money, the sinking fund commissioners were to invest it immediately in bonds of a like character with those issued to the company, and have them canceled. By this Act the company was released from the obligation under the Act of 1852 to provide for the interest on the whole issue of bonds, and required to deposit only for that which would accrue on the amount of bonds "unpaid" at the time the interest fell due. What was here meant by the word "unpaid" is shown by sections 1, 2 and 9 of the Act, which provide that all sinking fund payments, in money or bonds, made before January 1, 1860, with the accruing interest thereon to that date, "shall be credited directly to the credit of the party having made the same, and be a release to said party of the amount of the debt due by them to the State of Tennessee." The Comptroller of the State was also required to open and keep a separate account with each company, charging it with the total amount of bonds originally issued to such company, and crediting it with the amount of the sinking fund paid. It was also made his duty to furnish to the Treasurer of State a statement of the amount due by each company on the first days of June and December in every year, "that he may know how much interest each company has to pay," that is to say, "as now provided by law, on the amount of bonds unpaid at the time said interest falls due, and not on the original amount issued to * * * said company." Act of 1860, § 9.

While it is true that neither the Act of 1856 nor that of 1860 can change any contracts the companies may have made with bondholders under the Act of 1852 before their passage, they may be resorted to in aid of construction to show what had been the legislative understanding for a long series of years, of the meaning of the words "payment of said bonds and the accruing interest thereon," as used in the original Act.

The provision of section 7 is that the company shall pay the bonds purchased into the State treasury, and that for the purchased bonds a receipt shall be given and a credit allowed, as between the State and the company, of the bonds issued. Thus the company was required to make a payment to the State, and for the payment the State was to give a credit on the bonds. This clearly implies that the loan of the bonds was to create a debt on the bonds by the company to the State, and that this debt was to be discharged *pro tanto* on the payment annually into the state treasury of the amount required by the sinking fund section. If there were nothing else in the statute, no one would doubt that the payment of the bonds which the company was required to make was a payment to the State for the bonds at the [697] times and in the manner provided.

It is contended, however, that, as the credit to be secured by these payments was only "as between the State and said company," the liability of the company to the bondholders is not affected by what may be done by and with the State. This would be true if there were any such liability to the bondholders, but the very point to which our inquiries are now directed is as to whether or not that liability exists. The phrase relied on and quoted above is undoubtedly suggestive of some other liability of the company on the bonds than one to the State, but it does not of itself create such a liability. If it exists at all, it must be by virtue of some other provision of the statute. As has already been seen, there is but one debt, and whatever pays that debt cancels all the obligations of the company upon the bonds. Whenever, therefore, it appears that payment of the bonds must be made to one, the idea of a debt on the bonds to another is excluded. Here a payment to the State is absolutely required. This obligation to pay is express, and has not been left to implication. The provision is that the sinking fund bonds must be bought and paid in at the appointed times and to the prescribed amount. If this is not done, the payment is to be enforced by putting the railroad of the company into the hands of a receiver, and running and managing it until the requisite amount of money is realized by the State from the earnings. Under the Act of 1856 the payments were required to be made in money, and in case of default proceedings for foreclosure and sale were to be instituted to collect the amount to be paid, as in cases of nonpayment of bonds at maturity. If the statutes of 1852 and 1856 stood alone, it would be clear to our minds that payments into the sinking fund were to be treated as a release *pro tanto* of all the liability of the company on, or on account of, the bonds. But the Act of 1860 shows, beyond all question, that such was the legislative understanding at that time of the operation of this provision of the original Act. It is there declared, in positive language, that by the loan of the bonds a debt [698] was incurred by the company to the State, and that payments to the sinking fund should release and discharge the companies *pro tanto* from their liability on that debt.

It is argued, however, that as these payments under all the statutes were to be held and used by the State as a sinking fund for the ultimate redemption of the issued bonds themselves from the several holders thereof, the obligation of the company to pay the bonds would not be discharged in that way; and some remarks of this court in the *Sinking Fund Cases*, 99 U. S., 725 [Bk. 25, L. ed. 503], are cited as authority to that effect. The decision in that case was that the contributions to the sinking fund then under consideration did not pay the debts of

the several companies by which the contributions were made, because that fund was established, not to secure the payment of the bonds of the United States which had been lent to the companies, but the repayment to the United States, in the manner and at the time required by law, of "the amount of said bonds so issued and delivered to said company, together with the interest thereon which shall have been paid by the United States." But here the sinking fund is to be held and used by the State, not to discharge the debt of the company to the State, but that of the State to its bondholders. It was established, not to secure the State, but to enable the State to pay its own debts at maturity. In this way all payments made by the companies to the State on account of the principal of the bonds were set apart and laid by under investment, so that at the appointed time they might be used by the State to redeem its own obligations. The fund in the treasury belonged to the State, and was not in any manner subject to the control of the company, or to be used to pay its debt. That debt was discharged by the payments which under the law were put into the fund. All payments out of the sinking fund were to be made by the State on its own debts and not on the debt of the company. A sinking fund may be, and generally is, intended as a cumulative security for the payment of the debt with which it is connected. In this case the debt to which it belongs is that of the State, and not that of the company, which was paid so as to furnish the State with the means to create such a fund.

Reference was made in the argument to the way in which, under the Act of 1852, and perhaps that of 1856, the sinking fund was to be kept and invested, and it was urged that the [699] fund must have been intended as security for the payment of the bonds to the bondholders by the company, because if a bond issued to a particular company was brought by that company and paid into the fund, it was canceled, while all other bonds were kept alive to be held and used by the State to take up at maturity the bonds issued to the company which had not been so paid in. The argument seems to be, that, as the purchase of a bond issued to a particular company, and its payment into the fund by that company, would of itself be a payment of that bond by the company both to the State and the holder, the special provision for the cancellation of such a bond, while others are to be kept alive, is indicative of a purpose not to cancel the obligation of the company under the statute until the company had not only provided the State with the means to take up all the other outstanding bonds, but until the State had itself performed its own obligations and actually taken them up. This is undoubtedly a circumstance to be considered in determining what the payment was which the State intended the company should make, and for the security of which the lien was created; but it is not to our minds enough to overcome the many provisions found in the other parts of the statute, which so clearly show that there was to be but one creditor of the company on account of the contemplated loans of the bonds, and that creditor the State. Whatever, therefore, satisfies that creditor, under the law, satisfies the debt. We cannot accede to the proposition, so muc relied on by the counsel for the bondholder that on putting out the bonds the company o cupied towards the bondholder the relation c principal debtor, and the State that of suret only, until the company made the prescribe payments to the State, and that after these pa ments were made the relations of the partie changed, so that thereafter the State was pri cipal and the company a surety only. The del of the company, whatever it was, continue the same in its relation to all the parties fro the time it was created until it was paid. The is nothing in the statute which contemplat any change in the obligations of the parties t wards each other There may have been r good reason for keeping some of the state s curities paid into the fund alive, and directi that others should be canceled, inasmuch as s were to represent State debts, for which t State was equally bound; but that was the wi of the Legislature, and it was consequently enacted. Afterwards this policy was change and all State bonds, of whatever character, we canceled by mutilation as soon as they we paid in, or bought for the sinking fund. A of 1860. In this way all danger of a misappr priation of securities in the sinking fund w avoided. As bonds issued to railroad co panies under the Act could alone be used f the investment of the fund under this Act, the cancellation did not affect the liability of t several companies thereon to the State, becau that was to continue until payment was ma to the State by the company to which it w issued. Payment by the State to the bon holder did not discharge the liability of t company on the bond so paid.

The provision for a foreclosure in case of t failure of the company to pay at maturity t bonds issued to it is found in section 6, whi makes it the duty of the Governor, when suc default occurs, to notify the Attorney-Gener who must thereupon file a bill against the co pany in the name of the State of Tennessee the Chancery or Circuit Court of the pro county. Upon the filing of this bill, the co is authorized to make such judicial orders, cluding the appointment of a receiver, an sale of the road and all the property of t company, as may be necessary and proper secure the payment of the bonds, with the terest thereon, and to indemnify the St against loss by their issue. We see no spec significance, so far as the present question concerned, in the direction to the Attorn General to file the bill in the name of the Sta Without such a direction there might be do whether the suit to be instituted should be the name of the Attorney-General or of the St It was probably unimportant whether the form or the other was adopted, for, in event, the object would be to enforce the ligation of the company and collect the mo which was due. The Legislature, howe saw fit to avoid all doubt on this subject, to direct that the proceeding should be in name of the State. Taken by itself, theref this section adds little, if anything, to the o evidence in the statute as to who the cred was for whose benefit the money was to be lected. The proceeds of the foreclosure

[illegible] to pay the bonds, within the meaning of the statute, and also to indemnify the State against loss. To whom the payment was to be made must be determined by looking elsewhere. There is nothing to show that the author of the statute had the security of the bondholder in his mind when drafting this section [illegible] than when drafting the others. Payment of the bonds meant in this section what it did in the others; no more, no less. It is true that here payment of the bonds and indemnity to the State are both spoken of, but payment of the bonds through a proceeding for foreclosure might not be enough to indemnify the State against all loss incident to the loan of the bonds. There might be expenses incurred in the foreclosure which would not be reimbursed by a simple payment of the amount of the bonds. Indemnity of this and a like character was evidently the purpose of this particular provision in the section. It was, in the language of counsel for the bondholders, to secure the State against "a money loss * * * in the way of counsel charges, or receiver's charges, or betterment expenses, or debts not included in the words 'to secure the payment of said bonds.'"

Proceedings for foreclosure before the maturity of the bonds, and the liability of guilty stockholders in case of issues of bonds obtained by fraud, or contrary to the provisions of the Act, are provided for in section 13. This section makes it the duty of the Governor, as soon as he receives reliable information of such fraud or irregularity, to notify the Attorney-General, who must at once institute a suit in the Circuit or Chancery Court of the proper county. In such a suit the court is given authority to order a sale of the road, and the property and assets of the company, or so much thereof as may be necessary. When such a sale is made, the proceeds are to be paid into the treasury and invested by the comptroller in "the same manner, creating a sinking fund, as provided in the seventh section." The guilty company is also made to forfeit all its rights and privileges under the Act, and its guilty stockholders are made individually liable "for the payment of the bonds so fraudulently obtained by such company, and for all other losses that may fall upon the State in consequence of the commission of any other fraud by such company." This is manifestly for the benefit of the State alone. The bondholder can have no direct interest in such a proceeding. His rights are in no way affected by the fraud of the company in obtaining the bond he owns. The State is his debtor, and he has no right to call for the money owing to him until the maturity of the bond, which will not be until thirty or forty years after the commission of the fraud which gave the State the right to call at once on the company and its implicated stockholders for the payment of the bond he holds. It will hardly be contended that it was intended to make the stockholder individually liable to the bondholder, yet his liability is for "the payment of the bonds" just as is that of the company. If in one case payment of the bonds does not mean payment to the bondholder, it does not in the other case. The language of the Act is the same in both cases, and there is nothing [illegible] to show that as to one it meant one thing, and as to the other something else. The evident purpose of this section was to give the State the power, immediately on the discovery of a fraud, to demand of the company "payment of the bonds," that is, payment of an amount of money equal to that called for by the bonds, and a remedy at once against the company and its implicated stockholders for the enforcement of such a payment in case it was not voluntarily made. The money when collected was to be set apart and invested "as a sinking fund for the payment of the bonds" by the State.

By section 14 it was made the duty of the Governor to appoint an agent for the State, to attend all sales, made either under section 6 or section 13, to protect the interest of the State, and, if necessary for that purpose, to buy the road or property in the name of the State. If bought, it was to be put in the hands of a receiver to manage and run in the way provided in section 5, until the next meeting of the General Assembly. The receiver was to settle his accounts with the comptroller semi-annually, but no directions were given in relation to the manner in which the net earnings were to be used in case of a sale under section 6. He was to take possession of "the said road and property and use the same as provided for in the fifth section," and, on the settlement of his accounts with the comptroller, the balances remaining in his hands would necessarily go into the treasury, there to be dealt with as the General Assembly should direct. If a purchase was made by the State under section 13, the presumption would be that the earnings must go into the sinking fund, as such was the provision made for the proceeds of a sale to another purchaser, but all that would necessarily be under the control of the General Assembly when it met. [703]

Having thus gone over the other sections, we are prepared to consider section 12, in its bearing on the question which is now under discussion. This section reserves to the State in express terms the right to enact "all such laws as may be deemed necessary to protect the interest of the State, and to secure the State against all loss in consequence of the issuance of bonds under the provisions of this Act, but in such manner as not to impair the vested rights of the stockholders of the companies." This reservation includes, and was undoubtedly intended to include, full power in the State, as against every one except stockholders, to do whatever might be deemed necessary by the Legislature, with the lien reserved for the security of the obligations assumed by the companies. Nothing is said about bondholders. It will, of course, be conceded that if bondholders actually had any vested right or interest as against the State in the security created by the statute, nothing could be done under this section by the State to impair that right. But the same was probably true of stockholders, and the special care taken to preserve the rights of stockholders, without referring to bondholders at all, raises a strong presumption that it was never intended to vest in them any right which would interfere in the remotest degree with the free exercise of all the power of the State to deal with the borrowing companies in reference to the bonds and the security created therefor, [704]

just as might, under any circumstances that should arise, be deemed most for the interest of the State and the companies, they being the only parties to the contract of the companies that were to be at all interested in what was to be done. As has been seen, the bonds to be issued were on their face to bind only the State. At that time repudiation of state faith was not thought of. No purchaser of state bonds ever asked whether anything else than the faith of a State was pledged for their payment promptly at maturity. Repudiation was looked upon as dishonorable, and something that would never occur. Security to the State against loss by the loans of its bonds which were provided for must, therefore, be presumed to have been the sole purpose of the liens which were to be created on the issue of the bonds. Bondholders were never thought of in this connection, for they had the security of the faith of the State and could not have been supposed to look for anything else. Hence this reservation of power by the State was made broad enough to allow the State to deal with the securities which were taken from the companies at its own discretion, and in any way that might be deemed just. No such power could be exercised if the bondholders held an interest in the securities adverse to the State. Under these circumstances this section is to be looked upon as excluding any such possible intent, and operating as a standing notice to all who might, from time to time, become the holders of any of the lent bonds, that the payment of the bonds, and the interest thereon, which the several companies bound themselves for, was to be made to the State, and not to them, and that the security which was taken by the State was for the performance of this obligation, and might be dealt with by the State in any manner its own Legislature should direct or provide. This reservation of power is entirely inconsistent with the idea of a debt from the company to the bondholders on account of the bonds; and, if there could have been any doubt on this subject without section 12, there certainly is none with it.

This disposes of all the cases; for the State, in the exercise of its legislative discretion, has released each of the companies whose property [705] is involved in these suits from all its obligations growing out of the original loans, and has canceled the liens created for their security. The companies have either voluntarily paid their debts to the satisfaction of the State, or the State has foreclosed the lien which was reserved, and sold the property, free of that incumbrance, either to the present defendants, or to those under whom they claim.

Some reliance was placed, in the argument for the bondholders, upon the legislative history of the passage of the Act of 1852, which showed an offer and rejection of certain proposed amendments, and also upon the construction which had been put on the Act by certain state officers of high authority in the administration of the public affairs, but we have deemed it unnecessary to add to the length of this opinion by particular reference to that branch of the argument, because, as we think, the statute contains within itself unmistakable evidence of its meaning. The same is true of the reference which has been made to other statutes of Tennessee, and to statutes of the States and of the United States upon the sam general subject. This statute differs in it phraseology from some, and perhaps all, o the others, but its own language furnishes a the aid which is required for its true interpre tation.

The decree in each of these cases is affirmed.

Mr. Justice **Harlan,** dissenting:

I am of opinion that, while the object of th statutes in question was to protect the Stat against liability, they were also designed t create a lien for the payment of the bonds then selves, by whomsoever held. That lien, so fa as the holders of bonds were concerned, coul not be discharged, except by payment of th interest and principal, according to the term of the bonds, and in the mode prescribed b the statute under which they were issued. Fo these reasons, I am compelled to withhold m assent to the opinion and judgment.

Mr. Justice **Matthews** and *Mr. Justi* **Blatchford** took no part in these decision

True copy. Test:
James H. McKenney, Clerk, Sup. Court U.

FRANCIS DODGE ET AL., *Appts.*,
v.
THOMAS KNOWLES.

(See S. C., Reporter's ed., 436–439.)

Practice—appeal bond; when taken—citation jurisdiction.

1. Where, upon the face of the record, the val of the property involved is sufficient to give t court jurisdiction, and the appellee declines to a pear in this court, it is too late to present extrin evidence of the actual value of the property upo motion to set aside the judgment.
2. The giving of an appeal bond is not essential the taking of an appeal, though it is essential to prosecution.
3. The judicial allowance of an appeal in op court at the term in which the decree has been re dered, is sufficient notice of the taking of an a peal.
4. The citation is for the purpose of notice. Wh omitted, a motion to dismiss will not be grant until an opportunity to give the notice has be given.
5. An order of this court, served upon the app lee, to appear and argue the cause if he sees fit, itself the legal equivalent of a citation.

[No. 156.]

Motion to set aside filed Apr. 20, 1885. Su mitted Apr. 24, 1885. Decided May 4, 1885.

APPEAL from the Supreme Court of t District of Columbia.

On motion to set aside the judgment ente April 13, 1885, and to dismiss the appeal.

The history and facts of the case appear the opinion of the court, and in the opinion the merits, *ante*, 144.

Mr. **Charles M. Matthews,** for appell in support of motion.

Mr. **J. Holdsworth Gordon,** for app lants, *contra.*

Mr. Chief Justice **Waite** delivered the op ion of the court;

The facts on which this motion rests these:

The final decree in the cause was rende February 23, 1881. At the foot of the decr

[illegible] part of the original entry, is the follow-[illegible]

"From this decree the defendants pray an [illegible] to the Supreme Court of the United [illegible], which appeal is hereby allowed.

[illegible] order of the court: D. K. Cartter,
Ch'f Just."

[illegible] upon the appeal was not taken until [illegible] 5, 1881, which was after the term [illegible] the decree was rendered. No citation [illegible] served on the appellee, but the appeal was [illegible] docketed in this court November 11, 1881. [illegible] was filed in its regular order for the [illegible] January 9, 1885, and on that day sub-[illegible] printed brief by the counsel for the [illegible], no one appearing for the appellee. [illegible] of January, the court, of its own [illegible], ordered "that this cause be reargued, [illegible] or on printed briefs, to be filed on [illegible] the first Monday in March next." [illegible] purpose of this order was to allow the ap-[illegible] opportunity to be heard. A copy was [illegible] on him personally on or about January [illegible] he wrote the clerk, under date of Feb-[illegible], as follows:

"[illegible] been advised by counsel that no ap-[illegible] has ever been perfected to the Supreme [illegible] of the U. S. in the case of which you [illegible] I would inform you that I respectfully de-[illegible] to authorize an appearance to be entered [illegible] court for me in that case for any purpose [illegible]."

[illegible] March 2, the appellants again submitted [illegible] on a printed brief, no one appearing [illegible] appellee. The case was taken under [illegible] and held until April 13, when the [illegible] of the court below was reversed, and an [illegible] made to that effect. On the of 20th April, [illegible] appellee came, and entering an appearance [illegible] for the purposes of his motion, moved to [illegible] and annul the judgment of reversal, [illegible] to dismiss the appeal (1) because no cita-[illegible] had been issued or served, and (2) because [illegible] of the matter in dispute did not ex-[illegible].

[illegible] the last ground of the motion, it is suf-[illegible] to say that the decree appealed from was [illegible] than $2,500, and it charged the prop-[illegible] of the appellants with the full amount. [illegible] the face of the record, therefore, our ju-[illegible] is complete. Such being the case, we [illegible] willing to consider extrinsic evidence at [illegible] day for the purpose of ascertaining [illegible] the actual value of the property from [illegible] the collection must be made is sufficient [illegible] the whole debt or not.

[illegible] allowance of the appeal by the court [illegible] a session and acting judicially at the [illegible] which the decree was rendered, consti-[illegible] a valid appeal, of which the appellee was [illegible] to law to take notice. The docketing [illegible] in time, perfected the jurisdiction of this court. The giving of the bond was not essential to the taking, though it was to the due prosecution, of the appeal. It was furnished and accepted in this case before the cause was docketed here. Had this not been done we would have given the appellants leave to supply the omission before dismissing the appeal. All this was decided, on full consideration, in *Peugh* v. *Davis*, 110 U.S., 227 [Bk. 28, L. ed. 127].

It has also been decided that if an appeal was allowed in open court during the term in which the decree was rendered a citation was required, as matter of procedure, if the security was not furnished until after the term; but in *R. R. Co.* v. *Blair*, 100 U. S., 662 [Bk. 25, L. ed. 587], it was said: "Still, an appeal, otherwise regular, would not probably be dismissed absolutely for want of a citation, if it appeared, by clear and unmistakable evidence, outside of the record, that the allowance was made in open court at the proper term, and that the appellee had actual notice of what had been done."

The citation is intended as notice to the appellee that an appeal has been taken and will be duly prosecuted. No special form is prescribed. The purpose is notice, so that the appellee may appear and be heard. The judicial allowance of an appeal in open court at the term in which the decree has been rendered is sufficient notice of the taking of an appeal. Security is only for the due prosecution of the appeal. The citation, if security is taken out of court, or after the term, is only necessary to show that the appeal which was allowed in term has not been abandoned by the failure to furnish the security before the adjournment. It is not jurisdictional. Its only purpose is notice. If by accident it has been omitted, a motion to dismiss an appeal allowed in open court, and at the proper term, will never be granted until an opportunity to give the requisite notice has been furnished, and this, whether the motion was made after the expiration of two years from the rendition of the decree or before. Here, before the cause came on for final hearing notice was given the appellee, by order of the court, that the appeal taken in open court was being prosecuted, and that a reargument at an appointed time was desired. In response to this notice, the appellee declined to appear, not because he had not been served with a citation, but because no appeal had been perfected. Had he complained of a want of citation, the omission might have been supplied if, on consideration, it should have been deemed necessary. But the order which was served on him to appear and argue the cause if he saw fit, was of itself the legal equivalent of a citation for all the purposes of this appeal.

[439]

The motions are denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

END OF VOL. 114.

NOTE.

The Extra Annotation here following is arranged in the order of the cases in the [illegible] reporter's volume which precede it. At the upper outside corner of the page is [illegible] the volume and pages of the cases to which the Annotation refers. After the official [illegible] volume and page in the heading of each case is given book and page of the [illegible] edition, the abbreviation **L** being used for Lawyers Edition, or Law. Ed. for brev- [illegible] is throughout in the duplicate citations of cases from the Supreme Court.

ABBREVIATIONS.

F. C. appended to a citation from the regular reports of the U. S. Circuit and Dis- [illegible] refers to the series of reprints called the Federal Cases and gives, as its [illegible] do and recommend, the number of the case in that series.

Fed. Cas. is used when the case is contained in the series of Federal Cases but is [illegible] in the regular series of U. S. Circuit and District Court Reports, and the [illegible] of such cases is to the volume and page of Fed. Cas., not to the number of [illegible]

Fed. or **Fed. Rep.** refers to the well known series Federal Reporter, containing re- [illegible] Circuit and District Court decisions since 1880.

L. R. A. will be readily recognized as the abbreviation for the Lawyers Reports [illegible] and particular attention should be given to these citations, as in a large [illegible] of cases the citing case will be found accompanied by a note on its principal [illegible] exhaustive of the authorities thereon.

Am. Dec., **Am. Rep.** and **Am. St. Rep.** will be readily recognized as the abbreviations for the well known trinity of selected case reports, The American Decisions, [illegible] Reports and American State Reports.

Pennsylvania State Reports (**Pa. St.**) The New Jersey Law Reports (**N. J. L.**) and [illegible] Reports (**N. J. Eq.**) are distinguished by the number of the series, not by the [illegible] the reporter, while the North and South Carolina Reports, Law and Equity, are [illegible] the name of the reporter where the reports are so titled and it has been the [illegible] custom.

[illegible] citations are given to the National Reporter System where cases are therein [illegible] and to the Reporter System alone of cases not, at the date of the preparation [illegible] officially reported. The usual abbreviations are used, as follows:

At. Atlantic Reporter,	**So.** Southern Reporter,
Pac. Pacific Reporter,	**S. E.** Southeastern Reporter,
N. E. Northeastern Reporter,	**S. W.** Southwestern Reporter,
N. W. Northwestern Reporter,	**S. Ct.** Supreme Court Reporter.

It is [illegible] that in all other respects the abbreviations used are clear and familiar to [illegible] are accustomed to the use of legal reports and text-books.

EDITOR.

CXIV UNITED STATES.

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114 U. S. 1–14, 29 L. 76. THOMPSON v. BOISSELIER.

Patent.— Carr improvement in water-closets, held not patentable invention, pp. 1–13.

Patents.— It is not enough that a thing be new in shape or form, but it must amount to an invention or discovery, p. 11.

Approved in Gardner v. Herz, 118 U. S. 191, 30 L. 163, 6 S. Ct. 1033, and Vulcanized Fiber Co. v. Taylor, 49 Fed. 745, both holding improved chair seats not patentable; Pomace-Holder Co. v. Ferguson, 119 U. S. 338, 30 L. 408, 7 S. Ct. 384, patent for improvement in cheese formers for cider presses, held void; Thatcher Heating Co. v. Burtis, 121 U. S. 295, 30 L. 946, 7 S. Ct. 1039, patent of fireplace heater void for want of novelty; Hendy v. Miners' Iron Works, 127 U. S. 375, 32 L. 209, 8 S. Ct. 1278, holding mere putting of rollers under article, to make it movable, not patentable; Watson v. Cincinnati Ry., 132 U. S. 167, 33 L. 298, 10 S. Ct. 47, holding new combination of rigid and flexible grain doors, did not involve invention; Hill v. Wooster, 132 U. S. 701, 33 L. 506, 10 S. Ct. 231, refusing patent for "cabinet creamery;" Howe Mach. Co. v. National Co., 134 U. S. 397, 33 L. 968, 10 S. Ct. 573, annulling Spring lathe patent; Consolidated Roller-Mill Co. v. Walker, 138 U. S. 182, 34 L. 923, 11 S. Ct. 295, affirming S. C., 43 Fed. 579, improvement in roller-grinding mills held not patentable; Patent Clothing Co. v. Glover, 141 U. S. 563, 35 L. 859, 12 S. Ct. 80, holding patent for improvement in pantaloons, void; Lovell Mfg. Co. v. Cary, 147 U. S. 636, 37 L. 312, 13 S. Ct. 477, patent for tempering springs not involving invention.

The following also hold patents invalid for want of novelty: Hartford Woven-Wire, etc., Co. v. Peerless Wire, etc., Co., 23 Blatchf. 233, 23 Fed. 591, woven-wire fabrics; Fond du Lac Co. v. May, 137 U. S. 406, 34 L. 718, 11 S. Ct. 102, May's prison patent; J. L. Mott Iron Works v. Cassidy, 24 Blatchf. 290, 31 Fed. 48, patent for water-closet bowls; Scott Mfg. Co. v. Sayre, 26 Fed. 154, improvement in ice-creepers; Calkins v. Oshkosh Carriage Co., 27 Fed. 298, patent for carriage body; Consolidated Fruit-Jar Co. v. Bellaire, etc., Co., 28 Fed. 94, patent for fruit-jar caps; Leonard v. Lovell, 29 Fed. 314, patent for improvement in refrigerators; Puetz v. Bransford, 31 Fed. 462, holding two patents for a machine identical, and both covered by an assignment; Landesmann v. Jonasson, 32 Fed. 591, patent for ladies' cloaks; Brahn v. Ramapo Iron Works, 35 Fed.

68, claim for improvements in switch-stands; Williams Mfg. Co. v. Franklin, 41 Fed. 395, patent for stave basket; Heine Safety-Boiler Co. v. Anheuser, etc., Assn., 43 Fed. 790, limiting claim for improvement in steam generators; Simmonds v. Morrison, 44 Fed. 761, patent for dash-rail; American Road, etc., Co. v. Pennock, etc., Co., 45 Fed. 255, improvement in road machines; Johnson Co. v. Pacific Rolling, etc., Co., 47 Fed. 589, citing authorities, and holding patent for rails for street railroads void; Haughey v. Lee, 48 Fed. 384, patent for "striker;" Johnson Co. v. Tidewater Steel Works, 50 Fed. 94, claim for method of rolling rails; Bromley Bros. Carpet Co. v. Stewart, 51 Fed. 914, claim for power loom; Deere v. J. I. Case Plow Works, 56 Fed. 844, 9 U. S. App. 567, claims for corn cultivator; Bowman v. De Grauw, 60 Fed. 911, claim for method of making flags; Bonnell v. Stoll, 61 Fed. 768, 17 U. S. App. 543, improvement in bed bottoms; Brunswick, etc., Co. v. Phelan, etc., Co., 76 Fed. 979, patent for pool-ball frames; Klein v. Seattle, 77 Fed. 204, 44 U. S. App. 741, patent for pins for holding insulators; Olmsted v. Andrews, 77 Fed. 840, 46 U. S. App. 608, patent for map case; Schwarzwælder & Co. v. Detroit, 77 Fed. 891, improvement in folding-chairs; Interior Lumber Co. v. Perkins, 80 Fed. 531, 55 U. S. App. 95, claims for improvements in shingle machine; J. J. Warren Co. v. Rosenblatt, 80 Fed. 542, 53 U. S. App. 240, luggage-carriage for cycles; Tiemann v. Kraatz, 85 Fed. 439, 56 U. S. App. 332, case for exhibiting decorative art; Kelly v. Clow, 89 Fed. 303, 60 U. S. App. 364, improvement in water-closets; Antisdel v. Chicago Hotel-Cabinet Co., 89 Fed. 313, 60 U. S. App. 588, patent for hotel cabinet; Chuse v. Ide, 89 Fed. 497, 60 U. S. App. 646, engine frames and lubricating devices; Christy v. Hygeia, etc., Saddle Co., 92 Fed. 970, patent for bicycle saddle; Johnston v. Woodbury, 96 Fed. 424, improvement in ore concentrators. Cited generally in Celluloid Mfg. Co. v. Comstock, etc., Co., 27 Fed. 360.

Distinguished in Hoe v. Kahler, 23 Blatchf. 362, 369, 25 Fed. 277, 282, holding patent for "improvement in printing press" involved invention.

Miscellaneous.— Miscited in Kates v. Atlanta Baggage, etc., Co., 107 Ga. 649, 34 S. E. 377.

Patents.— Bartholomew improved water-closet patent, construed and limited, pp. 13, 14.

114 U. S. 15–47, 29 L. 47, MURPHY v. RAMSEY.

Appeal and error.— Action at law not tried by jury should be brought to Supreme Court by appeal, p. 35.

Elections.— Utah commissioners, under act of 1882, were not authorized to prescribe rules for registration officers, or qualification of voters, but only to appoint election officers, canvass returns and issue certificates of election, p. 36.

Distinguished in Bloomer v. Todd, 3 Wash. Ter. 621, 19 Pac. 142, 1 L. R. A. 117, holding legislative act of territory did not confer suffrage upon women.

Elections.— Bigamist or polygamist, within meaning of § 8, act of March 22, 1882, is one who, having become husband of two or more wives, maintains that relation when he offers to be registered as a voter, without reference to cohabitation, which constitutes punishable crime, pp. 41, 42.

Approved in Cannon v. United States, 116 U. S. 72, 29 L. 567, 6 S. Ct. 287, affirming S. C., 4 Utah, 142, 144, 7 Pac. 382, 383, where defendant was convicted of bigamy; Davis v. Beason, 133 U. S. 344, 33 L. 640, 10 S. Ct. 301, prosecution for violation of provisions of act of 1882; Innis v. Bolton, 2 Idaho, 415, 417, 17 Pac. 268, 269, holding territorial statute valid, disfranchising bigamists and polygamists; United States v. Simpson, 4 Utah, 229, 7 Pac. 258, holding marriage established without proof of cohabitation; Wenner v. Smith, 4 Utah, 243, 9 Pac. 297, holding defendant a polygamist and not entitled to hold office; dissenting opinions in United States v. Langford, 2 Idaho, 526, 21 Pac. 411, majority rejecting evidence of general repute of bigamous relations; United States v. Musser, 4 Utah, 175, 7 Pac. 404, indictment for unlawful cohabitation.

Constitutional law.— Act excluding bigamists from voting in Utah is not ex post facto, because not seeking by disfranchisement to punish for crime, and not retrospective; nor does it amount to an unlawful mode of prosecution for crime, pp. 42, 43.

Approved in Garrett v. Weinberg, 54 S. C. 144, 31 S. E. 343, holding act disqualifying as juror one previously convicted of crime, not ex post facto. See explanatory note in 37 Am. St. Rep. 590.

Territories.— People of United States have sovereign power over territories, and Congress may take from their inhabitants any right of suffrage previously conferred, or at any time modify or abridge it, pp. 44, 45.

Followed in United States v. Kagama, 118 U. S. 380, 30 L. 230, 6 S. Ct. 1112, holding act of Congress valid, giving territorial courts jurisdiction of crimes committed by Indians; Mormon Church v. United States, 136 U. S. 43, 34 L. 491, 10 S. Ct. 803, holding Congress had power to repeal charter of Mormon Church of territory of Utah; Boyd v. Thayer, 143 U. S. 169, 36 L. 112, 12 S. Ct. 385, construing naturalization laws of Congress for territory of Nebraska; Shively v. Bowlby, 152 U. S. 48, 38 L. 349, 14 S. Ct. 566, reviewing authorities, and holding Congress has power to grant lands below high-water mark of navigable river in territory; Thompson v. Utah, 170 U. S. 343, 42 L. 1066, 18 S. Ct. 622, provisions of Federal Constitution, relating to criminal prosecutions, apply to territories; Endleman v. United States, 86 Fed. 459, 57 U. S. App. 7, holding Congress could regulate sale of liquors in Alaska; Innis v. Bolton, 2 Idaho,

[illegible], 17 Pac. 268, holding territorial legislature, under authority of Congress, could disfranchise voters of certain class; Shepherd v. Grimmett, 2 Idaho, 1129, 31 Pac. 795, holding territorial law prescribing "test oath" for voters, valid; dissenting opinion in Morris v. Powell, 125 Ind. 299, 25 N. E. 229, 9 L. R. A. 334, majority holding act invalid requiring additional qualifications of voter absenting himself from State for certain period; Ferguson v. Allen, 7 Utah, [illegible], 26 Pac. 574, generally; dissenting opinion in Mackey v. Ensminger, 11 Utah, 170, 39 Pac. 546, arguendo. See 97 Am. Dec. [illegible], note.

Election officers, in exacting oath from voters required by statute, are required to exercise diligence and good faith in their inquiries, and are responsible in damages for rejection made without reasonable cause, or maliciously, pp. 46, 47.

114 U. S. 47-51, 29 L. 61, BOHALL v. DILLA.

Pleading.— California code permits an equitable defense by way of cross-complaint, in answer to an action for possession of lands, p. 50.

Followed in South End Min. Co. v. Tinney, 22 Nev. 27, 35 Pac. [illegible], answer setting up fraud in securing patent, allowed in an action of ejectment.

Public lands.— To charge patentee as trustee, claimant must show himself entitled to the patent and that it was erroneously refused him by land department. It is not sufficient to show possible error in adjudging title to patentee, pp. 50-51.

Followed in Sparks v. Pierce, 115 U. S. 418, 29 L. 430, 6 S. Ct. 105, holding mere occupant of public lands without title not entitled to compensation for improvements; Lee v. Johnson, 116 U. S. 50, 29 L. 571, 6 S. Ct. 249, holding alleged fraud in securing patent could not avail claimant; American Mtge. Co. v. Hopper, 64 Fed. 557, 29 C. C. App. 12, and California Redwood Co. v. Litle, 79 Fed. 856, both holding burden upon plaintiff to show that he was entitled to patent before patentee; Carter v. Thompson, 65 Fed. 331, holding townsite patent could be set aside only by direct proceeding by government; Savage v. Worsham, 66 Fed. 853, protecting patentee against alleged homestead entry; Savage v. Worsham, 72 Fed. 602, protecting patentee from claimed preference right of entry; Driver v. Evans, 47 Ark. 300, 1 S. W. 519, holding plaintiff bound to prove title derived from State; De Toro v. Robinson, 91 Cal. 377, 27 Pac. [illegible], alleged fraudulent extension of patent; Janes v. Wilkinson, 2 Kan. App. 369, 42 Pac. 738, reviewing authorities, and holding mere naked possessor could not attack voidable patent; Bangs v. Stephenson, 68 Mich. 669, 30 N. W. 320, where bill failed to aver good faith and compliance with statute; Horsky v. Moran, 21 Mont. 348, 53 Pac. 1065, holding townsite patentee entitled over locator of placer

claim; South End Min. Co. v. Tinney, 22 Nev. 33, 35 Pac. 93 (see dissenting opinion in 22 Nev. 57, 35 Pac. 102), majority holding plaintiff failed to show location superior to that of defendant; Parker v. Lynch, 7 Okl. 660, 56 Pac. 1091, holding one merely offering to contest homestead entry cannot maintain action against patentee; South, etc., Ala. R. R. v. Gilliam, 85 Ala. 175, 4 So. 695, and Sanford v. Sanford, 19 Or. 5, 13 Pac. 603, where evidence established fraud in patentee and title in plaintiff; American Mtge. Co. v. Hopper, 56 Fed. 72, and Chism v. Price, 54 Ark. 258, 15 S. W. 885, arguendo; Monroe Cattle Co. v. Becker, 147 U. S. 57, 37 L. 77, 13 S. Ct. 221, without particular application.

Modified in Duluth, etc., R. R. v. Roy, 173 U. S. 590, 19 S. Ct. 550, holding one entitled to complete his claim against another holding patent obtained by mistake.

Public lands.— To obtain patent as pre-emptioner, it is necessary to prove continuous and personal residence after filing of declaratory statement, p. 51.

Approved in Kirby v. Lewis, 39 Fed. 72, holding actual occupancy barred settlement by another; Northern Pac. R. Co. v. Amacker, 53 Fed. 53, holding land abandoned by pre-emption claimant; Duncan v. Newcomer, 9 S. Dak. 379, 69 N. W. 582, holding land not taxable until settler had a perfect equity.

Public lands.— Pre-emption settler may be excused for temporary absences caused by well-founded apprehensions of violence, sickness, epidemic, etc., p. 51.

114 U. S. 52-57, 29 L. 63, LOUISVILLE, ETC., R. R. v. IDE.

Removal of causes.— Suit against all defendants jointly, upon alleged joint contracts for transportation, is not removable by one defendant, who makes separate defense, since it does not introduce separate controversy, pp. 55, 56.

Approved and followed in Putnam v. Ingraham, 114 U. S. 59, 29 L. 66, 5 S. Ct. 747, and Brooks v. Clark, 119 U. S. 511, 30 L. 485, 7 S. Ct. 303, both holding partners jointly sued could not remove suit; St. Louis, etc., Ry. v. Wilson, 114 U. S. 62, 29 L. 67, 5 S. Ct. 739, and Weller v. J. B. Pace Tobacco Co., 32 Fed. 862, where actions to compel transfer of stock were held inseparable and not removable; Pirie v. Tœdt, 115 U. S. 42, 29 L. 332, 5 S. Ct. 1035, joint actions for malicious prosecution held inseparable. The following also hold controversy not removable: Crump v. Thurber, 115 U. S. 61, 29 L. 329, 5 S. Ct. 1156, and Rogers v. Van Nortwick, 45 Fed. 514, both suits to recover shares of stock; Starin v. New York, 115 U. S. 259, 29 L. 391, 6 S. Ct. 32, suit to restrain use of landing places by different companies; Sloane v. Anderson, 117 U. S. 278, 29 L. 900, 6 S. Ct. 732, action for wrongful seizure of property; Fidelity Ins. Co. v. Huntington, 117 U. S. 281, 29 L. 899, 6 S. Ct. 734, creditor's bill to

subject incumbered property to payment of judgment; Little v. Giles, 118 U. S. 601, 602, 30 L. 271, 7 S. Ct. 35, 36, and Rumsey v. Gill, 28 Fed. 771, both reviewing authorities, bills to quiet title, alleging conspiracy; Graves v. Corbin, 132 U. S. 588, 33 L. 468, 10 S. Ct. 262, citing authorities, bill to reach partnership property; Torrance v. Shedd, 144 U. S. 531, 36 L. 531, 12 S. Ct. 727, suit for partition; Merchants' Cotton-Press Co. v. North American Ins. Co., 151 U. S. 384, 38 L. 204, 14 S. Ct. 372, action by insurance companies against railroad, in nature of creditor's bill; Winnemans v. Edgington, 27 Fed. 326, and Sexton v. Seelye, 39 Fed. 705, both actions to recover personal property; Thompson v. Dixon, 28 Fed. 6, and Thurber v. Miller, 67 Fed. 373, 32 U. S. App. 209, both suits to foreclose mortgage; Hax v. Caspar, 31 Fed. 500, bill to set aside decree; Western Union Tel. Co. v. Brown, 32 Fed. 338, action on bond remanded under act of March, 1887; Anderson v. Appleton, 32 Fed. 52, action to establish will; Woodrum v. Clay, 33 Fed. 899, and Deere, etc., Co. v. Chicago, etc., Ry., 85 Fed. 881, actions for damages; Patchin v. Hunter, 38 Fed. 52, suit on note against partners; Kaiel v. Wylie, 38 Fed. 866, trespass on the case; Bissell v. Canada, etc., Ry., 39 Fed. 226, and Ames v. Chicago, etc., Ry., 39 Fed. 883, both actions to enforce lien and obtain priority; State v. Columbus, etc., R. Co., 48 Fed. 628, mandamus against railroads to compel them to lower grade; Fox v. Mackey, 60 Fed. 6, action in tort against directors, etc.; Barth v. Coler, 60 Fed. 468, 19 U. S. App. 646, to set aside deeds; In re The Jarnecke Ditch, 69 Fed. 170, petition to establish drain; Moore v. Los Angeles Iron, etc., Co., 89 Fed. 78, suit for damages against corporation and stockholders; National Docks Ry. v. Pennsylvania R. R., 52 N. J. Eq. 63, 28 Atl. 74, joint action against lessor and owner to establish right of way; Foundry Co. v. Howland, 99 N. C. 206, 6 Am. St. Rep. 517, 5 S. E. 767, action upon contract; Douglas v. Railroad, 106 N. C. 80, 10 S. E. 1052, suit by stockholder in resident corporation, against it and a non-resident corporation for relief.

Approved in Blacklock v. Small, 127 U. S. 105, 32 L. 73, 8 S. Ct. 1099, holding suit substantially between two defendants, residents of same State, not within Federal jurisdiction; Evans v. Durango Land, etc., Co., 80 Fed. 437, 49 U. S. App. 330, holding claim for continuing trespass stated but one cause of action; Hicklin v. Marco, 38 Fed. 556, 15 U. S. App. 55, dissenting opinion, majority holding party to foreclosure not indispensable, and jurisdiction, therefore, not defeated.

Distinguished in Chicago, etc., Ry. v. New York, etc., R. Co., 24 Fed. 517, holding plaintiff could not convert a several liability into joint, and defeat removal of cause; Beuttel v. Chicago, etc., Ry., 26 Fed. 51, holding action against railroad and engineer for personal injuries separable, and one defendant entitled to removal; Stanbrough v. Cook, 38 Fed. 373, 3 L. R. A. 402, holding action to recover realty, etc., separable as to defendant owners and tenants;

Bacon v. Felt, 38 Fed. 871, denying motion to remand in suit quiet title; Arrowsmith v. Nashville, etc., R. Co., 57 Fed. 169, ho ing plaintiff could not join defendant for sole purpose of defeati Federal jurisdiction; Fergason v. Chicago, etc., Ry., 63 Fed. 17 action against railroad and plaintiff's co-servants held separabl Garner v. Second Nat. Bank, 66 Fed. 371, where all defendants we non-residents, case held removable; Rich v. Gross, 29 Neb. 340, N. W. 468, removing distinct and separate cause of action, set in answer of one defendant.

Action.— Defendant has no right to say that an action shall several which plaintiff elects to make joint, although his separa defense may defeat joint recovery, p. 56.

Approved in Pirie v. Tvedt, 115 U. S. 42, 29 L. 332, 5 S. Ct. 103 holding defendants could not object to joint action for maliciou prosecution; Torrence v. Shedd, 144 U. S. 531, 36 L. 531, 12 S. C 727, bill for partition of tract of land; Connell v. Smiley, 156 U. 340, 39 L. 445, 15 S. Ct. 354, where petition for removal was hel sufficient, plaintiff seeking relief against one party alone; Texas Day Land, etc., Co., 49 Fed. 597, holding plaintiff could rely upo two counts and proceed in its own way; Brown v. Coxe, 75 Fed 689, joint action against tortfeasors.

114 U. S. 57-60, 29 L. 65, PUTNAM v. INGRAHAM.

Removal of causes.— On suit against several defendants on a alleged joint liability, answer by one, a non-resident, denying such joint or any liability, does not introduce a separable controversy p. 59.

Approved in following, holding controversies not separable or re movable: Crump v. Thurber, 115 U. S. 61, 29 L. 329, 5 S. Ct. 1157 Starin v. New York, 115 U. S. 259, 29 L. 391, 6 S. Ct. 32, Sloane v. Anderson, 117 U. S. 278, 29 L. 900, 6 S. Ct. 732, Fidelity Ins. Co. v. Huntington, 117 U. S. 281, 29 L. 899, 6 S. Ct. 734, Brooks v. Clark, 119 U. S. 509, 511, 30 L. 484, 485, 7 S. Ct. 302, 303, collecting authorities; Graves v. Corbin, 132 U. S. 588, 33 L. 468, 10 S. Ct. 202, Thompson v. Dixon, 28 Fed. 6, Hax v. Caspar, 31 Fed. 500, Western Union Tel. Co. v. Brown, 32 Fed. 338, Patchin v. Hunter, 38 Fed. 52, Ames v. Chicago, etc., Ry., 39 Fed. 883, 884, In re The Jarnecke Ditch, 69 Fed. 169, and Foundry Co. v. Howland, 99 N. C. 206, 6 Am. St. Rep. 517, 5 S. E. 747.

Removal of causes.— Fact that one of several parties jointly sued, defaults, places the parties in no different position with reference to removal, p. 59.

Approved in Wilson v. Oswego Twp., 151 U. S. 66, 38 L. 75, 14 S. Ct. 263, denying removal, notwithstanding default of one defendant; Sinclair v. Pierce, 50 Fed. 852, and Tate v. Douglas, 113 N. C. 196, 18 S. E. 203, both holding default of co-defendants did not alter situation as to removal.

114 U. S. 60-62, 29 L. 66, ST. LOUIS, ETC., RY. v. WILSON.

Removal of causes.— Action by citizen of one State against domestic corporation and non-residents, to compel company to transfer stock standing in name of latter, is on a single cause of action, and not removable, p. 62.

Approved in following, denying removal: Crump v. Thurber, 115 U. S. 61, 29 L. 329, 5 S. Ct. 1156, and Weller v. J. B. Pace Tobacco Co. 22 Fed. 862, both actions to compel transfer of stock by non-residents; Brooks v. Clark, 119 U. S. 511, 30 L. 485, 7 S. Ct. 303, holding joint action against partners not separable, and, therefore, not removable; Swan Land, etc., Co. v. Frank, 148 U. S. 611, 37 L. 583, 13 S. Ct. 694, where joining of indispensable parties defeated Federal jurisdiction; Wilson v. Oswego Twp., 151 U. S. 67, 38 L. 73, 14 S. Ct. 264, suit seeking cancellation of bonds; Merchants' Cotton-Press Co. v. North America Ins. Co., 151 U. S. 381, 38 L. 203, 14 S. Ct. 371, affirming S. C., 91 Tenn. 541, 19 S. W. 756, action by insurance companies against railroad and other insurance companies, to recover on account of loss by fire; Perrin v. Lepper, 26 Fed. 548, where controversy was between resident administrator and non-resident heirs and resident legatee; Thompson v. Dixon, 28 Fed. 6, 8, suit to foreclose mortgage, mortgagors and mortgagees being residents of same State; Anderson v. Appleton, 32 Fed. 859, action to establish will; Brenson v. St. Croix Lumber Co., 35 Fed. 635, replevin between citizens of same State; Yearian v. Horner, 36 Fed. 131, holding suit to compel partnership accounting involved single controversy; Perkins v. Hunter, 38 Fed. 52, action on note against partners; State v. Columbus, etc., R. Co., 48 Fed. 628, mandamus against railroads to compel lowering of grades; Missouri v. New Madrid Co., 73 Fed. 17 holding county necessary party in suit to set aside disposition of swamp lands, thus defeating Federal jurisdiction; Scoutt v. Lark, 73 Fed. 904, 36 U. S. App. 586, bill for specific performance of contract for sale of land, where agent was held a necessary party; Foundry Co. v. Howland, 99 N. C. 206, 6 Am. St. Rep. 517, 12 S. E. 747, action on contract; Douglas v. Railroad, 106 N. C. 80, 10 S. E. 1052, action by stockholder against resident corporation and non-resident corporation, holding majority of its stock, to enjoin issuance of mortgage bonds; dissenting opinion in Williamson v. Irvin, 66 Fed. 663, 31 U. S. App. 325, majority holding bridge company not necessary party in suit to compel assignment of its stock.

Distinguished in Garner v. Second Nat. Bank, 66 Fed. 371, where single controversy was between citizens of different States.

Parties.— Corporation is necessary party to action to compel transfer of its stock, p. 62.

Distinguished in Hamilton v. Savannah, etc., Ry., 49 Fed. 420, holding contractors for construction of railroad, not necessary parties to action to avoid conveyance and establish trust.

114 U. S. 63-86, 29 L. 67, SARGENT v. HALL SAFE, ETC., CO.

Patents.— Sargent patent, for improvement in time-locks, construed, and held not infringed by structure in which combinatio has not a revolving bolt, pp. 63-86.

Approved in Brown v. Davis, 116 U. S. 249, 29 L. 663, 6 S. Ct. 38 holding use of band, instead of lever described in patent for grai drill, not an infringement; Hendy v. Miners' Iron Works, 127 U. 1 376, 32 L. 209, 8 S. Ct. 1279, claim describing cylinder as havin chambers, in patent for ore-stamp feeder, is not infringed by use c smooth cylinders.

Patents.— In patents for combination of mechanism, limitation and provisos, especially when introduced into application after i had been persistently rejected, must be strictly construed in favo of public, and regarded as disclaimers, p. 86.

Approved in Shepard v. Carrigan, 116 U. S. 597, 598, 29 L. 724 6 S. Ct. 495, holding patent for skirt protector limited to plaited o fluted bands; Crawford v. Heysinger, 123 U. S. 607, 31 L. 274, 8 S Ct. 408, patent for staple-fastener limited to reciprocating clinche and stationary staple-supporting anvil; Rœmer v. Peddie, 132 U. S 317, 33 L. 383, 10 S. Ct. 99, citing authorities, and holding patent dispensing with bottom plate for lock-case not infringed by one having such plate; Knapp v. Morss, 150 U. S. 229, 37 L. 1062, 14 S. Ct. 84, patent for dress form held not infringed where one of its essential elements was left out; Otis Bros. Mfg. Co. v. Crane Bros. Mfg. Co., 27 Fed. 555, holding improvement in brakes for hoisting apparatus, not infringed; Falls Rivet Co. v. Wolfe, 40 Fed. 470, improvement in friction clutches limited to device described; Smith v. Pittsburgh Gas Co., 42 Fed. 150, holding defendant's process for producing illuminating gas from natural gas, not an infringement; Heine Safety-Boiler Co. v. Anheuser, etc., Assn., 43 Fed. 790, limiting claim to mud-drum having but one chamber; Johnson Co. v. Pacific Rolling, etc., Co., 47 Fed. 589, restricting patent to form of rail specified; Lane v. Park, 49 Fed. 458, holding restricted claim did not cover mere flat metal blanks in rough state; J. L. Mott Iron Works v. Standard Mfg. Co., 53 Fed. 821, 3 U. S. App. 386, affirming S. C., 51 Fed. 84, where patent for waste valves, etc., was strictly construed, and held not infringed; Frank v. Wm. P. Mockridge Mfg. Co., 65 Fed. 524, holding cuff-fastener covered only specific form described; Walter A. Wood Mowing, etc., Co. v. William Deering & Co., 66 Fed. 550, limiting patent to single-jointed sheaf-carriers; Wheaton v. Norton, 70 Fed. 842, 44 U. S. App. 118, and Norton v. Jensen, 90 Fed. 422, 61 U. S. App. 359, affirming S. C., 81 Fed. 497, both holding can-heading device not infringed by device omitting an essential element; Carter Mach. Co. v. Hanes, 70 Fed. 866, confining patentee to machine described in his patent; Craig v. Michigan Lubricator Co., 72 Fed. 176, sight-feed lubricator held not infringed; Engle Sanitary, etc., Co. v. Elwood, 73 Fed. 485, im-

[illegible] in furnace for burning wet material, not infringed by [illegible] improvement; Muller v. Lodge, etc., Tool Co., 77 Fed. 629, [illegible] U. S. App. 189, holding patent for tool-holder for lathes, not in[illegible]; Truman v. Holmes, 87 Fed. 747, 56 U. S. App. 748, limiting [illegible] for breaking cart to braces which extended beneath the [illegible]; Griffith v. Shaw, 89 Fed. 318, restricting patent for calf-wean[illegible] and holding no infringement; Warren v. Casey, 93 Fed. 965, [illegible] improvement for eyeglass case limited and not infringed; [illegible]burgh v. Jackson, 37 Fed. 884, arguendo.

Distinguished in Wirt v. Brown, 32 Fed. 286, holding patent for [illegible] pen infringed by use of equivalent element; Consolidated [illegible] Co. v. Coombs, 39 Fed. 29, holding patent for roller-[illegible] mill infringed by use of equivalents; Reece Button, etc., [illegible] v. Globe Button, etc., Co., 61 Fed. 965, 969, 21 U. S. App. 244, [illegible] authorities, and holding button-hole machine infringed [illegible] of machine merely changing movement of parts.

[illegible] U. S. 87-103, 29 L. 96, ELECTRIC-SIGNAL CO. v. HALL SIGNAL CO.

Patents.— To constitute infringement, result attained and ele[illegible] combined must be the same, so that each element shall per[illegible] same function, provided differences alleged are not merely [illegible], p. 96.

Approved in Kinzel v. Luttrell Brick Co., 67 Fed. 927, 31 U. S. [illegible] App. 682, holding patent for brick-kiln not infringed by one omit[illegible] use of side walls made of dirt or of plank covering.

Patents.— Pope railroad-signal patent is not infringed by Hall [illegible] patent, operated by wheels of passing train and using [illegible] arrangement of batteries and currents, pp. 96-103.

Cited in Electric Ry. v. Jamaica, etc., R. Co., 61 Fed. 672, obiter.

[illegible] U. S. 104-120, 29 L. 105, THOMSON v. WOOSTER.

Equity.— Decree pro confesso regards statement of bill as con[illegible] and proved, and is conclusive, unless shown to be erroneous [illegible] other statements contained in bill itself, pp. 110, 112.

Approved in Dobson v. Hartford Carpet Co., 114 U. S. 446, 29 L. [illegible] S. Ct. 948, holding decree conclusive of validity of patent, in [illegible] for infringement; Hefner v. Northwestern Life Ins. Co., 123 [illegible] U. S. 756, 31 L. 313, 8 S. Ct. 341, holding party defaulting concluded [illegible] decree of foreclosure; Sheffield Furnace Co. v. Witherow, 149 U. [illegible] 574, 37 L. 855, 13 S. Ct. 987, sustaining decree pro confesso en[illegible] after filing of demurrer, which was fatally defective; Wooster [illegible] Thornton, 26 Fed. 275, holding interlocutory decree, declaring [illegible] valid, conclusive; Austin v. Riley, 55 Fed. 836, 837, denying [illegible] to set aside default in foreclosure; Southern Pac. R. Co. v.

Temple, 59 Fed. 18, but holding defendant, who has appeared b his solicitor, entitled to notice of application for decree pro co fesso; Schofield v. Horse Springs Cattle Co., 65 Fed. 436, holdin showing did not warrant court in setting aside decree pro confess Sturtevant v. National Foundry, etc., Works, 88 Fed. 614, 60 U. S App. 238, holding, from allegations in the bill, that decree pro co fesso, establishing stockholder's liability, was erroneous; Price v Boden, 39 Fla. 222, 22 So. 658, holding defendants not entitled t notice of proceedings after default; Welsh v. Solenberger, 85 Va 443, holding, where allegations of bill were indefinite, proof was re quired after default.

Distinguished in Harmon v. Struthers, 48 Fed. 261, holding in terlocutory decree did not preclude inquiry into question of validity of patent.

Equity.— History of English chancery practice, as to bills pr confesso and its relation to our practice, discussed, pp. 110–112, and note.

Cited in Partee v. Thomas, 27 Fed. 430, Romaine v. Union Ins Co., 28 Fed. 632, Richmond v. Atwood, 52 Fed. 25, 5 U. S. App. 151 17 L. R. A. 620, Hazleton Tripod, etc., Co. v. Citizens, etc., Ry., 72 Fed. 328, Continental Trust Co. v. Toledo, etc., R. Co., 82 Fed. 646 National Folding-Box, etc., Co. v. Dayton Paper, etc., Co., 91 Fed 825. Deck v. Whitman, 96 Fed. 875, and Starr Cash, etc., Car Co. v. Starr, 69 Conn. 446, 37 Atl. 1059, all holding, as in English chancery practice, plaintiff, after default, must prove allegations ex parte.

Equity.— Decree pro confesso is not a decree as of course according to prayer of bill, nor such as complainant chooses to take it, but is made by court according to what is proper to be decreed upon statement of bill, assumed to be true, p. 113.

Approved in Central R. R. v. Central Trust Co., 133 U. S. 90, 33 L. 563, 10 S. Ct. 237, holding deficiency decree pro confesso improvidently entered; Southern Pac. R. Co. v. Temple, 59 Fed. 19, vacating decree where defendant, appearing by his solicitor, had no notice of application for decree pro confesso; Price v. Boden, 39 Fla. 223, 22 So. 658, holding decree for attorney's fee, not prayed for, erroneous in default case; Dotterer v. Freeman, 88 Ga. 498, 14 S. E. 865, reversing decree ordering cancellation of deed, where bill did not state facts sufficient to give relief granted; Aull v. Day, 133 Mo. 349, 34 S. W. 581, holding court could correct erroneous ruling any time before final order of distribution.

Equity.— Evidence that reissued patent was void is inadmissible after decree pro confesso establishing infringement, p. 114.

Patents.— Court cannot say, as matter of law, because reissue was applied for and granted fourteen years after date of original patent,

[illegible] delay was unreasonable and not susceptible of explanation, p. [illegible].

Approved in Clark v. Wooster, 119 U. S. 323, 325, 326, 30 L. 392, [illegible] S. Ct. 217, 218, sustaining reissue involved in principal case, where there was no evidence of expanded claim.

Distinguished in Hubel v. Dick, 24 Blatchf. 140, 28 Fed. 657, holding reissue after delay of five years, void on ground that it was for new combination.

Appeal and error.— Affidavits presented to master as grounds of application to reopen proofs upon hearing for taking account of profits from infringement of patent, cannot be examined on appeal to Supreme Court, p. 117.

Patents.— Defendants cannot complain of being accountable for profits realized in using complainant's machine, although it might have been more profitable to have bought of others, p. 118.

Approved in Tilghman v. Proctor, 125 U. S. 147, 148, 149, 31 L. [illegible] S. Ct. 900, 901, holding actual advantage to infringer measure of profits to be accounted for; Webster Loom Co. v. Higgins, 43 [illegible] 678, measuring profits by gain in economy of manufacture by infringer; Tuttle v. Claflin, 76 Fed. 233, 45 U. S. App. 105, measuring profits by saving of expense to infringers, but making allowance for improvements made in machine by defendants.

114 U. S. 120–127, 29 L. 81, HAYES v. HOLLY SPRINGS.

Municipal corporations.— Mississippi act of 1872, ratifying municipal railroad-aid subscriptions, except where in violation of Constitution, held not to validate subscription made at unauthorized special election, pp. 125, 126.

Approved in Bell v. Farmville, etc., R. Co., 91 Va. 108, 20 S. E. [illegible], holding Virginia statute, February 8, 1888, ratified railroad bonds.

Distinguished in Erskine v. Nelson Co., 4 N. Dak. 70, 58 N. W. [illegible] 27 L. R. A. 700, and n. (see dissenting opinion in 4 N. Dak. 85, [illegible] W. 355, 27 L. R. A. 708, and n.), holding that act of March 13, [illegible] of State legislature, validated Nelson county warrants.

Municipal corporations.— Bona fide holder of municipal bond must show legislative authority in issuing body to create the bond, laches or acts in pais may cure irregularities in execution of statutory power, but cannot create it, pp. 126, 127.

Approved in Hopper v. Covington, 118 U. S. 151, 30 L. 192, 6 S. Ct. [illegible], holding complaint bad on demurrer which failed to show authority of town to issue bonds; Merrill v. Monticello, 138 U. S. 682, [illegible] L. 1073, 11 S. Ct. 444, holding town not estopped to set up defense, want of authority to issue bonds; Brenham v. German, etc., Bank, 144 U. S. 188, 36 L. 396, 12 S. Ct. 565, holding bona fide holder

could not recover on bonds issued under authority to borrow money Barnett v. Denison, 145 U. S. 139, 36 L. 653, 12 S. Ct. 820, holding city bonds in aid of slaughter-houses, etc., invalid, even in hand of innocent holder; Moulton v. Evansville, 25 Fed. 386, reviewing authorities, and holding want of petition of freeholders, etc., did not render bonds invalid in hands of innocent purchaser; Dartmouth Sav. Bank v. School Dist., 6 Dak. 343, 43 N. W. 825, holding school bonds invalid for want of petition by citizens, etc.; Myers v. Jeffersonville, 145 Ind. 438, 44 N. E. 454, holding bonds issued to defray expense of litigation over county seat, unauthorized and void; Keehn v. Wooster, 13 Ohio C. C. 274, refunding bonds have invalidity of originals, notwithstanding recitals; Commissioners v Call, 123 N. C. 326, 31 S. E. 487, 44 L. R. A. 258, holding county railroad bonds invalid; dissenting opinion in West Plains Twp. v Sage, 69 Fed. 952, majority holding town estopped to deny validity of bonds containing lawful, but false, recitals.

Distinguished in Waite v. Santa Cruz, 89 Fed. 632, 633, protecting innocent purchaser, where bonds falsely recited authorized purpose See 98 Am. Dec. 686, note.

114 U. S. 127-128. 29 L. 117, MOWER v. FLETCHER.

Appeal and error.— Judgment is final and appealable which terminates litigation between parties on merits of case, so that, if affirmed, court below would only have to execute its judgment already rendered, p. 128.

Approved in Dainese v. Kendall, 119 U. S. 55, 30 L. 306, 7 S. Ct. 66, holding amounts due on notes, rents, etc., not ascertained, and decree ratifying sale not appealable; Talley v. Curtain, 58 Fed. 5, 8 U. S. App. 424, holding decree setting aside deed of assignment upon creditor's bill, not final; Merriman v. Chicago, etc., R. Co., 64 Fed. 547, 24 U. S. App. 428, holding decree leaving amount of certain credits undetermined, not appealable; Whitaker v. Sparkman, 30 Fla. 357, 11 So. 545, decree depriving administrator of lawful possession, final and appealable; Young v. Thrasher, 123 Mo. 312, 27 S. W. 327, holding inferior court bound to carry out judgment of appellate court as conclusive; Tourville v. Wabash R. R., 148 Mo. 623, 71 Am. St. Rep. 654, 50 S. W. 311, holding no error to issue execution on judgment of appellate court; Hall v. Swann, 39 W. Va. 356, 19 S. E. 510, holding decree releasing land from forfeiture, final; Williamson v. Jones, 39 W. Va. 263, 19 S. E. 444, 25 L. R. A. 235, and n., arguendo.

114 U. S. 128-133, 29 L. 119, BUTTERWORTH v. HILL.

Courts — Patents.— Rule that suit in Federal court must be in district where defendant resides or is found, applies to suit to obtain issue of patent, pp. 131, 132.

Approved in United States v. Amer
[illegible] fact that defendant owned te
Federal court of that district jurisdi
Fed. 145, holding New Jersey Federal
commissioner of patents; Union Swit
6 Fed. 626, dismissing suit for infrin
residents, and not brought in their
States Cordage Co., 66 Fed. 615, ho
could not be sued in Massachusetts f
etc. Co. v Metropolitan, etc., Co., 31

Patents.— Official residence of con
pass of suit, is in Washington, D. C.

Appearance.— Acceptance of servi
thrown by patent commissioner at W
jection to jurisdiction, and amount t
uit Court, which was without jurisd

Followed in Romaine v. Union Ins.
Co. and holding special appearanc
jurisdiction; Spencer v. Travelers' In
holding acceptance of service of cop
transcript, did not waive objection
made.

114 U. S. 133-137, 29 L. 118, DETRO

Courts.— Supreme Court's jurisdi
highest State court depends on decis
specified in R. S., § 709, and in the w

Courts.— Supreme Court's jurisdic
upon record before it can proceed.
question was actually raised and dec
essary to judgment, p. 136.

Approved in Jacks v. Helena, 115 U
where State decision was put on gro
of Federal question; Simmerman v.
325, 6 S. Ct. 333, where no Federal
was Endowment Assn. v. Kansas, 12
[illegible], where it did not appear that qu
tion was involved; New Orleans Wa
Co., 125 U. S. 30, 31 L. 612, 8 S. Ct. 7
tion was not involved in decision; Kr
44, 31 L. 678, 8 S. Ct. 755, where dec
upon grounds independent of co
De Saussure v. Gaillard, 127 U. S. 2
tions based on independent grounds
[illegible] L. 446, 10 S. Ct. 175, and Walles
[illegible], 15 S. Ct. 626, decisions not invo

114 U. S. 138–146, 29 L. 114, FARMINGTON v. PILLSBURY.

Courts.— Old rule, requiring objection to citizenship, unless ap pearing on face of record, to be taken by plea in abatement, wa changed by act of 1875, under which Federal court can dismiss fo want of jurisdictional citizenship at any time, p. 144.

Approved in Graves v. Corbin, 132 U. S. 590, 33 L. 469, 10 S. Ct 202, remanding case to State court, after its successful prosecutio in Federal court; Nashua R. R. v. Lowell R. R., 136 U. S. 374, 3 L. 368, 10 S. Ct. 1008, holding objection to jurisdiction could b taken in answer; Wetmore v. Rymer, 169 U. S. 119, 42 L. 683, 18 S Ct. 295, holding affidavits, etc., failed to show that property wa not of sufficient value to give jurisdiction; Keeney v. Roberts, 1 Sawy. 39, 39 Fed. 629, court remanding case to State court on it own motion; Hardin v. Cass Co., 42 Fed. 656, and Simon v. House 46 Fed. 319, where amount involved was under jurisdictiona amount, and suit was dismissed; Indiana v. Lake Erie, etc., Ry. 85 Fed. 2, remanding application for mandamus to State court upo plaintiff's motion. Approved in Alabama, etc., R. Co. v. Carroll 84 Fed. 780, 52 U. S. App. 458, without applying rule.

Distinguished in Cuthbert v. Galloway, 35 Fed. 469, holding ob jection to jurisdiction waived by plea in bar; Southern Exp. Co. v. Todd, 56 Fed. 105, 12 U. S. App. 351, holding objection that suit wa brought in wrong district came too late, when made for first time by motion in arrest of judgment. Denied in Imperial Refining Co v. Wyman, 38 Fed. 576, 578, 3 L. R. A. 505, 506, and n., holding special plea to jurisdiction necessary, and directing issue to be made by pleadings.

Courts.— Act of 1875 expressly prohibits collusive transfers of negotiable paper in order to confer jurisdiction upon Federal court, where assignor himself could not have brought action, pp. 144–146.

The following cases apply rule, and dismiss for want of jurisdiction: Little v. Giles, 118 U. S. 601, 603, 30 L. 271, 7 S. Ct. 35, 36, where deed was made to non-resident for purposes of jurisdiction; Morris v. Gilmer, 129 U. S. 326, 32 L. 694, 9 S. Ct. 292, holding change of domicile pretended, and not actual; Lehigh Min., etc., Co. v. Kelly, 160 U. S. 341, 40 L. 449, 16 S. Ct. 313, where foreign corporation was created and property transferred to it for jurisdictional purposes; Lake Co. Commrs. v. Dudley, 173 U. S. 253, 19 S. Ct. 402, reviewing authorities, and holding transfer of note to non-resident a mere device, and collusive; Norton v. European, etc., Ry., 32 Fed. 875, suit on railroad bonds colorably transferred; Industrial, etc., Guaranty Co. v. Electrical Supply Co., 58 Fed. 743, 16 U. S. App. 196, bill filed to enable filing of cross-bill and litigation among co-defendants. Approved in Andes v. Millard, 70 Fed. 516, but holding objection that action was fictitious could not be taken after judgment; Wonderly v. Lafayette Co., 150 Mo. 648, 649, 51 S. W. 748, 749, 45 L. R. A. 390, holding judgment fraudulently obtained by alleging

[illegible] ownership. Cited in Farmington Vill. Corp. v. Bank, 85 Me. [illegible] 28 Atl. 966, generally, as to subject-matter of suit.

Distinguished in Hartog v. Memory, 116 U. S. 590, 29 L. 726, 6 S. [illegible] 332, reversing S. C., 23 Fed. 837, holding defendant estopped by [illegible] silence from denying jurisdiction on account of citizenship; Cross v. Allen, 141 U. S. 533, 35 L. 847, 12 S. Ct. 69, where transfer of note and mortgage was made for valuable consideration; Lawton v. [illegible], 30 Fed. 642, denying motion to remand, where transfer of note was bona fide.

114 U. S. 147–149, 29 L. 184, EX PARTE HUGHES.

Mandamus does not lie to compel judge of inferior court to pay over money deposited in registry of court, where court has expressly adjudged that litigation was not at an end, and fund should remain there until suit was prosecuted to final decree, p. 149.

Not cited.

114 U. S. 149–158, 29 L. 58, STEPHENSON v. BROOKLYN R. R.

Patents of O'Haire, Jones, and Stephenson, for improvements "in operating car doors" and "in signalling devices for street cars," are void for want of patentable novelty, pp. 151–158.

Patents.— Combination is patentable, only when its several elements produce, by their joint action, a new and useful result, or an old result, cheaper or more advantageously, p. 157.

Approved in following, holding combinations not patentable: Beecher Mfg. Co. v. Atwater Mfg. Co., 114 U. S. 524, 29 L. 232, 5 S. Ct. 1006, use of two pairs of dies; Pomace-Holder Co. v. Ferguson, 119 U. S. 338, 30 L. 408, 7 S. Ct. 384, guide-frame and pomace-rack for cheese-formers; Watson v. Cincinnati Ry., 132 U. S. 167, 33 L. 304, 10 S. Ct. 47, use of outside and inside rigid doors in grain cars; Hill v. Wooster, 132 U. S. 701, 33 L. 506, 10 S. Ct. 231, addition of over compartment to box creamery on legs; Florsheim v. Schilling, 137 U. S. 77, 34 L. 579, 11 S. Ct. 25, patent for corset; Fond du Lac Co. v. May, 137 U. S. 406, 407, 34 L. 718, 11 S. Ct. 102, citing authorities, improvement in construction of prisons; Union Edge Setter Co. v. Keith, 139 U. S. 539, 35 L. 264, 11 S. Ct. 624, sole-edge burnishing machine; Cluett v. Claflin, 24 Blatchf. 416, 30 Fed. 924, improvement in shirt-bosoms; Leonard v. Lovell, 29 Fed. 314, collecting authorities, and holding improvement in ice-chest of refrigerator not patentable; Holmes Electric, etc., Co. v. Metropolitan, etc., Alarm Co., 33 Fed. 256, improvement in electric linings for safes; Nat. Progress, etc., Mach. Co. v. John R. Williams Co., 44 Fed. 192, 12 L. R. A. 109, and n., improved cigar-bunching machine; Johnson Co. v. Pacific Rolling-Mills Co., 47 Fed. 589, 592, improvement in street-car rails; Western Elec. Co. v. Capital Tel., etc., Co., 86 Fed. 777, use of multiple boards and "means" to ascertain what lines in

telephone exchange are in use. The following apply rule, and sustain patents: Railway Register Mfg. Co. v. North Hudson, etc., R. Co., 24 Fed. 795, and S. C., 26 Fed. 412, holding invention of fare-register new and patentable; Niles Tool Works v. Betts Machine Co., 27 Fed. 305, improvement in boring mills; Bowers v. Von Schmidt, 63 Fed. 583, claims for improvements in dredging machines and apparatus; Rubber-Tire Wheel Co. v. Columbia, etc., Wheel Co., 91 Fed. 990, patent for new rubber-tired wheel.

Distinguished in Hoe v. Kahler, 23 Blatchf. 362, 25 Fed. 277, holding certain adjustment of rollers in printing presses patentable.

114 U. S. 158–173, 29 L. 83, CHAPMAN v. BREWER.

Bankruptcy.— Where Federal bankruptcy proceeding was commenced before attachment in State court, the assignment in bankruptcy, though subsequently made, related back, vesting title in assignee, and attachment four months before commencement of proceeding was dissolved by the assignment, pp. 167, 168.

Approved in Sullivan v. Rabb, 86 Ala. 441, 5 So. 750, holding bankruptcy proceedings dissolved attachment levied less than four months before adjudication.

Distinguished in Witters v. Sowles, 33 Fed. 540, where first petition in bankruptcy was held ineffective because of control retained by attorneys, and on account of delay.

Judgment.— Adjudication of bankruptcy in District Court, correct in form, and court having jurisdiction of subject-matter and parties, is conclusive, and cannot be collaterally attacked in suit by assignee against person claiming adverse interest in property, p. 169.

Approved in Evers v. Watson, 156 U. S. 532, 39 L. 522, 15 S. Ct. 432, holding evidence insufficient to set aside decree of Federal court; Mount v. Manhattan Co., 41 N. J. Eq. 214, 3 Atl. 728, holding decree of bankruptcy conclusive in an action brought by bankrupt's administratrix.

Courts.— Circuit Court of United States, having otherwise jurisdiction in case, will, as a general rule, administer same relief in equity which State courts can grant, pp. 170, 171.

Approved in More v. Steinbach, 127 U. S. 84, 32 L. 56, 8 S. Ct. 1073, holding plaintiff out of possession, by virtue of California statute, could bring action to determine adverse claim; Greeley v. Lowe, 155 U. S. 75, 39 L. 76, 15 S. Ct. 28, holding, by virtue of Florida statute, court, in bill in equity, for partition, could settle questions of title; Wehrman v. Conklin, 155 U. S. 325, 39 L. 173, 15 S. Ct. 133, bill in equity, to quiet title, brought by persons in possession of lands in Iowa, sustained; Roberts v. Northern Pac. R. R., 158 U. S. 30, 39 L. 883, 15 S. Ct. 766, holding actual possession of part, and constructive possession of rest of land, under Wisconsin law, sufficient to

[illegible] bill to quiet title; Wells, Fargo & Co. v. Miner, 11 Sawy. [illegible], 25 Fed. 536, holding right of interpleader, conferred by California statute, could be enforced in Federal court of equity; Land, etc., Imp. Co. v. Bardon, 45 Fed. 707, equitable action to quiet title by [illegible] in possession, brought under provision of Wisconsin statute; Bigelow v. Chatterton, 51 Fed. 616, 10 U. S. App. 267, treating action to try title to unoccupied lands as an equity case; Grether v. Wright, 3 Fed. 746, 43 U. S. App. 770, entertaining bill in equity to enjoin [illegible] levied upon bonds of District of Columbia by State of Ohio; Murragh v. H. Wetter Mfg. Co., 78 Fed. 14, 49 U. S. App. 14, sustaining bill by contract creditor against insolvent corporation, permitted by Arkansas statute; California Oil, etc., Co. v. Miller, 96 Fed. 20, arguendo.

Distinguished in Northern Pac. R. Co. v. Cannon, 46 Fed. 232, dismissing bill to quiet title, by one holding legal title, and out of possession.

Courts — Bankruptcy.— Circuit Court has general power, irrespective of citizenship, to grant equitable relief in suit in equity, by assignee in bankruptcy, against adverse claimants on assigned property, and may enjoin him from throwing cloud on title by levy of execution from State court, after commencement of bankruptcy proceeding, or from making further levies, pp. 171–173.

Approved in Moran v. Sturges, 154 U. S. 270, 38 L. 985, 14 S. Ct. 1022, admiralty proceeding, restraining State court, where its jurisdiction had not attached; Louisville Trust Co. v. Cincinnati, 73 Fed. 124, arguendo.

Distinguished in Sargent v. Helton, 115 U. S. 351, 29 L. 413, 6 S. Ct. 80, holding Federal court could not enjoin proceedings of State court, at instance of purchaser at bankruptcy sale; United States v. Wilson, 118 U. S. 89, 30 L. 112, 6 S. Ct. 993, holding Federal court could not remove cloud by bill in equity, without requiring complainant to obtain prior possession; Baird v. Warwick Machine Co., 40 Fed. 386, holding purchaser at execution sale could not restrain foreclosure of mortgage as a fraudulent conveyance.

114 U. S. 174–176, 29 L. 135, EX PARTE MORGAN.

Mandamus may be used to require inferior court to decide matter within its jurisdiction, and pending before it, but not to control decision, p. 175.

Approved in Ex parte Brown, 116 U. S. 402, 29 L. 677, 6 S. Ct. 387, denying mandamus to review order dismissing an appeal; Parker, Petitioner, 131 U. S. 226, 33 L. 124, 9 S. Ct. 709, allowing mandamus directing Supreme Court of territory to reinstate an appeal; In re Morrison, 147 U. S. 26, 37 L. 65, 13 S. Ct. 250, refusing mandamus directing lower court to vacate order of dismissal upon the merits; In re Hawkins, 147 U. S. 490, 37 L. 252, 13 S. Ct. 527, holding mandamus did not lie to compel court to receive certain depositions;

Virginia v. Paul, 148 U. S. 124, 37 L. 392, 13 S. Ct. 542, holding question whether good cause was shown for granting writ of habeas corpus, could not be reviewed by habeas corpus; American Const. Co. v. Jacksonville Ry., 148 U. S. 379, 37 L. 489, 13 S. Ct. 761, denying petitions for mandamus to dismiss certain appeals; Hudson v. Parker, 156 U. S. 289, 39 L. 428, 15 S. Ct. 455, allowing mandamus to District Court to admit petitioner to bail on giving proper bond; United States v. Judges, 85 Fed. 180, 56 U. S. App. 37, refusing mandamus to compel inferior court to admit prisoner to bail; State v. Young, 31 Fla. 601, 34 Am. St. Rep. 44, 12 So. 675, 19 L. R. A. 638, holding mandamus proper to compel judge to hear a case, who refuses on ground of disqualification; State v. King, 32 Fla. 419, 13 So. 892, denying mandamus to reinstate an appeal; State v. Philips, 97 Mo. 343, 10 S. W. 859, 3 L. R. A. 480, and n., reviewing authorities, and allowing mandamus to reinstate an appeal, where there was a duty admitting of no discretion; State v. Eddy, 10 Mont. 324, 25 Pac. 1037, directing justice of peace to issue order commanding garnishee to appear. See 89 Am. Dec. 739, note.

Mandamus.— Judgment of lower court, on motion to amend original judgment so as to conform to complaint and verdict, cannot be reviewed by mandamus, p. 176.

Cited in State v. Philips, 97 Mo. 343, 10 S. W. 859, 3 L. R. A. 480, and n., granting writ of mandamus to reinstate an appeal.

114 U. S. 176–189, 29 L. 121, CHESAPEAKE, ETC., RY. v. MILLER.

Taxation.— West Virginia act of 1866 was personal to corporation incorporated by it, and clause exempting it from taxation did not confer immunity upon company purchasing its property at foreclosure sale, notwithstanding general law of State, transferring rights to such purchasers, pp. 183–185.

Approved in Norfolk, etc., R. R. v. Pendleton, 156 U. S. 673, 39 L. 576, 15 S. Ct. 415, holding purchaser of railroad at foreclosure sale subject to general law of State, prescribing rates; Keokuk, etc., R. R. v. Missouri, 152 U. S. 311, 38 L. 455, 14 S. Ct. 596, holding legislature had no power to grant exemption to consolidated corporation, after Constitution of 1865; Phœnix Ins. Co. v. Tennessee, 161 U. S. 180, 40 L. 662, 16 S. Ct. 473, reviewing authorities, and holding immunity from taxation did not pass to legal successor of insurance company; Covington, etc., Co. v. Sandford, 164 U. S. 587, 41 L. 563, 17 S. Ct. 202, holding turnpike company not entitled to immunity from taxation, granted to its predecessor; Baltimore, etc., Ry. v. Ocean City, 89 Md. 98, 42 Atl. 923, holding purchaser of railroad not entitled to prior exemption from taxation; Adams v. Yazoo, etc., R. Co., — Miss. —, 24 So. 210, reviewing authorities, and holding exemption could not pass into consolidated company, without express declaration; Hoard v. Chesapeake, etc., Ry., 123 U. S. 226, 31 L. 132, 8 S. Ct. 76, purchasers at foreclosure not bound to specifically

perform original railroad's contract; Frank v. New York, etc., R. R., 22 N. Y. 217, 25 N. E. 337, holding purchasing company acquired only such property as was transferred under direction of court; Railroad v. Alsbrook, 110 N. C. 153, 14 S. E. 655, holding charter did not extend exemption to branch roads; Pennison v. Chicago, etc., R. Co., 88 Wis. 347, 67 N. W. 702, holding a liability for tort did not pass to purchaser of offending railroad; dissenting opinions in Traverse Co. v. St. Paul, etc., Ry., 73 Minn. 433, 76 N. W. 222, majority holding exemption appurtenant to line of road, and existing in favor of purchaser; New Orleans City, etc., Co. v. New Orleans, 143 U. S. 196, 36 L. 122, 12 S. Ct. 407, obiter.

Distinguished in Tennessee v. Whitworth, 117 U. S. 146, 29 L. 835, 6 S. Ct. 651, holding consolidated company entitled to exemption of one of the uniting companies; International, etc., Ry. v. State, 75 Tex. 373, 12 S. W. 681, holding exemption adhered to property, and passed to successors. Explained in State Board v. Morris, etc., R. R., 49 N. J. L. 203, 204, 7 Atl. 830, holding immunity from taxation passed to lessee by force of lease, and statute validating it.

Railroads.— Franchises of railroad corporation are rights or privileges essential to its operation. Immunity from taxation is not one of them, and is incapable of transfer without express statutory direction. p. 186.

Approved in St. Louis, etc., Ry. v. Gill, 156 U. S. 656, 39 L. 570, 15 S. Ct. 487, holding right to fix rates of fare did not accompany transfer of railroad property; Norfolk, etc., R. R. v. Pendleton, 156 U. S. 667, 39 L. 576, 15 S. Ct. 415, holding purchaser of railroad at foreclosure sale not entitled to exemption from State law regulating fare; Keokuk, etc., R. Co. v. County Court, 41 Fed. 308, holding grant of franchises and privileges of another corporation did not include immunity from taxation; Chadwick v. Old Colony R. R., 171 Mass. 301, 50 N. E. 630, holding right to operate railroad and take tolls passed by foreclosure sale to a natural person; State Board v. Morris, etc., R. R., 49 N. J. L. 200, 206, 207, 7 Atl. 829, 831, 832, holding immunity from taxation passed to lessee by force of statute, and terms of lease; International, etc., Ry. v. State, 75 Tex. 373, 12 S. W. 686, holding immunity from taxation not a franchise, within meaning of Texas statute, respecting quo warranto proceedings; Commercial Electric-Light, etc., Co. v. Judson, — Wash. —, 56 Pac. 332, relating to assessment and taxation of franchises; State v. Anderson, 90 Wis. 561, 63 N. W. 748, holding franchises taxable.

Constitutional law.— Corporation created by West Virginia acts of 1870 and 1871, with same powers as its predecessor, created in 1863, is subject to provisions of act of 1869, reserving right to alter charter. pp. 187–189.

Approved in Bibb v. Hall, 101 Ala. 99, 14 So. 104, holding corporations created under old law not affected by repeal of that law;

Adams v. Yazoo, etc., R. Co., — Miss. —, 24 So. 211, holding consolidated corporation subject to constitutional provision, adopted prior to consolidation, prohibiting exemptions.

Miscellaneous.— Virginia Coupon Cases, 114 U. S. 296, 29 L. 194, 5 S. Ct. 917, generally, as to jurisdiction.

114 U. S. 190-195. 29 L. 132. LITCHFIELD v. BALLOU.

Equity.— Bill against city, for money had and received, for illegal bonds, fails for want of equitable jurisdiction, there being an appropriate remedy at law, p. 192.

Approved in Buzard v. Houston, 119 U. S. 352, 30 L. 454, 7 S. Ct. 252, dismissing bill where judgment for pecuniary damages would adjust rights under contract; Ætna Life Ins. Co. v. Middleport, 124 U. S. 547, 31 L. 541, 8 S. Ct. 629, dismissing bill in equity, brought by holder of invalid city bonds; Zeringue v. Texas, etc., R. Co., 34 Fed. 243, denying equitable relief in action on contract to enforce building of bridges, and for damages; Paton v. Majors, 46 Fed. 211, dismissing bill in equity to obtain decree for payment of money received through fraud of agent; Northern Pac. R. Co. v. Cannon, 46 Fed. 232, holding equity had no jurisdiction of bill, brought by one out of possession, to quiet title; Walker v. Brown, 58 Fed. 27, bill for discovery, brought by creditor, against administrator, dismissed for want of equity; Alger v. Anderson, 92 Fed. 699, 709, where vendee waived fraud of vendor, equity had no jurisdiction.

Municipal corporations.— Prohibition in State Constitution, limiting indebtedness for any purpose, incurrable by municipal corporation, is as effectual against an implied, as an express promise, and is as binding in equity as at law, pp. 192, 193.

Approved in Doon Twp. v. Cummins, 142 U. S. 374, 35 L. 1047, 12 S. Ct. 222, holding township bonds void as against constitutional prohibition limiting indebtedness; Hedges v. Dixon Co., 150 U. S. 191, 37 L. 1048, 14 S. Ct. 74, and Anderson v. Orient Fire Ins. Co., 88 Iowa, 592, 55 N. W. 352, both holding similarly as to county bonds; Andrews Bros. Co. v. Youngstown Coke Co., 39 Fed. 354, refusing equitable relief on contract not legally binding; Morton v. Nevada, 41 Fed. 586, action for money had and received, held ineffectual to recover on void bonds; Weber v. Spokane Nat. Bank, 50 Fed. 737, holding contract creating debt in excess of limitation fixed by charter of bank, void; Brazoria Co. v. Youngstown Bridge Co., 80 Fed. 17, 52 U. S. App. 18, holding equity could not enforce void bridge contract with county; Gillette, etc., Mfg. Co. v. Canyon Co., 85 Fed. 398, denying recovery on void bridge contract with county; Gamewell v. Laporte, etc., Tel. Co., 96 Fed. 666, affirming S. C., 146 Ind. 469, 58 Am. St. Rep. 361, 45 N. E. 589, 35 L. R. A. 688, holding contract with city, for use of fire alarms, void as in excess of powers; People v. May, 9 Colo. 99, 10 Pac. 652, county

warrants held void; Prince v. Quincy, 128 Ill. 458, 21 N. E. 771, contract for supply of water held within constitutional prohibition; Lovejoy v. Foxcroft, 91 Me. 383, 40 Atl. 147, excessive loans to town for building road; Water-Works Co. v. Ironwood, 99 Mich. 459, 58 N. W. 373, holding city could not avoid restriction upon its indebtedness, by buying property subject to mortgage; Mister v. Kansas City, 18 Mo. App. 228, holding appropriation by council for retaining wall illegal, and contract unenforceable; Raton Water-Works Co. v. Raton, 9 N. Mex. 87, 49 Pac. 904, 908, dismissing bill seeking to recover more than amount of two-mill levy provided by law; England v. Dinnie, 8 N. Dak. 12, 76 N. W. 297, illegal contract by city to construct electric-light plant; McAleer v. Angell, 19 R. I. 694, 36 Atl. 580, contract for stone held void, where town had reached its debt limit; Huron Water-Works Co. v. Huron, 7 S. Dak. 34, 58 Am. St. Rep. 834, 62 N. W. 982, 30 L. R. A. 859, holding sale of water-works by city unauthorized, and therefore it entitled to possession; Davis v. County Court, 38 W. Va. 108, 18 S. E. 375, holding county orders binding future levies, void; Earles v. Wells, 94 Wis. 296, 59 Am. St. Rep. 889, 68 N. W. 967, reviewing authorities, and holding city contract for purchase of water-works void; Crogster v. Bayfield Co., 89 Wis. 15, 74 N. W. 640, as to executory contract to issue bonds in aid of railroad; Buck v. Eureka, 119 Cal. 45, 50 Pac. 1065, without particular application. See 44 Am. St. Rep. 233, and 45 Am. St. Rep. 259, notes.

Distinguished in Weber v. Spokane Nat. Bank, 64 Fed. 211, 29 U. S. App. 97, holding indebtedness incurred by national bank in excess of powers, not void; Ætna Life Ins. Co. v. Lyon Co., 82 Fed. 99, where excessive indebtedness of county was used to discharge prior indebtedness; Thomas v. Burlington, 69 Iowa, 143, 28 N. W. 462, allowing recovery of taxes illegally exacted, though city was indebted beyond constitutional limitation.

Municipal corporations.— When money received from bonds, void because in excess of constitutional limit of indebtedness, was expended with other funds in erecting city water-works, it would be equally within the prohibition to impose a lien upon such works in favor of bondholders, p. 194.

Approved in Randolph v. Allen, 73 Fed. 40, 41 U. S. App. 117, holding no lien existed upon stock purchased in part with money fraudulently obtained, and in part with other moneys; O'Brien v. Wheelock, 95 Fed. 909, holding no lien existed in favor of bondholders, on lands assessed to pay for invalid bonds. See 51 Am. St. Rep. 861, note.

Municipal corporations.— Holders of illegal bonds are participes criminis with agent of city issuing them, and equity will not raise a resulting trust in favor of bondholders, p. 194.

Approved in Metropolitan Nat. Bank v. Campbell Com. Co., 77 Fed. 708, 709, holding creditor had no preference, where misappro-

priated trust funds could not be clearly followed; O'Brien v. Wheelock, 95 Fed. 909, denying relief to bondholders against landowners assessed to pay for illegal bonds; Anderson v. Orient Fire Ins. Co., 88 Iowa, 592, 55 N. W. 352, holding bondholders bound to take notice of illegality of bonds; Goose River Bank v. Willow Lake, etc., Twp., 1 N. Dak. 29, 26 Am. St. Rep. 607, 44 N. W. 1002, holding teacher without lawful certificate could not recover on warrant.

Municipal corporations.— If complainants seek money given to city for illegal bonds, they must clearly identify it, or fund or other property which represents that money, so that it can be reclaimed and delivered without interfering with rights of other persons, p. 195.

Cited in 98 Am. Dec. 691, note.

114 U. S. 196-218, 29 L. 158, GLOUCESTER FERRY CO. v. PENNSYLVANIA.

Commerce.— A tax upon receiving and landing of passengers and freight, is a tax upon their transportation, p. 203.

Commerce among the States consists of intercourse and traffic between their citizens, and includes transportation of persons and property, and navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities, p. 203.

Approved in Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 217, 38 L. 968, 14 S. Ct. 1092, holding traffic across bridge connecting two States, to be interstate commerce; Addyston Pipe, etc., Co. v. United States, 175 U. S. 241, 20 S. Ct. 107, holding combination for monopoly of iron pipe, etc., in the several States, a restraint upon interstate commerce; Mobile, etc., R. Co. v. Sessions, 28 Fed. 593, holding transportation of goods through several States constitutes interstate commerce; The Katie, 40 Fed. 492, 7 L. R. A. 65, and n., holding navigation of Savannah river in Georgia and South Carolina within jurisdiction of Congress; In re Grand Jury, 62 Fed. 841, and United States v. Cassidy, 67 Fed. 705, instructions to grand jury at time of great railroad strike; Ex parte Jervey, 66 Fed. 959, holding South Carolina law void, so far as it prohibited importation of liquors into State, without being unloaded; United States v. Coal Dealers' Assn., 85 Fed. 265, holding contracts regulating sale of coal in California, brought from other States, in violation of act of Congress, July 2, 1890; McNaughton v. McGirl, 20 Mont. 131, 63 Am. St. Rep. 614, 49 Pac. 653, 38 L. R. A. 370, holding agent in Montana buying wool and consigning it to foreign corporation engaged in interstate commerce; Singer Mfg. Co. v. Hardee, 4 N. Mex. 177, 16 Pac. 607, selling of machines, by agent in New Mexico, shipped from New Jersey, constitutes interstate commerce; Bateman v. Western Star Milling Co., 1 Tex. Civ. App. 92, 20 S. W. 932, holding sale of merchandise in Texas, belonging to Kansas corporation, constituted

interstate commerce; dissenting opinions in O'Neil v. Vermont, 144 U. S. 346, 36 L. 461, 12 S. Ct. 702, majority holding commerce clause of Constitution not in question; United States v. E. C. Knight Co., 156 U. S. 22, 39 L. 832, 15 S. Ct. 257, majority holding monopoly of refined sugar was not in restraint of commerce, contrary to act of July 2, 1890; Henderson Bridge Co. v. Kentucky, 166 U. S. 167, 41 L. 969, 17 S. Ct. 538, majority holding bridge company taxed did not itself actually carry on interstate commerce; Dueber, etc., Mfg. Co. v. Howard Watch, etc., Co., 66 Fed. 650, 35 U. S. App. 16, majority holding complaint failed to show case within act of Congress of July 2, 1890; In re Greene, 52 Fed. 113, arguendo.

Distinguished in Hopkins v. United States, 171 U. S. 597, 19 S. Ct. 6[illegible], reversing S. C., 82 Fed. 538, 540, holding Kansas City Live-Stock Exchange, soliciting consignments from other States, not engaged in interstate commerce.

Commerce.— Power of Congress includes power to prescribe rules by which it is to be governed, and control instrumentalities by which it may be carried on, pp. 203, 204.

Approved in Cuban Steamship Co. v. Fitzpatrick, 66 Fed. 67, holding State law prohibiting sailors of foreign vessels from working on wharves, unconstitutional; Clyde Steamship Co. v. City Council, 76 Fed. 48, holding State could not exact license tax from vessel landing wharf, and having office at one of its ports; North Bloomfield, etc., Min. Co. v. United States, 88 Fed. 675, 59 U. S. App. 385, reviewing authorities, and sustaining act of Congress regulating hydraulic mining in California in its relation to navigable rivers; Cann v. White, etc., Mach. Co., 57 Ark. 34, 38 Am. St. Rep. 225, 20 S. W. 582, 18 L. R. A. 207, holding contract of agent selling for principal residing in another State, not affected by State statute requiring certificate to be filed with secretary of State, etc.; Bullard v. Northern Pac. R. R., 10 Mont. 180, 25 Pac. 122, act of Congress of February 4, 1887, prohibiting unjust discrimination by carriers; Missouri, etc., Ry. v. Fookes, — Tex. Civ. App. —, 40 S. W. 859, holding State could not compel railroad to redeem unused tickets in interstate transportation; Baltimore v. Baltimore Trust Co., 166 U. S. 684, 41 L. 1164, 17 S. Ct. 701, holding, under power to "regulate," city could compel street railroad to use but one track; Hershfield v. Rocky Mt., etc., Co., 12 Mont. 118, 29 Pac. 887, holding power of city to license telephone company, carried with it power to grant privilege of using telephone poles.

Commerce.— States may prescribe regulations as to subjects of commerce, local and limited in their nature, until Congress intervenes and assumes control, p. 204.

Approved in The City of Norwalk, 55 Fed. 107, reviewing authorities, and holding State statute valid, conferring damages for death caused by collision on navigable waters, within State; Cotting v.

Kansas City, etc., Co., 82 Fed. 844, holding State statute regulating Kansas City stockyards, valid; dissenting opinions in Potter v. Rio Arriba, etc., Co., 4 N. Mex. 333, 17 Pac. 620, majority holding act prohibiting acquisition of land by aliens, did not apply to pre-existing contracts of sale; Wabash, etc., Ry. v. Illinois, 118 U. S. 564, 30 L. 246, 7 S. Ct. 6, arguendo.

Commerce.— When subjects are national in their character, requiring uniformity, power of Congress is exclusive, and its non-action is a declaration that commerce shall remain free, p. 204.

Approved in Pickard v. Pullman, etc., Car Co., 117 U. S. 49, 29 L. 790, 6 S. Ct. 642, holding sleeping-car tax void, so far as it affected interstate transit; Wabash, etc., Ry. v. Illinois, 118 U. S. 575, 30 L. 250, 7 S. Ct. 12, holding State statute prohibiting discriminations in rates, invalid as to transportation beyond its limits; Robbins v. Shelby Taxing Dist., 120 U. S. 492, 30 L. 696, 7 S. Ct. 594, holding State tax on drummers, void; Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 344, 30 L. 1204, 7 S. Ct. 1124, State tax on gross receipts of domestic steamship company transporting beyond the State, held void; Western Union Tel. Co. v. Pendleton, 122 U. S. 357, 30 L. 1189, 7 S. Ct. 1128, holding Indiana statute invalid, regulating delivery of telegraph messages outside of State; Leloup v. Port of Mobile, 127 U. S. 648, 32 L. 314, 8 S. Ct. 1384, holding State license tax on telegraph company, unconstitutional; Crutcher v. Kentucky, 141 U. S. 58, 35 L. 652, 11 S. Ct. 854, holding Kentucky statute taxing agents of foreign express companies, void; State v. Woodruff Sleeping, etc., Coach Co., 114 Ind. 158, 15 N. E. 815, holding tax on earnings of sleeping-car company, transporting from one State to another, void; Commonwealth v. Smith, 92 Ky. 46, 36 Am. St. Rep. 583, 17 S. W. 189, holding arbitrary tax on business of foreign express companies, void; State v. Stephens, 146 Mo. 682, 69 Am. St. Rep. 637, 48 S. W. 934, and Bain v. Railroad, 105 N. C. 367, 18 Am. Rep. 916, 11 S. E. 312, 8 L. R. A. 301, and n., both holding rolling-stock of foreign railroad company in transitu, not taxable by State; McNaughton v. McGirl, 20 Mont. 131, 63 Am. St. Rep. 614, 44 Pac. 653, 38 L. R. A. 370, holding State act, imposing terms upon foreign corporations, void as to transactions of agent buying wool for, and consigning it to, such corporation; Singer Mfg. Co. v. Hardee, 4 N. Mex. 178, 16 Pac. 608, holding law requiring foreign corporation to file articles, etc., void as to corporation selling machines by its agents; People v. Hawkins, 157 N. Y. 16, 68 Am. St. Rep. 747, 51 N. E. 261, 42 L. R. A. 497, holding State act making it penal to sell any convict-made goods without a label, void; Missouri, etc., Ry. v. Fookes, — Tex. Civ. App. —, 40 S. W. 859, holding State statute requiring railroads to redeem unused tickets invalid, as to interstate transportation; concurring opinion in Bowman v. Chicago, etc., Ry., 125 U. S. 508, 31 L. 715, 8 S. Ct. 1066, majority holding Iowa statute requiring certificate of carrier bringing liquors into State, void;

dissenting opinions in Mugler v. Kansas, 123 U. S. 676, 31 L. 215, 8 S. Ct. 305, majority sustaining Kansas "prohibition law;" Adams Exp. Co. v. Ohio, 165 U. S. 234, 41 L. 700, 17 S. Ct. 314, majority holding State law valid, taxing property of express company within State in proportion to whole capital employed in several States; Roper v. California, 155 U. S. 653, 39 L. 300, 15 S. Ct. 209, generally. Cited in 59 Am. Rep. 269, and 27 Am. St. Rep. 550, notes.

Distinguished in Western Union Tel. Co. v. James, 162 U. S. 661, 40 L. 1109, 16 S. Ct. 938, sustaining Georgia statute, imposing penalty on telegraph company for failure to deliver messages coming from points outside of State; Rhea v. Newport, etc., R. Co., 50 Fed. 22, holding State had right to authorize bridge across navigable stream within its borders, where Congress had not intervened; Seawell v. Kansas City, etc., Ry., 119 Mo. 235, 237, 24 S. W. 1005, holding State could prohibit discriminating rates between different points within the State, although line of transportation was partly without; Providence Coal Co. v. Providence, etc., R. R., 15 R. I. 310, 4 Atl. 31, holding State statute prohibiting discriminations in transportation to points without the State, not a regulation of commerce; Gulf, etc., Ry. v. Dwyer, 75 Tex. 579, 16 Am. St. Rep. 928, 12 S. W. 1002, 7 L. R. A. 479, holding State law, imposing penalty upon carrier, for failure to deliver, not a regulation of commerce; Western Union Tel. Co. v. Tyler, 90 Va. 299, 44 Am. St. Rep. 912, 18 S. E. 281, holding State act requiring telegraph companies to deliver messages promptly, not a burden upon commerce.

Commerce.— Corporations, as well as individuals, are within protection of commercial power of Congress, pp. 204, 205.

Approved in Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 342, 344, 30 L. 1206, 1204, 7 S. Ct. 1123, 1124, holding State tax upon gross receipts of domestic steamship company engaged in interstate transportation, unconstitutional; Stockton v. Baltimore, etc., R. Co., 32 Fed. 14, where Congress granted to New York corporation right to build bridge over river from one State to another; McNaughton v. McGirl, 20 Mont. 128, 63 Am. St. Rep. 612, 49 Pac. 652, 38 L. R. A. 33, foreign corporation engaged in interstate commerce in Montana.

Commerce.— Power of State to interfere with landing and receiving of passengers and freight, is confined to such measures as will prevent confusion among vessels, and collision between them, and facilitate discharge of passengers and freight, which fall under head of port regulations, p. 206.

Approved in Madison v. Abbott, 118 Ind. 339, 341, 21 N. E. 29, sustaining State statute designating time and place of landing for ferry plying between different States; Carroll v. Campbell, 108 Mo. 32, 17 S. W. 888, holding city could grant ferry privilege to boats on navigable rivers between two States; dissenting opinion in Norfolk, etc., R. R. v. Commonwealth, 88 Va. 111, 13 S. E. 345, 13 L. R.

A. 113, and n., majority holding State could not forbid interstate trains to run on Sunday. See 29 Am. St. Rep. 714, note.

Commerce.— Ferry-boat plying between two States, can only be taxed at its home port, p. 210.

Cited in State v. State Board, 3 S. Dak. 351, 53 N. W. 196, holding real and personal property of foreign express company, within the State, taxable.

Commerce.— Tax by Pennsylvania, upon capital stock of New Jersey ferry company, and upon transportation of passengers and freight from New Jersey to Pennsylvania, is unconstitutional and void, pp. 210, 211.

Approved in Pickard v. Pullman, etc., Car Co., 117 U. S. 49, 29 L. 790, 6 S. Ct. 642, holding State tax on sleeping cars, used in interstate commerce, void; Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 344, 30 L. 1204, 7 S. Ct. 1124, holding State tax on domestic company doing transportation business in different States, void; Fargo v. Michigan, 121 U. S. 244, 30 L. 894, 7 S. Ct. 863, holding State tax upon gross receipts of foreign transportation company, void; Norfolk, etc., R. R. v. Penn, 136 U. S. 120, 34 L. 397, 10 S. Ct. 961, holding license tax upon railroad doing interstate business, and having office in Pennsylvania, invalid; Central R. R. v. State Board, 49 N. J. L. 23, 7 Atl. 317, New Jersey act, taxing engines, cars, etc., of Pennsylvania corporation, according to time used in State, held unconstitutional; People v. Wemple, 138 N. Y. 14, 15, 33 N. E. 724, 19 L. R. A. 699, holding tax on business of railroad exclusively engaged in interstate commerce, void; dissenting opinions in Adams Exp. Co. v. Ohio, 165 U. S. 232, 233, 234, 41 L. 699, 700, 17 S. Ct. 313, 314, majority holding "unit rule" of taxation upon property of foreign express company within State, valid; Henderson Bridge Co. v. Kentucky, 166 U. S. 169, 41 L. 960, 17 S. Ct. 539, majority holding tax on intangible property of company owning bridge between Kentucky and Indiana, valid; Pullman's Car Co. v. Pennsylvania, 141 U. S. 23, 35 L. 616, 11 S. Ct. 878, arguendo.

Distinguished in Pullman's Car Co. v. Pennsylvania, 141 U. S. 24, 25, 35 L. 617, 11 S. Ct. 878, 879 (see dissenting opinion in 141 U. S. 33, 36, 35 L. 620, 621, 11 S. Ct. 881, 883), holding State tax on proportion of capital stock of foreign corporation, invested in cars used within the State, valid; Carroll v. Campbell, 108 Mo. 565, 17 S. W. 888, holding city had right to grant franchise to ferry doing interstate business; People v. Wemple, 131 N. Y. 71, 27 Am. St. Rep. 546, 29 N. E. 1003, holding State statute valid, imposing tax upon foreign manufacturing corporation for privilege of doing business; Tugwell, etc. v. Eagle Pass Ferry Co., 74 Tex. 490, 9 S. W. 122, holding State could grant exclusive ferry privilege over river between United States and Mexico. Questioned in Telegraph Co. v.

Sav. 71 Miss. 560, 562, 42 Am. St. Rep. 477, 479, 14 So. 37, 38, reviewing conflicting authorities, and holding State privilege tax on foreign telegraph company, valid.

Commerce.— Freedom of commerce from imposition of State taxes, does not imply exemption from charges, as compensation for use of property, or for facilities afforded for its use, or ordinary taxes upon value of property within jurisdiction of State, p. 217.

Approved in Ficklen v. Shelby Co., 145 U. S. 22, 36 L. 607, 12 S. Ct. 862, holding tax on commission merchants, though buying and selling goods outside of State, valid; Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 222, 38 L. 970, 14 S. Ct. 1093, holding company might make reasonable charges for use of bridge connecting two States; Pullman's Car Co. v. Twombly, 29 Fed. 663, 668, holding sleeping cars, used continuously on a single run, subject to State tax; Beyer v. Odd Fellows, etc., Assn., 157 Mass. 373, 34 Am. St. Rep. 293, 32 N. E. 472, holding State may prescribe mode of service of process of its courts upon foreign corporation doing business there; J. S. Keator Lumber Co. v. St. Croix, etc., Corp., 72 Wis. 94, 7 Am. St. Rep. 857, 38 N. W. 541, holding State could grant privilege of constructing boom in navigable river constituting its boundary; dissenting opinions in Wabash, etc., Ry. v. Illinois, 118 U. S. 589, 30 L. 255, 7 S. Ct. 20, majority holding State law prohibiting discriminating rates invalid, as to transportation from that to other States; Bain v. Railroad, 105 N. C. 365, 18 Am. St. Rep. 914, 11 S. E. 812, 8 L. R. A. 300, and n., arguendo; Commonwealth v. Roswell, 173 Mass. 121, 53 N. E. 133, obiter; Jack v. Walker, 79 Fed. 141, generally, with approval. See 27 Am. St. Rep. 555, note.

Distinguished in Tugwell, etc. v. Eagle Pass Ferry Co., 74 Tex. 494, 12 S. W. 655, holding State had power to grant license to operate ferry across stream constituting its boundary.

114 U. S. 218-223, 29 L. 94, LAMAR v. MICOU.

Domicile.— Marriage of widow to second husband does not necessarily change the domicile of infant children by first marriage, p. 219.

Cited, arguendo, in Marks v. Marks, 75 Fed. 325.

Guardian, appointed in State not the domicile of his ward, should err in accounting for his investments, be held to a narrower range of securities than was allowed by law of ward's domicile, pp. 220-222.

Cited without particular application in Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 458, 32 L. 796, 9 S. Ct. 476.

Domicile.— Infants, who, after the death of both their parents, move to the home of their paternal grandmother, and next of kin, in another State, acquire her domicile, p. 223.

Approved in In re Benton, 92 Iowa, 205, 54 Am. St. Rep. 542, 60 N. W. 615, holding paternal grandfather and next of kin, guardian by nature; Woodward v. Woodward, 87 Tenn. 657, 11 S. W. 886, holding adopted child acquired domicile of its adoptive parent.

Evidence.— Federal courts are bound to take judicial notice of the law of any State, whether depending upon statutes or judicial opinions, p. 223.

Followed in Mills v. Green, 159 U. S. 657, 40 L. 295, 16 S. Ct. 134, taking judicial notice of convention to revise State Constitution; Newberry v. Robinson. 36 Fed. 843, as to Constitution and statutes of Ohio; State v. Coosaw Min. Co., 45 Fed. 808, taking notice of acts not fully pleaded; Merchants' Exch. Bank v. M'Graw, 59 Fed. 977, 15 U. S. App. 332, holding pleading of wrong statute immaterial; Davidow v. Pennsylvania R. Co., 85 Fed. 944, examining laws of Pennsylvania, giving cause of action for injury causing death.

Qualified in Hanley v. Donoghue, 116 U. S. 6, 29 L. 537, 6 S. Ct. 245, holding, on writ of error from State court, Federal Supreme Court will not take judicial notice of law of another State, unless made part of record. Distinguished in Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 445, 32 L. 793, 9 S. Ct. 473, holding law of Great Britain must be pleaded and proved.

114 U. S. 224-233, 29 L. 101, XENIA BANK v. STEWART.

Evidence.— Declarations made by officer or agent of corporation, in response to timely inquiries, properly addressed to him, and relating to matters under his charge, in respect to which he is authorized, in usual course of business, to give information, may be given in evidence against corporation, p. 229.

Followed in Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co., 26 Fed. 600, declaration of master of vessel before notary, that compass was "a little out;" St. Louis, etc., Ry. v. Weaver, 35 Kan. 431, 11 Pac. 418, collecting authorities, and admitting conversation of civil engineer and roadmaster, before the accident, respecting dangerous place on road.

Distinguished in Tuthill Spring Co. v. Shaver Wagon Co., 35 Fed. 646, declarations, as to transfer of note, made by officer of corporation, held not part of res gestæ, and inadmissible; Williams v. Lewis, 115 Ind. 50, 7 Am. St. Rep. 407, 17 N. E. 265, holding declaration of partner that firm property belonged to one partner individually, not binding on firm.

Evidence.— Statement by cashier to person, who was in treaty to purchase, that bank was not owner of certain security in manual possession of cashier, was in line of his duty, and binding on bank, p. 229.

Cited in Pouilin v. Canadian Pac. Ry., 47 Fed. 860, railroad company held liable for negligence of ticket agent.

Distinguished in Consolidated Milling Co. v. Fogo, 104 Wis. 96, 80 N. W. 105, holding declarations of officer of bank, made without scope of his authority, not binding on bank.

Evidence.— Letter written by cashier of bank, admitting cancellation of note, and holding of securities, is admissible against bank, as evidence of certain disposition of securities, p. 230.

Distinguished in Clark v. Ford, 7 Kan. App. 336, 51 Pac. 939, rejecting letters, where there was no showing as to how they were exchanged.

Evidence.— Proof of insolvency of debtor is not competent evidence to show non-payment of debts, p. 231.

Approved in Bridgewater Gas Co. v. Horne Gas, etc., Co., 59 Fed. 42, 16 U. S. App. 569, holding evidence of expense of pipe line, too remote to prove good faith in performing contract; Triplett v. Goff, 83 Va. 787, 3 S. E. 527, habits of defendant as to becoming surety, held inadmissible in action on bond; Devere v. State, 5 Ohio C. C. 517, 523, evidence of indigence of one accused of forgery, held inadmissible.

Evidence.— Question calling for information, and not for knowledge of teller of bank, as to certain payment, is incompetent, p. 232.

Payment.— Creditor, in possession of debtor's property as agent, trustee or bailee, cannot, without reducing debt to judgment, without order of court, or consent of debtor, apply its proceeds to payment of his debt, p. 233.

114 U. S. 233-244, 29 L. 110, UNITED STATES v. MINOR.

Courts.— Question presenting whole case, without showing distinct point of division, cannot be certified to Supreme Court for answer, p. 238.

Public lands.— United States, in bill in equity, to set aside patent for fraud, is not bound to offer return of purchase money. It is forfeited under provisions of § 2262, R. S., p. 238.

Approved in Mery v. Brodt, 121 Cal. 338, 53 Pac. 820, holding owners of mining claim, in action against fraudulent patentee, not required to reimburse him for money forfeited to government.

Distinguished in People v. Bryan, 78 Cal. 377, 14 Pac. 893, holding State must offer return of purchase money, in suit to cancel swamp-land patent, on account of defective application.

Public lands.— United States may, by bill in chancery, vacate land patent, obtained by fraud, if there are no innocent purchasers for value, pp. 239-241.

Approved in United States v. San Jacinto Tin Co., 125 U. S. 282, 284, 31 L. 750, 751, 8 S. Ct. 855, 856, holding, if government has an interest, it may file bill to set aside patent for fraud; United States

v. [illegible] Co., 125 U. S. 366, 32 L. 461, 9 S. Ct. 96, reviewing authorities, and sustaining bill to revoke patent for invention, obtained by fraud; Smith v. Ewing, 11 Sawy. 64, 23 Fed. 747, where innocent purchaser of certificate of purchase took right to patent purged of fraud; United States v. Rose, 11 Sawy. 85, 24 Fed. 197, bill to set aside patent for fraud; United States v. Curtner, 11 Sawy. 412, 415, 26 Fed. 297, 299, sustaining bill by United States, to annul patents issued by mistake; United States v. Williams, 12 Sawy. 149, 30 Fed. 315, suit to cancel listing of lands to State of Nevada, alleging fraud or mistake; United States v. Hancock, 12 Sawy. 385, 386, 30 Fed. 853, 854, holding no satisfactory proof of fraud sufficient to annul patent; United States v. Iron Silver Min. Co., 24 Fed. 569, bill to set aside patents for placer mines, dismissed on the merits. The following also hold bills to set aside patents maintainable by the government; Brewster v. Kansas City, etc., Ry., 25 Fed. 243, and United States v. Maxwell Land-Grant Co., 26 Fed. 123, to correct mistake in survey; United States v. Central Pac. R. Co., 84 Fed. 219, mistake as to character of land; United States v. San Pedro, etc., Agua Co., 4 N. Mex. 290, 17 Pac. 402 (see concurring opinion in 4 N. Mex. 310, 17 Pac. 422), wrongful survey obtained by fraud; Steele v. Walker, 115 Ala. 490, 67 Am. St. Rep. 65, 21 So. 943, as to right of government to recover lands forfeited by State; Hilton v. Guyot, 159 U. S. 207, 40 L. 123, 16 S. Ct. 160, holding judgment obtained in France could be impeached for fraud; Dunlap v. Steere, 92 Cal. 348, 27 Am. St. Rep. 145, 28 Pac. 564, 16 L. R. A. 363, and n., sustaining bill to set aside judgment obtained upon fraudulent claim, and without actual notice to defendant; United States v. Reed, 12 Sawy. 104, 28 Fed. 485, generally; Laughton v. Nadeau, 75 Fed. 793, generally; Horsky v. Moran, 21 Mont. 356, 53 Pac. 1068, generally; United States v. Bell Tel. Co., 167 U. S. 240, 42 L. 154, 17 S. Ct. 810, arguendo; Noble v. Union River, etc., R. R., 147 U. S. 176, 37 L. 127, 13 S. Ct. 274, obiter.

Distinguished in Colorado Coal Co. v. United States, 123 U. S. 313, 31 L. 185, 8 S. Ct. 133, where patented land had passed to bona fide purchasers; United States v. Ball, 12 Sawy. 516, 31 Fed. 668, holding certificate of purchase not subject to collateral attack; Northern Pac. R. Co. v. Cannon, 46 Fed. 230, dismissing bill in equity by private parties having legal title, to determine adverse title of patentee; Jones v. Meyers, 2 Idaho, 798, 35 Am. St. Rep. 262, 26 Pac. 217, where commissioner of land office cancelled final receipt and certificate before patent issued.

Public lands.— Patent issued on confirmation of grant, after proceedings prescribed by act of Congress, judicial in character, is an execution of such decree of confirmation, and conclusive, pp. 241, 242.

Approved in United Land Assn. v. Knight, 85 Cal. 469, 472, 24 Pac. 827, 828, holding patent should conform to decree fixing boundary of pueblo grant to San Francisco.

Public lands.— Though decisions of land department, on facts before them, are conclusive, rule does not apply to proceedings only ex parte, pp. 243, 244.

Approved in Heath v. Wallace, 138 U. S. 585, 34 L. 1068, 11 S. 2 34, holding decision of land department that lands were not "swamp lands," conclusive; Bishop of Nesqually v. Gibbon, 158 U. S. 155, 39 L. 936, 15 S. Ct. 784, collecting authorities, decision of secretary of interior, as to existence of missionary station, and amount of land occupied, held final; Wisconsin Cent. R. R. v. United States, 164 U. S. 207, 41 L. 405, 17 S. Ct. 50, holding mistake of postmaster-general in making overpayment, could be rectified by his successor; Calhoun v. Violet, 173 U. S. 63, 19 S. Ct. 325, decision of land department that party had made entry prior to time fixed by statute, held final; United States v. Hancock, 12 Sawy. 384, 30 Fed. 6, holding decree of commissioners, confirming designated tract of land, final; Northern Pac. R. Co. v. Wright, 51 Fed. 72, holding, not discretion of land department to determine whether land was mineral or non-mineral; Stimson Land Co. v. Hollister, 75 Fed. 944, cancellation of entries by land department, by proceedings based on extortion and fraud, held not conclusive; Forbes v. Driscoll, 4 Dak. 357, 31 N. W. 644, holding court of law could not hear contest's right to pre-emption; Porter v. Bishop, 25 Fla. 760, 6 So. 8, holding decision of secretary of interior, as to settlement and improvements, final: Horsky v. Moran, 21 Mont. 352, 53 Pac. 1066, holding patentee presumably entitled under decision of land office; Bissell v. Bush, 6 Wyo. 354, 45 Pac. 490, cancellation of entry by commissioner held conclusive, in absence of fraud or want of power; United States v. San Pedro, etc., Agua Co., 4 N. Mex. 308, 17 Pac. 420, majority holding facts showed fraud, and United States entitled to have survey set aside, etc.

114 U. S. 244-247, 29 L. 143, WEAVER v. FIELD.

Mortgages.— In suit to foreclose, held, that plaintiff never acquired title to notes as owner, and under laws of Louisiana they were extinguished by confusion, pp. 245-247.

Not cited.

114 U. S. 248-252, 29 L. 142, DOE v. HYDE.

Bankruptcy.— Suit by creditor, against assignee, to recover securities surrendered to assignee, held barred, § 5057, R. S., p. 250.

Not cited.

114 U. S. 252-262, 29 L. 126, BISSELL v. FOSS.

Tenancy in common.— Purchase of outstanding title or incumbrance, by one or more tenants in common, inures to benefit of all,

[illegible] 150 U. S. 586, 37 L. 1191, 14 [illegible] of legal title from land office, inured [illegible] Chapman, 24 Fed. 678, holding tena[illegible] to save running of statute again[illegible] 15 Mont. 211, 38 Pac. 1070, holdin[illegible] of patent obtained upon payment [illegible] Am. Dec. 767, note.

[illegible] mining.— Member of mining partnership may pu[illegible] for his own benefit, without being require[illegible] partnership for property, pp. 260–262.

[illegible] Harris v. Lloyd, 11 Mont. 404, 28 Am. St. Rep. 48[illegible] where one mining partner received higher sum for hi[illegible] his co-owners.

[illegible] Kimberly v. Arms, 129 U. S. 529, 32 L. 770, 9 S[illegible] holding member of partnership for purchase and sale o[illegible] liable to account as in ordinary partnerships.

[illegible] and mining.— There is no relation of trust between min[illegible] violated, by sale by one partner to a stranger, or to on[illegible] of his share in property and business of associa[illegible] p. 261.

[illegible] Mills v. Hurd, 29 Fed. 411, holding "car trust associa[illegible]" similar to mining partnerships; Thomas v. Hurst, 73 Fed. [illegible] statute of limitations does not commence to run against repre[illegible] of mining partner at his death, for an accounting; Meag[illegible] v. Reed, 14 Colo. 354, 24 Pac. 687, 9 L. R. A. 462, mining part[illegible] organized to lease and operate mine; Harris v. Lloyd, 11 [illegible] 404, 28 Am. St. Rep. 482, 28 Pac. 739, where one mining partner sold his interest for more than was paid to his co-owners; Congdon v. Olds, 18 Mont. 491, 46 Pac. 263, holding members of mining partnership not necessarily liable on note signed by one; G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 39, generally, without particular application. See 69 Am. St. Rep. 418, note.

114 U. S. 262–264, 29 L. 176, BRADSTREET CO. v. HIGGINS.

Costs.— Where writ of error was dismissed on motion of defendant in error, for want of jurisdiction, Supreme Court has authority to adjudge costs of motion to dismiss, against plaintiff in error, p. 264.

Approved in Miller v. Clark, 47 Fed. 851, Circuit Court refusing to proceed until costs of appeal to Supreme Court were paid; Patter[illegible] v. Cilley, 50 Fed. 337, 5 U. S. App. 9, judgment for costs awarded to defendant in error, on motion to dismiss in Circuit Court of Appeals; Kinnear v. Flanders, 17 Colo. 14, 28 Pac. 328, taxing costs of intervention against intervenor, upon judgment of dismissal; Walko v. Walko, 64 Conn. 77, 29 Atl. 244, awarding costs to party properly pleading to jurisdiction; Kent v. Commrs. Labette Co., 4[illegible]

Kan. 857, 22 Pac. 611, costs given to appellee upon dismissal of appeal; Cereghino v. Third Dist. Court, 8 Utah, 459, 32 Pac. 699, taxing costs to appellee where appeal was dismissed for want of jurisdiction of lower court.

Distinguished in Tug River Coal, etc., Co. v. Brigel, 67 Fed. 630, 31 C. C. A. App. 665, dividing costs, where jurisdiction of lower court was questioned for first time on appeal.

114 U. S. 265-269, 29 L. 174, BOATMAN'S BANK v STATE SAVINGS ASSN.

Courts.— Question whether presentation of check drawn on banker, by customer having funds to his credit, two months before commencement of proceedings in bankruptcy, amounted to an equitable transfer of that amount, presents no Federal question, and Supreme Court is without jurisdiction, pp. 268, 269.

Not cited.

114 U. S. 269-340, 29 L. 185, VIRGINIA COUPON CASES.

114 U. S. 270-306, 29 L. 185, POINDEXTER v. GREENHOW.

Constitutional law.— Virginia funding act of 1871, declaring coupons of State bonds receivable for State taxes, was a contract, and acts of 1882 and 1884, requiring taxpayer to pay taxes in money under protest, and file coupons in suit against collector, impairs its obligation, and are void, pp. 278-306.

Reaffirmed in following cases, involving same matter: White v. Greenhow, 114 U. S. 308, 29 L. 199, 5 S. Ct. 923, Chaffin v. Taylor, 114 U. S. 310, 29 L. 199, 5 S. Ct. 924, Allen v. Baltimore, etc., R. Co., 114 U. S. 314, 29 L. 201, 5 S. Ct. 926, Chaffin v. Taylor, 116 U. S. 570, 571, 29 L. 728, 6 S. Ct. 519, 520, and McCullough v. Virginia, 172 U. S. 106, 108, 19 S. Ct. 135, 136. Approved also in Royall v. Virginia, 116 U. S. 578, 583, 29 L. 737, 738, 6 S. Ct. 513, 515, holding coupons receivable in payment of license; United States Exp. Co. v. Allen, 39 Fed. 713, holding Tennessee could not require payment of tax under protest alleged to be unconstitutional; Carr v. State, 127 Ind. 207, 22 Am. St. Rep. 626, 26 N. E. 779, 11 L. R. A. 771 and n., holding State could not repudiate certificates issued; Canal Co.'s Case, 83 Md. 626, 35 Atl. 365, holding State could not impair its contract to give bondholders first lien on tolls of canal; Marye v. Parsons, 114 U. S. 337, 29 L. 209, 5 S. Ct. 966, generally, in dissenting opinion to principal case. Cited historically in McGahey v. Virginia, 135 U. S. 664, 668, 675, 676, 677, 684, 34 L. 305, 306, 309, 312, 10 S. Ct. 973, 974, 977, 980, and First Nat. Bank v. Treasurer, 25 Fed. 731, without particular application.

Distinguished in Shelton v. Platt, 139 U. S. 599, 35 L. 277, 11 S. Ct. 649, holding bill in equity did not lie to restrain collection of illegal tax; Pearsall v. Great Northern Ry., 161 U. S. 663, 40 L. 844,

16 S. Ct. 709, holding general power given to railroad to consolidate, unexecuted, may be revoked as to parallel lines. Criticised in Commonwealth v. McCullough, 90 Va. 598, 611, 19 S. E. 114, 118, holding coupon feature of act of March 30, 1871, unconstitutional and void.

Taxation.— It being legal duty of collector to receive coupons in payment of taxes, on equal footing with gold or silver, lawful tender of payment is equivalent to actual payment, for purpose of affecting proceedings to enforce payment of taxes, making every subsequent step by collector illegal, pp. 279-283.

Reaffirmed in Royall v. Virginia, 116 U. S. 579, 29 L. 736, 6 S. Ct. 513, tender of coupons to pay license fee; Norfolk Trust Co. v. Marye, 25 Fed. 663, involving Virginia coupons; Commonwealth v. Latham, 85 Va. 637, 8 S. E. 490, majority denying jurisdiction of suit to enjoin execution of judgment by State. See 77 Am. Dec. 489, note.

Explained in In re Ayers, 123 U. S. 495, 31 L. 226, 8 S. Ct. 177, holding tender insufficient to extinguish all subsequent claim of State for taxes.

Detinue lies, where tax collector, without authority of law, has unlawfully seized personal property of natural private person, pp. 282, 283.

Distinguished in In re Ayers, 123 U. S. 500, 31 L. 228, 8 S. Ct. 180, holding acts complained of to be acts of State of Virginia.

States.— Coupons of Virginia, negotiable by delivery merely, and receivable in payment of taxes, were not "bills of credit" within prohibition of Constitution, not being issued as substitute for money, p. 284.

Approved in Bragg v. Tuffts, 49 Ark. 563, 6 S. W. 162, treasury warrants of Arkansas held void; Hunt, Appellant, 141 Mass. 520, 6 N. E. 556, holding certificates of deposit of national banks, valid.

Distinguished in Wesley v. Eells, 90 Fed. 157, 160, holding bond scrip of South Carolina, to be "bills of credit," and void.

Constitutional law — States.— State and government of State are not identical. Immunity from suit does not exempt State from operation of constitutional provision, respecting impairment of contracts, and collector, distraining property without authority of law, cannot assert his official character as defense to suit, by party injured, pp. 286-292.

Approved in Hans v. Louisiana, 134 U. S. 16, 33 L. 847, 10 S. Ct. 507, but dismissing direct suit against State; Pennoyer v. McConnaughy, 140 U. S. 10, 14, 35 L. 365, 366, 11 S. Ct. 701, 703, affirming S. C., 14 Sawy. 588, 589, 43 Fed. 199, 200, holding suit maintainable against land commissioners to restrain certain illegal acts; Reagan v. Farmers' Loan, etc., Co., 154 U. S. 389, 38 L. 1021, 14 S. Ct. 1051, and Chicago, etc., Ry. v. Dey, 35 Fed. 871, 1 L. R. A. 748, and n.,

suits to restrain railroad commission from enforcing unjust rates, sustained; Mercantile Trust Co. v. Texas, etc., Ry., 51 Fed. 542 holding similarly; Scott v. Donald, 165 U. S. 112, 41 L. 653, 17 S. Ct. 262, equity will enjoin constables from seizing property under unconstitutional statute; Tindal v. Wesley, 167 U. S. 220, 42 L. 142, 17 S. Ct. 776, secretary of State denied defense in suit to recover real property; Head v. Porter, 48 Fed. 485, 486, 487, 488, sustaining action for infringement against officer of United States; President, etc. v. Sanger, 62 Fed. 180, action against State treasurer to enjoin diversion of funds under unconstitutional act; Mills v. Green, 67 Fed. 824, restraining registration officer from carrying out provisions of unconstitutional registration laws; Western Union Tel. Co. v. Henderson, 68 Fed. 594, reviewing authorities, and holding suit to restrain auditor in certifying certain valuations, not suit against State; Metropolitan Life Ins. Co. v. M'Nall, 81 Fed. 893, action against superintendent of insurance held not suit against State; Taylor v. Louisville, etc., R. Co., 88 Fed. 356, 60 U. S. App. 181, action against board of equalization, to enjoin them from certifying tax valuation; Scottish Union, etc., Ins. Co. v. Herriott, — Iowa, —, 89 N. W. 666, holding action against State treasurer to recover back taxes, not suit against State; Warren v. Kelley, 80 Me. 532, 15 Atl. 54, holding State officer liable for taking property by process in rem, issuing from State court against foreign vessel; Water-Power Co. v. Electric Co., 43 S. C. 169, 20 S. E. 1007, holding State not indispensable party in action between power companies for damages; Grunert v. Spalding, 104 Wis. 212, 78 N. W. 613, holding act of governor as to certain grants of land, not act of State; dissenting opinions in In re Ayers, 123 U. S. 510, 513, 31 L. 231, 232, 8 S. Ct. 185, 187, majority holding suit virtually against State, and not maintainable; Robertson v. State, 109 Ind. 100, 10 N. E. 592, majority holding court had no jurisdiction to settle title to office of lieutenant-governor; generally in In re Comingore, 96 Fed. 562, and Brown v. Epps, 91 Va. 736, 21 S. E. 122, 27 L. R. A. 679.

Distinguished in Hagood v. Southern, 117 U. S. 70, 29 L. 811, 6 S. Ct. 617, holding comptroller-general could not enter appearance of State and defend for it in his name; In re Ayers, 123 U. S. 501, 31 L. 224, 8 S. Ct. 180, where acts of auditor, etc., were held acts of State of Virginia; Belknap v. Schild, 161 U. S. 19, 20, 21, 40 L. 602, 603, 16 S. Ct. 446, holding United States necessary party to bill to enjoin infringement from use of patent in navy yard; Fitts v. McGhee, 172 U. S. 527, 529, 19 S. Ct. 273, 274, dismissing suit against governor and attorney-general to test constitutionality of law reducing tolls; Manchester Fire Ins. Co. v. Herriott, 91 Fed. 715, dismissing bill by foreign corporation, effect of which was to compel State to allow it to carry on business there; Ball v. Rutland R. Co., 93 Fed. 218, dismissing action against State officers, to test validity of statute requiring sale of mileage books by railroad; State v. Auditor, 47 La. Ann. 1695, 18 So. 752, holding auditor could not question

constitutionality of act in action against him, to compel performance of duty; Lowry v. Thompson, 25 S. C. 421, 1 S. E. 145, suit against commissioners of sinking fund, held suit against State.

States.— Question whether suit is against State, and within prohibition of eleventh amendment, is not always determined by reference to nominal parties on record, but provision is to be substantially applied in furtherance of its intention, p. 287.

Approved in In re Ayers, 123 U. S. 487, 31 L. 223, 8 S. Ct. 173, holding bill in equity against auditor, and other State officers, in reality suit against State; Railroad Commrs. v. Pensacola, etc., R. R., 24 Fla. 461, 12 Am. St. Rep. 224, 5 So. 131, 2 L. R. A. 506, holding suit against State, though not named in record.

Taxation laws of State are often adjudged void, in particular cases, as regulating commerce or impairing contracts, p. 295.

Approved in Wade v. Kimberley, 5 Ohio C. C. 44.

United States.— Individual cannot plead State statute, which violates Federal Constitution, as his authority for taking or holding property to which citizen asserts title or possession, p. 292.

Cited in Wolfe v. Pearson, 114 N. C. 632, 19 S. E. 266, without particular application.

Detinue against collector, for unlawful seizure, is itself purely defensive, its object being to restore status in quo as it was wh right to be vindicated was invaded, like preventive remedy of junction in equity, p. 295.

Set-off may be subject of contract, and it is not then depend upon law of lex fori, nor can it be impaired by subsequent legi tion, p. 300.

Cited generally in McGahey v. Virginia, 135 U. S. 685, 34 L. 10 S. Ct. 980.

Constitutional law.— To take all remedy for enforcement of is to take right itself, p. 303.

Courts.— Unconstitutional laws of State are not within st making State laws rules of decision in Federal court, in cases they apply, pp. 303, 304.

Statutes.— One part of statute may be enforced as valid another declared void, but parts must be so distinctly sep that each can stand alone, pp. 304, 307.

Approved in Baldwin v. Franks, 120 U. S. 688, 689, 30 L. 7 7 S. Ct. 660, 661, holding whole of § 5519, R. S., invalid, so applicable to facts of case; Pollock v. Farmers' Loan, etc., U. S. 636, 39 L. 1125, 15 S. Ct. 920, holding income tax inva whole; Levis v. Newton, 75 Fed. 895, holding ordinance valid certain provisions were invalid; In re Wong Hane, 108 Cal.

t. Rep. 141, 41 Pac. 694, holding penal ordinance could only sidered as an inseparable whole; State v. Indiana, etc., Min. 0 Ind. 579, 22 N. E. 779, 6 L. R. A. 582, and n., holding respecting sinking of wells, and transportation of gas, in-le, and wholly void; Logan v. Stogsdale, 123 Ind. 375, 24 136, 8 L. R. A. 60, and n., whole act, providing for establish-f highways, held void; State v. Thomas, 138 Mo. 100, 39 492, collecting authorities, and holding repealing clause of t fell, as part of that act; State v. Stewart, 52 Neb. 250, 71 1001, where two amendatory sections were held inseparable d; Johnson v. State, 59 N. J. L. 539, 37 Atl. 950, 38 L. R. A. tire act, establishing new court in place of old, held void; y-General v. Dover, 62 N. J. L. 50, 40 Atl. 643, 644, holding act for government of towns and cities, fell with void pro-State v. O'Connor, 5 N. Dak. 632, 67 N. W. 826, act in viola-commerce clause held invalid also as to residents; Robertson ton, 97 Va. 301, 33 S. E. 619, holding act invalid, so far as it to persons without limits of town; dissenting opinion in . Gerhardt, 145 Ind. 490, 44 N. E. 485, 33 L. R. A. 330, majority section of liquor statute separable, and one proviso valid. obiter in The Katie, 40 Fed. 482, 7 L. R. A. 58, and n., and t v. Columbus Const. Co., 49 N. J. Eq. 42, 23 Atl. 492. See St. Rep. 505, note.

8. 307-308, 29 L. 198, WHITE v. GREENHOW.

1.— Circuit Court has jurisdiction of case arising under Constitution, regardless of citizenship of parties, where controversy exceeds $500, p. 308.

d in Barry v. Edmunds, 116 U. S. 559, 29 L. 732, 6 S. Ct. ing validity of Virginia coupons; Crystal Springs Land, Los Angeles, 76 Fed. 154, taking jurisdiction in case of en without due process of law; Cox v. Gilmer, 88 Fed. party alleged imprisonment under statute, void as de-of liberty without due process of law; dissenting opin-s Falls v. Fergus Falls Water Co., 72 Fed. 877, 878, 480, majority holding Circuit Court had no jurisdic-on contract, obligation of which was alleged to be nessee v. Union, etc., Bank, 152 U. S. 472, 38 L. 518, arguendo, in dissenting opinion.

al law.— Poindexter v. Greenhow followed, p. 308.

in McGahey v. Virginia, 135 U. S. 676, 34 L. 309, holding Virginia coupons not receivable for special uor license.

29 L. 199, CHAFFIN v. TAYLOR.

law.— Poindexter v. Greenhow followed, pp. 308,

Distinguished in McGahey v. Virginia, 135 U. S. 676, 34 L. 309, 10 S. Ct. 977, where Virginia coupons were held not receivable in payment of school tax or liquor license; Belknap v. Schild, 161 U. S. 21, 40 L. 603, 16 S. Ct. 446, holding government officer could not be restrained by injunction from infringing patent.

114 U. S. 311–317, 29 L. 200, ALLEN v. BALTIMORE, ETC., R. R.

Constitutional law.— Decided in accordance with Poindexter v. Greenhow, p. 314.

Reaffirmed in Virginia Coupon Cases, 25 Fed. 660. Approved in Tindal v. Wesley, 167 U. S. 220, 42 L. 142, 17 S. Ct. 776, holding suit to which secretary of State was a party, not suit against State; Metropolitan Life Ins. Co. v. M'Nall, 81 Fed. 893, and Mutual Life Ins. Co. v. Boyle, 82 Fed. 710, where suits against superintendent of insurance were held not suits against State.

Distinguished in Hagood v. Southern, 117 U. S. 69, 29 L. 811, 6 S. Ct. 616, holding comptroller-general could not defend in name of State, action for specific performance; McGahey v. Virginia, 135 U. S. 676, 34 L. 309, 10 S. Ct. 977, holding coupons not receivable in payment of certain school taxes and liquor licenses; Fitts v. McGhee, 172 U. S. 527, 529, 19 S. Ct. 273, 274, holding suit against attorney-general and solicitor, to restrain reduction of tolls, a suit against State; Manchester Fire Ins. Co. v. Herriott, 91 Fed. 715, dismissing bill to compel auditor to issue certificates to foreign corporation to do business in State; Ball v. Rutland R. Co., 93 Fed. 518, holding suit against State's attorney, to test validity of statute requiring railroad to sell mileage tickets, a suit against State; Lowry v. Thompson, 25 S. C. 422, 1 S. E. 145, holding suit against governor, etc., for recovery of title deed, action against State, and not maintainable.

Injunction to restrain collection of taxes by distraint of rolling-stock and other property of railroad, after tender of payment in tax-receivable coupons, is proper remedy, there being no adequate remedy at law, pp. 314–317.

Approved in Pennoyer v. McConnaughy, 140 U. S. 10, 14, 19, 35 L. 365, 367, 368, 11 S. Ct. 701, 703, 704, affirming S. C., 14 Sawy. 588, 591, 43 Fed. 199, 201, sustaining suit in equity to enjoin land commissioners from selling land; Reagan v. Farmers' Loan, etc., Co., 154 U. S. 389, 38 L. 1021, 14 S. Ct. 1051, reviewing authorities, and holding court had jurisdiction of suit to enjoin railroad commission from enforcing unjust rates; Scott v. Donald, 165 U. S. 112, 41 L. 653, 17 S. Ct. 263, equity will enjoin constables from seizing property under authority of unconstitutional statute; President, etc. v. Sanger, 62 Fed. 181, sustaining suit by Yale College, to restrain State treasurer from diverting certain funds; Western Union Tel. Co. v. Henderson, 68 Fed. 597, holding court had jurisdiction of bill to restrain auditor from making valuations under alleged void statute;

Southern Ry. v. Asheville, 69 Fed. 360, allowing railroad remedy of injunction, where legality of tax was disputed; dissenting opinion in In re Ayers, 123 U. S. 510, 514, 31 L. 231, 232, 8 S. Ct. 185, 187, majority denying injunction to restrain bringing of suits to enforce collection of taxes; Tennessee v. Union, etc., Bank, 152 U. S. 452, 38 L. 518, 14 S. Ct. 660, obiter; In re Tyler, 149 U. S. 188, 37 L. 697, 13 S. Ct. 792, arguendo.

Distinguished in Hagood v. Southern, 117 U. S. 71, 29 L. 811, 6 S. Ct. 617, action to compel specific performance of contract by State; In re Ayers, 123 U. S. 500, 31 L. 228, 8 S. Ct. 180, refusing injunction which, in effect, was intended to prevent State from violating its contract; Shelton v. Platt, 139 U. S. 598, 35 L. 277, 11 S. Ct. 649, holding injunction did not lie to restrain collection of illegal tax; Belknap v. Schild, 161 U. S. 18, 21, 40 L. 602, 603, 16 S. Ct. 445, 446, dismissing bill to enjoin infringement from use of patent by government officers in navy yard; Bates v. Taylor, 87 Tenn. 330, 11 S. W. 268, 3 L. R. A. 319, and n., holding court could not coerce governor in matter of issuing certificates of election.

114 U. S. 317-323, 29 L. 202, CARTER v. GREENHOW.

Courts.— Sixteenth clause of R. S., § 629, giving Circuit Court jurisdiction irrespective of amount or citizenship, where State law infringes Federal rights, does not embrace trespass against collector in Virginia, who, having rejected tender of tax-receivable coupons, seeks to collect tax by seizure and sale of personal property of plaintiff, pp. 320-322.

Cited in McGahey v. Virginia, 135 U. S. 677, 678, 34 L. 309, 310, 10 S. Ct. 977, 978, and McCullough v. Virginia, 172 U. S. 106, 19 S. Ct. 135, historically.

States.— In any judicial proceeding necessary to vindicate rights under contract with States, individual has right to judicial determination declaring nullity of legislative attempt to impair its obligation, but no direct action for denial of right secured by contract will lie, p. 322.

Approved in In re Ayers, 123 U. S. 504, 31 L. 229, 8 S. Ct. 182, holding State could not be sued through its officers on contract to receive coupons for taxes.

114 U. S. 323-324, 29 L. 204, PLEASANTS v. GREENHOW.

Constitutional law.— Decided in accordance with Carter v. Greenhow, supra, p. 324.

Cited in McGahey v. Virginia, 135 U. S. 678, 34 L. 310, 10 S. Ct. 978, historically.

114 U. S. 325-338, 29 L. 205, MARYE v. PARSONS.

States.— Since there is no remedy by suit to compel State to pay its debts, one holding unpaid Virginia coupons cannot maintain action for breach of same, p. 328.

Cited in Christian v. Atlantic, etc., R. R., 133 U. S. 243, 33 L. 593, 10 S. Ct. 263, dismissing action on bonds, when State was indispensable party.

States.— Damages suffered by creditor, from known inability or unwillingness of debtor to perform his obligations, is damnum absque injuria, and not actionable; accordingly, complainant held not entitled to relief as holder of Virginia coupons, where he owed no taxes or other debts to State, but was simply prevented from selling same by State's refusal to accept, p. 329.

Cited in Hagood v. Southern, 117 U. S. 64, 29 L. 809, 6 S. Ct. 613, holding general refusal to accept revenue bond script, not actionable; In re Ayers, 123 U. S. 496, 31 L. 226, 8 S. Ct. 178, refusing injunction in favor of assignor of Virginia coupons; Parsons v. Slaughter, 63 Fed. 880, dismissing Parsons' bill after he had tendered the coupons in payment of other parties' taxes.

Distinguished in Virginia Coupon Cases, 25 Fed. 656, 664, enjoining levy for taxes after tender of Virginia coupons.

States.— It is only when in hands of taxpayers or other debtors that Virginia coupons are receivable in payment of taxes and debts due the State, p. 329.

Courts.— No court sits to determine questions of law in thesi; there must be litigation upon actual transactions between real parties, growing out of controversy affecting legal or equitable rights as to person or property, p. 330.

State cannot be compelled to perform its contracts with individuals unless State consents to be sued, per Bradley, J., dissenting, p. 332.

Approved in State v. Jumel, 38 La. Ann. 340, refusing to compel auditor to assess tax to pay interest on bonds.

States.— Citizen cannot be harassed, injured or destroyed by unconstitutional laws without having some legal means of resistance or redress; but this is when State is moving party; right to these means of redress is very different thing from right to coerce State into fulfilment of its contracts, per Bradley, J., dissenting, p. 336.

Approved in Western Union Tel. Co. v. Henderson, 68 Fed. 595, reviewing authorities, entertaining suit to restrain auditor from acting under alleged unconstitutional statute.

Distinguished in Parsons v. Slaughter, 63 Fed. 879, dismissing bill relating to same coupons.

Miscellaneous.— Carter v. Greenhow, 114 U. S. 323, 29 L. 204, Pleasants v. Greenhow, 114 U. S. 324, 29 L. 205, and McCullough v. Virginia, 172 U. S. 106, 19 S. Ct. 135, citing historically; McGahey v. Virginia, 135 U. S. 678, 34 L. 310, 10 S. Ct. 978, in statement of case by court.

114 U. S. 338-340, 29 L. 240, MOORE v. GREENHOW.

States.— Mandamus to compel officers of Virginia to receive coupons in payment of license taxes, refused because, under decision of Antoni v. Greenhow, 107 U. S. 769, 27 L. 468, 2 S. Ct. 91, remedy by Virginia act of January 14, 1882, is adequate, pp. 339, 340.

Cited in Virginia Coupon Cases, 25 Fed. 662, holding coupons of Virginia must be received for verification in manner provided by act of January 14, 1882; McCullough v. Virginia, 172 U. S. 106, 19 S. Ct. 135, historically.

114 U. S. 340-353, 29 L. 136, EAST ALABAMA RY. v. DOE.

Railroads.— Grant of right of way to railroad and its "assigns," conveys mere easement, not an estate capable of sale on execution, separate from the franchise to run the railroad, p. 350.

Approved in Louisville, etc., Ry. v. Boney, 117 Ind. 507, 20 N. E. 424, 3 L. R. A. 438, and n., annulling order to sell roadbed to pay contractor's judgment; Farmers' Loan, etc., Co. v. Canada, etc., Ry., 127 Ind. 261, 26 N. E. 786, 11 L. R. A. 745, and n., laborer's lien must be enforced against railroad as an entirety; Fort Worth, etc., Ry. v. Jennings, 76 Tex. 377, 13 S. W. 271, 8 L. R. A. 182, and n., railroad cannot convey part of its right of way to additional road over the same; Railway v. Railway, 2 Tex. Civ. App. 655, 22 S. W. 169, right of way still remains property of grantee, notwithstanding forfeiture of its charter; Yellow River Imp. Co. v. Wood Co., 81 Wis. 562, 51 N. W. 1006, 17 L. R. A. 95, and n., dams of river improvement company not taxable as realty; State v. Anderson, 89 Wis. 563, 63 N. W. 749, transfer franchises and necessary property of electric-light company to street railway does not release them from taxation; Eufaula Water Co. v. Addyston Pipe, etc., Co., 99 Ala. 560, 8 So. 28, query, whether materialman can satisfy his lien out of water company's necessary property.

Distinguished in Gardner v. Mobile, etc., R. R., 102 Ala. 647, 48 Am. St. Rep. 91, 15 So. 274, right of way owned in fee by abandoned railroad is subject to execution; Purifoy v. Lamar, 112 Ala. 132, 20 So. 977, permitting sale for taxes of railroad lands owned in fee.

Courts.— Federal courts possess an independent jurisdiction and exercise their own judgment on meaning of State laws, and adopt their own interpretation thereof in applying them to contracts and transactions prior to interpretation by State courts, p. 353.

114 U. S. 353-378, 29 L. 152, THE BELGENLAND.

Admiralty.— Any court of admiralty which first obtains jurisdiction can adjudicate salvage or collision case arising on high seas, though both the vessels and those interested belong to foreign countries, p. 362.

Cited in Christian v. Atlantic, etc., R. R., 133
10 S. Ct. 263, dismissing action on bonds, wh
pensable party.

States.— Damages suffered by creditor, fr
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absque injuria, and not actionable; accord
not entitled to relief as holder of Virginia
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States.— Citizen cann
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7, WALDEN v. KNEVALS.
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71, 13 S. Ct. 355, where location did not conform to require-
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W. 800, rule has no application where location unauthorized.

4 U. S. 376–381, 29 L. 168, PENN BANK v. FURNESS.
Partnership.—Where it is agreed to pay retiring partner in firm,
erroneously believed to be solvent, a certain sum as his share, and

Approved in The Noddleburn, 12 Sawy. 228, 30 Fed. 143, affirming 12 Sawy. 133, 28 Fed. 857, taking jurisdiction of libel for tort to British seaman; Panama R. R. v. Napier Shipping Co., 166 U. S. 285, 41 L. 1006, 17 S. Ct. 574, domestic court will try libel for tort in foreign harbor; The Lamington, 87 Fed. 757, approving rule.

Admiralty Court will not take jurisdiction of controversies between foreigners arising on high seas, where governed by laws of country to which they belong, or parties have agreed to resort only to domestic tribunal, p. 363.

Admiralty Courts will often not take jurisdiction of suit for foreign seamen's wages or ill-treatment, except on consent of their consul; but where voyage is completed or seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction sometimes even against consul's protest, p. 364.

Approved in The Sirius, 47 Fed. 827, taking jurisdiction of seamen's libel for wages, British consul so requesting; The Walter D. Wallet, 66 Fed. 1011, refusing jurisdiction of seaman's libel, in conformity with consul's request; The City of Carlisle, 39 Fed. 815, 5 L. R. A. 60, upholding seamen's claim against British ship for tort; Wilson v. The John Riston, 35 Fed. 664, upholding libel for foreign seaman's wages; Camille v. Couch, 40 Fed. 176, refusing to take jurisdiction of seaman's claim for tort, where settled by consul; The Noddleburn, 12 Sawy. 229, 30 Fed. 143, allowing damages to British seaman for tort on British vessel; Bolden v. Jensen, 70 Fed. 509, sustaining jurisdiction of foreign seaman's libel for cruelty on Chilian ship; The Egyptian Monarch, 36 Fed. 775, to point that seamen's wages controlled by lex loci contractus; The Topsy, 44 Fed. 635, refusing to relinquish jurisdiction of seaman's libel at consul's request.

Admiralty Court will take jurisdiction of controversies between foreigners arising outside its own territory, where governed by common law of nations, unless special reasons appear against it, p. 365.

Approved in Slocum v. Western Assur. Co., 42 Fed. 236, upholding jurisdiction on insurance policy executed in South America on cargo traded there; Fairgrieve v. Marine Ins. Co., 94 Fed. 687, upholding jurisdiction of suit on insurance policy between foreigners, but issued in Chicago.

Admiralty.— Where it is discretionary with trial court to take jurisdiction over controversy between foreigners arising on high seas, this discretion will not be disturbed on appeal unless clearly abused, p. 368.

Admiralty.— In controversy arising on high seas between foreigners, court will administer general admiralty law as understood by country in which it sits, except in so far as the law of both nations represented in the controversy makes same variation from maritime law of forum, pp. 369, 370.

Approved in Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 444, 32 L. 793, 9 S. Ct. 473, American courts do not recognize rule of maritime law sustaining exemption from liability for employee's negligence; The John G. Stevens, 170 U. S. 127, 42 L. 975, 18 S. Ct. 530, administering maritime lien law as understood in United States; The Brantford City, 29 Fed. 383, upholding liability for tort, although not allowed by British law; The Lamington, 87 Fed. 754, holding British seaman's libel for tort of British ship, governed by English law; Card v. Hine, 39 Fed. 820, arguendo.

Collision.— International rules of navigation, as revised and adopted by Congress, 1885, are generally accepted, p. 370, note.

Approved in The Oregon, 158 U. S. 201, 39 L. 951, 15 S. Ct. 811, a collision case; Richelieu Nav. Co. v. Boston Ins. Co., 136 U. S. 422, 34 L. 408, 10 S. Ct. 937, case of stranding of vessel; The New York, 175 U. S. 197, 20 S. Ct. 71, collision case between Canadian and United States vessel.

Collision.— Steamer held liable for night collision with bark, for failure to keep proper lookout and reduce speed, pp. 371, 372.

Followed in The Patria, 92 Fed. 414, steamer liable for want of proper lookout, etc.

Collision.— Where facts as found by lower court clearly indicate negligence, lack of express finding of negligence is immaterial, p. 372.

Cited in Williams v. United States, 137 U. S. 136, 34 L. 598, 11 S. Ct. 51, arguendo, whether certain finding was of law or fact.

114 U. S. 373–376, 29 L. 167, WALDEN v. KNEVALS.

Public lands.— Railroad route is "definitely fixed" under land grant act, and lands are withdrawn from entry when map of route is filed with and accepted by secretary of interior, p. 374.

Followed in Sioux City, etc., Land Co. v. Griffey, 143 U. S. 38, 36 L. 65, 12 S. Ct. 363, St. Paul, etc., R. Co. v. Ward, 47 Minn. 44, 49 N. W. 406, Missouri, etc., Ry. v. Cook, 163 U. S. 497, 41 L. 241, 16 S. Ct. 1095, and St. Paul, etc., Ry. v. Sage, 71 Fed. 49, 50, 36 U. S. App. 340. Approved in Wisconsin Cent. R. Co. v. Price Co., 64 Wis. 391, 392, 398, 26 N. W. 98, where title passed upon completion of road; United States v. McLaughlin, 12 Sawy. 191, 30 Fed. 155, applied to Central Pacific; Wineman v. Gastrell, 53 Fed. 706, 2 U. S. App. 449, in deciding when swamp land title passed.

Distinguished in Hamblin v. Western Land Co., 147 U. S. 535, 37 L. 271, 13 S. Ct. 355, where location did not conform to requirements of act; Western Land Co. v. Hamblin, 79 Iowa, 545, 44 N. W. 809, rule has no application where location unauthorized.

114 U. S. 376–381, 29 L. 168, PENN BANK v. FURNESS.

Partnership.— Where it is agreed to pay retiring partner in firm, erroneously believed to be solvent, a certain sum as his share, and

new firm discounts its paper at bank to pay such share, bank cannot hold old firm for such debt, p. 379.

Partnership.— Where retiring partner withdraws part of capital, with agreement that others pay debts, he must restore it so far as necessary to pay existing creditors, though transaction was bona fide, p. 380.

Not cited.

114 U. S. 381-387, 29 L. 170, AURRECOECHEA v. BANGS.

Public lands.— Lands embraced in Mexican claim, although not included in its final survey, were excepted from confirmation under act of 1866, confirming grants by California under its attempted disposal of school lands before government survey, p. 385.

Cited in United States v. Curtner, 14 Sawy. 548, 38 Fed. 10, construing railroad grant and State selection of lieu lands; United States v. Garretson, 42 Fed. 24, as distinguishing between reserve lands and those subject to entry; Lockhart v. Wills, — N. Mex. —, 54 Pac. 340, arguendo.

Public lands.— Pre-emptor making due entry on land embraced in Mexican claim, but not included within limits of its final survey, has better title than claimant who has patent under invalid selection of said lands by State of California, p. 386.

Cited in United States v. Curtner, 14 Sawy. 546, 38 Fed. 9, to point that California could not select lands before survey.

114 U. S. 387, 29 L. 172, AURRECOECHEA v. SINCLAIR.

Adjudged in conformity with preceding case, q. v.

114 U. S. 387-394, 29 L. 172, AMY v. SHELBY CO. TAXING DIST.

Set-off and counterclaim.— Tax debt due a municipality, and its bonds expressly made receivable for taxes, come clearly within doctrine of set-off, p. 392.

Constitutional law.— Right of a debtor to procure obligations of his creditor and use them as set-off is undeniable, and statute so providing in behalf of debtors of a municipality impairs no contract of bondholders and divests no vested rights, p. 393.

Constitutional law.— Tennessee acts of 1883, providing for optional surrender and refunding of Memphis bonds, and making them receivable for back taxes at same rate as Flippin bonds, did not divest rights of holders of unpreferred debts of the city to use them as set-off for back taxes, nor impair their contract obligation, pp. 392-394.

Cited in Bank v. Commissioners, 116 N. C. 362, 21 S. E. 417, to point that municipality may compromise with its debtors.

114 U. S. 394–401, 29 L. 130, HUNTLEY v. HUNTLEY.

Frauds, statute of.— Verbal agreement by one-third owner in stage company to sell one-sixth interest to A., applying his debt to A. in payment, thereafter recognized in an agreement of the stage company reciting A. as one-sixth owner, is a contract executed, and not within the statute, p. 400.

Cited in Bibb v. Allen, 149 U. S. 497, 37 L. 826, 13 S. Ct. 955, upholding stockholder's contract as complete.

114 U. S. 401–410, 29 L. 149, STATE BANK v. UNITED STATES.

United States.— Where treasury disbursing clerk gave government moneys to brokers for speculation, and latter, by fraud, obtained from a bank sufficient to cover defalcations, paying it to disbursing clerk, who did not know the fraud, government was not liable to refund amount to bank, pp. 409, 410.

Cited in Holly v. Domestic, etc., Soc., 92 Fed. 748, holding innocent holder of misappropriated trust funds could not be compelled to pay them to owner; Atlantic Mills v. Indian, etc., Mills, 147 Mass. 275, 9 Am. St. Rep. 702, 17 N. E. 502, holding corporation could not retain moneys fraudulently obtained by its defaulting agent.

114 U. S. 411–417, 29 L. 147, THE LAURA.

United States.— Constitutional provision investing president with pardoning power, does not prohibit remission of penalties under R. S., § 5294, by secretary of treasury, p. 414.

Approved in Brown v. Walker, 161 U. S. 601, 40 L. 822, 16 S. Ct. 644, upholding power of Congress to grant immunity from penal proceedings on evidence offered before interstate commerce commission.

Constitutional law.— Contemporaneous construction and long acquiescence thereunder are of great weight; applied in construing president's pardoning power, p. 416.

Approved in Auffmordt v. Hedden, 137 U. S. 329, 34 L. 679, 11 S. Ct. 109, following practice as to merchant appraisers of imports; Field v. Clark, 143 U. S. 691, 36 L. 309, 12 S. Ct. 504, upholding act authorizing president to take certain imports from free list; Northern Pac. R. Co. v. United States, 36 Fed. 285, in construing railroad land grant; Rand v. United States, 38 Fed. 667, determining fees of United States commissioners; Northern Pac. R. Co. v. Barden, 46 Fed. 622, following land office practice as to mineral patents; Hovey v State, 119 Ind. 409, 21 N. E. 26, upholding legislature's power to appoint asylum trustees; France v. Connor, 3 Wyo. 463, 27 Pac. 894, construing Edmunds-Tucker act as affecting dower in Wyoming; dissenting opinion in Trout, etc., Club v. Mather, 68 Vt.

363, 35 Atl. 329, 33 L. R. A. 574, arguing as to meaning of "boatable waters." See 13 Am. St. Rep. 143, note.

Distinguished in Hilburn v. St. Paul, etc., Ry., — Mont. —, 58 Pac. 812, rule only applicable where vested rights have been acquired.

Penalties given by R. S., § 4399 et seq., to informers against vessel carrying more than licensed number of passengers, are expressly made subject to possibility that secretary of treasury will remit same before trial, p. 416.

114 U. S. 417-429, 29 L. 89, EX PARTE WILSON.

Courts.— Supreme Court, having no jurisdiction of criminal cases by error or appeal, cannot discharge, on habeas corpus, one imprisoned under sentence of Circuit or District Court, unless in excess of its jurisdiction, or there is no authority to hold him under the sentence, p. 421.

Approved in Ex parte Harding, 120 U. S. 784, 30 L. 825, 7 S. Ct. 781, refusing writ, where objection was to formation of grand jury and refusal to grant compulsory process to bring in witnesses; Nielsen, Petitioner, 131 U. S. 184, 33 L. 120, 9 S. Ct. 675, discharging prisoner where it appeared that there was double conviction; Horner v. United States, 143 U. S. 578, 36 L. 269, 12 S. Ct. 525, citing cases, denying writ where question below was whether scheme constituted lottery; In re Schneider, 148 U. S. 166, 37 L. 408, 13 S. Ct. 572, denying petition for writs when objections were to selection of jury; In re Frederich, 149 U. S. 75, 37 L. 656, 13 S. Ct. 795, collecting authorities, denying application where writ of error might have been prosecuted; United States v. Doherty, 27 Fed. 733, disallowing recovery of penalty for refusal to answer appraiser's question found incompetent; Ex parte Farley, 40 Fed. 68, issuing writ where grand jury was impanelled without authority; Ex parte Ulrich, 43 Fed. 663, remanding prisoner where complaint was that jury was irregularly discharged; In re King, 51 Fed. 436, collecting authorities, refusing writ when complaint was as to misconduct and disqualification of jurors; Ex parte Buskirk, 72 Fed. 22, 25 U. S. App. 613, discharging prisoner held for contempt of void order of court; In re Rowe, 77 Fed. 166, 40 U. S. App. 516, citing cases, remanding prisoner where there was mere defect in indictment; Ex parte Brandon, 49 Ark. 144, 4 S. W. 452, denying writ where prisoner had been denied trial by jury; In re Thompson, 9 Mont. 389, 23 Pac. 934, remanding prisoner when verdict was alleged to be contrary to evidence; In re McVey, 50 Neb. 483, 70 N. W. 52, discharging prisoner sentenced, though found not guilty of crime charged; Ex parte Tice, 32 Or. 184, 49 Pac. 1039, discharging prisoner where jury was discharged without authority; Ex parte Crawford, 36 Tex. Cr. 182, 36 S. W. 93, denying writ where sentences were cumulative; Ex parte Rollins, 80 Va. 317, discharging prisoner

held under unconstitutional statute; dissenting opinion in Ex parte Wood, 36 Tex. Cr. 13, 34 S. W. 969, majority refusing writ where verdict failed to designate place of confinement, as required; Ward v. Suter, 70 Tex. 346, 8 Am. St. Rep. 607, 8 S. W. 52, arguendo.

Indictment and information.— R. S., § 1022, authorizing certain offenses to be prosecuted either by indictment or information, does not preclude prosecution, by information, of other offenses of such grade as may be so prosecuted consistently with Federal Constitution and laws, p. 421.

Criminal law.— General verdict and sentence on two counts, one of which is good, are valid, p. 421.

Approved in In re Haynes, 30 Fed. 772, where one of two indictments was good, defendant was denied writ of habeas corpus.

Criminal law.— Misrecital of verdict, in statement of intermediate inquiry whether prisoner had aught to say why sentence should not be pronounced, is mere irregularity, not ground for habeas corpus, p. 421.

Approved in Stevens v. Fuller, 136 U. S. 478, 34 L. 463, 10 S. Ct. 913, failure to read examination of poor debtor to him, etc., not jurisdictional.

Habeas corpus.— Certified copy of record of sentence to imprisonment, if valid upon its face, is sufficient to authorize keeper to hold prisoner without any warrant or mittimus, pp. 421, 422.

Approved in Howard v. United States, 75 Fed. 989, 43 U. S. App. 678, 24 L. R. A. 513, and n., reviewing authorities, refusing to release prisoner held under defective mittimus; In re Greenwald, 77 Fed. 508, warden justified in holding prisoner under judgment valid on its face; Newberry v. State, 15 Ohio C. C. 218, court properly committed one under indictment for murder who failed to object to indictment's sufficiency; In re Thayer, 69 Vt. 316, 37 Atl. 1042, holding certified copy of judgment and sentence sufficient, though mittimus defective.

Constitutional law.— Scope and effect of many constitutional provisions is best ascertained by bearing in mind what law was before, p. 422.

Approved in United States v. Sanges, 144 U. S. 312, 36 L. 446, 12 S. Ct. 609, construing 26 Stat. 827, 828, as to appeal and error, in light of common law; United States v. Wong Kim Ark, 169 U. S. 654, 42 L. 893, 18 S. Ct. 459, holding native-born Chinaman a citizen, under fourteenth amendment to Constitution.

Indictment and information.— In England, informations by attorney-general, without intervention of grand jury, were not allowed for capital crimes, nor for any felony, p. 423.

Cited in State v. Ah Jim, 9 Mont. 171, 23 Pac. 77, quashing information for murder.

Criminal law.— Felony, at common law, was any crime which occasioned total forfeiture of offender's lands or goods, p. 423.

Approved in Bannon, etc. v. United States, 156 U. S. 468, 39 L. 496, 15 S. Ct. 469, holding that infamous punishment provided did not make crime a felony; Reagan v. United States, 157 U. S. 303, 39 L. 710, 15 S. Ct. 610, holding crime of receiving smuggled goods not a felony; Kurtz v. Moffitt, 115 U. S. 499, 29 L. 460, 6 S. Ct. 152, arguendo.

Criminal law.— Rulings of certain Circuit and District Courts as to what constitutes infamous crime, discussed and rejected, pp. 425, 426.

Approved in Andrews v. Hovey, 124 U. S. 717, 31 L. 563, 8 S. Ct. 685, holding construction of statute, by commissioner of patents, not conclusive; Capital Traction Co. v. Hof, 174 U. S. 41, 19 S. Ct. 596, refusing to follow line of decisions in courts of District of Columbia.

Indictment and information.— Test of infamous crime, under fifth amendment to Constitution, is whether statute authorizes court to award infamous punishment; e. g., imprisonment for term of years at hard labor. In such case, he may not be put upon trial, except on accusation of grand jury, pp. 425, 429.

Approved in United States v. Petit, 114 U. S. 430, 29 L. 94, 5 S. Ct. 1190, where prisoner was sentenced to five years' hard labor, for counterfeiting; Mackin v. United States, 117 U. S. 350, 351, 29 L. 910, 911, 6 S. Ct. 778, reviewing authorities, where prisoner was charged with fraudulent altering of poll-book, etc.; Ex parte Bain, 121 U. S. 13, 30 L. 853, 7 S. Ct. 787, conviction for making false report as bank cashier; Parkinson v. United States, 121 U. S. 282, 30 L. 960, 7 S. Ct. 896, conviction for fraudulent voting; Medley, Petitioner, 134 U. S. 169, 33 L. 839, 10 S. Ct. 386, law changing punishment to solitary confinement, held ex post facto; In re Mills, 135 U. S. 267, 34 L. 109, 10 S. Ct. 763, conviction for selling liquor to Indians; In re Claasen, 140 U. S. 204, 35 L. 411, 11 S. Ct. 737, citing cases, conviction under R. S., § 5209; Wong Wing v. United States, 163 U. S. 234, 237, 41 L. 142, 143, 16 S. Ct. 979, 981, holding imprisonment of Chinese at hard labor, under act of May 5, 1892, unlawful; United States v. Tod, 25 Fed. 815, 816, offenses, under §§ 4746, 5418, and 5479, R. S., must be prosecuted by indictment; United States v. Harmon, 34 Fed. 873, holding indictment for sending obscene matter through mail did not sufficiently specify same; United States v. Johannesen, 35 Fed. 413, informations for violations of revenue laws, held demurrable; Ex parte M'Clusky, 40 Fed. 72, 73, 74, holding prisoners could not waive right to be prosecuted for larceny by indictment; Ex parte Brown, 40 Fed. 83, assault with intent to kill; United States v. Smith, 40 Fed. 757, 758, 759, 760, refusing to allow information to be filed for intimidating voters;

United States v. Cobb, 43 Fed. 571, sustaining demurrer to information for violation of Federal election laws; United States v. Sutton, 47 Fed. 130, holding adultery an infamous crime within act of March 3, 1891, as to appeals; Ex parte Van Vranken, 47 Fed. 889, releasing civilian prisoner convicted by court-martial; United States v. Wong Dep Ken, 57 Fed. 209, annulling decree sentencing Chinese to State prison, under Geary act of 1892; United States v. Cadwallader, 59 Fed. 679, embezzlement, etc., from national bank, described in R. S., § 5209; Stokes v. United States, 60 Fed. 598, 23 U. S. App. 289, construing term "infamous crime," used in fifth section judiciary act of 1891; In re Kirby, 84 Fed. 607, disbarring attorney convicted of receiving stolen goods; People v. Kipley, 171 Ill. 73, 49 N. E. 239, 41 L. R. A. 785, disqualification for holding public office is an infamous punishment; Crum v. State, 148 Ind. 469, 47 N. E. 836, larceny held infamous crime, justifying disfranchisement; State v. Clark, 60 Kan. 455, 56 Pac. 769, conviction of grand larceny rendered witness incompetent, as one convicted of infamous crime; Bright v. Patton, 5 Mack. 534, 60 Am. Rep. 399, officer should not arrest without warrant, where punishment only fine and imprisonment; Butler v. Wentworth, 84 Me. 32, 24 Atl. 458, 17 L. R. A. 766, 767, and n., illegal transportation of liquors, punishable by one year's imprisonment; Danner v. State, 89 Md. 226, 228, 42 Atl. 967, holding one accused of petit larceny, maximum punishment eighteen months, entitled to jury trial; Fuller v. United States, 3 N. Mex. 444, 9 Pac. 597, quashing information for larceny; Harris v. Terry, 98 N. C. 134, 3 S. E. 746, disqualification to hold office is infamous punishment; dissenting opinion in O'Neil v. Vermont, 144 U. S. 340, 36 L. 459, 12 S. Ct. 700, majority sustaining sentence to hard labor, for selling liquor; Rosen v. United States, 161 U. S. 45, 40 L. 611, 16 S. Ct. 481, majority holding obscene matter sufficiently set out in indictment for sending it through mail; United States v. Clark, 31 Fed. 713, and The Paquete Habana, 175 U. S. 682, 20 S. Ct. 293, generally; United States v. Van Leuven, 42 Fed. 68, arguendo. See 10 Sawy. 135, note.

Distinguished in Bannon v. United States, 156 U. S. 467, 39 L. 494, 15 S. Ct. 469, holding infamous punishment affixed did not raise crime to grade of felony; United States v. Cobb, 43 Fed. 573, sustaining information where possible punishment did not exceed one year's imprisonment; State v. Whisner, 35 Kan. 278, 10 Pac. 857, holding violations of prohibition law might be prosecuted by information; State v. Nolan, 15 R. I. 531, 10 Atl. 482, when maximum penalty was three months in county jail, punishment was not infamous.

Criminal law.— Imprisonment at hard labor, compulsory and unpaid, is involuntary servitude for crime, within provision of ordinance of 1787, and thirteenth amendment to Constitution, p. 429.

Approved in concurring opinion in Wong Wing v. United States,

163 U. S. 242, 41 L. 145, 16 S. Ct. 983, holding imprisonment of Chinese at hard labor, under act of May 5, 1892, illegal; Topeka v. Boutwell, 53 Kan. 31, 35 Pac. 822, 27 L. R. A. 603, and n., obiter.

Distinguished in People v. Hanrahan, 75 Mich. 621, 42 N. W. 1127, 4 L. R. A. 755, sustaining ordinance which provided for payment of fine, or imprisonment until paid; concurring opinion in Topeka v. Boutwell, 53 Kan. 38, 35 Pac. 825, 27 L. R. A. 613, and n., sustaining ordinance requiring prisoners to work out fines.

Habeas corpus.— Conviction of and sentence for crime punishable by infamous punishment, without presentment or indictment by grand jury, is without jurisdiction, and one held under such sentence may be released upon habeas corpus, pp. 422, 429.

Approved in United States v. Petit, 114 U. S. 430, 29 L. 94, 5 S. Ct. 1190, discharging prisoner convicted of counterfeiting; In re Snow, 120 U. S. 286, 30 L. 663, 7 S. Ct. 562, releasing prisoner, where record showed court's want of jurisdiction to convict; Ex parte Bain, 121 U. S. 14, 30 L. 853, 7 S. Ct. 788, discharging prisoner when court changed indictment; In re Sawyer, 124 U. S. 221, 31 L. 409, 8 S. Ct. 493, writ issued when prisoners were committed for contempt of injunction issued without jurisdiction; Logan v. United States, 144 U. S. 308, 36 L. 445, 12 S. Ct. 632, granting new trial, where list of witnesses was not furnished, under R. S., § 1033; Ex parte M'Clusky, 40 Fed. 72, 73, 74, reviewing authorities, holding person accused of larceny must be prosecuted by indictment; In re Taylor, 7 S. Dak. 388, 58 Am. St. Rep. 849, 64 N. W. 256, 45 L. R. A. 148, and n., remanding prisoner, where term fixed was greater than court had right to impose.

114 U. S. 429–430, 29 L. 93, UNITED STATES v. PETIT.

Indictment and information.— Offense of counterfeiting, punishable under R. S., § 5457, is an infamous crime, requiring prosecution by indictment, p. 430.

See note to Ex parte Wilson, supra.

114 U. S. 430–439, 29 L. 144, DODGE v. KNOWLES.

Appeal and error.— On equity appeal, both law and fact are reviewable by Supreme Court, p. 434.

Husband and wife.— Obligation to pay for family supplies is, ordinarily, debt of husband; promissory notes given by him for wife, though describing him as her trustee, bind him personally and not her estate, unless his authority to give them on her behalf is clearly proved. In this case authority was not shown, pp. 435, 436.

Approved in Chaffee v. Browne, 109 Cal. 220, 41 Pac. 1031, holding insolvency of husband did not affect rule as to charging wife's separate estate.

Appeal and error.— Jurisdiction of Supreme Court, being complete on the record, appellee's objection that required amount was not involved comes too late, p. 437.

Appeal and error.— Judicial allowance of appeal at term in which decree was rendered, constitutes valid appeal; docketing cause in this perfects jurisdiction of Supreme Court; bond is essential to prosecution, but not to taking of appeal, and when not furnished before docketing of cause, appeal will not be dismissed until appellant is given opportunity to supply omission, p. 438.

Cited in The Natchez, 27 Fed. 310, refusing to dismiss appeal for defect in bond; Noonan v. Chester Park, etc., Club Co., 93 Fed. [illegible] refusing to dismiss appeal where bond was not filed within six months after decree.

Appeal and error.— Judicial allowance of appeal in open court during term is sufficient notice of taking appeal; security is only for due prosecution of appeal; purpose of citation, where security is taken out of court or after term, is notice only; it is not jurisdictional, and if, by accident, omitted, motion to dismiss appeal so allowed will not be granted until opportunity to give requisite notice has been furnished, p. 438.

Approved in Richardson v. Green, 130 U. S. 114, 32 L. 875, 9 S. Ct. 446, directing issuance and service of citation, where security was taken after term; Farmers' Loan, etc., Co. v. Chicago, etc., R. Co., 73 Fed. 317, 34 U. S. App. 626, refusing to dismiss, where citation was not signed by judge granting appeal; Central Trust Co. v. Continental Trust Co., 86 Fed. 524, holding no citation necessary where appeal taken and perfected during term; Noonan v. Chester Park, etc., Club Co., 93 Fed. 577, refusing to dismiss, where citation was not issued within six months of decree.

Distinguished in Hewitt v. Filbert, 116 U. S. 144, 29 L. 582, 6 S. Ct. 330, dismissing appeal for want of citation, where appeal was allowed after term.

Appeal and error.— Notice by order of Supreme Court, served on appellee, that appeal taken in open court was being prosecuted and argument was desired, is equivalent of citation, p. 439.

Approved in Goodwin v. Fox, 120 U. S. 778, 30 L. 816, 7 S. Ct. 780, where counsel's indorsement of approval of bond was equivalent to citation.

114 U. S. 439–447, 29 L. 177, DOBSON v. HARTFORD CARPET CO.

Patents.— In infringement suit, plaintiff may recover, in addition to profits, actual damages sustained, assessed by court, or under its direction, and with same power to increase damages as in case of verdicts, p. 443.

Patents.— In suit for infringement of design for carpets, allowance of entire profits from manufacture and sale of carpets, as

damages or profits, is not proper, unless shown by reliable evidence that entire profit is due to figure or patent, p. 444.

Patentee must, in infringement suit, give reliable and tangible evidence apportioning defendant's profits and patentee's damages between patented and unpatented features; or he must show that profits and damages are to be calculated on whole machine, because its value is properly and legally attributable to patented feature, p. 445.

Approved in Dobson v. Dornan, 118 U. S. 16, 17, 30 L. 65, 6 S. Ct. 949, holding award of entire profits from manufacture and sale of carpets, erroneous; Tilghman v. Proctor, 125 U. S. 151, 31 L. 669, 8 S. Ct. 902, sustaining master's calculation of profits upon saving in manufacture; Fay v. Allen, 24 Blatchf. 276, 30 Fed. 447, refusing to allow profits from sale and manufacture, where invention was of improvement; Rœmer v. Simon, 24 Blatchf. 397, 31 Fed. 42, nominal damages allowed for infringement of locks to travelling-bags; Everest v. Buffalo, etc., Oil Co., 24 Blatchf. 465, 31 Fed. 744, 745, proof of higher price paid for oil tested by infringed method did not justify more than nominal damages; Bostock v. Goodrich, 25 Fed. 819, nominal damages allowed for infringement of improvements in "tuck-markers;" Tuttle v. Gaylord, 28 Fed. 97, infringement of improvement in harrow teeth; Reed v. Lawrence, 29 Fed. 918, 920, 921, holding patentee of improved harrow teeth entitled only to proportion of profits on sale of harrows; Bell v. United States Stamping Co., 32 Fed. 551, evidence of sales to persons not customers of licensee not proof that sales were lost to him; Tomkinson v. Willets Mfg. Co., 34 Fed. 537, patentee entitled only to proportionate profits for infringement of design for dish; Fischer v. Hayes, 39 Fed. 618, nominal damages, when, on evidence, the profits could not be computed; Webster Loom Co. v. Higgins, 43 Fed. 675, awarding difference in cost of producing carpet on infringing and non-infringing loom; Royer v. Shultz Belting Co., 45 Fed. 53, refusing to presume that patentee's damages equalled infringer's gains; Mosher v. Joyce, 51 Fed. 445, 6 U. S. App. 107, nominal damages for infringement of improvement of lifting-jack, being no evidence to segregate; Hunt Bros. Fruit, etc., Co. v. Cassidy, 53 Fed. 261, 7 U. S. App. 424, when refusal to instruct for nominal damages was erroneous; Untermeyer v. Freund, 50 Fed. 78, and Untermeyer v. Freund, 58 Fed. 211, 20 U. S. App. 32, both sustaining, as constitutional, act of 1887, creating liability of $250 against infringer of design patent.

Distinguished in Warren v. Keep, 155 U. S. 268, 39 L. 145, 15 S. Ct. 84, Welling v. La Bau, 34 Fed. 43, and Creamer v. Bowers, 35 Fed. 208, allowing entire profits from manufacture and sale, where invention was new article of manufacture sold separately; Avery v. Meikle, 85 Ky. 450, 7 Am. St. Rep. 611, 3 S. W. 613, allowing profits on sales in case of imitation of trademark.

Patents.— When bill for infringement of "invention" is taken pro confesso, patent will be held valid for purposes of case, p. 446.

Patents.— Mere joinder of claims for constituent members, with claim for design, does not per se invalidate patent, on any particular claim, at objection of a defendant, p. 446.

Approved in Britton v. White Mfg. Co., 61 Fed. 95, holding separate claims for entire design and separate parts properly allowed.

Patent which claims design "substantially as shown," refers to description, as well as drawing, and is valid in form, p. 446.

Approved in Dobson v. Dornan, 118 U. S. 14, 30 L. 64, 6 S. Ct. 948, design patent for carpets, claim held sufficient; Whittall v. Lowell Mfg. Co., 79 Fed. 789, reaffirming rule.

Distinguished in New York Belting, etc., Co. v. New Jersey Car, etc., Co., 53 Fed. 817, 11 U. S. App. 637, holding carpet design not infringed under the description.

Costs.— Upon reversal of interlocutory decree, for plaintiff, on question of damages, costs were allowed to plaintiff until the interlocutory decree, and thereafter to defendant, p. 447.

Distinguished in Du Bois v. Kirk, 158 U. S. 67, 39 L. 899, 15 S. Ct. 732, full costs awarded plaintiff, where interlocutory decree was affirmed.

114 U. S. 447–453, 29 L. 210, WESTERN ELEC. MFG. CO. v. ANSONIA BRASS, ETC., CO.

Patents covering old process, applied to same subject, with no change in manner of applying it, and with no result substantially distinct in its nature, are invalid; hence, Olmstead patent process for compressing insulation of telegraph wires is void, p. 451.

Approved in Ansonia Co. v. Electrical Supply Co., 144 U. S. 18, 36 L. 339, 12 S. Ct. 604, citing cases, Cowles patent for insulated electric conductor, invalid.

Patents.— Scope of letters-patent should be limited to invention covered by claim, and though claim be illustrated, it cannot be enlarged by language in other parts of specifications; e. g., where process is not described, court will not infer it from quality of patent product, pp. 452, 453.

Approved in Grant v. Walter, 148 U. S. 554, 37 L. 557, 13 S. Ct. 701, feature not covered by claim cannot be protected; Johnson Co. v. Pacific, etc., Mills Co., 47 Fed. 589, collecting authorities, holding defendant's rail did not infringe form claimed by plaintiff; Ashton Valve Co. v. Coale Muffler, etc., Co., 52 Fed. 318, 8 U. S. App. 169, holding patent for improvement in safety valve did not cover use of vent holes; Stutz v. Robson, 54 Fed. 508, holding specification did not cover sulphur-deposit chamber; H. W. Johns Mfg. Co. v. Robertson, 60 Fed. 905, holding feature of improvement in packing

for steam joints, not sufficiently described; Thomasson v. Bumpass, 78 Fed. 492, 42 U. S. App. 295, holding new features in poultry crates not covered by claim.

114 U. S. 453–463, 29 L. 216, DISTRICT OF COLUMBIA COMMRS. v. BALTIMORE, ETC., R. R.

District of Columbia.— Title to streets of Washington city is in United States, not in city or owners of adjacent lots, and right to use them for any other than ordinary use of streets, must proceed from Congress, pp. 460, 461.

Cited in Daly v. Georgia, etc., R. R., 80 Ga. 801, 12 Am. St. Rep. 292, 7 S. E. 150, holding, where fee of streets was in State, their use for railway must be by State's authority; Bauman v. Ross, 167 U. S. 565, 42 L. 280, 17 S. Ct. 973, historically.

114 U. S. 463–464, 29 L. 221, PACIFIC BANK v. MIXTER.

Banks and banking.— No bond is required, on writs of error, or appeals issuing from, or brought to, Supreme Court, by direction of comptroller of currency, in suits by or against insolvent national banks, or receivers thereof, p. 464.

Approved in Gibson v. Peters, 150 U. S. 344, 37 L. 1105, 14 S. Ct. 135, receiver of national bank is officer of United States, within § 380, R. S.; Robinson v. Southern Nat. Bank, 94 Fed. 22, dispensing with bond in such an appeal.

Appeal and error.— Where record shows that comptroller directed receiver of national bank to take out writ of error, case will not be dismissed for mere clerical mistake in name, p. 464.

Approved in Walton v. Marietta Chair Co., 157 U. S. 347, 39 L. 727, 15 S. Ct. 628, allowing amendment to correct mistake in name of plaintiff in error; Citizens' Bank v. Farwell, 56 Fed. 572, 12 U. S. App. 409, holding mere clerical errors in spelling, or arrangement of plaintiffs' names, immaterial; United States, etc., Accident Assn. v. Weller, 30 Fla. 219, 11 So. 788, use of "guardian" for "next friend," held immaterial error.

114 U. S. 464–474, 29 L. 212, CAVENDER v. CAVENDER.

Equity.— If statements of answer supply material facts, omitted from bill, the defect is thereby waived, p. 471.

Approved in Provisional Municipality v. Lehman, 57 Fed. 330, 18 U. S. App. 411, holding defects in bill cured by allegations of answer; Richardson v. Green, 61 Fed. 431, 15 U. S. App. 488, regarding demurrer as waived, where answer supplied defect.

Trusts.— Where trustee's acts show want of reasonable fidelity, equity will remove him; e. g., failure to invest funds as directed, pp. 471, 473.

Trustee, who not only fails to discharge any duty of the trust, but denies receipt of trust property, will be removed upon application, pp. 473, 474.

Approved in Kintner v. Jones, 122 Ind. 153, 23 N. E. 702, removal of trustee for failure to sell property as directed.

114 U. S. 474–477, 29 L. 215, BURTON v. WEST JERSEY FERRY CO.

Appeal and error.— General exception to charge, which does not direct attention of court to portions objected to, raises no question for review in Supreme Court, p. 476.

Approved in Anthony v. Louisville R. R., 132 U. S. 173, 33 L. 302, 10 S. Ct. 54, Holder v. United States, 150 U. S. 92, 37 L. 1010, 14 S. Ct. 10, Baltimore, etc., R. R. v. Mackey, 157 U. S. 92, 39 L. 631, 15 S. Ct. 497, M'Clellan v. Pyeatt, 50 Fed. 687, 4 U. S. App. 319, and Price v. Pankhurst, 53 Fed. 313, 10 U. S. App. 497, collecting authorities, Walker v. Windsor Nat. Bank, 56 Fed. 78, 5 U. S. App. 423, and Masonic Ben. Assn. v. Lyman, 60 Fed. 500, 18 U. S. App. 507, citing cases; Thom v. Pittard, 62 Fed. 236, 8 U. S. App. 597, St. Louis, etc., Ry. v. Spencer, 71 Fed. 95, 36 U. S. App. 229, Shelp v. United States, 81 Fed. 700, 48 U. S. App. 385, Ohio, etc., Ry. v. McCartney, 121 Ind. 388, 23 N. E. 259, and Morrill v. Palmer, 68 Vt. 17, 33 Atl. 834, 33 L. R. A. 417, and n., all holding general exception of no avail, where part of charge was sound. Approved also in Van Stone v. Stillwell, etc., Mfg. Co., 142 U. S. 135, 35 L. 964, 12 S. Ct. 183, and Black v. Lewiston, 2 Idaho, 257, 13 Pac. 81, reviewing authorities refusing to consider general exception to charge as a whole; Chateaugay Iron Co. v. Blake, 144 U. S. 488, 36 L. 514, 12 S. Ct. 734, and Pittsburgh, etc., Ry. v. Thompson, 82 Fed. 728, 54 U. S. App. 236, both holding exception to refusal to charge series of propositions as requested, insufficient.

Negligence.— Mere failure of ferry company to provide passenger with seat, is not, in law, negligence, without proof of habitual failure to provide those customarily travelling thereon, pp. 476, 477.

114 U. S. 477–488, 29 L. 179, CLAWSON v. UNITED STATES.

Jury.— Venire to summon jurors is writ, proper and necessary to exercise of jurisdiction of the court, where affirmative provisions of law, so far as they extend, have been first observed, p. 487.

Approved in Lovejoy v. United States, 128 U. S. 173, 32 L. 390, 9 S. Ct. 58, holding act of June 30, 1879, did not change rule; Territory v. Harding, 6 Mont. 330, 12 Pac. 754, holding court might appoint special attorney, in absence of prosecutor, to sign indictment; Territory v. Carmody, 8 N. Mex. 384, 45 Pac. 882, where failure to resort to open venire was held error; State v. Hart, 19 Utah, 450, 57 Pac. 418, holding court retained power to impanel by open venire,

State's admission to Union; Carter v. Territory, 3 Wyo. 195, 18 Pac. 751, 752, approving practice under Wyoming statutes.

Jury.— Act of March 22, 1882 (22 Stat. 30), providing that belief in certain doctrines of Mormon church should be cause for challenging jurors in prosecutions for bigamy, polygamy, and unlawful cohabitation, is valid, and applies to grand juries, pp. 478-484.

Approved in Jenkins v. State, 99 Tenn. 575, 42 S. W. 265, sustaining act excluding from jury service, all persons engaged in conspiracy against law and order. See 12 Am. St. Rep. 907, note.

Miscellaneous.— In re Wilson, 11 Utah, 118, 39 Pac. 498, miscited.

114 U. S. 488-492, 29 L. 183, HOPT v. UTAH.

Criminal law.— Under Utah criminal code, record of conviction of murder must either set forth charge in writing, or defendant's waiver of such charge; failing in this, new trial will be granted, without formal bill of exceptions, pp. 490, 491.

Cited in Bassett v. United States, 137 U. S. 502, 34 L. 763, 11 S. Ct. 166, generally.

Distinguished in Territory v. Christensen, 4 Dak. 421, 422, 424, 31 N. W. 853, 854, holding, under local statute, charge was not necessary part of judgment-roll.

Criminal law.— Lawfulness of conviction and sentence is determined by formal record of what was done at trial, in open court, and ex parte affidavits of subsequent private conversation in defendant's absence, will not be considered on appeal, pp. 491, 492.

Miscellaneous.— Hopt v. Utah, 120 U. S. 431, 30 L. 709, 7 S. Ct. 614, historically; United States v. Ball, 163 U. S. 672, 41 L. 306, 16 S. Ct. 1195, miscited.

114 U. S. 492-501, 29 L. 221, ATLANTIC PHOSPHATE CO. v. GRAFFLIN.

Sales.— Where contract of sale is executed by vendor, by delivery of goods, liability of vendee to pay for them accrues, and law raises implied contract to pay interest from delivery, on purchase money, which was liquidated by terms of invoices in name of plaintiff, received and retained by defendant, pp. 499, 500.

Not cited.

114 U. S. 501-511, 29 L. 244, NEW ORLEANS, ETC., R. R. v. DELAMORE.

Courts.— Supreme Court has jurisdiction on error to State court judgment, adverse to title based on sale in bankruptcy, p. 506.

Cited in Traer v. Clews, 115 U. S. 534, 29 L. 469, 6 S. Ct. 156, taking jurisdiction when dispute was as to validity of transfer by trustee in bankruptcy.

Distinguished in Merritt v. American, etc., Barge Co., 75 Fed. 816, 6 U. S. App. 127, holding Circuit Court of Appeals has jurisdiction of question whether full faith and credit has been given judgment of sister State.

Bankruptcy.— Court has jurisdiction to adjudicate railway company bankrupt, and to administer its property under the bankrupt act, p. 506.

Corporations.— Franchise to be a corporation is not subject of sale and transfer, unless so made by positive law; but franchises to build, own and manage railroad, and to take tolls thereon, are not necessarily corporate rights, and have nothing in their nature inconsistent with their being assignable, p. 508.

Approved in New Orleans v. Railroad, 40 La. Ann. 588, 4 So. 513, holding business of street railroad, subject to license tax; dissenting opinion in Citizens, etc., R. Co. v. City Ry., 64 Fed. 656, majority holding city council could not limit franchise to use street to less term than life of company. See 7 Am. St. Rep. 725, and 35 Am. St. Rep. 402, notes.

Limited in Detroit v. Detroit City Ry., 56 Fed. 882, 888, reviewing authorities, holding franchises, though assigned, terminate with life of corporation; State v. Railway, 140 Mo. 548, 62 Am. St. Rep. 745, 41 S. W. 957, 38 L. R. A. 220, holding quo warranto proper remedy to enforce forfeiture of street railroad franchise; dissenting opinion in Railroad v. Gibbes, 27 S. C. 404, 4 S. E. 57, majority sustaining income tax on railroad companies.

Railroads.— Upon judicial sale of railroad property, under mortgage covering franchises, those franchises necessary to use and enjoyment of road pass to purchaser; hence, where they may be mortgaged, those franchises are carried by surrender of company's property in bankruptcy, and pass to purchaser at bankruptcy sale, p. 510.

Approved in Nat. Foundry, etc., Works v. Oconto Water Co., 52 Fed. 58, decreeing sale of water company's franchises, under lien law; Baltimore Trust, etc., Co. v. Mayor, etc., 64 Fed. 160, collecting authorities, grant of right to build double track, accepted and acted upon, could not be repealed; Louisville Trust Co. v. Cincinnati, 76 Fed. 239, 47 U. S. App. 36, holding mortgagee succeeded to railroad's franchises; Burrus v. Columbus, 105 Ga. 45, 31 S. E. 125, where franchise to operate side track passed by judicial sale; Chadwick v. Old Colony R. R., 171 Mass. 243, 50 N. E. 630, collecting cases, holding franchise to operate road passed to assignee of mortgage; People v. O'Brien, 111 N. Y. 43, 7 Am. St. Rep. 697, 18 N. E. 700, 2 L. R. A. 262, and n., holding indefinite grant of franchise to use streets for railroad, survived corporation; Chicago, etc., Ry. v. Warner, etc., Ry., 139 Ind. 306, 47 Am. St. Rep. 268, 38 N. E. 606, 28 L. R. A. 338, obiter. See 7 Am. St. Rep. 722, 25 Am. St. Rep. 477, and 35 Am. St. Rep. 398, 403, notes.

Constitutional law.— City of New Orleans, having granted right of way to one railroad, could not repeal said grant by subsequent attempt to confer same right on another, any more than by special repealing ordinance, p. 510.

Approved in Africa v. Board of Mayor, etc., 70 Fed. 734, 738, reviewing authorities, and holding repealing ordinance void.

Distinguished in Lake Roland, etc., Ry. v. Mayor, etc., 77 Md. 368, 26 Atl. 512, 20 L. R. A. 130, sustaining repealing ordinance, after track laid.

114 U. S. 511-523, 29 L. 240, STURGES v. CARTER.

Taxation.— Where taxpayer, in attendance before auditor, was told of latter's purpose to increase his assessment, this was substantial compliance with Ohio statute, requiring notice of increase, p. 516.

Approved in Lee v. Dawson, 8 Ohio C. C. 371, 372, involving same legislation.

Distinguished in Meyers v. Shields, 61 Fed. 720, holding notice, under § 2782 of said statute, did not cover proceedings under § 2781.

Constitutional law.— Ohio act of 1878, authorizing tax auditor to go back for period of four years to correct false returns, merely gives new remedy for enforcing existing right to taxes, and is not retroactive, within constitutional prohibition, pp. 516-519.

Cited in Reynolds v. Bowen, 138 Ind. 445, 36 N. E. 760, and Gager v. Prout, 48 Ohio St. 107, 26 N. E. 1015, sustaining similar statutes; Mergenthaler v. Crites, 4 Ohio C. C. 488, amendment of 1886, having an added penalty, is invalid if retrospective; Wade v. Kimberley, 5 Ohio C. C. 39, judgment for taxes, which omits penalties, is not invalid under amendment of 1886.

Constitutional law.— Every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions already past, must be deemed retrospective, p. 519.

Approved in Commissioners v. Rosche, 50 Ohio St. 112, 40 Am. St. Rep. 656, 33 N. E. 409, 19 L. R. A. 585, statute authorizing recovery of taxes already paid, without protest, held unconstitutional; Wade v. Kimberley, 5 Ohio C. C. 39, construing Ohio tax legislation.

Taxation of both capital stock, and shares in stockholders' hands, is not necessarily double taxation, p. 521.

Approved in Herrman v. Guttenberg, 62 N. J. L. 616, 43 Atl. 707, bond issue for improvements, for which assessment had been paid, not double taxation.

Taxation.— Exemption from taxation must be express and clear, p. 521.

Taxation.— Statute providing that no person shall be taxed for certificates of stock in corporation, capital stock of which is taxed in name of company, does not exempt shares held in foreign corporations, only a small part of the property of which is subject to taxation in that State, p. 522.

Approved in Ogden v. St. Joseph, 90 Mo. 529, 3 S. W. 27, sustaining tax on shares in foreign corporation; Lee v. Sturges, 46 Ohio St. [illegible], 170, 19 N. E. 565, 568, 2 L. R. A. 560, 562, holding § 8, act of April 5, 1859, did not apply to stock of foreign corporations.

Appeal and error.— There being nothing in record to contrary, Supreme Court will presume that amount of judgment was right, until contrary is shown, pp. 522, 523.

114 U. S. 523-524, 29 L. 232, BEECHER MFG. CO. v. ATWATER MFG. CO.

Patents.— Use in succession of two distinct pairs of dies, of well-known kinds, not combined in one machine, nor co-operating to one result, is not patentable invention, p. 524.

Approved in Thatcher Heating Co. v. Burtis, 121 U. S. 295, 30 L. [illegible], 7 S. Ct. 1039, citing cases, holding patent for improvement in fire-place heaters, void; Florsheim v. Schilling, 137 U. S. 77, 34 L. [illegible], 11 S. Ct. 24, improvement in corsets held not patentable; Gunn v. Savage, 25 Fed. 103, reissued patent for ox-shoe dies, held void; National, etc., Mach. Co. v. John R. Williams Co., 44 Fed. 192, 12 L. R. A. 109, and n., cigar-bunching machine held not to be patentable combination; Johnson Co. v. Pacific, etc., Mills Co., 47 Fed. [illegible] holding Johnson's improved form of street railroad rails, not patentable.

Distinguished in Celluloid Mfg. Co. v. American, etc., Co., 31 Fed. [illegible] sustaining patent for process and apparatus for making celluloid; Brickill v. Hartford, 49 Fed. 374, sustaining patent for water-heater for fire-engine; Consolidated Fastener Co. v. Columbian, etc., Co., 79 Fed. 797, sustaining Raymond patent stud; Von Schmidt v. Bowers, 80 Fed. 150, 48 U. S. App. 188, affirming S. C., 63 Fed. 583, sustaining Bowers patents for dredgers.

114 U. S. 525-542, 29 L. 264, FORT LEAVENWORTH R. R. v. LOWE.

United States.— Where State land is purchased by United States, for forts, arsenals, etc., with consent of State legislature, Federal jurisdiction over same is exclusive of State authority, pp. 531, 532, [illegible]

Approved in Sharon v. Hill, 11 Sawy. 130, 24 Fed. 731, holding Federal jurisdiction over appraisers' building in San Francisco, exclusive; Martin v. House, 39 Fed. 695, holding process of State court on judgment lien, could not affect title to such land; Bannon v. Barnes, 39 Fed. 899, holding Kansas City post-office site not

subject to taxation; In re Ladd, 74 Fed. 35, reviewing authorities, holding State had no jurisdiction over crime committed at Fort Robinson; State v. Mack, 23 Nev. 363, 62 Am. St. Rep. 813, 47 Pac. 764, holding Federal jurisdiction over courthouse and post-office, exclusive; Foley v. Shriver, 81 Va. 572, Federal jurisdiction exclusive over Soldiers' Home, so purchased; United States v. American Water-Works Co., 37 Fed. 748, arguendo.

Distinguished in State v. Board of Commrs., 153 Ind. 308, 54 N. E. 811, holding State had jurisdiction over Soldiers' Home; Exum v. State, 90 Tenn. 506, 25 Am. St. Rep. 702, 17 S. W. 108, 15 L. R. A. 382, 383, State could punish perjury committed in its court, while sitting in Federal building.

Eminent domain.— United States may acquire needed lands by purchase, without consent of State within which they lie, or may, by exercise of right of eminent domain, where needed to execute powers conferred by Constitution, p. 531.

Approved in Van Brocklin v. Tennessee, 117 U. S. 155, 29 L. 846, 6 S. Ct. 672, reviewing authorities, holding land purchased by United States at tax sale, not subject to State taxation; Chappell v. United States, 160 U. S. 510, 40 L. 514, 16 S. Ct. 400, holding land might be condemned for purpose of lighthouse.

United States.— Reservation, accompanying consent of State to purchase of lands by United States, that process of State courts may be served in the places purchased, intended to prevent them from becoming asylums for fugitives from justice, and is not invalid as interfering with supremacy of United States, p. 533.

Approved in United States v. Meagher, 37 Fed. 878, such reservation did not affect Federal jurisdiction of crime committed within limits of the land; In re Ladd, 74 Fed. 36, 37, 38, this reservation did not extend State's jurisdiction to offenses committed at Fort Robinson; State v. Mack, 23 Nev. 367, 62 Am. St. Rep. 817, 47 Pac. 766, as to courthouse and post-office site.

Public lands.— Where lands within limits of State are acquired by United States, in any other way than purchase, with State's consent, they are subject to qualification, that forts, arsenals, and other public buildings erected thereon, for uses of general government, will be free from any such State interference as would impair their effective use for designated purpose; but when not so used, legislative power of State will be complete, p. 539.

Approved in Chicago, etc., Ry. v. McGlinn, 114 U. S. 545, 29 L. 271, 5 S. Ct. 1006, holding law as to killing of animals by railroad, continued in effect after cession; Palmer v. Barrett, 162 U. S. 403, 40 L. 1016, 16 S. Ct. 838, holding State jurisdiction extended to land leased by Federal government to city, for market purposes; Crook, etc., Co. v. Old Pt., etc., Hotel Co., 54 Fed. 608, 609, 610, title of Old Point Comfort held to be subject to restrictions of act of cession;

In re Kelly, 71 Fed. 549, 551, 552, 553, Federal court had no jurisdiction over prosecution for assault, committed at Soldiers' Home, Milwaukee; In re Ladd, 74 Fed. 36, but holding State had given up jurisdiction over Fort Robinson; Ex parte Gaines, 56 Ark. 230, 19 S. W. 608, interest of lessee in Hot Springs reservation, subject to State tax; Barrett v. Palmer, 135 N. Y. 340, 31 Am. St. Rep. 837, 32 N. E. 1018, 17 L. R. A. 723, and n., holding State had jurisdiction of civil action, arising within ceded territory.

United States.— Cession of land by State, to United States, may be accompanied by such conditions as State may see fit to annex, not inconsistent with its free and effective use for intended purposes, pp. 539, 540.

Approved in Palmer v. Barrett, 162 U. S. 403, 40 L. 1016, 16 S. Ct. 838, holding State jurisdiction extended to land leased by Federal government to city, for market purposes; United States v. Bateman, 13 Sawy. 215, 34 Fed. 88, murder committed in Presidio reservation, San Francisco, not an offense against United States; United States v. Carter, 34 Fed. 624, Federal court had jurisdiction of prosecution for murder committed on battleship, at Cob Dock. See 31 Am. St. Rep. 837, note.

Distinguished in Territory v. Burgess, 8 Mont. 67, 19 Pac. 561, 1 L. R. A. 810, reviewing authorities, holding State had jurisdiction over prosecution for murder, committed within Fort Maginnis; United States v. Schwalby, 8 Tex. Civ. App. 683, 29 S. W. 92, holding act did not authorize cession of jurisdiction over land not owned by United States.

United States jurisdiction extends over all territory within the States, and their authority, as well as that of State within which property is situated, is necessary, before cession of sovereignty or political jurisdiction can be made to foreign country, pp. 540, 541.

Distinguished in Geofroy v. Riggs, 133 U. S. 267, 33 L. 645, 10 S. Ct. 297, holding treaty power extended to provision for ownership and transfer of property by foreigners.

United States.— Cession to the general government of legislative authority and political jurisdiction over lands within State, used for forts, or other public buildings, being of necessity temporary, subject to revert to State, when the public use ceases, and for interest of State, as well as Federal government, is valid, pp. 541, 542.

Approved in Benson v. United States, 146 U. S. 330, 36 L. 994, 13 S. Ct. 61, holding Federal court had jurisdiction of crime committed on Fort Leavenworth reservation; United States v. Partello, 48 Fed. 677, holding State might consent to retention of Federal control over Indian reservation; In re Ladd, 74 Fed. 39, holding Nebraska lost jurisdiction over Fort Robinson, by act of cession; State v. Central Pac. R. R., 21 Nev. 235, 30 Pac. 687, presuming acceptance of Federal grant of taxing privilege.

Distinguished in Territory v. Burgess, 8 Mont. 67, 19 Pac. 561, 1 L. R. A. 810, reviewing authorities, holding State had jurisdiction over prosecution for murder, committed within Fort Maginnis.

United States.— Military reservation at Fort Leavenworth, Kansas, was not acquired by purchase, with State's consent, and the cession of jurisdiction over same to United States is not exclusive, except so far as necessary for its use as military post; saving clause, reserving right to tax property of railroads within reservation, is, therefore, valid, p. 542.

114 U. S. 542-547, 29 L. 270, CHICAGO, ETC., RY. v. McGLINN.

United States.— Only mode prescribed by Constitution, whereby United States may acquire exclusive legislative authority over land situate within a State, is by purchase, with State's consent; when such power is acquired in any other way, as by act of cession, that act may be accompanied with any conditions not inconsistent with effective use for public purposes intended, pp. 545, 546.

Approved in Benson v. United States, 146 U. S. 331, 36 L. 994, 13 S. Ct. 61, Circuit Court has jurisdiction of murder committed within Fort Leavenworth reservation; Crook v. Old Point, etc., Hotel Co., 54 Fed. 608, holding State lien law in force within ceded reservation; In re Kelly, 71 Fed. 549, 551, holding United States criminal laws did not apply to Soldiers' Home.

United States.— Kansas statute, ceding Fort Leavenworth reservation to United States, with proviso for service of process, and taxation of private property therein, held valid, p. 546.

Approved in Benson v. United States, 146 U. S. 330, 331, 36 L. 994, 13 S. Ct. 61, holding Circuit Court had jurisdiction over murder committed on that reservation; United States v. American Water-Works Co., 37 Fed. 748, obiter; In re Ladd, 74 Fed. 35, 36, holding Nebraska ceded away jurisdiction over Fort Robinson.

States.— It is competent for legislature to cede exclusive jurisdiction over places needed by general government in execution of its powers, such use being for people of State as well as of United States, and such jurisdiction necessarily ending when places cease to be used for those purposes, p. 546.

Approved in In re Ladd, 74 Fed. 39, holding Nebraska liquor laws not in force in Fort Robinson reservation; United States v. Carter, 84 Fed. 624, reviewing authorities, holding Federal court had jurisdiction of offense committed on battleship, moored at Cob Dock.

Treaties.— As to laws strictly municipal in their character, the rule is general, that a change of government leaves them in force, until, by direct action of new government, they are altered or repealed, pp. 546, 547.

Approved in Crook v. Old Point, etc., Hotel Co., 54 Fed. 609, [illegible], holding mechanics' lien law in force within ceded territory; Barnett v. Barnett, 9 N. Mex. 212, 50 Pac. 338, citing cases, Spanish law as to acquest property, applied; Barrett v. Palmer, 135 N. Y. [illegible], 31 Am. St. Rep. 837, 31 N. E. 1016, 17 L. R. A. 728, and n., holding State had jurisdiction to enforce private rights within Brooklyn navy yard. See 31 Am. St. Rep. 838, note.

Distinguished in In re Ladd, 74 Fed. 40, holding Nebraska liquor laws not in force within Fort Robinson reservation.

United States.— Law of Kansas, as to liability of railroad for killing live-stock, not being inconsistent with laws of United States, and not having been changed or abrogated, remained in force within Fort Leavenworth reservation after cession of political jurisdiction over same to United States, p. 547.

114 U. S. 548, 29 L. 281, EX PARTE HUGHES.

Costs.— Disbursements by counsel, or parties, for printing briefs, on appeal to Supreme Court, cannot be allowed as costs, p. 548.

Approved in Kelly v. Springfield Ry., 83 Fed. 188, reviewing authorities, refusing to tax, as costs, disbursements for printing briefs, etc., in patent case; Price v. Garland, 4 N. Mex. 366 (John), 5 N. Mex. 101 (Gild.), 20 Pac. 183, refusing to allow cost of record and briefs, on appeal.

Costs.— Original proceeding in Supreme Court, for mandamus, to compel action by circuit judge, is a civil cause; and docket fee is taxable, in favor of attorney for prevailing party, as costs, as also are disbursements for printing objections in nature of pleadings, but not for printing brief, p. 548.

Approved in 88 Am. Dec. 185, note.

114 U. S. 549-555, 29 L. 255, MARTINSBURG, ETC., R. R. v. MARCH.

Contracts.— Where parties to railroad construction contract stipulate that decision of company's engineer shall conclusively determine quantity and quality of work, amount due, etc., such action of the engineer, in absence of fraud, gross mistake, or dishonest judgment, is conclusive upon the parties, pp. 551, 553.

Approved in Hamilton v. Liverpool, etc., Ins. Co., 136 U. S. 255, 34 L. 424, 10 S. Ct. 930, holding stipulation for appraisal, in insurance policy, binding; Chicago, etc., R. R. v. Price, 138 U. S. 192, 34 L. 919, 11 S. Ct. 291, where rule was applied in favor of the contractor; Pauly, etc., Mfg. Co. v. Hemphill County, 62 Fed. 704, 23 C. C. App. 481, upholding commissioner's decision on jail construction contract; Sheffield, etc., Ry. v. Gordon, 151 U. S. 292, 38 L. 166, 14 S. Ct. 345, superintendent's acceptance held conclusive as to its quality; United States v. Gleason, 175 U. S. 602, 20 S. Ct. 234, where

[illegible] of time was left to engineer's [illegible] United States, 60 Fed. 727, 13 U. S. App. [illegible], [illegible] as to quantity and quality of work, held conclu[illegible] [illegible] etc., R. Co., 67 Fed. 637, 31 U. S. App. [illegible] excavated in railroad grading; Elliott v. [illegible] [illegible] Fed. [illegible], 40 U. S. App. 61, as to inspection and [illegible] of [illegible] furnished; Newman v. United States, 8[illegible] Fed. [illegible] of excavations, etc., in road building; [illegible] etc., Co. v. Harris, 81 Fed. 931, 54 U. S. App. 144, [illegible] purchase of bonds was conditioned on their approval by [illegible]; Breyman v. Ann Arbor R. Co., 85 Fed. 584, where [illegible] certificate of work done was held conclusive; Logansport, [illegible] Co. v. Peru, 89 Fed. 187, when franchise gave council right to fix gas rate after specified time; Western Assurance Co. v. Hall, [illegible] Ala. 325, 20 So. 449, collecting authorities, stipulation in policy for arbitration, held binding; Electric-Lighting Co. v. Elder, 115 Ala. [illegible] 21 So. 987, citing cases, construing term "satisfactory completion;" Hot Springs Ry. v. Maher, 48 Ark. 529, 3 S. W. 641, as to quantity and quality of work on railroad; Howard v. Pensacola, etc., R. R., 24 Fla. 600, 5 So. 374, reviewing authorities, settlement on basis of engineer's estimates concluded plaintiff; Ross v. McArthur, 85 Iowa, 206, 52 N. W. 126, as to classification of excavations, measurements, etc.; Covington v. Limerick, — Ky. —, 40 S. W. 256, reviewing cases, as to estimate of extra work done; Wilbur v. Bingham, 3 Ohio C. C. 462, where furnace was to be put in to suit purchaser, error to charge that if properly put in he must take it; Moore v. Gaus Mfg. Co., 113 Mo. 108, 20 S. W. 977, holding, when work was completed in accordance with contract, court of law had jurisdiction; Baltimore, etc., R. R. v. Brydon, 65 Md. 227, 57 Am. Rep. 326, 9 Atl. 128, where question of good faith was properly left to jury; New England Trust Co. v. Abbott, 162 Mass. 154, 38 N. E. 434, 27 L. R. A. 279, and n., citing cases, purchaser bound by agreement for appraisal of stocks; Williams v. Chicago, etc., Ry., 112 Mo. 487, 490, 495, 497, 34 Am. St. Rep. 418, 421, 424, 426, 20 S. W. 637, 638, 640, reviewing authorities, and holding, under allegations, plaintiff must show engineer's refusal to act; Railroad v. Central Lumber, etc., Co., 95 Tenn. 544, 545, 32 S. W. 636, 637, as to allowances for extra work, etc.; Jones, etc. v. Risley, 91 Tex. 7, 32 S. W. 1030, where bridge materials were subject to engineer's approval; Kilgore v. Baptist, etc., Soc., 89 Tex. 469, 35 S. W. 145, as to architect's estimates; Bœttler v. Tendick, 73 Tex. 494, 11 S. W. 500, 5 L. R. A. 276, and n., builder bound by architect's acceptance; dissenting opinions in Connecticut Fire Ins. Co. v. Hamilton, 59 Fed. 264, 16 U. S. App. 366, majority holding insurance company had waived right to stipulated appraisal; Wortman v. Kleinschmidt, 12 Mont. 336, 30 Pac. 286, majority holding builder not liable for extra work, not ordered by architects; Norfolk, etc., R. Co. v. Mills, 91 Va. 643, 22 S. E. 564, majority holding engineer's mistake amounted to fraud.

Distinguished in Lewis v. Chicago, etc., Ry., 49 Fed. 709, citing cases, but relieving against mistakes arising from wrong construction of contract, by engineer; Central Trust Co. v. Louisville, etc., Ry., 70 Fed. 284, holding contract in question did not render engineer's decision conclusive; Marks v. Northern Pac. R. Co., 76 Fed. 946, 44 U. S. App. 714, where engineer's award and refusal to act were held to show bad faith; Crane Elevator Co. v. Clark, 69 Fed. 708, 711, 53 U. S. App. 263, 268, collecting authorities, holding question of bad faith should have gone to jury; Manchester Fire Assurance Co. v. Kœrner, 13 Ind. App. 378, 55 Am. St. Rep. 235, 40 N. E. 1111, collecting cases, and holding agreement for arbitration waived; Milwaukee, etc., Ins. Co. v. Stewart, 13 Ind. App. 65, 42 N. E. 292, where company lost right to arbitration by failure to submit; Moran v. Schmitt, 109 Mich. 292, 67 N. W. 326, where refusal to make estimates was held to show bad faith; G. H., etc., Ry. v. Henry, 65 Tex. 691, 692, engineer's decision not binding, where based on erroneous construction of contract; Sigler v. Beebe, 44 W. Va. 590, 30 S. E. 77, jury having found that there was fraud in agreed measurement, new trial denied.

114 U. S. 555-562, 29 L. 248, STRANG v. BRADNER.

Bankruptcy.— Term "fraud," used in bankrupt act, defining debts not dischargeable, means positive fraud, involving moral turpitude or intentional wrong, not implied fraud, or fraud in law, p. 559.

Approved in Noble v. Hammond, 129 U. S. 68, 32 L. 623, 9 S. Ct. 236, debt, created by innocent mingling of proceeds of collection with bankrupt's funds, discharged; Ames v. Moir, 138 U. S. 311, 34 L. 954, 11 S. Ct. 312, citing cases, call for delivery of goods under contract, made after bankrupt's insolvency, held fraudulent; Upshur v. Briscoe, 138 U. S. 377, 34 L. 935, 11 S. Ct. 317, reviewing authorities, where designation of bankrupt as trustee did not affect transaction, facts of which created simple debt; Georgia R. R. v. Cubbedge, etc., Co., 75 Ga. 323, mere failure of bankrupt to account for goods held in trust, not fraud; Lawrence v. Harrington, 122 N. Y. 412, 25 N. E. 407, where debt created by conversion of funds collected, was held discharged.

Distinguished in Herrlich v. McDonald, 80 Cal. 479, 22 Pac. 301, holding money, taken by stock dealer to purchase stock for another, held in fiduciary capacity.

Bankruptcy.— Claim against bankrupt for damages, on account of fraud or deceit practiced by him, is not discharged by proceedings in bankruptcy, even though proved against his estate, and dividend thereon received; accordingly, where notes were procured by false representations, the debt was not discharged, pp. 560, 561.

Cited in 67 Am. St. Rep. 47, monographic note.

Partnership.— If, in course of partnership business, partner makes fraudulent misrepresentations of fact, to injury of innocent

persons, without notice of limitations upon his general authority, his partners are responsible therefor, though ignorant of the fraud; especially if they received and appropriated its fruits, p. 561.

Cited in Brundage v. Mellon, 5 N. Dak. 73, 63 N. W. 209, citing cases, holding evidence of partner's misrepresentations, admissible to charge firm.

114 U. S. 562-564, 29 L. 272, ALLING v. UNITED STATES.

Courts.— Claims against United States, for money received from Mexico, under treaty of July 4, 1868, are claims founded on treaty, over which Court of Claims has no jurisdiction, pp. 563, 564.

Distinguished in United States v. Weld, 127 U. S. 55, 32 L. 64, 8 S. Ct. 1002, reviewing authorities, holding claim against gross sum allowed to United States, under Geneva award, not within rule.

114 U. S. 564-575, 29 L. 277, WALES v. WHITNEY.

Courts.— Act of March 3, 1885, restored appellate jurisdiction o Supreme Court, in habeas corpus cases, over decisions of Circui Courts; this included jurisdiction over similar judgments of Suprem Court of District of Columbia, pp. 565, 566.

Cited in Ex parte Terry, 128 U. S. 302, 32 L. 408, 9 S. Ct. 78, S. C note to 13 Sawy. 461, where original application to Supreme Cour for writ of habeas corpus was entertained, Circuit Court havin made the order of commitment; In re Heath, 144 U. S. 95, 36 L. 360, 12 S. Ct. 616, refusing to grant writ of error to Supreme Cour District of Columbia, in criminal case; Ex parte Mirzan, 119 U. S. 586, 30 L. 513, 7 S. Ct. 342, refusing to entertain original applicatio for writ; Shoemaker v. United States, 147 U. S. 301, 37 L. 18 13 S. Ct. 391, obiter; King v. M'Lean Asylum, 64 Fed. 341, 21 U. S. App. 481, 26 L. R. A. 789, generally.

Limited in In re Palliser, 40 Fed. 575, holding appeal to Suprem Court would not lie in habeas corpus case, where writ is returnabl before Circuit judge. Denied in Cross v. Burke, 146 U. S. 86, 8 36 L. 898, 13 S. Ct. 23, holding no appeal lay from Supreme Cour District of Columbia, in habeas corpus proceeding.

Courts.— Neither Supreme Court, nor Supreme Court, District Columbia, has appellate jurisdiction over naval court-martial, over offenses which that court has power to try, p. 570.

Army and navy.— Civil courts cannot interfere with naval cou martial, in performance of its duty, by writ of prohibition, or oth writ of that nature; and may relieve person from imprisonme under order of such court, only by writ of habeas corpus, where is apparent that court-martial proceeds without jurisdiction, p. 5

Approved in Kurtz v. Moffitt, 115 U. S. 500, 29 L. 461, 6 S. Ct. 1 reviewing authorities, holding police had no authority to arrest a detain deserter; Smith v. Whitney, 116 U. S. 177, 29 L. 604, 6

[illegible], reviewing authorities, refusing to prohibit court-martial to [illegible] paymaster for "scandalous conduct;" In re Spencer, 40 Fed. [illegible] remanding minor, convicted of desertion by court-martial; In [illegible] Zimmerman, 12 Sawy. 260, 30 Fed. 178, reviewing cases, refusing [illegible] interfere by habeas corpus, where court-martial had jurisdiction [illegible] offense.

Habeas corpus is not a writ of error, though in some cases, in which court issuing it has appellate power over detaining court, it may be used with writ of certiorari, for that purpose, p. 571.

Cited in Kurtz v. Moffitt, 115 U. S. 497, 29 L. 460, 6 S. Ct. 151, reviewing cases, holding writ of habeas corpus not removable from State to Circuit Court; Horner v. United States, 143 U. S. 578, 36 L. [illegible] 12 S. Ct. 525, citing cases, refusing to consider question as to whether alleged transaction constituted an offense; In re Tsu Tse [illegible] 51 Fed. 564, petitioner could not complain that he was entitled [illegible] deportation to another country.

Habeas corpus.— More than mere moral restraint necessary to make case for habeas corpus; there must be actual confinement, or present means of enforcing it, pp. 571, 572.

Distinguished in In re Grice, 79 Fed. 682, entertaining application for writ, where petitioner, at large on bail, surrendered himself to sheriff.

[illegible] U. S. 576–587, 29 L. 273, RICHMOND MINING CO. v. ROSE.

Mines and minerals.— Inclusion of larger number of lineal feet in the lode, does not render mining claim void; but, unless it interferes with rights previously acquired, excess may be rejected and claim held good for remainder, p. 580.

Cited and applied in Glacier Min. Co. v. Willis, 127 U. S. 481, 32 L. 254, 8 S. Ct. 1217, to tunnel site; Lakin v. Dolly, 53 Fed. 336, holding patent void as to excess; Doe v. Waterloo Min. Co., 54 Fed. 941, patent not avoided by drawing in end line to make it parallel; Thompson v. Spray, 72 Cal. 533, 14 Pac. 185, holding location valid, except as to excess claimed; Doe v. Tyler, 78 Cal. 23, 14 Pac. 376, location not invalidated, as whole, by mistake in placing monument, whereby it overlapped; Sherman v. Wrinkle, 121 Cal. 509, 53 Pac. 1082, application for unsurveyed lands, not wholly vitiated by fact that it embraces excess; Stem-Winder Min. Co. v. Emma, etc., Min. Co., 2 Idaho, 428, 21 Pac. 1042, location valid, though stakes were set to include excessive amount; Burke v. McDonald, 2 Idaho, [illegible] 18 Pac. 50, mistake in marking, where accuracy of measurement difficult, did not affect location; Hansen v. Fletcher, 10 Utah, [illegible] 17 Pac. 482, mistake of 300 feet in length did not render location void.

Mines and minerals.— Where claim of 200 feet, as discoverer, [illegible] no one at time it is made, is made in good faith, in reliance

upon one of the constituent veins, and acted on for years before knowledge of mistake, it is justified, p. 581.

Mines and minerals.— By filing of complaint in proper court proceedings to determine right of possession to mineral land were commenced, within meaning of § 2326, R. S., p. 583.

Courts.— What constitutes commencement of action in State court, being matter of State law, is not reviewable in Supreme Court, as Federal question, p. 583.

Mines and minerals.— Sections 2325, 2326, R. S., intended in every instance where there was possibility of conflicting claims, to give opportunity to have conflict adjudicated before issuance of patent, p. 584.

Cited in Hoffman v. Beecher, 12 Mont. 497, 31 Pac. 94, sustaining complaint, in contest, as to description of claim.

Mines and minerals.— Where a contest is instituted under § 2326, R. S., officials of land department have no further act of judgment to exercise until court has decided same; after that, they are bound by it, p. 585.

Approved in Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 693, 39 L. 864, 15 S. Ct. 737, reversing S. C., 61 Fed. 561, 15 U. S. App. 456, doubting effectiveness of amendment to application, pending contest; M'Evoy v. Hyman, 25 Fed. 541, certificate issued while contest pending, did not terminate the suit.

Courts — Mines and minerals.— While mining claim contest is before court, undecided, land office could not resume control, because of an implied waiver of claim, by delay in court; and patent to disputed claim, thus issued, is void, p. 586.

Cited in M'Evoy v. Hyman, 25 Fed. 541, certificate issued, while contest pending, did not terminate that suit; Garrard v. Silver Peak Mines, 82 Fed. 584, holding patent might be collaterally attacked, in action at law, for want of authority to issue same.

Distinguished in Northern Pac. R. Co. v. Cannon, 54 Fed. 258, 7 U. S. App. 507, reviewing authorities, holding voidable patent could not be attacked in equity suit to quiet title.

Mines and minerals.— Where, pending contest, party obtained patent to claim on same lode, but outside not in surface conflict with claim in litigation, it was a claim initiated by party to suit, pendente lite, and could not be used in his favor, pp. 586, 587.

Miscellaneous.— Witters v. Sowles, 33 Fed. 541, miscited; Albion Min. Co. v. Richmond Min. Co., 19 Nev. 226, 8 Pac. 480, historically. See 58 Am. St. Rep. 273, monographic note as to width of lode; dissenting opinion in Bullion, etc., Min. Co. v. Eureka Hill Min. Co., 5 Utah, 72, 11 Pac. 534, majority holding discoverer of apex entitled to entire width of lode.

114 U. S. 587-598, 29 L. 235, WABASH, ETC., RY. v. HAM.

Corporate property is trust fund for payment of debts; and conveyance by debtor corporation of its property without authority of law, and in fraud of existing creditors, is void against them, p. 594.

Approved and applied in Mellen v. Moline Iron Works, 131 U. S. 365, 33 L. 183, 9 S. Ct. 785, holding creditor might maintain suit to remove cloud or lien from such property; Richardson v. Green, 133 U. S. 44, 33 L. 522, 10 S. Ct. 284, reviewing cases, holding creditors entitled to certain bonds of insolvent corporation; Smith Purifier Co. v. McGroarty, 136 U. S. 241, 34 L. 349, 10 S. Ct. 1019, entertaining suit by creditor to set aside mortgage; Clark v. Bever, 139 U. S. 112, 35 L. 95, 11 S. Ct. 474, holding corporation might dispose of stock to creditors in payment of debts; Hollins v. Brierfield Coal, etc. Co., 150 U. S. 383, 37 L. 1116, 14 S. Ct. 130, reviewing cases, dismissing creditor's bill for application of corporate property to payment of their claims; Blake v. McClung, 172 U. S. 254, 19 S. Ct. 171, Tennessee act, giving resident creditors priority in distribution of assets, invalid; McDonald v. Williams, 174 U. S. 403, 19 S. Ct. 745, receiver of national bank could not recover dividend paid stockholder out of capital; Gould v. Little Rock, etc., Ry., 52 Fed. 684, reviewing cases, and sustaining trust deed to secure debts of insolvent corporation; Sutton Mfg. Co. v. Hutchinson, 63 Fed. 500, 24 C. C. App. 145, setting aside mortgage made by insolvent corporation; Butler v. Cockrill, 73 Fed. 947, 36 U. S. App. 702, directing pro rata distribution of property of insolvent corporation; Ames v. Union Pac. Ry., 74 Fed. 343, holding receiver could not divert income from property of insolvent corporation from creditors; Childs v. N. B. Carlstein Co., 76 Fed. 90, reviewing cases, holding president entitled to his security, against general creditors of corporation; National Bank v. Allen, 90 Fed. 551, 61 U. S. App. 116, collecting cases, and upholding corporation's right to prefer creditors; Childs v. N. B. Carlstein Co., 76 Fed. 90, reviewing cases, holding president entitled to his security, against general creditors of corporation; National Bank v. Allen, 90 Fed. 551, 61 U. S. App. 116, collecting cases, and upholding corporation's right to prefer creditors; Central of Georgia Ry. v. Paul, 93 Fed. 885, holding creditor might follow assets of insolvent corporation into hands of reorganized company; McCherry v. Troutman, 94 Fed. 956, holding transferrer of corporate property not liable to creditor, where company undissolved; Gottlieb v. Miller, 154 Ill. 53, 39 N. E. 995, collecting numerous authorities, holding insolvent corporation entitled to confess judgment in favor of bona fide creditors; First Nat. Bank v. Dovetail, etc., Gear Co., 143 Ind. 553, 52 Am. St. Rep. 437, 40 N. E. 811, sustaining confessed judgment in favor of stockholder creditor; Henderson v. Indiana Trust Co., 143 Ind. 569, 40 N. E. 519, where accounts were assigned to secure creditor, who also held, as collateral, note of directors; Louisville Banking Co. v. Etheridge Mfg. Co., — Ky. —,

43 S. W. 171, reviewing cases, giving attaching creditors of insolvent company priority over fraudulent assignee; Fear v. Bartlett, 81 Md. 443, 32 Atl. 323, 33 L. R. A. 724, and n., stockholder in insolvent company, having repudiated his subscription, for fraud, not liable on same; Miller v. Matthews, 87 Md. 475, 40 Atl. 178, sustaining assignment for benefit of creditors against subsequent attachment; Hospes v. Northwestern Mfg. Co., 48 Minn. 193, 31 Am. St. Rep. 643, 50 N. W. 1119, 15 L. R. A. 473, holding creditor not entitled to compel payment on bonus stock; Kelly v. Clark, 21 Mont. 322, 69 Am. St. Rep. 678, 53 Pac. 965, 42 L. R. A. 628, reviewing authorities, where creditor compelled payment on stock fraudulently issued as paid up; Shaw v. Robinson, 50 Neb. 417, 69 N. W. 950, holding question as to fraudulent transfer one of fact; Vance v. McNabb Coal, etc., Co., 92 Tenn. 60, 20 S. W. 427, transfer of property to new corporation held void as to creditors of old; Hardware Co. v. Manufacturing Co., 86 Tex. 164, 165, 24 S. W. 24, 25, 22 L. R. A. 816, and n., reviewing authorities, deed of trust, after insolvent company ceased business, void against creditors; Weyeth Hardware, etc., Co. v. James, etc., Co., 15 Utah, 131, 47 Pac. 611, reviewing authorities, refusing to set aside assignment for benefit of creditors of insolvent corporation; Albright v. Texas, etc., R. Co., 8 N. Mex. 438, 439, 46 Pac. 453, majority holding unpaid subscriptions a trust fund for creditors.

Corporations.— On consolidation, by statutory authority, of two or more solvent corporations, business of old corporations is not wound up nor property sequestrated, but is continued; consolidated company takes property of old corporations charged with lien for payment of debts, only when so provided by agreement or statute; accordingly, in this case, mere fact of consolidation did not create lien in favor of unsecured equipment bonds of old corporation, pp. 595, 596.

Approved in Tod v. Kentucky Union Land Co., 57 Fed. 56, defining meaning of consolidation, holding consolidation might result in absorption of old corporation; Toledo, etc., R. Co. v. Continental Trust Co., 95 Fed. 523, affirming S. C., 86 Fed. 948, holding consolidated company assumed liabilities of old corporations; Berry v. Kansas City, etc., R. R., 52 Kan. 775, 39 Am. St. Rep. 382, 36 Pac. 725, in absence of specific provision, consolidated company held to assume liabilities of old corporations. See 59 Am. St. Rep. 558, monographic note.

Denied in Compton v. Railway, 45 Ohio St. 624, 16 N. E. 121, contrary ruling on same state of facts as principal case. Distinguished in Hatry v. Painesville, etc., Ry., 1 Ohio C. C. 443.

Railroads.— Stipulation in agreement of consolidation, between certain railroads, that bonds and debts of old companies should "be protected by consolidated company," did not create lien in favor of unsecured equipment bonds, p. 596.

Denied as to same bonds in Compton v. Railway, 45 Ohio St. 624, 16 N. E. 121, contrary ruling as to same state of facts as principal case.

Liens.— Doctrine of vendors' liens applies only to sales of real estate, and cannot be invoked to secure lien for unsecured bonds transferred to new company as part of consideration for consolidation of railroads, p. 597.

Railroads.— Where all debts of company were consolidated into one mortgage debt, with privilege to bondholders of exchanging existing bonds for new ones, and before holders of unsecured bonds offered to make such exchange another mortgage was given and proceedings were begun for its foreclosure, sale under that foreclosure was made free from lien in favor of said bondholders, pp. 597, 598.

Cited in Compton v. Jesup, 167 U. S. 34, 42 L. 67, 17 S. Ct. 807, S. C., 68 Fed. 317, 330, 31 U. S. App. 486, holding principal case disposed of question as to equipment bonds; Adelbert College v. Toledo, etc., Ry., 47 Fed. 837, 841, 842, 843, remanding case, involving similar facts, to State court.

114 U. S. 596–606, 29 L. 233, MACALESTER v. MARYLAND.

Canals.— Rule that mortgagee out of possession is not entitled to rents and profits as against mortgagor or attaching creditors, applies to mortgages of railroads, canals, bridges, etc., pp. 604, 605.

Cited in Hook v. Bosworth, 64 Fed. 448, 24 U. S. App. 341, citing cases, mortgagor not entitled to moneys earned before receiver appointed; Mercantile Trust Co. v. Baltimore, etc., R. Co., 52 Fed. 366, holding creditors entitled to net earnings under receiver for judgment creditor.

Canals.— Where statute directs disposal of canal company's tolls between operating expenses and mortgage indebtedness, a general creditor, with full knowledge, will be restrained from levying upon such tolls needed for such specified purposes, pp. 605, 606.

Cited in Roberts v. Denver, etc., R. R., 8 Colo. App. 510, 46 Pac. 832, enjoining interference with profits.

114 U. S. 606–615, 29 L. 229, WURTS v. HOAGLAND.

Drains.— General laws, authorizing drainage of tracts of swamp lands, by commissioners appointed upon proceedings instituted by some of owners of the lands, and assessment of whole expense of work upon all lands within tract in question, such as provided in act of New Jersey of March 8, 1871, are just and constitutional, and do not deprive parties of property without due process of law, or deny to them equal protection of the laws, pp. 610–614.

Approved in Fallbrook Irr. Dist. v. Bradley, 164 U. S. 163, 41 L. 390, 17 S. Ct. 65, reversing S. C., 68 Fed. 960, sustaining Wright irrigation act, of California; Wisconsin v. Siebecker, 164 U. S. 702, 41 L. 1182, 17 S. Ct. 1000, affirmed on authority of principal case; Carson v. St. Francis Levee Dist., 59 Ark. 533, 27 S. W. 593, sustaining act creating levee district; Swift v. Calnan, 102 Iowa, 213, 63 Am. St. Rep. 446, 71 N. W. 234 (see 37 L. R. A. 464), sustaining act authorizing extension of party wall on land adjoining; Turner v. Nye, 154 Mass. 582, 28 N. E. 1049, 14 L. R. A. 490, and n., sustaining act authorizing flowing of land for fish culture; Paxton, etc., Irr. Co. v. Farmers, etc., Irr. Co., 45 Neb. 895, 50 Am. St. Rep. 592, 64 N. W. 346, 29 L. R. A. 857, holding use of water, for irrigation, a public use; Board of Directors, etc. v. Collins, 46 Neb. 423, 64 N. W. 1090, reviewing cases, Nebraska "district irrigation law," 1895, upheld; Lewis Co. v. Gordon, 20 Wash. 90, 54 Pac. 781, sustaining act providing for construction of drains, etc.; Bryant v. Robbins, 70 Wis. 271, 35 N. W. 550, sustaining Wisconsin drainage act of 1885; Traute v. White, 46 N. J. Eq. 441, 19 Atl. 197, but questioning validity of party-wall ordinance; Gage v. Gage, 66 N. H. 294, 29 Atl. 549, 28 L. R. A. 857, and n., generally. See 20 Am. St. Rep. 559, note.

Constitutional law.— When law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied, p. 615.

Approved in Walston v. Nevin, 128 U. S. 582, 32 L. 546, 9 S. Ct. 193, citing cases, sustaining Kentucky street-assessment law of 1882; State v. American, etc., Refining Co., 51 La. Ann. 566, 25 So. 449, sustaining Louisiana license tax of 1890; Wallace v. Myers, 38 Fed. 185, 4 L. R. A. 172, and n., sustaining New York inheritance tax of 1885, 1887; Newark, etc., Ry. v. Hunt, 50 N. J. L. 313, 12 Atl. 699, sustaining act as to disposition of diseased horses; Caldwell v. Wilson, 121 N. C. 462, 28 S. E. 559, reviewing authorities, law authorizing suspension of railroad commissioner sustained.

114 U. S. 615–619, 29 L. 224, SCHOFIELD v. CHICAGO, ETC., RY.

Negligence.— One approaching familiar crossing of railroad track, who could have seen train coming seventy rods from crossing, at any distance within 600 feet from crossing, is guilty of contributory negligence, though train was not regular one, was running at high rate of speed, and did not stop at depot or blow whistle or ring bell between depot and crossing, pp. 617, 618.

Approved and relied upon in Pike v. Chicago, etc., R. Co., 41 Fed. 99, setting aside verdict, court holding there was contributory negligence; St. Louis, etc., R. Co. v. Whittle, 74 Fed. 300, 40 U. S. App. 23, where walking on track at night was contributory negligence; Baltimore, etc., R. Co. v. Anderson, 85 Fed. 416, 56 U. S. App. 144, holding court properly left question of defendant's negligence to

jury; Memphis, etc., R. R. v. Martin, 117 Ala. 386, 23 So. 238, refusal to give instruction, similar to rule, held error; Bauer v. St. Louis, etc., Ry., 46 Ark. 400, reviewing authorities, rule held applicable to car inspector, engaged in his duties; Baltimore Traction Co. v. State, 78 Md. 425, 28 Atl. 399, under circumstances, it was contributory negligence to board moving street car; Northern Pac. R. R. v. Freeman, 174 U. S. 382, 19 S. Ct. 764, Ward v. Richmond, etc., R. Co., 43 Fed. 423, Horn v. Baltimore, etc., R. Co., 54 Fed. 304, 306, 6 U. S. App. 381, and Missouri Pac. Ry. v. Moseley, 57 Fed. 924, 12 U. S. App. 601, all following rule; Blount v. Grand Trunk Ry., 61 Fed. 378, 22 U. S. App. 129, though gates at crossing were up; Reynolds v. Great Northern Ry., 69 Fed. 811, 32 U. S. App. 377, 29 L. R. A. 697, and MacLeod v. Graven, 73 Fed. 632, 43 U. S. App. 129, both following rule.

Approved and followed also in Pyle v. Clark, 79 Fed. 747, 49 U. S. App. 263 (affirming S. C., 75 Fed. 646), Grand Trunk Ry. v. Baird, 94 Fed. 951, and Louisville, etc., R. R. v. Webb, 90 Ala. 194, 8 So. 821, 11 L. R. A. 678, reviewing numerous authorities, though there was watchman; Railway v. Cullen, 54 Ark. 435, 436, 16 S. W. 170, though there was box-car in way; Glascock v. Central Pac. R. R., 73 Cal. 141, 14 Pac. 520, and non-suit granted; Bertelson v. Chicago, etc., Ry., 5 Dak. 321, 323, 40 N. W. 533, 534, when plaintiff walked between two cars; Indiana, etc., Ry. v. Greene, 106 Ind. 204, 55 Am. Rep. 740, 6 N. E. 606, Cones v. Cincinnati, etc., Ry., 114 Ind. 331, 16 N. E. 639, and Mann v. Belt R. R., etc., Co., 128 Ind. 142, 26 N. E. 821, all reaffirming rule; Oleson v. Lake Shore, etc., Ry., 143 Ind. 413, 42 N. E. 739, where train was obscured by smoke; Hunter v. Montana, etc., Ry., 22 Mont. 532, 57 Pac. 143, and Durbin v. Oregon R. R., etc., Co., 17 Or. 12, 11 Am. St. Rep. 784, 17 Pac. 8, and directing non-suit; Blackburn v. Southern Pac. Co., — Or. —, 55 Pac. 226, though train was running at unlawful speed; New York, etc., R. R. v. Kellam, 83 Va. 858, 3 S. E. 706, following rule; Johnson v. Chesapeake, etc., R. Co., 91 Va. 179, 21 S. E. 240, all holding failure to look and listen constituted contributory negligence; dissenting opinions in Cahill v. Chicago, etc., Ry., 74 Fed. 294, 46 U. S. App. 85, majority holding was evidence of implied license; St. Louis, etc., Ry. v. Barker, 77 Fed. 814, 40 U. S. App. 739, majority holding failure to stop, look and listen, as contributory negligence, properly left to jury; Railway Cos. v. Foster, 88 Tenn. 633, 14 S. W. 428, majority holding contributory negligence no bar, under statute; Hadley v. Lake Erie, etc., R. Co., 21 Ind. App. 687, 51 N. E. 341, holding plaintiff guilty of contributory negligence. See notes in 90 Am. Dec. 780, 781, 782, and 50 Am. Rep. 653.

Distinguished in Grand Trunk Ry. v. Ives, 144 U. S. 432, 36 L. 494, 12 S. Ct. 688, reviewing authorities, holding question of contributory negligence properly left to jury; Texas, etc., Ry. v. Gentry, 163 U. S. 353, 41 L. 192, 16 S. Ct. 1109, holding no evidence to justify instruction as to stopping before crossing track; Louisville,

etc., R. Co. v. East Tennessee, etc., Ry., 60 Fed. 996, 22 U. S. App. 102, where law required train to stop at crossing; Cincinnati, etc., Ry. v. Farra, 66 Fed. 501, 31 U. S. App. 306, question as to whether failure to stop, look and listen was contributory negligence, properly left to jury; Beatty v. Mutual Reserve Fund, etc., Assn., 75 Fed. 68, 44 U. S. App. 527, collecting numerous authorities, case improperly taken from jury; Graven v. MacLeod, 92 Fed. 849, holding implied invitation to passenger to alight on track, question of contributory negligence for jury; Georgia Pac. Ry. v. Lee, 92 Ala. 267, 9 So. 232, plaintiff's duty to alight and look left to jury; Gratiot v. Missouri Pac. Ry., 116 Mo. 465, 21 S. W. 1098, 16 L. R. A. 196, collecting numerous authorities, train running in violation of speed ordinance, case left to jury.

Trial.— When evidence given at trial, with all justifiable inferences, is insufficient, so that verdict for plaintiff would have to be set aside, court may direct verdict for defendant, pp. 618, 619.

The following cases approve the rule and hold circumstances were such as to justify court in directing verdict: Ferguson v. Arthur, 117 U. S. 490, 29 L. 982, 6 S. Ct. 865, citing cases, action to recover duties; Gunther v. Liverpool Ins. Co., 134 U. S. 116, 33 L. 860, 10 S. Ct. 450, action on policy of insurance; Franklin Brass Co. v. Phœnix Assur. Co., 65 Fed. 776, 25 U. S. App. 119, action on fire policy; Smyth v. New Orleans Canal, etc., Co., 93 Fed. 927, reviewing authorities, patent case; Knapp v. Sioux Falls Nat. Bank, 5 Dak. 396, 40 N. W. 589, action of trover; Bunt v. Sierra Butte, etc., Min. Co., 138 U. S. 485, 34 L. 1032, 11 S. Ct. 464, Elliott v. Chicago, etc., Ry., 150 U. S. 246, 37 L. 1070, 14 S. Ct. 85, Southern Pac. Co. v. Seley, 152 U. S. 156, 38 L. 396, 14 S. Ct. 533, Ward v. Richmond, etc., R. Co., 43 Fed. 425, Missouri Pac. Ry. v. Moseley, 57 Fed. 923, 12 U. S. App. 601, Southern Pac. Co. v. Johnson, 69 Fed. 566, 44 U. S. App. 1, reviewing authorities, Reynolds v. Great Northern Ry., 69 Fed. 810, 32 U. S. App. 577, 29 L. R. A. 697, MacLeod v. Graven, 73 Fed. 632, 43 U. S. App. 129, St. Louis, etc., R. Co. v. Whittle, 74 Fed. 301, 40 U. S. App. 23, Southern Ry. v. Smith, 86 Fed. 295, 52 U. S. App. 716, 40 L. R. A. 749, Claus v. Northern Steamship Co., 89 Fed. 647, 60 U. S. App. 718, Detroit Crude-Oil Co. v. Grable, 94 Fed. 82, Elliott v. Chicago, etc., Ry., 5 Dak. 546, 41 N. W. 762, 3 L. R. A. 367, Werk v. Illinois Steel Co., 154 Ill. 432, 40 N. E. 444, Gregory v. Cleveland, etc., R. R., 112 Ind. 388, 14 N. E. 229, Oleson v. Lake Shore, etc., Ry., 143 Ind. 409, 42 N. E. 737, 32 L. R. A. 150, Candelaria v. Atchison, etc., R. Co., 6 N. Mex. 284, 27 Pac. 503, Butte v. Pleasant Valley Coal Co., 14 Utah, 265, 47 Pac. 78, and Northern Pac. R. R. v. Holmes, 3 Wash. 210, 14 Pac. 690, all damage cases.

Approved also in Delaware, etc., R. R. v. Converse, 139 U. S. 472, 35 L. 215, 11 S. Ct. 571, collecting cases, holding court properly instructed jury that defendant was guilty of negligence; Sparf v. United States, 156 U. S. 100, 39 L. 360, 15 S. Ct. 292, reviewing au-

thorities, in absence of evidence, court properly charged that jury could not find defendant guilty except as charged; Norris v. M'Canna, 29 Fed. 762, holding there was no evidence to justify finding of partnership; Northern Pac. R. Co. v. Sullivan, 53 Fed. 222, 10 U. S. App. 473, instruction that blowing of whistle was negligent act, sustained; Northwestern Fuel Co. v. Danielson, 57 Fed. 920, 12 U. S. App. 688, sustaining instruction that certain acts of defendant constituted negligence; Mann v. Belt R. R., etc., Co., 128 Ind. 141, 26 N. E. 820, collecting authorities, holding evidence did not sustain verdict for damages; Clark v. Jenkins, 162 Mass. 368, 38 N. E. 974, setting aside verdict proper, though motion to direct had been denied; Swallow v. Bain, 7 N. Mex. 114, 32 Pac. 504, refusal to direct verdict for plaintiff, held error, in action of covenant; Linkhauf v. Lombard, 137 N. Y. 426, 33 Am. St. Rep. 749, 33 N. E. 475, 20 L. R. A. 51, refusal to direct verdict for defendant, held error; Pool v. Southern Pac. Co., — Utah, —, 58 Pac. 333, instruction limiting jury to finding of damages only, sustained. See 30 Am. Rep. 653, note.

Distinguished in Travelers' Ins. Co. v. Randolph, 78 Fed. 760, 47 U. S. App. 260, reviewing authorities, question as to deceased's voluntary exposure to danger, for jury; Stewart v. Sixth Ave. R. Co., 45 Fed. 22, refusing to set aside verdict where evidence was conflicting; Kansas City, etc., R. Co. v. Kirksey, 60 Fed. 1002, 22 U. S. App. 94, holding court wrongfully withheld question of negligence from jury; Louisville, etc., R. Co. v. Kelly, 63 Fed. 410, 24 U. S. App. 106, question of contributory negligence properly left to jury; State v. Union R. R., 70 Md. 77, 18 Atl. 1034, under facts, court erred in taking case from jury; Ladouceur v. Northern Pac. R. R., 4 Wash. St. 44, 29 Pac. 945, damage suit, non-suit held error; Lewis v. Prien, 98 Wis. 90, 73 N. W. 655, direction for verdict properly denied; dissenting opinion in Sparf v. United States, 156 U. S. 174, 39 L. 386, 15 S. Ct. 321, majority holding proper an instruction that defendant could be found guilty only as charged.

114 U. S. 619–622, 29 L. 254, UNITED STATES v. CORSON.

Army and navy.— Prior to act of 1866, president had power to dismiss any officer of army or navy, p. 620.

Army and navy.— Officer dismissed from army by president cannot regain his position by subsequent revocation of the dismissal, but only by new appointment concurred in by senate if in session, or if not, operative only until end of the next ensuing session, pp. 621, 622.

Not cited.

114 U. S. 622–635, 29 L. 257, BROWN v. HOUSTON.

Commerce.— Federal prohibition of State tax on "imports and exports" has reference only to goods brought from or carried to foreign countries, not from one State to another, pp. 628, 629.

Reaffirmed in Ex parte Brown, 48 Fed. 442. Approved in Coe v. Errol, 116 U. S. 527, 29 L. 719, 6 S. Ct. 478, State may tax intended exports not yet in carriers' hands; Rothermel v. Meyerle, 136 Pa. St. 263, 20 Atl. 586, 9 L. R. A. 367, and n., upholding license law. See 62 Am. St. Rep. 474, note.

Commerce.— State tax on coal on board towboats on river, offered for sale generally, does not become export tax by fact that it is thereafter sold to vessels going abroad, p. 629.

Approved in Leisy v. Hardin, 135 U. S. 120, 34 L. 136, 10 S. Ct. 688, prohibition law void as to imports in original packages.

Commerce.— General State tax, on all property alike, does not become duty on exports because some of it is thereafter exported, p. 630.

Approved in State v. French, 109 N. C. 726, 26 Am. St. Rep. 592, 14 S. E. 384, tax on merchants, based on all their purchases, is valid license tax.

Commerce.— Power of Congress is exclusive whenever the matter is national or admits of uniformity of regulation, and no State may affect the freedom of interstate intercourse, p. 631.

Approved in Walling v. Michigan, 116 U. S. 455, 29 L. 694, 6 S. Ct. 457, annulling State law discriminating against sellers of imported liquors; Bowman v. Chicago, etc., Ry., 125 U. S. 495, 31 L. 710, 8 S. Ct. 703, annulling Iowa law, requiring carriers importing liquors to procure certificate; Fitzgerald v. Fitzgerald, etc., Const. Co., 41 Neb. 468, 59 N. W. 864, interstate commerce act exclusive, and applicable to prior contracts; Bullard v. Northern Pac. R. R., 10 Mont. 180, 25 Pac. 122, 11 L. R. A. 250, and n., interstate commerce law applied to prior unexecuted contract; People v. Wemple, 138 N. Y. 8, 33 N. E. 722, 19 L. R. A. 697, State corporate franchise tax is void as to foreign corporation doing only interstate business; People v. Hawkins, 157 N. Y. 16, 68 Am. St. Rep. 747, 51 N. E. 261, 42 L. R. A. 497, prison-goods law is void as to product of other States; Ex parte Rollins, 80 Va. 319, annulling State license discriminating against importers; Arkansas v. Kansas, etc., Coal Co., 96 Fed. 367, arguendo; dissenting opinion in O'Neil v. Vermont, 144 U. S. 346, 352, 36 L. 461, 463, 12 S. Ct. 702, 704, arguendo. See 27 Am. St. Rep. 548, note.

Distinguished in Territory v. Guyott, 9 Mont. 49, 22 Pac. 134, upholding Montana law prohibiting sale of liquor to Indians.

Commerce.— Omission of Congress to regulate any form of interstate commerce is a declaration that it shall be untrammelled, p. 631.

Approved in Pickard v. Pullman, etc., Car Co., 117 U. S. 49, 29 L. 790, 6 S. Ct. 642, annulling Tennessee sleeping-car tax as affecting interstate commerce; Wabash, etc., Ry. v. Illinois, 118 U. S. 589, 30 L. 255, 7 S. Ct. 20, denying State's right to regulate State rate on

transportation to another State; Robbins v. Shelby Taxing Dist., 120 U. S. 493, 30 L. 696, 7 S. Ct. 594, drummers' license tax invalid as to citizens of other States; Bowman v. Chicago, etc., Ry., 125 U. S. 508, 31 L. 715, 8 S. Ct. 1066, annulling Iowa law requiring carriers importing liquor to procure certificate; Leisy v. Hardin, 135 U. S. 110, 34 L. 132, 10 S. Ct. 684 (see dissenting opinion in 135 U. S. 147, 34 L. 145, 10 S. Ct. 697), annulling prohibition law as applied to imports in original packages; Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 212, 38 L. 966, 14 S. Ct. 1090, Kentucky regulation of charges of interstate bridge, invalid; In re Rebman, 41 Fed. 868, annulling Virginia meat-inspection law as discriminatory; Swift v. Philadelphia, etc., R. R., 58 Fed. 859, holding common law against discriminating rates by carriers, no part of Federal law; Ex parte Scott, 66 Fed. 46, annulling law prohibiting sale of oleomargarine; W. A. Vandercook Co. v. Vance, 80 Fed. 789, South Carolina dispensary act invalid as to imports in original packages; Grafty v. Rushville, 107 Ind. 510, 57 Am. Rep. 135, 8 N. E. 613, annulling city peddlers' ordinance; Gatton v. Chicago, etc., Ry., 95 Iowa, 129, 63 N. W. 595, 28 L. R. A. 562, common law as to unreasonable freight charges is no part of Federal jurisprudence; Bagg v. Railroad, 109 N. C. 284, 26 Am. St. Rep. 574, 14 S. E. 81, 14 L. R. A. 598, State statute, penalizing failure to ship freight promptly, applies to interstate trade; Arkansas v. Kansas, etc., Co., 96 Fed. 367, arguendo. See 27 Am. St. Rep. 550, valuable note, and 59 Am. Rep. 269, note.

Commerce.— Products of other States are not to be free from taxation in State whither carried for use or sale, in absence of congressional act so providing, p. 633.

Reaffirmed in Pittsburgh, etc., Coal Co. v. Bates, 40 La. Ann. 228, 8 Am. St. Rep. 521, 3 So. 643.

Commerce.— State tax on property imported from another State, which has reached its destination and become part of the general mass of property of the State, and is taxed only in common with such other property, is valid; e. g., tax on coal on towboats in city harbor, imported for general sale, p. 634.

Reaffirmed in Pittsburgh, etc., Coal Co. v. Bates, 156 U. S. 584, 589, 39 L. 542, 544, 15 S. Ct. 418, 419, affirming 40 La. Ann. 228 8 Am. St. Rep. 521, 3 So. 643, similar to principal case. **Approved** in Coe v. Errol, 116 U. S. 527, 29 L. 719, 6 S. Ct. 478, State may tax intended exports not yet in carrier's hands; Robbins v. Shelby Taxing Dist., 120 U. S. 497, 30 L. 697, 7 S. Ct. 596, annulling drummers' license tax as to citizens of other States; Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 346, 30 L. 1205, 7 S. Ct. 1126, annulling State tax on gross receipts of interstate transportation; Leloup v. Port of Mobile, 127 U. S. 648, 32 L. 314, 8 S. Ct. 1384, license tax on interstate telegraph, invalid; Pullman's Car Co.

v. Pennsylvania, 141 U. S. 23, 35 L. 616, 11 S. Ct. 878, upholding State tax on cars of interstate carrier; Emert v. Missouri, 156 U. S. 317, 319, 39 L. 436, 437, 15 S. Ct. 372, 373, affirming 103 Mo. 245, 246, 23 Am. St. Rep. 877, 15 S. W. 82, 11 L. R. A. 220, upholding peddlers' tax not discriminating against foreign goods or peddlers; Anderson v. United States, 171 U. S. 615, 19 S. Ct. 53, upholding validity of live-stock exchange; Ex parte Brown, 48 Fed. 439, 440, 443, upholding merchants' license tax based on their purchases; In re Greene, 52 Fed. 113, construing act of 1890, against monopolies; Patapsco Guano Co. v. Board of Agriculture, 52 Fed. 693, upholding North Carolina fertilizer-inspection law; American Harrow Co. v. Shaffer, 68 Fed. 757, upholding Virginia license tax on sale of manufactured implements; Preston v. Finley, 72 Fed. 860, 862, upholding occupation tax on sale of certain Sunday papers; In re May, 82 Fed. 426, Montana cigarette license law held valid, because not discriminatory; Oliver Finney Grocery Co. v. Speed, 87 Fed. 413, upholding Tennessee tax on merchants based on amount invested and stock in trade; Price Co. v. Atlanta, 105 Ga. 365, 31 S. E. 622, sale of imported goods from warehouse within State is not interstate commerce; Singer Mfg. Co. v. Wright, 97 Ga. 123, 25 S. E. 252, 35 L. R. A. 501, upholding State sewing-machine license; South Bend v. Martin, 142 Ind. 48, 49, 41 N. E. 320, 29 L. R. A. 537, upholding peddlers' license; State v. Wheelock, 95 Iowa, 583, 58 Am. St. Rep. 444, 64 N. W. 621, 30 L. R. A. 438, and n., upholding State law against itinerant vendors of nostrums; Myers v. Baltimore Co., 83 Md. 389, 391, 55 Am. St. Rep. 352, 354, 35 Atl. 145, 146, 34 L. R. A. 311, 312, upholding tax on cattle imported for sale; Bluefields Banana Co. v. Board of Assessors, 49 La. Ann. 46, 21 So. 629, upholding tax on cash in bank, at agency of foreign importer; McClellan v. Pettigrew, 44 La. Ann. 360, 10 So. 854, license tax on drummers for imported goods is invalid; Lumberville Bridge Co. v. Assessors, 55 N. J. L. 534, 26 Atl. 713, 25 L. R. A. 137, upholding corporate license fee as applied to one in interstate business; Waterbury v. Newton, 50 N. J. L. 542, 14 Atl. 608, State oleomargarine law applicable to imported package; People v. Wemple, 138 N. Y. 11, 33 N. E. 723, 19 L. R. A. 698, State franchise tax void as to foreign corporation doing only interstate business; State v. Gorham, 115 N. C. 727, 44 Am. St. Rep. 496, 20 S. E. 181, 25 L. R. A. 812, upholding tax on itinerant salesmen, as applied to salesmen of imported goods; Kelley v. Rhoads, 7 Wyo. 258, 51 Pac. 597, 598, 599, 39 L. R. A. 600, 602, upholding law taxing live-stock imported for grazing; dissenting opinions in Leisy v. Hardin, 135 U. S. 151, 152, 34 L. 147, 10 S. Ct. 699, majority annulling prohibition law as applied to original packages imported; Adams Exp. Co. v. Ohio, 165 U. S. 234, 41 L. 700, 17 S. Ct. 314, majority upholding State tax on telegraph and express companies; Hynes v. Briggs, 41 Fed. 470, arguendo. See 59 Am. Rep. 272, note, and 62 Am. St. Rep. 449, 474, valuable note on taxation.

Distinguished in United States v. Hopkins, 82 Fed. 540, holding live-stock trading association an unlawful combination; Jamieson v. Indiana Natural Gas, etc., Co., 128 Ind. 581, 28 N. E. 84, upholding regulation of transportation of natural gas under police power.

Constitutional law.— A State taxing law is not invalid as to coal imported from and owned by citizen of another State, because denying equal privileges and immunities guaranteed by the Federal Constitution, p. 634.

Miscellaneous.— Arkansas v. Kansas, etc., Coal Co., 96 Fed. 355, and Tennessee v. Union, etc., Bank, 152 U. S. 460, 38 L. 514, 14 S. Ct. 636, as to removal of causes.

114 U. S. 635-642, 29 L. 261, PROVIDENT SAVINGS SOC. v. FORD.

Removal petition by insurance company, alleging that Ohio judgment upon which suit was brought in New York, was not obtained after personal service, was evasive and inconsequential, because not denying voluntary appearance, or service on an agent such as insurance companies usually maintain in all States, p. 639.

Courts.— Method of acquiring jurisdiction of foreign corporation by service on its agent, as established by State law, applies in Federal as well as State courts, p. 639.

Removal of causes.— In suit on judgment obtained in another State, it is no ground for removal that it was colorably assigned to citizen of domestic State to prevent removal thereof by defendant, p. 641.

Reaffirmed in Oakley v. Goodnow, 118 U. S. 44, 30 L. 62, 6 S. Ct. 944. Carson v. Dunham, 121 U. S. 426, 30 L. 994, 7 S. Ct. 1032, Leather Manufacturers' Bank v. Cooper, 120 U. S. 781, 30 L. 818, 7 S. Ct. 778, and Vimont v. Chicago, etc., Ry., 69 Iowa, 301, 28 N. W. 612. **Approved** in Dow v. Bradstreet Co., 46 Fed. 826, on removal petition by one defendant, he may show another to have been fraudulently joined; Bowley v. Railroad, 110 N. C. 318, 14 S. E. 778, denying removal by one defendant of non-separable action; Carson v. Dunham, 149 Mass. 56, 14 Am. St. Rep. 400, 20 N. E. 314, 3 L. R. A. 205, and n., holding colorable transfer to defeat Federal jurisdiction, not ground for injunction in Massachusetts court.

Removal of causes.— In suit on a judgment, fact that judgment was obtained in Federal court does not make suit one arising under Federal laws, and so removable, p. 641.

Reaffirmed in Carson v. Dunham, 121 U. S. 428, 429, 30 L. 994, 7 S. Ct. 1032, Metcalf v. Watertown, 128 U. S. 588, 32 L. 544, 9 S. Ct. 114, and Pope v. Louisville, etc., Ry., 173 U. S. 580, 19 S. Ct. 502. **Approved** in Starin v. New York, 115 U. S. 257, 29 L. 390, 6 S. Ct. 31, denying that extent of New York ferry rights raised Federal

question; Kansas v. Bradley, 26 Fed. 289, remanding case questioning prohibition law; Arkansas v. Kansas, etc., Coal Co., 96 Fed. 355, 357, bill to prevent influx of railroad employees raises Federal commerce question; King v. Lawson, 84 Fed. 210, bill by homestead entryman to protect his possession, held not of Federal cognizance; Pacific Gas Imp. Co. v. Ellert, 64 Fed. 429, denying Circuit Court's jurisdiction on bill alleging defendants would rely on Federal law; Walker v. Windsor Nat. Bank, 56 Fed. 80, 5 U. S. App. 423, allowing removal of suit on national bank cashier's bond; Tate v. Douglas, 113 N. C. 195, 18 S. E. 203, suit on Federal receiver's bond does not raise Federal question; Tennessee v. Union, etc., Bank, 152 U. S. 460, 38 L. 514, 14 S. Ct. 656, arguendo.

Distinguished in Pullman's Palace, etc., Co. v. Washburn, 66 Fed. 793, Federal court has jurisdiction of ancillary proceedings, irrespective of citizenship.

Judgment is a security of record showing a debt due from one person to another, p. 641.

114 U. S. 642–653, 29 L. 250, EX PARTE REGGEL.

Extradition.— R. S., §§ 5278, 5279, respecting extradition of one accused of treason, felony "or other crime," extends to one accused of a misdemeanor, as do also the words of Constitution upon same subject, pp. 649, 650.

Reaffirmed in Barranger v. Baum, 103 Ga. 475, 68 Am. St. Rep. 122, 30 S. E. 528. Approved in Lascelles v. Georgia, 148 U. S. 542, 37 L. 551, 13 S. Ct. 689, defendant, after surrender to demanding State, has no immunity from charge for another crime than that of the requisition.

State has power, except as limited by Federal Constitution, to define offenses against its laws, and citizens of other States are bound thereby, p. 650.

Extradition.— Fugitive is entitled to insist upon proof, before governor of asylum State, that he was within the demanding State at time of alleged crime, and subsequently withdrew therefrom, p. 651.

Approved in In re White, 55 Fed. 58, 14 U. S. App. 87, but holding guilt or innocence of accused cannot be investigated; State v. Hall, 115 N. C. 814, 44 Am. St. Rep. 503, 20 S. E. 730, 28 L. R. A. 291, and n. (and see dissenting opinion in 115 N. C. 823, 20 S. E. 733, 28 L. R. A. 294, and n., 44 Am. St. Rep. 509, note), one firing a bullet into a State, but never actually there, is not an extraditable fugitive.

Extradition.— State has power to establish forms of civil and criminal process in its own courts, subject only to Federal constitutional provisions protecting life, liberty and property; consequently, in extradition proceedings, it may not be objected that

indictment is not technically correct, if substantially according to laws of demanding State, p. 651.

Approved in Brown v. New Jersey, 175 U. S. 175, 20 S. Ct. 78, upholding New Jersey law as to struck jury; Pearce v. Texas, 155 U. S. 313, 39 L. 167, 15 S. Ct. 117, technical sufficiency of indictments not open on habeas corpus; Ex parte Pearce, 32 Tex. Cr. 305, 307, 23 S. W. 16, 17, holding indictment sufficient under laws of demanding State; Barranger v. Baum, 103 Ga. 475, 68 Am. St. Rep. 122, 30 S. E. 528, construing extradition warrant and indictment.

Extradition.— Executive of asylum State may require competent proof that accused is, in fact, a fugitive from justice of demanding State, p. 652.

Approved in Cook v. Hart, 146 U. S. 183, 36 L. 939, 13 S. Ct. 43, on habeas corpus in Federal court, after surrender to demanding State; Webb v. York, 79 Fed. 620, 621, 49 U. S. App. 171, 172, requisition cannot be denied if indictment sufficient under laws of demanding State. See 68 Am. St. Rep. 132, note.

Extradition.— On habeas corpus, Supreme Court refused to order release of accused, whose extradition had been granted by governor of asylum State, where proofs made out a prima facie case, though not as full as might properly have been required, p. 653.

Approved in Roberts v. Reilly, 116 U. S. 96, 29 L. 549, 6 S. Ct. 300, presumption is in favor of governor's findings; Whitten v. Tomlinson, 160 U. S. 245, 40 L. 413, 16 S. Ct. 303, warrant of extradition and indictment make out prima facie case; Ex parte Brown, 28 Fed. 654, 655, courts will not overrule governor's decision except for clear error; In re Cook, 49 Fed. 843, executive warrant is prima facie evidence of flight; Ex parte Whitten, 67 Fed. 231, one extradited will not be discharged by Federal court on habeas corpus, in advance of hearing by State court; In re Huse, 79 Fed. 307, 48 U. S. App. 328, Federal courts ought to interfere by habeas corpus only in extreme cases; Ex parte Dawson, 83 Fed. 308, 49 U. S. App. 678, extradition warrant, reciting receipt of requisition and indictment, "in due form," is sufficient; In re Bloch, 87 Fed. 983, requisition by governor of demanding State and copy of indictment are necessary; Kurtz v. State, 22 Fla. 43, 1 Am. St. Rep. 176, affidavit distinctly charging offense cannot be impeached by the accused, governor of requesting State is judge of its authenticity; Hackney v. Welch, 107 Ind. 259, 8 N. E. 144, governors need certify only that papers are authenticated, not genuine; Drinkall v. Spiegel, 68 Conn. 448, 36 Atl. 832, 36 L. R. A. 488, a paroled prisoner permitted to leave the State, is a fugitive; Barranger v. Baum, 103 Ga. 475, 477, 68 Am. St. Rep. 122, 124, 30 S. E. 528, 529, indictment and warrant in due form make out prima facie case; In re Sylvester, 21 Wash. 203, 57 Pac. 831, holding warrant and requisition sufficient; In re Fitzsa, 45 Fed. 474, arguendo.

114 U. S. 654–663, 29 L. 226, STREET R. R. v. HART.

Removal of causes.— Affidavit for removal for local prejudice, sworn to ten days before suit was filed in State court, and averring that affiant "is the plaintiff in the case of," etc., held sufficient, p. 660.

Removal petition, showing facts making out case for removal under act of 1875, is not rendered abortive by allegation that removal was asked under R. S., § 639, p. 660.

Approved in Whelan v. New York, etc., R. Co., 35 Fed. 863, 1 L. R. A. 74, and n., distinguishing between formal and jurisdictional requirements.

Removal of causes.— Absence of oath to removal petition is only an informality, and waived by failure to object, p. 660.

Cited in dissenting opinion, Dunn v. Burlington, etc., Ry., 35 Minn. 83, 84, 27 N. W. 453, 454, arguendo.

Appeal and error.— Motion to expunge and arrest judgment is not, any more than motion for new trial, reviewable on error in Supreme Court, pp. 660–661.

Courts.— State law authorizing fi. fa. against a city upon judgment against it, is a remedy enforceable upon similar judgment in Circuit Court in a common-law cause, under R. S., § 916, p. 661.

Courts.— Louisiana special act of 1870, prohibiting fi. fa. against city of New Orleans to enforce payment of money judgments, was not in force proprio vigore, in the Circuit Court, and a judgment creditor might proceed against that city by fi. fa., under the general statute authorizing it, as provided in R. S., § 916, p. 662.

Appeal and error.— Assignments of error respecting questions not saved by bill of exceptions at jury trial, cannot be considered on error, p. 663.

Approved in Alexander v. United States, 138 U. S. 355, 34 L. 956, 11 S. Ct. 351, error in selecting jury waived by failure to make objection until motion for new trial.

114 U. S. 663–705, 29 L. 281, TENNESSEE BOND CASES.

States.— Statutory lien created by Tennessee act of 1852, upon property of railroads aided by grant of State bonds, accrued only to the State, not the bondholders; hence, after repudiation of debt by State, bondholders could not enforce it against railroads, pp. 685–705.

Followed in Cunningham v. Macon, etc., R. R., 156 U. S. 420, 39 L. 476, 15 S. Ct. 365, holding bondholders not entitled to lien reserved by Georgia in railroad loan of 1866.

Payment implies a debt from payor to payee, p. 687.

Statutes creating contracts are to be interpreted according to language of each particular case, p. 688.

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SUPREME COURT

OF THE

UNITED STATES

IN

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT OCTOBER TERM, 1884.

COMMISSIONERS OF BUNCOMBE CO., ET AL., *Appts.*,

v.

VINCENT R. TOMMEY.

See S. C. Reporter's ed. 122 ET AL.

Mechanic's lien—statutes of North Carolina; railroad property not subject to.

1. The statutes of North Carolina of March 28, [illegible] and March 1, 1873, the first giving a lien to mechanics and laborers in certain cases, and the other [illegible] liens under mortgages given by corporations do not give to those performing labor and furnishing materials in the construction of railroads a lien upon the property and franchises of a corporation owning and operating such roads.

2. Mechanic's lien laws giving to mechanics and laborers a lien on buildings, including the lot upon which it stands, or a lien upon a lot or farm or other property for work done thereon, or for materials furnished in the construction or repair of buildings, [illegible] be interpreted as giving a lien upon the road, bridges or other property of a railroad company that may be essential in the operation and maintenance of its road for the public purposes for which it was established.

3. The proviso of the 3d section of the said Act (Battle's Revisal, chap. 24, § 48) has reference to grants and contracts of private corporations [illegible] under the Act of February 12, 1872 (Public Laws, C. 1871-2, chap. 199) and not those of railroad corporations organized for public use under the Act of February 8, 1872.

[illegible] for rehearing, State v. Rives, 5 Ired. [illegible] v. McGee, 28 N. C., and certain state [illegible].]

[No. 136.]

[illegible] 17, 18, 1884. *Decided Mar. 2, 1885.*

[illegible] from the Circuit Court of the [illegible] States for the Western District of [illegible].

[illegible] and facts of the case fully appear [illegible] opinion of the court. See also the re[illegible] opinion of this court on petition for [illegible], post, p. 308.

[illegible] F. Phillips and *A. S. Merrimon*, [illegible].

[illegible] Wm. R. Earle and *Jas. H. Rion*, [illegible].

Mr. Harlan delivered the opinion of [illegible].

[illegible] and Asheville Railroad Company [illegible] created by the consolida[illegible] year 1874, of a railroad company of [illegible], organized under the laws of [illegible] and of the Greenville and French Broad Railroad Company, of North Carolina—executed, under date of October 1, 1876, a deed of trust, whereby, for the purpose of securing the payment of its bonds, with interest coupons attached, it conveyed its franchises, railroad, rights, lands and property, real and personal, in trust for those who should become holders or owners of such bonds. The deed contained a provision by which the principal of all the bonds should become due after continuous default for six months in the payment of semi-annual interest upon them or upon any of them. Such a default having occurred in respect of [123] the installments of interest due January 1, 1878, the present suit was brought for the purpose of enforcing, in satisfaction of the entire amount of said bonds and coupons, the lien given by the beforementioned deed. Certain parties—Garrison, Fry & Deal, Clayton, and Rice & Coleman—were made defendants, because, as creditors of the railroad company, they claimed, respectively, a lien upon property covered by the mortgage superior to that asserted in behalf of the bondholders. Garrison alleged that, being a mechanic, he contracted, December 1, 1876, and June 2, 1877, with, and afterwards built for, the railroad company two trestles in Polk County, North Carolina, his work being completed February 18, 1878; Fry & Deal, the first named being a mechanic, that they furnished materials and work upon trestles in the same county, under a contract made with the company on June 2, 1877, and fully executed June 17, 1878; Clayton, that he performed work (grading, etc.), upon the company's road in the same county, under a contract made with it prior to the mortgage, but not executed until after its date; and Rice & Coleman, that they did work and labor, and furnished materials, on the company's road in Henderson County, North Carolina, such work beginning June 1, 1876, and ending May 1, 1878.

The decree below, ordering a sale of the mortgaged property, must have proceeded upon the ground that, under the laws of North Carolina, these defendants acquired no lien whatever upon the property of the railroad company. The contention here is that some of the defendants acquired a lien as well under a statute passed in 1873, regulating sales under mortgages given by companies upon all their works and property, as under the Act called the Workmen's Lien Law of 1870; and that one of the defendants has a lien under the former,

while others have liens under the latter statute. The main inquiry now is, whether the court below correctly interpreted those statutes. It is necessary to a clear understanding of the case that their provisions be examined in detail.

By the Constitution of North Carolina of 1868, the General Assembly of that State was [124] required to "provide, by proper legislation, for giving to mechanics and laborers an adequate lien on the subject matter of their labor." Art. 14, § 4.

Subsequently, by an Act approved March 28, 1870, entitled "An Act for the Protection of Mechanics and other Laborers, Materials," etc., it was provided "that every building built, rebuilt, repaired or improved, together with the necessary lots on which said building may be situated, and every lot, farm or vessel, or any kind of property not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same or material furnished"; § 1; that "any mechanic or citizen, who shall make, alter or repair any article of personal property, at the request of the owner or legal possessor of such property, shall have a lien upon such property so made, altered, or repaired, for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges shall be paid," etc.; § 3; that "all claims under $200 may be filed in the office of the nearest magistrate, if over $200, in the office of the Superior Court clerk in any county where the labor has been performed or the material furnished. § 4;" that proceedings to enforce the lien created must be commenced in the courts of justice of the peace and in the superior courts, according to their jurisdiction; and, upon judgment being rendered in favor of the claimant, an execution for the collection and enforcement thereof may issue in the same manner as upon other judgments in actions arising upon contracts for the recovery of money. Pub. Laws N. C., chap. 206, p. 258; Battle's Revisal, N. C., chap. 65, p. 563.

By the general statute, approved February 8, 1872, entitled "An Act to Authorize the Formation of Railroad Companies and to Regulate the Same," provision was made for the formation by any number of persons, not less than twenty-five, of corporations for the purpose of constructing, maintaining and operating railroads. This statute contains sixty-six sections, and prescribes the mode in which a company may be organized under it; what its articles of association shall contain; what shall be the [125] amount of its capital stock and in what way subscribed; when it shall become a corporation, with the powers and privileges therein granted; to what extent its stockholders shall be liable for the debts of the company; when it shall be liable to laborers for the amount due them from contractors for the construction of any part of the road; the mode in which it may, by condemnation, acquire real estate needed for the purposes of its incorporation; an annual report to the Governor showing its operations and condition in every respect; when and under what circumstances the Legislature may alter or reduce its rates of freight, fare or other profits; and many other duties respecting the operation and management of its railroad and other property. Public Laws N. C., 1871-2, chap. 188 Battle's Revisal, chap. 99.

Corporations formed under that statute ar given power to do various things involving th raising and expenditure of money; and also "from time to time to borrow such sums o money as may be necessary for completing an finishing or operating their railroad, and to is sue and dispose of their bonds for any amoun so borrowed, and to mortgage their corporat property and franchises to secure the paymen *or* [of] any debt contracted for the purpose aforesaid," etc. The statute further declare that "all existing railroad corporations withi this State shall respectively have and possess al the powers and privileges" therein specified.

On the 12th of February, 1872, the Gener Assembly of North Carolina passed anothe statute providing for the formation of "privat corporations for any purpose not unlawful" b three or more persons. Pub. Laws N. C 1871-2, chap. 199.

At its subsequent session an Act was approve March 1, 1873, entitled "An Act to Regula Mortgages by Corporations, and to Regula Sales under Them." As the present case depen largely upon the construction to be given to th provisions of that statute, its 1st and 3d sectio (the 2d and other sections being immaterial i the determination of any question here i volved) are given entire, as follows:

"Sec. 1. If a sale be made under a deed of trust mortgage executed by any company on all its wor and property, and there be a conveyance pursua thereto, such sale and conveyance shall pass to t purchaser at the sale not only the works and pro erty of the company as they were at the time making the deed of trust or mortgage, but a works which the company may, after that time a before the sale, have constructed, and all oth property of which it may be possessed at the tin of the sale other than debts due to it. Upon su conveyance to the purchaser the said compa shall, *ipso facto*, be dissolved, and the said purchas shall forthwith be a corporation by any na which may be set forth in the said conveyance, in any writing signed by him and recorded in t same manner in which the conveyance shall be r corded."

"Sec. 3. When such corporation shall expire or dissolved, or its corporate rights and privileg shall have ceased, all its works and property a debts due to it shall be subject to the payment debts due by it, and then to distribution among t members according to their respective interes and such corporation may sue and be sued as b fore for the purpose of collecting debts due to prosecuting rights under previous contracts with and enforcing its liabilities and distributing t proceeds of its works, property and debts amo those entitled thereto; *Provided*, That all debts a contracts of any corporation, prior to or at the ti of the execution of any mortgage or deed of tr by such corporation, shall have a first lien upon t property, rights and franchises of said corporatio and shall be paid off or secured before such mo gage or deed of trust shall be registered." Pu Laws N. C., 1872-3, chap. 131; Battle's Revisal, ch 26, §§ 46, 48.

The first question to be considered is wheth the Act of 1870 gives a lien to mechanics contractors upon the property of a railroad c poration, for work performed or materials f nished in and about the construction of its ro or of its bridges constituting a part of its li We are of opinion that no such statutory li exists in North Carolina, or was intended to given by the Act 1870. In reaching this c clusion, we are not aided by any direct decisi of the question by the Supreme Court of No Carolina. Reference was made by counsel

[illegible] v. Smith, 81 N. C., 340, where it was [illegible] that an overseer is not entitled, under that [illegible] to a lien, for his wages, upon the employ[illegible] crop or land over which he has superin[illegible]. After alluding to the constitutional [illegible] that laws be enacted to give to [illegible] and laborers an adequate lien on [illegible] subject matter of their labor, the court said: "A very large proportion of the laboring pop[illegible] of the State had just recently been re[illegible] from thraldom, and thrown upon their [illegible] resources, perfectly ignorant of the com[illegible] business transactions of social life, and [illegible] provision of the Constitution, and the Acts [illegible] to carry it into effect, were intended to [illegible] protection to that class of persons who [illegible] totally dependent upon their manual labor [illegible] subsistence. The law was designed ex[illegible] for mechanics and laborers." If such [illegible] the effect of the Act of 1870, there is strong [illegible] to hold that a mere contractor for the [illegible] of a railroad, or of railroad bridges, [illegible] entitled to the lien given by it. But with[illegible] accepting as conclusive an opinion delivered [illegible] the rights of the parties had become fixed, [illegible] v. Seligman, 107 U. S., 33 (Bk. 27, L. ed., [illegible]) we [illegible] our interpretation of the statute [illegible] the ground that it has no reference to [illegible] done or materials furnished in the con[illegible] of railroads. The words of the Act [illegible] adequate to express a purpose to [illegible] a lien upon a public improvement of that [illegible]. The words "building," "lot," [illegible] and "any kind of property not herein [illegible]" are too limited in their scope to [illegible] the conclusion that the Legislature had [illegible], by that Act, to give a lien upon [illegible] property. This view is strengthened [illegible] circumstance that, by the subsequent [illegible] providing for the organization of railroad [illegible] and regulating their affairs, no saving [illegible] of liens in behalf of mechanics and [illegible], and express power is given to such [illegible] to borrow, from time to time, any [illegible] necessary for completing and furnishing [illegible] their railroads upon bonds secured [illegible] upon their corporate property and [illegible]. Indeed, the idea of a lien in favor [illegible] actually performing work in the [illegible] of a railroad seems to have been [illegible] excluded; for, when the railroad [illegible] fails to pay such laborers, the com[illegible] upon notice, may become bound to do so; [illegible] lien is given therefor upon the property [illegible] corporation.

[illegible], however, from these considerations, [illegible] of opinion that a law, giving to mechan[illegible] laborers a lien on buildings, including [illegible] or ground upon which they stand, or a [illegible] a lot or farm or other property, for [illegible] thereon, or for materials furnished [illegible] construction or repair of buildings, should [illegible] interpreted as giving a lien upon the [illegible], bridges, or other property of a rail[illegible] company, that may be essential in the [illegible] and maintenance of its road. In [illegible], as in most, if not in all the States, [illegible] although constructed for the private [illegible] of those engaged in such enterprises, [illegible] which have been established, [illegible] the authority of law, primarily for the [illegible] and benefit of the public. The [illegible] of February 8, 1872, authorized the formation of corporations to construct, maintain and operate railroads "for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed for the like public use." Battle's Revisal, chap. 99, § 1. The pecuniary profit derived by those who project and operate them is the reward which they receive for maintaining a public highway. Municipal taxation to aid in their construction has been maintained only upon the ground that they are, in a large sense, instrumentalities or agencies for the purpose of accomplishing public ends. Upon that ground rests the authority of the State to invest them with the right of eminent domain in the condemnation of private property, and to prescribe from time to time, in the interest of the public, reasonable regulations for their control and management. *Taylor* v. *Ypsilanti*, 105 U. S., 68, 69 (Bk. 26, L. ed., 1011). Such being the relations existing in North Carolina between these corporations and the public, it should not be presumed that the Legislature intended to subject them to the operation of ordinary lien laws, enacted for the benefit of those performing labor [129] and furnishing materials in the construction, repair or improvement of what the Statute of 1870 designates as buildings, or who perform labor upon lots, farms and other property belonging to private persons and having no connection with public objects. A different construction of the statute would enable parties having liens for amounts within the jurisdiction of justices of the peace, to destroy a public highway and defeat the important objects which the State intended to subserve by its construction. No such intention should be imputed to the Legislature, unless the words of the statute clearly requires it be done.

There is nothing, it may be observed in this connection, in *Brooks* v. *R. Co.*, 101 U.S., 443 (Bk. 25, L. ed., 1057], in conflict with the views here expressed. The decision in that case rests upon the construction given to the mechanics' lien law of Iowa by the Supreme Court of that State. Besides, the Iowa Statute in terms included, among those entitled to the lien it gave, "contractors, subcontractors, material furnishers, mechanics and laborers engaged in the construction of any railroad or other work of internal improvement." Iowa R. S., 1860, § 1846. The legislative will was there expressed so clearly as to leave no room for interpretation of the statute.

It is, however, contended that the proviso of the 3d section of the Act of March 1, 1873, is sufficient to sustain the lien asserted by such of the appellants as were contractors and mechanics. That Act, as we have seen, regulates sales under deeds of trusts or mortgages "executed by any company on all its works and property," and provides for the purchaser becoming a corporation, with all the franchises, rights and conveyances of, and subject to the duties imposed upon, the original corporation. In connection with a general provision for the disposition of the assets of corporations which shall expire or be dissolved, or whose corporate rights and privileges shall cease, it is declared "that all debts and contracts of any corporation, prior to or at the time of the execution of any mortgage [130] or deed of trust by such corporation, shall have

a first lien upon the property rights, and franchises of said corporation, and shall be paid off or secured before such mortgage or deed of trust shall be registered."

It must be admitted that the broad language of this Act gives some support to the proposition that it was intended to apply to all corporations, including those formed for the construction and operation of railroads. But there are reasons of great weight that have brought us to the conclusion that such is not its proper interpretation. The language of the proviso in question is fully satisfied by restricting its operation to merely private corporations, which may be formed by three or more persons. And to this may be added the important consideration, that any other interpretation might defeat the express power given to railroad corporations to raise money for completing and finishing or operating their roads, upon bonds to be secured by mortgage upon their property and franchises; for, such bonds, in the very nature of things, could not be readily, if at all, disposed of, if the lien given by the railroad mortgage is subordinate to a lien for "all debts and contracts," of whatever nature, "existing prior to and at the time of the execution" of such mortgage. Did the Legislature intend that the power of a railroad corporation to mortgage all of its property and franchises for money with which to complete or operate a road for public use should be exercised, subject to the condition that every creditor it had at the time of the mortgage, no matter how his debt originated, nor whether there was an agreement for a lien, should have a first lien upon the corporate property and franchises? If this construction should be adopted, it would follow that mechanics and laborers would acquire, as between them and the holders of mortgage bonds, a first lien for work done or materials furnished to the railroad company without filing a claim therefor, as required by the Act of 1870; and this although the Legislature had in that Act refrained from using language that necessarily gives them a lien upon railroad property and franchises. We are of opinion that the proviso of the third section of the Act of 1873 has no application to deeds of trust or mortgage given by railroad corporations.

[131] This view is strengthened by the history of the compilation of the statutes of North Carolion, known as Battle's Revisal. At the same session of the Legislature at which the Railroad Act of 1872 and the Private Corporation Act of the same year were passed, another statute was enacted providing for the publication of the public statutes under the supervision of Wm. H. Battle, who was directed "to collate, digest and compile all the public statute laws of the State," distributing them under such titles divisions, and sections as he deemed most convenient and proper to render them "more plain and easy to be understood." Acts N. C., 1871-2 p. 373.

His revision was reported to the Legislature in 1873, and was formally approved, to take effect January 1, 1874. Upon looking into that revision, we find that the Act of 1872, relating to private corporations, and that of 1873, in reference to sales of property under deeds of trust or mortgages executed by "any company on all its works and property," are consolidated, in one chapter, under the title of "Corpor tions" simply; the former constituting sectio 1 to 44, inclusive, of that title, and the latt Act constituting sections 45 to 49, inclusiv while the Act of 1872, in reference to railro corporations, organized for public use, is place under the separate title of "Railroad Com panies." We have thus what may not unre sonably be regarded as a legislative indicatio of the original purpose of the Act of 1873, viz to make provision for the sales of property co ered by deeds of trust or mortgages execute by merely private corporations, formed by thr or more persons, leaving the rights of partie in respect of like instruments executed by ra road companies organized for public purpose subject to the terms of those instruments ar the general principles of law. While Mr. Ba tle had no power, by any mode of revision, change the words or to modify the meaning, the statutes themselves (*Sikes* v *Bladen Co.*, N.C., 34; *State* v. *Cunningham*, Id. 469; *State Taylor*, 76 Id. 64), he had authority to arran them under their appropriate titles; and, wh the Legislature approved his placing the A of 1873 in direct connection with that of 187 relating exclusively to private corporation that fact is not without weight in determini the scope and effect of the original Act of 187 This circumstance would be entitled to ve little weight, if the language of the last nam Act necessarily embraced all corporations, pu lic or private, and was not, as we have sai fully satisfied by restricting its operation private corporations, as indicated by the re sion in question.

In view of what has been said, the iss made by the County of Buncombe, as a stoc holder of the company, in reference to Inma conduct as trustee, need not be examined. U on the facts disclosed, the County does not se to be in any position to question the decree favor of the appellees.

There is no error in the record, and the dec is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.

Cited—115 U. S. 257.

Same case, on a petition for rehearing.

[Filed May 4, 1885.]

Mr. Justice **Harlan** delivered the opin of the court:

In the opinion in this case it was stated t in North Carolina, as in most if not in all States, railroads, although constructed by vate persons or corporations for their o emolument, are highways, established un the authority of law, primarily for the ben of the public. For that reason, in the abse of an express statutory declaration to the c trary, we were not willing to presume that Legislature of that State intended to sub railroads, within her limits and established her authority, to the operation of ordinary laws; for such a construction of her stat would enable creditors to enforce their l upon distinct portions of a railroad, and th by easily destroy a highway and defeat the portant public objects intended to be subse

by its construction. The petition for rehearing suggests that the court is in error as to the policy of the State with reference to the seizure of railroad property by execution or other process, and we are referred, upon this point, to *State* v. *Rives*, 5 Ired., 297, and *Gooch* v. *McGee*, 83 N.C., [illegible] authorities not heretofore cited by counsel.

In the first of these cases it was decided that, under the law of North Carolina as it then was, the writ of *fieri facias* lay against the land on which a railroad is laid out. In support of that view reference was made to an Act passed in 1850. But, from the decision in *Gooch* v. *McGee*, determined in 1880, it is apparent that the court was not satisfied with the correctness of that decision; for it said that, "so far as the opinion, except by force of the statute, extends the liability to the estates of corporations for public purposes, indispensable to the exercise of the conferred franchise and to the performance of correlative duties, it is not in harmony with adjudications elsewhere of the highest authority, and we are not disposed to enlarge the sphere of its authority." After citing several adjudged cases, including *Gue* v. *Tide Water Canal Co.*, 24 How., 257 [65 U.S., bk. 16, L.ed. [illegible]], the court proceeds: "In our researches we have met with a single case (*Arthur* v. *Bank*, [illegible] & M., 394) recognizing the authority and approving the decision in *State* v. *Rives*, and in opposition to the current of judicial opinion. The general words of the statute, which to some extent influenced that decision, may, without violence to their meaning, admit of a narrower scope, and be restricted to the property of private corporations, and to that of public corporations which may be replaced and is not indispensable to the exercise of their necessary functions, and the discharge of public duties, upon the distinction taken in the cases cited." It is difficult to resist the conclusion that the Supreme Court of North Carolina intended, by their opinion in *Gooch* v. *McGee*, to intimate that *State* v. *Rives* was wrongly decided, even with reference to the statutes in force when [illegible] the latter case was determined.

It is suggested that section 9, chap. 26 of the Revised Code of North Carolina, adopted in [illegible], indicated a public policy in that State in harmony with the decision in *State* v. *Rives*; for it is claimed by that section, the franchises and property of railroad corporations, having the right to receive fare or tolls, may be taken in execution. Upon this point it is sufficient to say that we are not satisfied that the statutory provision referred to, as being a part of the Code of 1855, was in force after Battle's Revisal was adopted. By express enactment, "all Acts and parts of Acts passed before" the [illegible] of the Legislature which directed the publication of Battle's Revisal, "the subjects whereof are digested and compiled" in that revisal, [illegible] were "repugnant to the provisions [illegible]," were declared to be repealed and of no force or effect from and after the first of January next thereafter, with certain exceptions and limitations, not embracing the present case. Battle's Revisal, p. 861. Independent, however, of this question, and even if section 9, chap. 26 of the Code of 1855 be in force, we adhere to the opinion that there was no purpose, in the Act of 1870, to give a lien upon the property of a railroad corporation for work performed or materials furnished in and about the construction of its road or of its bridges constituting a part of its line.

In the original opinion we were in error in supposing that the Act of 1873 was passed at a session previous to that at which the Act was passed approving Battle's Revisal, and directing its publication under the supervision of the compiler. Both Acts, it seems, were passed at the same session. The incorporation of the Act of 1873 into that part of the Revisal which related to private corporations was, therefore, the work of Mr. Battle and not in pursuance of any previous express direction by the Legislature. Making this correction in the statement of a fact to which we attached but little weight in our interpretation of the Act of 1873, we perceive no sufficient ground for extending its provisions to the property of corporations operating a public highway.

The rehearing is denied.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

REBECCA GRAY, Admrx., *etc.*, of WILLIAM H. GRAY, Deceased, *Appt.*, [116]

v.

NATIONAL STEAMSHIP COMPANY.

(See S. C., Reporter's ed., 116-121.)

Sale of corporate property—liability of vendee on judgment against vendor.

1. The National Steam Navigation Company, a corporation formed under the English statute known as the Companies Act of 1862, went into liquidation on August 15, 1867, selling its property to the appellee, a corporation organized to continue the same business. The appellee is not chargeable with the payment of a judgment, recovered against the former company, for damages for loss of life occasioned by a collision with one of the vessels subsequent to its transfer to the new company.

2. A suit in equity will not lie to charge an incorporated company with a judgment recovered against another company.

[No. 216.]

Submitted Mar. 31, 1885. Decided May 4, 1885.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Messrs. **John Fitch** and *Siegmund Spingarn*, for appellant.

Mr. **John Chetwood**, for appellee.

Mr. Justice **Field** delivered the opinion of the court: [117]

This was a suit in equity to charge the defendant, the National Steamship Company, with the payment of a judgment recovered against another company, known as the National Steam Navigation Company. Both of the companies were English corporations, formed under the English statute known as the Companies Act of 1862. The National Steam Navigation Company continued in business until August 15, 1867, when it went into liquidation. On the following day it sold its ships and its other property and delivered the same to the National Steamship Company. This latter company was

incorporated on the first of July, 1867, under the name of the Steamship Company, limited. The change of its name to the National Steamship Company was made August 8, 1867. After the sale of its property the Navigation Company had no power to do business under the Companies Act, and existed only for purposes of liquidation.

On the 24th of October, 1867, the steamtug Princeton was going up the harbor of New York with a tow of fourteen canal boats loaded with coal. When near the mouth of the Hudson River she met the English steamship Pennsylvania, owned by the National Steamship [118] Company, and a collision took place between the canal boats and the steamship, by which three of the boats were sunk, and a man by the name of Wilson W. Gray was killed. The widow of Gray took out letters of administration upon his estate and then brought an action in the Superior Court of the City of New York, under a statute of the State, for damages caused by the loss of her husband, against the National Steam Navigation Company, evidently supposing that this company continued the owner of the steamship as it formerly had been. In May, 1868, she obtained a verdict, and in June following judgment was entered thereon for $3,289.05.

The National Steamship Company was formed for the purpose of buying the property of the Navigation Company and conducting the same business. The consideration for the purchase was stock of the new company to such of the old stockholders as would consent to take it; and money to the dissenting stockholders. Provision was made to raise the money necessary to fill up the capital stock to the required sum, and the sale was subject to the debts of the old company on August 16, 1867. The officers of the old company became the officers of the new company.

The widow Gray issued execution on her judgment to the sheriff of the county of New York, which was returned unsatisfied. In December, 1869, she assigned the judgment to one Asa F. Miller, and in January, 1870, he commenced a suit in the Supreme Court of New York against the National Steamship Company, setting forth in his complaint the judgment of the superior court, the return of the execution unsatisfied, the incorporation of the National Steam Navigation Company, and that a short time before the commencement of the action it was engaged in the shipping business between New York and Liverpool, employing steamers, and having a general agency in New York; that at the time of the accruing of the cause of action it was thus engaged in business; that about the time the judgment was obtained and the execution issued the company assumed and became known by the name of the National [119] Steamship Company; that the sheriff was thereby disabled from levying on the property which up to that time had stood in the name of the Navigation Company; that the change of name was to cure a technical defect; that the Steamship Company was incorporated under a statute limiting the liability of the stockholders, and to that company the Navigation Company had handed over its ships and all its other property to a sufficient amount to pay the judgment; that such property remained under the same control; that the change of name was mad fraudulently to prevent a levy upon the prop erty; that the Steamship Company held the ship of the Navigation Company as trustee for th creditors of the latter company; that the Navi gation Company had not been within the Stat of New York for a year, and had no propert except that standing in the name of the Steam ship Company; and that this last company ha a steamship and other ships in its hands, th property of the Navigation Company. Th prayer of the complaint was that the Steamshi Company might be decreed to pay the judgmen and be enjoined from disposing of the propert it had received from the Navigation Compan and for the appointment of a receiver.

The Steamship Company answered, admittin the judgment of the plaintiff, the return of ex cution issued upon it unsatisfied, and the org nization of the Navigation Company, allegi its own distinct incorporation; admitting t sale, transfer and delivery of the steamshi and business of the old company to the ne company, August 16, 1867, the conduct of i shipping business and its employment of stea ers by the old company, up to such transfer a sale; and alleging that the old company had property in the State, with a general denial other allegations. The case was heard up the pleadings and proofs, and at a special ter of the court on December 12, 1870, judgme was rendered dismissing the complaint. May 7, 1875, at a general term of the co this judgment was affirmed. A year after affirmance an order was entered at a spec term by consent of parties discontinuing t suit. Before this was done Asa F. Miller, t plaintiff therein, assigned the superior co judgment to one Morrison, and in Februa 1877, Morrison assigned it back to the plainti who soon afterwards commenced the pres action in the Supreme Court of New York. motion of defendants, it was removed to Circuit Court of the United States, and th the plaintiff filed a bill in equity in place of complaint filed in the state court. This set up the agreement between the two com nies of August 16, 1867; alleged the identity the officers of the two companies; mentio the recovery of the judgment of the plain and the various assignments of that judgme the unsatisfied execution issued thereon, transfer of the ships and other property of old Navigation Company to the new Steams Company; alleged that the Navigation Co pany had not made a change of ownership the steamers by sufficient bills of sale, accord to British law; mentioned the winding up the Navigation Company, and averred that new company held the property of the company in fraud of the right of the plaintif have his judgment satisfied out of it, and t the Navigation Company had no property embraced in the transfer to the Steamship Co pany out of which execution upon the judgm could be satisfied. The bill prayed for a ceiver of the property of the Navigation Co pany at the time of its assignment, for an counting by the defendant of such prope and that the receiver be directed to sell property and pay the debts of the plaintiff, for general relief. The defendant, in its swer, admitted the agreement, the substan

[illegible] of the officers of the two companies, [illegible] judgment recovered in the Superior Court, [illegible] executed execution issued thereon, and [illegible] and delivery of all the property of the [illegible] Navigation Company to the defendant on [illegible] August, 1867, for a full consideration; [illegible] that the defendant at that time became [illegible] of all the property including the steam- [illegible] the fraudulent transfer alleged and [illegible] ship of the steamships by the Navi- [illegible] Company at the time of the recovery of [illegible] judgment, or of the return of the execution; [illegible] the sale and delivery of the steam- [illegible] before the judgment by good and [illegible] instruments; and admitted the liqui- [illegible] of the Navigation Company, and the [illegible] up of its affairs. It also set up the [illegible] recovered by the defendant in the [illegible] of Miller against it, in the Supreme Court [illegible] York, as a bar to the present action; [illegible] all fraud in the transfer of the property [illegible] company, and asked that the bill be [illegible]. The case was heard upon the plead- [illegible] and proofs, and a decree was rendered [illegible] by the Circuit Court dismissing the bill. [illegible] that decree the case was brought here by [illegible].

[illegible] not necessary to consider the position [illegible] the judgment of the Supreme Court of [illegible] York, in the case of Miller against the de- [illegible] is a bar to the prosecution of this suit. [illegible] sufficient for the affirmance of the decree of [illegible] below that the judgment of the Supe- [illegible] Court of the City of New York, which was [illegible] to be enforced against the new company, [illegible] recovered against the old company. That [illegible] had then ceased to do business of any [illegible] and was incapable, under its articles of [illegible], of doing any except so far as [illegible] be necessary to wind up its affairs. It [illegible] only for purposes of liquidation. It [illegible] no more own and run a steamship than [illegible] own and manage any other property. [illegible] nothing in the transfer of the property [illegible] the old company to the new of which the [illegible] can in any way complain. It took [illegible] before the collision occurred which caused [illegible] death of the plaintiff's husband. The [illegible] of the old company do not com- [illegible] of that transfer; and it does not appear [illegible] comes from any creditors then [illegible] of that concern. The debts of the old [illegible] assumed by the new; and there is [illegible] nor sense in attempting to fasten [illegible] the new company a judgment for dam- [illegible] only against the old. If the [illegible] by mistake, commenced an action [illegible] the wrong company, it is a fault of [illegible] cannot complain. At least the new [illegible] not chargeable as though it had it- [illegible] and had its day in court. The [illegible] Company never made any pretense [illegible] after its affairs were closed up, [illegible] the plaintiff nor her counsel were [illegible] by the action of the representatives [illegible] company. The case is too plain for [illegible].

[illegible] affirmed.

[illegible] copy. Test:

[illegible] McKenney, Clerk, Sup. Court, U. S.

GEORGE W. FRASHER ET AL., *Plffs. in Err.*, [102]

v.

M. J. O'CONNOR.

(See S. C., Reporter's ed., 102-116.)

Public lands—state grants, adjustment of—jurisdiction—surveys under Act of July 23, 1866—certified lists—title.

*1. In adjusting Congressional grants of lands to a State, the only questions for consideration by the officers of the General Government are, whether the State possessed the right to claim the land under her grant, and whether the land was subject to selection by her agents. Those officers have no jurisdiction to review transactions between the State and her purchasers, nor between the State and her locating agents, and determine whether such purchasers or locating agents complied with the provisions of her laws relating to the sale of the lands.

2. Surveys under the 8th section of the Act of July 23, 1866, "to quiet land titles in California," become operative by approval of the United States Surveyor-General for the State, and his filing in the local land-office of the township plats. Upon such approval of a survey and filing of the township plats, lands thereby excluded from a confirmed private land claim become subject to state selections and other modes of disposal of public lands. Previous approval of the survey by the Commissioner of the General Land-Office is not necessary.

3. Lists of lands certified to the State by the Commissioner of the General Land-Office, and the Secretary of the Interior, convey as complete a title as patents; and lands embraced therein are not thereafter open to settlement and preemption.

[No. 244.]

Argued Apr. 10, 1885. Decided May 4, 1885.

IN ERROR to the Supreme Court of the State of California.

The history and facts of the case appear in the opinion of the court.

Messrs. **Geo. F. Edmunds,** *William J. Johnston* and *James K. Redington*, for plaintiffs in error.

Mr. **Edward R. Taylor,** for defendant in error.

Mr. Justice **Field** delivered the opinion of the court: [103]

This is an action for the possession of a parcel of land in Los Angeles County, California. The plaintiff, the defendant in error here, traces title to the premises by a patent of the State, issued to Robert Thompson on the 21st day of April, 1874, and certain mesne conveyances from the patentee. The title of the State was derived from selections of land in lieu of sections sixteen and thirty-six granted for school purposes by the Act of Congress of March 3, 1853.

The defendants below, the plaintiffs in error here, contend that the selections by the State were void, because made within the asserted limits of a claim under a Mexican grant before the survey of such grant, which excluded the disputed premises, had become final; and set up a right to the land as preemptors under the laws of the United States by settlement and improvement subsequent to the state patents, with a tender to the officers of the Land Department of the required sums in such cases to entitle them to patents of the United States.

The position of the defendants below is that,

* Head notes by *Mr. Justice* FIELD.

being entitled as such preemptors to patents from the United States of the lands in controversy, they are in a position to call in question the validity of the proceedings by which the land was selected by the state agents and listed to the State. To determine the questions thus presented, it will be necessary to give a brief history of the legislation of Congress, and of California with respect to the lands granted to the State for school purposes.

The Act of Congress of March 3, 1853, "to Provide for the Survey of the Public Lands in California, the Granting of Preemption Rights [104] therein, and for other Purposes," placed the public lands in that State, with certain specified exceptions, subject to the general preemption law of September 4, 1841. 10 Stat. at L., 246, §6. Among the excepted lands were sections sixteen and thirty-six of each township, which were declared to be thereby granted to the State for the purposes of public schools, and lands claimed under any foreign grant or title. The Act also declared in its 7th section that where a settlement by the erection of a dwelling-house, or the cultivation of any portion of the land, should be made on the sixteenth and thirty-sixth sections before they should be surveyed, or where such sections should be reserved for public uses, or "taken by private claims," other lands should be selected in lieu thereof by the proper authorities of the State.

The lands in controversy were within the boundaries of a tract claimed under a confirmed Mexican grant, known as the Rancho Sausal Redondo. As sections sixteen and thirty-six of townships were covered by the grant, a case was presented within the 7th section of the Act of Congress, in which the State was authorized to select other lands in lieu of them.

The Legislature of California, by an Act passed April 27, 1863, provided for the sale of certain lands granted to the State by Congress, and, among others, of the sixteenth and thirty-sixth sections in the several townships, or of lands which might be selected in lieu thereof. It prescribed the proceedings to be taken for the purchase of the lands, and required each state locating agent to keep a record of applications to purchase made to him, and when they amounted to 320 or more acres, to apply on behalf of the State to the register of the United States Land-Office of the district for such lands, in part satisfaction of the grant under which they were claimed, and to obtain his acceptance of the selections thus made. Various other proceedings were required by the Act to secure a proper presentation to the Land Department of the United States of the lands thus purchased of the State; that is, of lands thus selected in satisfaction of the grant to her.

Surveys of the public lands in California were greatly delayed after the passage of the Act of 1853, and as late as 1866 many townships had not been surveyed. For want of these [105] surveys, it was impossible to ascertain the precise locality, in each township, of the sixteenth and thirty-sixth sections and, of course, except in a few instances such as where the whole township was embraced in a private claim under a Mexican or Spanish grant, it could not be known whether there had been any such settlement on those sections as would authorize the State to select other lands in lieu thereof.

The State was embarrassed by this delay i the public surveys, not only in the use of th sixteenth and thirty-sixth sections, and, whe they were occupied by settlers, in the selection of lands in lieu of them, but also in the selec tion of lands granted by other Acts of Congres than that of March 3, 1853. By the eighth se tion of the general preemption law of Septem ber 4, 1841, 500,000 acres of land were grante to each new State subsequently admitted int the Union, and of course to California, for pu poses of internal improvement, the selection c the lands to be made from any public lan within her limits, except such as was or migl be reserved from sale by a law of Congress c the proclamation of the President, and in suc manner as her Legislature should direct, an located in parcels conformably to section divisions and subdivisions of not less than 3 acres in any one location.

In May, 1852, in advance of any surveys l the United States, the State passed an Act f the sale of these 500,000 acres. It authoriz the Governor to issue land warrants for not le than 160 acres and not more than 320 acres one warrant, to the full amount of the gra the treasurer to sell them at $2 an acre, a the purchasers and their assigns to locate the on behalf of the State on any vacant and una propriated land belonging to the United Sta subject to such location.

Under these laws selections were made agents of the State, or purchasers of warra who were authorized to locate the same. Simi legislation was had and similar proceedin were authorized with respect to other lan granted by Acts of Congress to the Sta When, however, selections thus made w brought to the attention of the Land Depa ment at Washington, they were not recogni as conferring any right to the parties claimi under them. Selections made in advance of public surveys were held to be wholly inval This ruling of the department caused great c fusion and embarrassment in the State. Ti thought to be unquestionable were found to worthless, and interests of great magnit which had grown up upon their supposed lidity were endangered. To relieve against embarrassments arising from this cause the of Congress of July 23, 1866, "to quiet l titles in California," was passed. 14 Stat L., 218. The 1st section of this Act decl that in all cases where the State of Califor had previously made selections of any por of the public domain in part satisfaction c grant made to the State by Act of Congr and had disposed of the same to purchaser good faith under her laws, the lands so sele should be and were thereby confirmed to State.

From this confirmation were excepted s tions of lands to which an adverse preemp or homestead or other right had at the dat the passage of the Act been acquired by a tler under the laws of the United States, an lands reserved for naval, military or In purposes, and of mineral land or of claimed under a valid Mexican or Spanish gr

The 2d section provided that where the s tions had been made of land which had surveyed by authority of the United State should be the duty of the authorities of

[illegible] where it had not already been done, to notify the register of the United States land-office for the district in which the land was situated of such selections, and that the notice should be regarded as the date of the State's selection.

The 3d section provided that where the selections had been made of land which had not been surveyed by authority of the United States, but the selections had been surveyed by authority of and under laws of the State, and sold to purchasers in good faith, such purchases should, from the date of the passage of the Act, when marked off and designated in the field, have the same force and effect as the preemption rights of a settler on unsurveyed public land.

As thus seen, selections made pursuant to this Act, embracing lands held or claimed under a valid Mexican or Spanish grant, were excepted from confirmation. By the Act of [illegible] lands claimed under "any foreign grant or [illegible]" were excepted from preemption. 10 Stat. at L. 248, ch. 145, sec. 6. The effect of these exceptions was to exclude from settlement large tracts of land in the State, which, upon a definite ascertainment of the boundaries of the grants, would have been open to settlement. A very great portion of the lands in the State were covered by Mexican or Spanish grants. Some of the grants were by specific boundaries, and the extent of the land covered by them could be readily ascertained without an official survey. But by far the greater number were for a specific quantity of land lying within outboundaries embracing a much larger quantity. Thus, grants of one or two leagues would often describe the quantity as being within boundaries embracing double or treble that amount, the grant declaring that the quantity was to be surveyed off by officers of the vicinage and the surplus reserved for the use of the nation. The grantee in such case was of course entitled only to the specific quantity named, but what portion of the general tract should be set apart to him could only be determined by a survey under the authority of the government. Until then the grantee and the government were tenants in common of the whole tract. No one could intrude upon any portion of it, the whole being exempted from the preemption law. The practical effect of this condition in many cases was to leave the grantee, until the official survey, in the possession, use and enjoyment of a tract of land containing a much larger quantity than that granted. And before such survey could be made the validity of the grant was to be determined by the commission created to investigate private land claims in California, and the action of the commission was subject to review by the District Court of the United States, with a right of appeal from its decision to the Supreme Court. When the validity of the grant was confirmed the commissioners could not measure off the quantity for himself and thus legally segregate it from the balance of the tract. As we said in *Van Reynegan v. Bolton*, 95 U. S., 36 [Bk. 24, L. ed. 352]: "The right to make the segregation rested exclusively with the government and could only be exercised by its officers. Until they acted and allotted the segregation the confirmees were interested in preserving the entire tract from waste and injury, and in improving it, for until then they could not know what part might be assigned to them. Until then no third person could interfere with their right to the possession of the whole. No third person could be permitted to determine, in advance of such segregation, that any particular locality would fall within the surplus, and thereby justify his intrusion upon it and its detention from them. If one person could, in this way, appropriate a particular parcel to himself, all persons could do so, and thus the confirmees would soon be stripped of the land which was intended by the government as a donation to its grantees, whose interests they have acquired, for the benefit of parties who were never in its contemplation. If the law were otherwise than as stated, the confirmees would find their possessions limited, first in one direction and then in another, each intruder asserting that the parcel occupied by him fell within the surplus, until, in the end, they would be excluded from the entire tract. *Cornwall* v. *Culver*, 16 Cal., 429; *Riley* v. *Heisch*, 18 Id., 198; *Mahoney* v. *Van Winkle*, 21 Id., 552."

The delays before the official surveys were made, even after the confirmation of a grant, sometimes lasted for years. In some instances they were attributable to the want of sufficient appropriations by Congress to meet the expenses of the surveys. To obviate them from this cause Congress provided in the sixth section of the Act of July 1, 1864, "to Expedite the Settlement of Titles to Lands in the State of California," that it should be the duty of the Surveyor-General of California to cause all private land claims finally confirmed to be accurately surveyed and plats thereof to be made whenever requested by the claimants; provided, that each claimant requesting a survey and plat should first deposit in the District Court of the district within which the land was situated a sufficient sum of money to pay the expenses of such survey and plat, and of the publication required by the first section of the Act. 13 Stat. at L., 332, chap. 194. And in the seventh [109] section it prescribed the manner in which the surveys should be made.

But, inasmuch as the confirmee had the possession and use of the whole tract, from which his quantity was to be taken, until it was segregated, he was not in haste to have the survey made of his claim. It was for his interest to postpone it; and therefore few confirmees of grants of quantity within exterior boundaries embracing a larger amount applied for surveys under that Act. Accordingly when the Act of July 23, 1866, "to Quiet Land Titles in California" was passed, confirming selections previously made by the State, except those from lands held or claimed under a valid Mexican or Spanish grant, it provided in its 8th section as follows: "That in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities has been finally confirmed and a survey and plat thereof shall not have been requested within ten months from the passage of this Act, as provided by sections six and seven of the Act of July 1, 1864, 'to Expedite the Settlement of Titles to Lands in California,' and in all cases where a like claim shall hereafter be finally confirmed, and a survey and plat thereof shall not be re-

quested, as provided by said sections, within ten months after the passage of this Act, or any final confirmation hereafter made, it shall be the duty of the Surveyor-General of the United States for California, as soon as practicable after the expiration of ten months after the passage of this Act, or such final confirmation hereafter made, to cause the lines of the public surveys to be extended over such land, and he shall set off, in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree; and all the land not included in such grant as so set off shall be subject to the general land laws of the United States; *Provided*, That nothing in this Act shall be construed so as in any manner to interfere with the right of *bona fide* preemption claimants." 14 Stat. at L., 218, ch. 219.

After the passage of this Act neither the State nor persons desiring to settle upon the [110] public lands were obliged to wait beyond ten months for the grantee of a confirmed Mexican land claim to take action for the segregation of the specific quantity granted to him. If he delayed for that time after the passage of the Act, if his claim had been previously confirmed, or for that time after the confirmation of his claim, if it should be subsequently confirmed, to obtain a final survey, it became the duty of the Surveyor-General of the United States to proceed and extend the lines of the public surveys over the land and to set off, in satisfaction of the grant and according to the lines of such surveys, the quantity of land confirmed, and all the land not included in such grant as so set off was made "subject to the general land laws of the United States."

The grant known as the Rancho Sausal Redondo, was made to Antonio Ygnacio Abila, May 20, 1837, by Alvarado, then Governor *ad interim* of the Department of California. The claim of the grantee to the land was confirmed on the 10th of June, 1855, by the Board of Land Commissioners for the ascertainment and settlement of private land claims in California, and at its December Term, 1855, by the District Court of the United States. It embraced land within the limits of Los Angeles County. The decree of the District Court became final, the appeal from it to the Supreme Court having been dismissed by stipulation of the Attorney-General. In 1858 a deputy surveyor made a survey of the claim, but it was not approved by the Surveyor-General and was, in consequence, of no validity. For more than ten years afterwards no other survey was made, nor does it appear from the record that the grantee, or those owning the claim, made application for any under the Act of July 1, 1864. Accordingly, in 1868, more than ten months having elapsed after the passage of the Act of July 23, 1866, at the instance of General Rosecrans, the rancho was surveyed by a deputy United States Surveyor, George Hansen, and land was set off to the grantee in satisfaction of the grant. Over the land within the boundaries of the grant confirmed the United States Surveyor extended the section and township lines; and, on [111] April 22, 1868, the township plats were filed in the district land-office at San Francisco. Subsequently General Rosecrans, as hereafter stated, applied to the State to purchase the lands on side of the tract allotted to the grantee, part which are the subject of the present contr versy. The owners of the grant protested th notice of the survey had not been given to the and that it did not conform to the decree confirmation, and demanded a new survey. T Surveyor-General thereupon recalled the tow ship plats and ordered a new survey, whi was made in July, 1868, by deputy survey Thompson. This new survey included t lands in controversy as part of the grant.

Afterwards, however, in October, 1871, t Secretary of the Interior set aside this new su vey, ordered the township plats to be return to the land-office, and affirmed the survey ma by Hansen. Before, however, the recall the township plats, and the order for a new su vey, General Rosecrans had procured a numb of men to make applications for his benefit f the purchase of the lands in controversy, a to transfer their interests thus acquired, to hi The applications were approved by the locati agents of the State, and the lands as selectio by the State were afterwards listed to her, a patents were issued to the purchasers or th assignees.

According to the findings of the local distr court, the applications and subsequent proce ings were very loosely conducted, and great regularities are charged against the princi purchaser. But if the locating agents of t State were satisfied with the applications to pu chase, and the selections thus made were a proved by the land department of the Unit States, and the lands were listed to the State part of the grant to her, it is not perceived wh ground of complaint the loose character of t proceedings furnish to the defendants. Th title is not advanced by showing how irre larly the proceedings were conducted by part who obtained the title of the State; and to t General Government it is enough that she d not complain, but accepts the selections in s isfaction of the grant to her. The same vi was taken by the Interior Department with r erence to one of the state selections referred

It was objected that the selection was inva because not made in accordance with the p visions of the Act of the Legislature of State, of April 27, 1863. But the Secretary swered that it was not necessary to enter int consideration of the alleged defects in the plication of the purchaser; that was a quest between him and the State; that by the seve section of the Act of March 3, 1853, the St was granted indemnity if sections sixteen a thirty-six lay within private grants; that manner of selecting such indemnity was specified; that the Act of the Legislature l provided for the sale of certain lands belo ing to the State, and if purchasers failed comply with the requirements of the stat their claims may fail; that the questions to considered by the General Government were, right of the State to claim the land under grant, and was the land subject to selecti observing that these were the only question determine, as the General Government only ognized the State in the proceedings; that was no part of its duty to inquire into the tr actions between the State and her purchas neither would it go back of the record to

certain whether, as between the State and her agent, he complied with the provisions of the statute relating to the sale of granted lands." The Secretary added that there was no complaint on the part of the State of any irregularity in the selection in question, but, on the contrary, she had recognized and approved of it and issued a patent to the purchaser. And further, that the Legislature of the State had passed an Act for the relief of the purchasers of state lands, approved March 27, 1872, declaring that when application had been made to purchase such lands, and full payment had been made to the treasurer of the proper county for the same, and a certificate of purchase or patent had been issued to the applicant, the title of the State was vested in him or his assignees, if no other application had been made for the purchase of the land prior to the issue of the certificate. Thus, said the Secretary, has the State in the most emphatic manner asserted her claim to the land notwithstanding the alleged irregularities on the part of her agent in selecting the same.

To this action of the State it may be added, that the General Government has, by the Act of Congress of March 1, 1877, relinquished every possible objection on its part to a recognition of the claim of the State, by confirming her title to lands certified to her as indemnity school selections in lieu of the sixteenth and thirty-sixth sections lying within Mexican grants, the final survey of which had not been made; and also confirming indemnity school sections certified to the State, which were defective or invalid from any other cause.

The sole question, therefore, remaining for our determination is, whether the premises in controversy were open to selection at the time the selection was made. And of this we think there can be no reasonable doubt. The Mexican grant, under which the land was claimed, had been confirmed in December, 1856, and although, as stated above, a survey had been made by a deputy surveyor in 1858, it had not been approved by the Surveyor-General, and was therefore, of no effect. No other attempt was made to obtain a survey of the land until February, 1868, over eleven years after the confirmation of the grant, and over three years after the passage of the Act of July 1, 1864, and over eighteen months after the passage of the Act of July 23, 1866. Had a survey been asked for by the grantee, or made under the Act of 1864, it would have required the approval of the Commissioner of the General Land-Office before it could have been the basis of action by the State or by individuals. But the grantee having neglected to take any action, and ten months having elapsed after the passage of the Act of 1866, it was competent for the Surveyor-General of California, and indeed it was made his duty, to extend the lines of the public surveys over the land confirmed; and the Act declares that "he shall set off, in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree and, as nearly as can be done, in accordance with such decree, and all the land not included in such grant as so set off shall be subject to the general land laws of the United States."

Nothing can be plainer than this language. It leaves no doubt as to its meaning. All the land not included in the grant as thus set off "shall be subject to the general land laws of the United States." The survey of the land confirmed is withdrawn, therefore, from that special supervision and control which are vested in the Commissioner of the General Land-Office over surveys of private land claims made under the Act of 1864. The laws and practice of the Land Department, with respect to surveys of the public lands generally, only apply and must govern the case. Had it been the intention of Congress to retain the special supervision of the commissioner, it is reasonable to suppose that the intention would, in some way, have been expressed. But there is nothing of the kind, and the survey is therefore to be treated as an ordinary official survey of the public lands, and, as such, is operative until changed or set aside by the Land Department. It is not necessary, as in the case of surveys of private land claims under other laws, to obtain the previous approval of such department before it becomes operative; and proceedings to acquire the title to lands outside of it may at once be taken either by the State or preemptors upon its assumed validity. Such was the view of the Interior Department with reference to the survey of the land confirmed here, after a most elaborate consideration. [114]

In illustration of the manner in which public lands, when once surveyed, can be disposed of, the Secretary refers to the Act of Congress approved May 18, 1796, providing for the sale of lands of the United States in the territory northwest of the River Ohio, and above the mouth of the Kentucky River. The Surveyor-General was authorized to prepare plats of township surveys, to keep one copy in his office for public information, and to send other copies to the places of sale and to the Secretary of the Interior. The present local land-offices, said the Secretary, are equivalent to the places of sale mentioned in the Act of 1796, and, as a matter of practice, from that day to the present time, the township plats prepared by the Surveyor-General have been filed by him with the local land officers, who thereupon have proceeded to dispose of the public lands according to the laws of the United States. There was nothing in the Act of 1796, or any subsequent Acts, which required the approval of the Commissioner of the General Land-Office before the survey became final and the plats authoritative. Such a theory, said the Secretary, is not only contrary to the letter and spirit of the various Acts providing for the survey of the public lands, but it is contrary to the uniform practice of the department. Applying this uniform practice to the case at bar, all doubt that the lands in controversy were open to selection by the State disappears. The grant was surveyed in February, 1868, and sufficient land set apart to satisfy it. In March following, a survey of the townships in which the land lay was made and approved by the United States Surveyor-General of the district, and in April the survey and township plats were filed in the land-office of the district. The state selections of lands lying outside of the survey of the grant were made before any action of the Surveyor-General was had recalling the plats and ordering a new survey. Had his action been sustained by the [115]

Land Department, and the new survey made upon his order, which included the land in controversy as part of the grant, been approved, a question would have arisen as to the validity of the selections in the face of such subsequent proceedings. It is not necessary to hold that they would have been unaffected. It may, perhaps, be that they would have had to abide the judgment of the department as to the *status* of the land. All that is necessary to decide here is that after the grant had been surveyed and the township plats filed, the State was at liberty to make selections from land lying outside of the survey ,and preemptors were at liberty to settle upon it, and if the survey were not ultimately set aside, their rights thus initiated would be protected.

As already said, the Interior Department held the original survey valid, directed the township plats to be returned to the land-office, and accepted the selections of the State outside of the survey and listed the land to her. The inchoate rights acquired to the lands selected were not lost by the subsequent action of the Surveyor-General in setting aside the first survey of the grant, and, after that action was vacated,could be perfected. The original survey, outside of which the selections were made, was approved by the Secretary of the Interior on the 31st of October, 1871, and the lands selected were listed to the State by the Commissioner of the General Land-Office on the 29th of May, 1872, and by the Secretary of the Interior on the 31st of the same month. The title of the State to the lands thus became as complete as though transferred by a patent of the United States. The statute declares that lists of lands granted to the State by a law of Congress, which does not convey the fee-simple title or require patents to be issued, "shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such Act of Congress and intended to be granted thereby." It does not appear why the lands should have been listed by the Secretary of the Interior as well as by the Commissioner of the General Land-Office, but it may have been because by the Act of July 23, 1866, selections of indemnity school lands for the sixteenth and thirty-sixth sections, when lost in private grants, were to be approved by that officer. Having the title, there was nothing to prevent the issue by the State of her patent to the purchaser under whom the plaintiff claims. The land was not thereafter open to settlement and preemption, and *the judgment must, therefore, be affirmed.*

[116]

B. F. Good, C. R. Clark, J. E. Whistler, D. Murphy *et al., Plffs. in Err.*, v. M. J. O'Connor. No. 312.

In error to the Supreme Court of the State of California.

Daniel Hazard, W. W. Taylor, James M. Trusler, Samuel Erwin *et al., Plffs. in Err.*, *v.* M. J. O'Connor. No. 313.

In error to the Supreme Court of the State of California.

Each of these cases presents similar questions to those considered and determined in *Frasher et al.* v. *O'Connor*, just decided, and on the a thority of that case the judgment in each affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.

Cited—116 U. S., 334.

STEAMBOAT CHARLES MORGAN ET AL., *Appts.*, *v.* MARTIN H. KOUNS ET AL.

(See S. C., Reporter's ed., 69-78.)

Admiralty—collision—compliance with rule amendment of libel—evidence—witnesses— peachment—contradictory declarations—pr tice.

1. Where, in cases of collision, it appears signals were exchanged as required by rule 2 of board of supervising inspectors of steam vess and the question of distance between the vessel the time of such exchange of signals is not rai in the court below, it will be presumed to have be at the proper distance, as nothing appears to t contrary.

2. Under the operation of admiralty rule 24 circuit court may, in its discretion, permit amendment of the libel, so as to include a claim damages growing out of the original cause of tion and litigated in the court below, but reject because not specified in the pleadings.

3. The finding of the board of local inspectors proceedings instituted under section 4450, R. S., the investigation of the facts connected with a c lision and the documents connected therewith, inadmissible in evidence.

4. Contradictory declarations of a witness, whe er oral or in writing, made at another time, can be used for the purpose of impeachment until witness has been examined upon the subject, and attention particularly directed to the circumstan in such a way as to give him full opportunity explanation or exculpation.

[No. 278.]

Argued Apr. 24, 1885. Decided May 4, 18

APPEAL from the Circuit Court of the U ed States for the Eastern District of Lou ana.

The history and facts of the case appea the opinion of the court.

Messrs. **T. D. Lincoln** and *R. H. Ma* for appellants.

Messrs. **Richard H. Browne** and *Cha B. Singleton*, for appellees.

Mr. Chief Justice **Waite** delivered the o ion of the court:

This is a suit in admiralty, brought by owners of the steamboat Cotton Valley, to cover for the loss of their boat and certain ticles of personal property belonging to Ma H. Kouns alone, in a collision on the Missis pi River with the steamboat Charles Morg In the original libel, filed in the district co claim was made only for the value of the b and for an itemized account for clothes, jewe furniture, etc., of the libelant Kouns. The trict court found The Morgan in fault, and ferred the cause to a commissioner to take t mony and report the damages. The com sioner reported that the libelants were enti to recover the value of the boat, and also value of stores and supplies, $1,376.16, $500 cash in the safe of the boat, and bel

[illegible] lost at the time of the collision; he [illegible] reported that Martin H. Kouns, one of the [illegible], should recover the value of a lady's [illegible] watch, $150; of a gentleman's gold watch, [illegible] and $75 cash lost. The claimant of The [illegible] excepted to the allowances for stores [illegible], and for cash in the boat's safe, on [illegible] ground that they had not been sued for. [illegible] district court sustained this exception, and [illegible] a decree only for the value of the boat and [illegible] allowances by the commissioner to Kouns. [illegible] this decree both parties appealed to the [illegible] court. When the case got into the cir[illegible] court leave was granted the libelants to file [illegible] supplemental and amended libel setting up [illegible] claim for stores, supplies and cash, proved [illegible] the commissioner in the district court, [illegible] rejected by that court because not included [illegible] the original libel.

[illegible] the hearing in the circuit court that [illegible] found, among other things, that at the [illegible] of the collision The Connon Valley, bound [illegible] Red River, was the ascending boat, and [illegible] Charles Morgan, bound for New Orleans, [illegible] descending boat; that the collision occurred [illegible] Bringier's Point, about three miles below [illegible]ville; that both boats were properly [illegible] and manned, and had proper watches [illegible] proper lights set.

[illegible] That prior to the collision The Cot[illegible] Valley was in her proper position in the [illegible] near the left bank, following up the [illegible] Point preparatory to rounding the [illegible] while The Charles Morgan was above the [illegible], perhaps in the middle of the river, but [illegible] across and near the point to a wood[illegible] light, in the bend of the river below the [illegible].

"Fourth. That when the respective boats [illegible] the positions just described, The Cotton [illegible] blew one whistle as a signal that she [illegible] pass The Charles Morgan to the right, [illegible] signal The Charles Morgan answered [illegible] one whistle, as a signal that the pilot of [illegible] understood, and would also pass [illegible] the right.

"Fifth. Both boats kept on their respective [illegible] approaching each other, when the pilot [illegible] The Morgan sounded three or four short [illegible] stopped The Morgan's engines, and [illegible] commenced backing the wheels, but not [illegible] to stop The Morgan's headway, and [illegible] in anywise changing her course to star[illegible] or port.

"Meanwhile, The Cotton Valley, rounding [illegible] at the three or four short whistles [illegible] The Morgan, understanding the signal [illegible], stopped the engines.

"[illegible] time the boats were within one hun[illegible] of each other, The Morgan, with [illegible] and the current, coming straight [illegible] changing her course, the pilot of [illegible] Valley, foreseeing an inevitable [illegible] if he remained still, started The Cot[illegible] ahead, sheering to starboard; but [illegible] of The Cotton Valley was too [illegible] immediately The Charles Mor[illegible] struck her on the port side, about [illegible] feet forward of the stern, and at an [illegible] sixty degrees, with such force as [illegible] through her guards into her hull nearly to [illegible], and cause her to sink in about ten [illegible].

"Sixth. That The Charles Morgan and her officers were in fault, as the proper position of the boat was nearer the middle of the river, and as her officers disregarded the passing signal given and answered, and made no effort to change the boat's course to the starboard, by which the boats would have been so separated that a collision would have been avoided.

"Seventh. That The Cotton Valley was not in fault, as she was in her proper place as the ascending boat, and as she gave the proper signal for passing.

"The failure of the pilot to understand the signal of three or four short whistles given by The Morgan was not, under the circumstances of the case, a fault; and if the starting of The Cotton Valley's engines and sheering to starboard when The Morgan was upon them was an error, it was an error of judgment *in extremis*, not putting the boat in fault."

Upon these facts a decree was rendered against The Morgan and her owners and stipulators for the value of The Cotton Valley, and for the value of the personal property belonging to Kouns, the same as in the district court, and also for the value of the stores, supplies, etc., set forth in the supplemental libel, $1,376.16. From that decree this appeal was taken. [73]

The record contains a bill of exceptions, which shows that in the progress of the trial in the circuit court the defendants offered in evidence a certified copy of "the finding of the board of local inspectors of steam vessels, New Orleans, December 18, 1878, being their decision in the case of the collision between the steamers Cotton Valley and The Charles Morgan, and signed by C. B. Johnson and J. A. Moffat, United States local inspectors." They also offered certain other documents connected with that proceeding, including an appeal to the district inspectors and their decision thereon. To the introduction of this evidence the libelants objected, and their objection was sustained. To this ruling the claimant of The Morgan excepted, and the exception was made part of the record.

It is also shown by another bill of exceptions in the record, that, after the depositions of Albert Stein, Harry W. Stein, Sylvester Doss, John B. Evelyn and Livingston McGeary had been read on behalf of the claimant of The Morgan, the libelants, for the purpose of impeaching and contradicting their evidence, offered certain depositions of the same witnesses used on the trial of certain other suits, growing out of the same collision, between one Menge and some insurance companies, to which the claimant was not a party. To the introduction of this evidence the claimant objected, on the ground that no basis for offering said purported depositions had been laid, it not having been shown or pretended that said purported depositions were ever submitted to the said witnesses, or otherwise verified as their evidence in said causes; but as, "in the cross examination of each of said witnesses in this case, the attention of the witness was called to the evidence given by him in the cases of *Menge* v. *Insurance Companies*, * * * and the witnesses were specifically examined as to the correctness of said evidence, and admitted having testified therein," and "no objection was made that the [74]

evidence offered was not the evidence of said witnesses respectively, or that the same had been improperly taken or reported," the depositions were admitted for the purpose for which they were offered. The cross examination referred to is not set forth in the bill of exceptions. To the admission of this evidence the claimant excepted.

The following positions are taken by the appellants:

1. That the findings of fact are not sufficient to support the decree.

2. That leave to file the supplemental and amended libel should not have been granted, and consequently that the decree should not have included the value of the stores, supplies and money belonging to The Cotton Valley, which were lost.

3. That the record of the proceedings and findings of the board of local inspectors, and the documents connected therewith, were improperly excluded as evidence; and

4. That the depositions taken in the Menge cases were improperly admitted.

1. The objection to the sufficiency of the findings is based on Rule 2 of the board of supervising inspectors of steam vessels, which is as follows:

"Should steamers be likely to pass near each other and these signals should not be made and answered by the time such boats shall have arrived at a distance of 800 yards from each other, the engines of both boats shall be stopped; or should the signal be given and not properly understood, from any cause whatever, both boats shall be backed until their headway shall be fully checked, and the engines shall not be again started ahead until the proper signals are made, answered and understood. Doubts or fears of misunderstanding signals shall be expressed by several short sounds of the whistle in quick succession."

The particular specifications of insufficiency are:

1. That it does not appear that the signals for passing had been made and answered before the boats came within eight hundred yards of each other; and, 2, that the failure of The Cotton Valley to understand the signal of doubt or fear made by The Morgan was a fault on her part.

[75]

There is no complaint in the pleadings as to the time when The Cotton Valley made the first signal, and neither party at the hearing below seems to have considered that an important fact in the case. So long as it was made and assented to by The Morgan without any signal of misunderstanding, it will be presumed to have been at the proper distance as nothing appears to the contrary. The findings show affirmatively that it was understood and assented to by The Morgan.

As the "several short sounds of the whistle" were only to be given in case of doubt or fear of a misunderstanding of signals, it was not necessarily a fault in The Cotton Valley to misinterpret their meaning when made by The Morgan, so short a time after her assent had been given to the signal of The Cotton Valley to pass to the right.

2. Admiralty Rule 24 provides that in all informations and libels, in causes of admiralty and maritime jurisdiction, "new counts may be filed, and amendments, in matters of substa may be made, upon motion, at any time be the final decree, upon such terms as the c shall impose." 3 How. xiv.* In *The Lucill* Wall., 74 [86 U.S., bk. 22, L. ed. 64], it was ded that an appeal in admiralty from the dis to the circuit court "has the effect to super and vacate the decree from which it was ta A new trial, completely and entirely new, other testimony and other pleadings, if n sary, or if asked for, is contemplated—a in which the judgment of the court belo regarded as though it had never been rend A new decree is to be made in the circuit co Clearly, under this decision, after an appe taken, and the decree of the district cour cated, a motion to amend, made while the is pending in the circuit court for a new on its merits, will be before the final de and, under the operation of the rule, we no doubt the circuit court may, in its discre permit an amendment of the libel, so as t clude a claim for damages growing out o original cause of action and litigated in court below, but rejected because not spe in the pleadings. It is true, that in the c *Houseman* v. *The North Carolina*, 15 Pet it was decided that a libel could not be ame after an appeal, so as to bring in a new for damages; but this was before the ado of the admiralty rules, the decision having made in 1841, and the rules not taking until September 1, 1845. 3 How., xix.* Act authorizing the rules was passed Augu 1842, chap. 188, § 6, 5 Stat. at L., 518, is quite possible Rule 24 was suggested b case. It has long been the practice of th cuit Courts to allow such amendments. v. *Thomson*, 1 Wall., Jr., 343, decided in in the third circuit; *Lamb* v. *Parkman*, 2 Rep., 589, first circuit, in 1858; *The C. E ter*, 1 Fed. Rep., 733, same circuit; *The ing Star*, 14 Fed. Rep., 866, seventh c *The Oder*, 21 Blatchf., 26, second circuit; [*F Ins. Co.* v. *Steamship Co.*], 22 Blatchf. same circuit. In *Lamb* v. *Parkman*, *supr Justice* Curtis, then holding the circuit said: "The 24th Rule, made by the su court to regulate the practice of the in courts of admiralty, applies to this as we the district court. Pursuant to it, amend in matters of substance may be made c tion, at any time before the final decree such terms as the court shall impose. amendments shall be allowed, under wh cumstances and supported by what proo must be applied for, and in what form must be incorporated into the record, a to the sound discretion of the court, to ercised in each case, or to be regulated b ten rules of practice, so far as the cou find it useful to frame such rules." I of the circuits, rules upon the subjec been adopted. The second circuit is them. In the case of *Lamb* v. *Parkma Justice* Curtis, after saying that there w written rules in his circuit, proceeded what, from the course of decisions in si analogous cases would, in his opinion, be guides to the exercise of the discretion court. If proper care is taken to av prise, and to confine amendments in th

*See Book 20, L. ed. p. 222.

[illegible] court to the original subject of controversy, [illegible] as not to allow matters outside of the general [illegible] of the pleadings below to be brought in, [illegible] difficult to see how any possible harm can [illegible] from permitting a libelant to amend his [illegible] in such a way as to give him the full benefit of his suit as it has been begun.

[illegible] The finding of the board of local inspectors and the documents connected therewith were properly excluded. The proceeding in which the finding was made was instituted under section 4450 of the Revised Statutes, for an [illegible] of the facts connected with the collision, so far as they had a bearing on the conduct of the licensed officers on board the boats, and at most it only showed the opinion of the board upon the subject from the evidence adduced before them. It was offered, to use the language of counsel, "as tending to affect the evidence offered by the libelants to show that The Cotton Valley was in her proper position in the river, and had proper watches and lights set at the time of the collision." Clearly it was not admissible for any such purpose.

4. The specific objection to the depositions in the Menge cases that were offered for the purpose of impeachment, is that they were not exhibited to the witnesses whose testimony was to be impeached upon their cross examination, or otherwise verified, as the evidence of the witnesses in the former causes. The rule is, that the contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or [illegible], if he desires to make it. *Conrad v. Griffey*, 16 How., 46. If the contradictory declaration is in writing, questions as to its contents, without the production of the instrument itself, are ordinarily inadmissible, and a cross examination for the purpose of laying the foundation of its use as impeachment would not, except under special circumstances, be allowed until the paper was produced and shown to the witness while under examination. Circumstances may arise, however, which will excuse its production. All the law requires is, that the memory of the witness shall be so refreshed by the necessary inquiries as to enable him to explain, if he can and desires to do so. Whether this has been done is for the court to determine before the impeaching evidence is admitted. Here the cross examination, on which the right to use the depositions depended, has not been put into the record, but the bill of exceptions shows "that, in the cross examination of each of said witnesses, the attention of the witness was called to the evidence given by him in the cases of Menge, * * * and the said witnesses were specifically examined as to the [illegible] of said evidence, and admitted having [illegible] therein." From this, and the failure to incorporate the cross examination into the bill of exceptions, we must presume that [illegible] foundation was laid for the introduction of the evidence, unless the failure to show the [illegible] to the witnesses at the time of their [illegible] examination was necessarily and under all [illegible] fatal. The objection is not to the [illegible] as to the contents of the depositions without their production, but to the admission of the depositions after a cross examination which was, as we must presume, properly conducted in their absence. It is also stated in the bill of exceptions that, "at the offering, no objection was made that the evidence offered was not the evidence of said witnesses respectively, or that the same had been imperfectly taken and reported." This shows that the depositions must have been sufficiently identified as the evidence of the witnesses in the former cases.

In the case, as it comes to us, we find no error. *The decree of the Circuit Court is affirmed and interest allowed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNION PACIFIC RAILWAY COMPANY,
Plff. in Err., [2]
v.
ABRAM MYERS.
[No. 291.]

In error to the Circuit Court of the United States for the District of Kansas.

UNION PACIFIC RAILWAY COMPANY,
Plff. in Err.,
v.
CITY OF KANSAS.
[No. 461.]

In error to the Circuit Court of the United States for the Western District of Missouri.

UNION PACIFIC RAILWAY COMPANY,
Plff. in Err.,
v.
LUCIA KNUTH.
[No. 810.]

In error to the Circuit Court of the United States for the District of Nebraska.

UNION PACIFIC RAILWAY COMPANY,
Plff. in Err.,
v.
FRANK HARWOOD.
[No. 980.]

In error to the Supreme Court of the State of Kansas.

TEXAS AND PACIFIC RAILWAY COMPANY, *Plff. in Err.*,
v.
A. F. McALISTER.

SAME *v.* LAURA KIRK.

SAME *v.* JAMES MURPHY.
[Nos. 610, 797, 824.]

In error to the Supreme Court of the State of Texas.

(See S. C., *Pacific Railroad Removal Cases*, Reporter's ed., 1-25.)

Removal of causes—corporations of the United States entitled to removal—separate controversy—practice.

1. Corporations of the United States created by and organized under Acts of Congress are entitled as such to remove into the Circuit Courts of the United States suits brought against them in state courts under and by virtue of the Act of March 3, 1875, on the ground that such suits are suits "arising under the laws of the United States."
2. The Union Pacific Railway Company and the Texas Pacific Railway Company are corporations of the United States although certain state and territorial corporations have been consolidated with them.
3. On proceedings for widening a street a trial before the mayor is in its nature an inquest of valuations and assessments, not having the character of a suit, and a petition for removal may be filed after appeal taken to a state court.
4. Under such proceedings there is a distinct controversy between the city and the company, although many others are made parties defendant.
5. The authority of the Kansas Pacific Railway Company to extend its road into Missouri was granted by Congress under its power "to regulate commerce among the several States."
6. An objection not raised in the court below is waived.

[Nos. 291, 461, 810, 980, 610, 797, 824.]

Argued Nov. 20, 21, 24, 1884. Decided May 4, 1885.

The history and facts of these cases fully appear in the opinion of the court.

Messrs. **John F. Dillon, W. D. Davidge,** *J. P. Usher, A. J. Poppleton, John C. Brown* and *A. S. Williams,* for plaintiffs in error.

Mr. **A. H. Garland,** for defendants in error in Nos. 610, 797 and 824.

Mr. **W. Hallett Phillips,** for defendants in error.

Mr. **Thos. P. Fenlon,** for defendant in error in No. 291.

Mr. **Geo. L. Hill,** for defendant in error in No. 610.

Messrs. **W. H. Munger** and **E. F. Gray,** for defendant in error in No. 810.

[3] *Mr. Justice* **Bradley** delivered the opinion of the court:

The principal question involved in these cases is whether a suit brought in a state court against a corporation of the United States may be removed by such corporation into the Circuit Court of the United States, on the ground of its being a corporation organized under a law of the United States. The plaintiff in error in four of the cases is the Union Pacific Railway Company, and in the other three cases is the Texas and Pacific Railway Company. They contend that they have such a right of removal, either under the removal Act of July 27, 1868, 15 Stat. at L., 227, now forming section 640 of the Revised Statutes, or under the Act of March 3, 1875, entitled "An Act to determine the Jurisdiction of Circuit Courts of the United States, and to Regulate the Removal of Causes from State Courts, and for Other Purposes," 18 Stat. at L., 470, or both. Whether the corporations of the United States, organized under Acts of Congress, have or have not this right of removal is the principal question in these cases.

The suits were all brought in state courts against the said corporations severally. In the first case, Myers, a switchman at Armstrong, in Kansas, in the employ of the Union Pacific Railway Company, sued the company for an injury alleged to have been sustained by hin through the carelessness of the company or it agents, in the construction of the coupling o its cars. The company filed an answer, and a the same time a petition for the removal of th cause to the Circuit Court of the United State for the District of Kansas, and the proper bon required by the law. The petition for remova stated that the petitioner was a corporatio other than a banking corporation, and organ ized under a law of the United States, namely an Act of Congress entitled "An Act to Ai in the Construction of a Railroad and Telegrap Line from the Missouri River to the Pacifi Ocean, and to Secure to the Government th Use of the Same for Postal, Military, an Other Purposes," approved July 1, 1862; an that, in accordance with said Act and the Act amendatory and supplemental thereto, the p titioner had exercised and did exercise its co porate functions and powers.

The petition then proceeded as follows:

"That February 1, 1880, pursuant to sectio 16 of the said Act of July 1, 1862, and of th Act of July 2, 1864, the Kansas Pacific Railwa Company, a corporation created by the Ter torial Legislature of Kansas, and organize under the laws of said Territory, and the De ver Pacific Railway and Telegraph Company, corporation created and organized under th laws of the Territory of Colorado, both which said companies are mentioned in sa Acts of Congress and their said railroads said Acts made a part of the Union Paci Railroad system, were, by agreement, conso dated with the Union Pacific Railroad Co pany. Your petitioner and said consolidat company, by agreement, as by said Acts a thorized, assumed and adopted the name of t Union Pacific Railway Company; which co pany consolidated, assumed, took and fro thenceforth had and has, by virtue of sa agreement of consolidation, possession a ownership of all the railroads and other pro erty, real and personal, of said constitue companies, and has and does operate and ma age the same under and by authority of sa Acts of Congress and is governed and controll by said Acts, and is to all intents and purpo and in fact a corporation under the laws of United States.

"That the plaintiff, Abram Myers, has su your petitioner, the Union Pacific Railw Company, process in this suit having be served on its agents, and your petitioner appeared thereto and filed its answer; that matter and amount in this suit above entit exceeds, exclusive of costs, the sum or value $500; that your petitioner has a defense to s action arising under and by virtue of the afo said laws of the United States; that said has not been tried, nor has it been ready for stood for trial, and the present is the first te of the court at which it could have been trie

The petition concluded with the proffer the proper bond, and a prayer for an order removal, and that the court would proceed further in the cause. The bond was appro and an order of removal was made. On fil the record in the Circuit Court of the Uni States, a motion was made to remand the ca to the state court, and it was remanded acco ingly, the Circuit Judge holding that the

[illegible] arising "under the Constitution [illegible] of the United States," within the [illegible] of the Act of Congress of March 3, [illegible] and that a suit cannot be removed from [illegible] to a federal court, upon the sole ground [illegible] is a suit by or against a corporation or[illegible] under the laws of the United States. [illegible] the judgment remanding the cause, the writ [illegible] was sued out in this court.

[illegible] case, *Union Pacific R. Co.* v. *City* [illegible], was a proceeding instituted by the [illegible] council of said city by ordinance [illegible] in April, 1880, for widening a street [illegible] the depot grounds of the company, [illegible] taking a portion of its said grounds [illegible] property of many other persons. A [illegible] was summoned in November, 1880, before [illegible], to inquire and find the value of the [illegible] taken for the street, and to assess the [illegible] upon surrounding property benefited [illegible] On December 12, 1880, this jury [illegible] the value of the company's property [illegible] equal to $7,305, and assessed, as bene[illegible] upon the remaining property of the com[illegible] the sum of $12,225 towards paying the [illegible] for widening the street. The verdict [illegible] was confirmed by the mayor and common [illegible], February 26, 1881. The laws of Mis[illegible] give to any party, dissatisfied with the [illegible] of the jury in such cases, an appeal to [illegible] Circuit Court of Jackson County (in which [illegible] City is situated), and the Union Pacific [illegible] Company, and some other dissatisfied [illegible] filed separate appeals, and the proceed[illegible] were certified to the said court, where the [illegible] were by the law directed to be [illegible] in all respects, and subject to the same [illegible] and the same law, as other trials had in [illegible] Circuit Court, and the same record thereof [illegible] and kept." After the case was certified [illegible] Circuit Court of Jackson County, the [illegible] in due time, April, 1881, filed a pe[illegible] for removal of the case to the Circuit [illegible] of the United States for the Western [illegible] of Missouri. The petition, as in the [illegible] of Myers, set out the incorporation of the [illegible] and the consolidation of the three [illegible] before mentioned under the Acts of [illegible] before referred to, by the name of [illegible] Union Pacific Railway Company. The [illegible] then proceeds to state as follows:

"[illegible] your petitioner, by agreement of said [illegible] companies, succeeded to, had and [illegible] all the rights and privileges and [illegible] real and personal, which was of said [illegible] companies, or either of them, and [illegible] the time of commencement of this pro[illegible] your petitioner had owned and pos[illegible], exclusive of all other rights and claims, [illegible] and described in said proceeding, as [illegible] It then describes the land of the com[illegible] taken for the street, and then states as [illegible] and that the same had been acquired [illegible] Kansas Pacific Railway Company for [illegible] and other railway purposes by authority [illegible] and that your petitioner held said land [illegible] purposes, and was occupying the same [illegible] for such purposes at the time of the [illegible] of the proceedings, and was [illegible] to appropriate the residue thereof to such [illegible] the business of your petitioner [illegible] it imperatively necessary that it should [illegible] acquired.

"Your petitioner distinctly avers that it is a corporation, not banking, organized under the laws of the United States; that it holds and possesses said property pursuant to such laws; that it has a defense in this action arising under and by virtue of the laws of the United States hereinbefore referred to; and your petitioner desires that said cause may be removed into said Circuit Court of the United States for trial pursuant to section 640 of the Revised Statutes of the United States. Your petitioner further states that the matter in dispute in this cause, in which your petitioner is interested, exceeds the sum of $500, exclusive of costs; and further, that this suit has not been tried, but is now pending for trial on appeal in the Circuit Court of Jackson County, Missouri." [7]

The petition concluded with the ordinary proffer of a bond and prayer for removal of the case, etc., and an order of removal was made by the state court. Motion was then made to the Circuit Court of the United States to remand the cause, and that court, after holding the motion under consideration for some time, gave judgment to remand, which judgment is brought here by writ of error.

Before rendering judgment, the Circuit Court of the United States allowed the company to file an additional statement of facts for the purpose of showing that the cause was removable, averring its acceptance of the Acts of Congress, and the passage of an Act by the Legislature of Missouri, authorizing the company to extend its track within the limits of Missouri, and to acquire depot grounds there, which it did; and the fact that said grounds are essential to the operations of the company in carrying out the objects declared in the Acts of Congress relating thereto; that the United States loaned its bonds on said portion of the road and has a lien thereon for their payment.

The third suit, *Union Pacific R. Co.* v. *Knuth*, was an action brought by the defendant in error against the Company in the District Court of Dodge County, Nebraska, in July, 1883, to recover damages for injuries sustained by her at the Company's depot at North Bend, between Omaha and Ogden. A petition for removal of the cause to the Circuit Court of the United States for the District of Nebraska was filed in due time, alleging the incorporation and organization of the company under and by virtue of the Acts of Congress of 1862 and 1864, before referred to; that the matter in dispute exceeds $500 exclusive of costs; that the defendant had a defense to the action arising under and by virtue of the laws of the United States, to wit: the Act and amendatory Act of Congress above referred to, concluding with the usual proffer of bond and prayer for removal. The order of removal was granted, the circuit court remanded the cause to the state court, and a writ of error brings the case here. In this case the place of injury was on the main line of the Union Pacific Railway Company. [8]

The fourth case is that of Frank Harwood, who brought a suit against the Union Pacific Railway Company in the District Court of Davis County, Kansas, in July, 1882, to recover damages for an injury received by him at the company's depot at Junction City, Kansas, whilst loading hogs in a car. A petition for

removal of the cause was filed in due time, alleging the organization of the company under the Act of Congress of July 1, 1862, and the amendments thereto, and other Acts of Congress; and that the petitioner had a defense arising under the laws of the United States, and concluding with tendering the proper bond, and a prayer for removal. The state court approved the bond offered, but denied the petition and proceeded with the cause. A verdict being found for plaintiff, the case was taken to the Supreme Court of Kansas by appeal. One of the reasons assigned on the appeal was the denial of the petition to remove the cause. The supreme court affirmed the judgment, and a writ of error to the judgment of that court brings the case here.

The three cases of the Texas and Pacific Railway Company were as follows: the first was a suit brought by A. F. McAlister against the Company in the District Court of Harrison County, Texas, in April, 1879, to recover damages for an injury to the plaintiff whilst a passenger in one of the company's trains. A petition for removal was filed in due time, alleging that the suit arose under the laws of the United States, and that the defendant was a corporation organized under and by virtue of certain Acts of Congress of the United States, to wit: "An Act Entitled an Act to Incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and an Act [9] suplementary thereto, approved May 2, 1872; that the petitioner had a defense to the action arising under and by virtue of a law of the United States, to wit: said Act of incorporation; that it was not a banking, but a railroad corporation authorized to construct, own and maintain a railroad to and from certain places designated in said Acts of Congress; concluding with a proffer of a bond and a prayer for removal. The court approved the bond, but refused to remove the cause. The special exceptions to the petition for removal were two: first, that it did not show what the defense was, arising under and by virtue of a law of the United States; secondly, denying the allegation that the defendant was a corporation created and existing under and by virtue of Acts of Congress of the United States. Afterwards the defendant filed a plea in abatement, stating that it had filed in the United States Circuit Court at Jefferson, Eastern District of Texas, a certified copy of the record of the pleadings and other papers in the cause, and had the same entered on the docket of said court, in the fall term, 1879, and that plaintiff appeared and moved to remand the cause to the state court, which motion was overruled, and the Circuit Court of the United States entertained jurisdiction of the cause; and the plaintiff agreed to a continuance of the cause in that court to the spring term of 1880, and at the spring term, 1880, procured the same to be continued, and at the fall term, 1880, appeared before said court and consented to a continuance, and at the spring term, 1881, again prosecuted his cause in said court, and continued the same. This plea was accepted to, and overruled by the state court. Judgment was rendered in favor of the plaintiff, and an appeal was taken to the Supreme Court of Texas. That court overruled the error assigned on the refusal of the district court to remo the cause, on the ground that the defendant petition for removal did not set forth the d fense so as to show that it was a defense arisir under the laws of the United States. Tl court took notice also that the petition was n sworn to; but as that point was not raised b the plaintiff's counsel, they did not consider i The judgment of the district court was affirme and the case is brought here by writ of error the judgment of the supreme court.

The second case of the Texas and Paci Railway Company was a suit brought by Lau Kirk against the company in the District Cou of the Second Judicial District of Texas, March, 1881, to recover damages for the dea or her husband, caused by the company's ca running off the track. The petition for r moval was filed in this case similar in all r spects to that in the preceding case. A seco petition was filed a few days later, adding averment that the defendant had fixed domicil and principal business office at Phil delphia, in the State of Pennsylvania, and w in contemplation of law a citizen of that Stat The prayer of the petition was denied, the cau went to trial, judgment was rendered for t plaintiff, an appeal was taken, and the jud ment was affirmed by the Supreme Court Texas, upon the reasons and authority of t previous case of *McAlister* v. *The Texas a Pacific Railway Company*. The case is nc here by writ of error.

The third and last case of the Texas and P cific Railway Company was a suit brought James Murphy against the company (or, rath against one of its constituent companies, a afterwards, by amendment, against the co pany itself) in the District Court of Harris County, Texas, in 1873, to recover damages f an injury received by the plaintiff in getti upon the cars of the company at Jonesvil Texas. The pleadings were amended from ti to time on both sides, and the cause was co tinued, until finally an amended original pe tion was filed in October, 1878, followed b petion for removal filed November 1, 18 The prayer of the petition was denied. T case was afterwards tried, and a verdict a judgment rendered for the plaintiff; and May, 1883, this judgment was affirmed by t Supreme Court of Texas on appeal. On t question of removal the court followed the cision in the *McAlister Case* above stated. question was raised in this case on account the time at which the petition for removal w filed. The application for removal was treat by the court as made under section 640 of t Revised Statutes.

With some diversification of details, it w be perceived that all of these cases depend pr cipally on two questions:

First, whether the fact that the plaintiffs error are corporations of the United Sta created by Act of Congress makes the su against them "suits arising under the laws the United States," within the meaning of t second section of the Act of March 3, 1875, fore referred to, so as to be removable from state into the federal courts for that cause: a

Secondly, whether, if not removable on t ground, they are removable under section 64 the Revised Statutes, upon the allegation c

[illegible] in the several petitions of removal, that [illegible] defendant has a defense to the action arising [illegible] and by virtue of a law of the United [illegible], in some cases, the Act of in[illegible] as the law referred to.

[illegible] of opinion that corporations of the [illegible] States, created by and organized under [illegible] of Congress, like the plaintiffs in error in [illegible] cases, are entitled as such to remove into [illegible] circuit courts of the United States suits [illegible] against them in the state courts, under [illegible] by virtue of the Act of March 3, 1875, on [illegible] ground that such suits are suits "arising [illegible] the laws of the United States." We do [illegible] to go into a lengthy argument on [illegible] subject; we think that the question has been [illegible] decided long ago by this court. [illegible] argument of *Chief Justice* Marshall in the case of *Osborn* v. *The Bank of the* [illegible] *States*, 9 Wheat. 817–828, delivered [illegible] sixty years ago, and always acquiesced in, renders any further discussion unnecessary to show that a suit by or against a [illegible] of the United States is a suit arising [illegible] the laws of the United States. That [illegible] was the basis of the decision on the [illegible] question in that case. The pre[illegible] question, it is true, was as to the power of [illegible] to authorize the bank to sue and be [illegible] in the United States Courts. The words [illegible] charter were, that the bank should be [illegible] and capable in law to "sue and be [illegible], plead and be impleaded, answer and be [illegible], defend and be defended, in all state [illegible] having competent jurisdiction, and in [illegible] circuit court of the United States." The [illegible] to create such a jurisdiction in the fed[illegible] courts rested solely on the truth of the [illegible] that a suit by or against the bank [illegible] a suit arising under the laws of the [illegible] States; for the Constitution confined the [illegible] power of the United States to these [illegible] classes of cases, namely: first, to cases in [illegible] and equity, arising under the Constitution, [illegible] of the United States, and treaties made [illegible] their authority; secondly, to cases affecting [illegible], other public ministers and [illegible]; thirdly, to cases of admiralty and [illegible] jurisdiction; fourthly, to certain [illegible] depending on the character of the [illegible], such as controversies to which the [illegible] States was a party, those between two [illegible], or a State and citizens of another [illegible], or citizens of different States, or citizens [illegible] claiming lands under grants of [illegible] States, or a State or its citizens and [illegible] States, citizens or subjects. Now, suits [illegible] against the United States Bank could not [illegible], as such, belong to any of these classes [illegible] the first, namely: cases in law and equity [illegible] under the Constitution, laws or treaties [illegible] United States; and the Supreme Court [illegible] as the distinguished counsel who argued [illegible] *Case*, so understood it. Unless [illegible], a case in which the bank was a par[illegible] for that reason a case arising under the [illegible] United States, Congress would not [illegible] the power to authorize it to sue and [illegible] in the Circuit Court of the United [illegible], and to this question, to wit: whether [illegible] was a suit arising under the laws of the United States, the court directed its prin[illegible]. But as it was objected that several questions of general law might arise in a case, besides that which depended upon an Act of Congress, the court first disposed of that objection, holding that, as scarcely any case occurs every part of which depends on the Constitution, laws or treaties of the United States, it is sufficient for the purposes of federal jurisdiction if the case necessarily involves a question depending on such Constitution, laws or treaties. The Chief Justice then proceeds as follows:

"We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it.

"The case of the bank is, we think, a very [13] strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally as well as substantially under the law? Take the case of a contract, which is put as the strongest against a bank.

"When the bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, Has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends upon a law of the United States. The next question is, Has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. * * *

"The question forms an original ingredient in every case. Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be relied upon. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense and must depend on the state of things when the action was brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not." (Pp. 823, 824.)

"It is said that a clear distinction exists between the *party* and the *cause:* that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the bank.

"This distinction is not denied; and if the [14] Act of Congress was a simple Act of incorporation, and contained nothing more, it might be entitled to great consideration. But the Act

does not stop with incorporating the bank. It proceeds to bestow upon the being it has made all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the Constitution, every act of the bank arises out of this law." (P. 827.)

If the case of *Osborn* v. *The Bank* is to be adhered to as a sound exposition of the Constitution, there is no escape from the conclusion that these suits against the plaintiffs in error, considering the said plaintiffs as corporations created by and organized under the Acts of Congress referred to in the several petitions for removal in these cases, were and are suits arising under the laws of the United States. An examination of those Acts of Congress shows that the corporations now before us, not only derive their existence, but their powers, their functions, their duties, and a large portion of their resources from those Acts, and, by virtue thereof, sustain important relations to the Government of the United States.

A question is made in the cases coming from Kansas about the Constitution of a company owning and controlling the line of railroad running through that State. The allegations of the petition for removal in the *Meyers Case* (and the others are substantially the same) are: That on February 1, 1880, pursuant to section 16 of the Act of Congress of July 1, 1862, and section 16 of the Act of July 2, 1864, the Kansas Pacific Railway Company, a corporation created by the Territorial Legislature of Kansas, and organized under the laws of the said Territory, and the Denver Pacific Railway and Telegraph Company, a corporation created and organized under the laws of the Territory of Colorado, both of which companies are mentioned in the said Acts of Congress, and their roads by said Acts made a part of the Pacific Railroad system, were by agreement consolidated with the Union Pacific Railroad Company, and said consolidated company assumed and adopted the name of The Union Pacific Railroad Company, which as-
[15] sumed, took, and thenceforth has had, by virtue of said agreement of consolidation, possession and ownership of all the railroads and other property, real and personal, of said constituent companies, and has operated and managed the same under and by authority of said Acts of Congress, and is governed and controlled by said Acts, and is to all intents and purposes and in fact a corporation under the laws of the United States. These allegations, if true (and they must be taken so on the application for removal), show that the present corporation, the Union Pacific Railway Company, which is the corporation sued, and which appears and defends the suits, is a corporation formed and organized under an Act of Congress. Besides, the legislation of Congress in reference to all the companies so consolidated, in the Acts of 1862 and 1864, and subsequent Acts, all which is reviewed and commented on in the opinion of this court in *Ames* v. *Kansas*, 111 U. S., 449 [Bk. 28, L. ed. 482], shows that all the said companies, before the said consolidation, had received large donations of land, subsidies, powers and privileges from Congress, and had accepted and were subject to important duties to the United States Government, and were subject to a wide control of said government both in the construction and management of their roads and works; and on of said companies, to wit: the Union Pacifi Railroad Company, was originally incorporate and organized under said Acts, and was strictl a corporation of the United States, subject t the Acts of Congress, and having importa duties to perform to the government in th prosecution of its business. The facts that th last named company is one of the constituer elements of the consolidated company, and th the entire system of roads now in its possessio and under its charge and control constitut one of the most comprehensive and importa mediums of interstate commerce in the countr and that in all its transactions it is subject the supervision and control of the Governme of the United States, are sufficient, it seems us, to bring the Kansas Cases, as well as t other cases, fairly within the principle of t case of *Osborn* v. *The Bank*. The organizatio of the company under the consolidation pr ceedings makes it, at least, a corporation *facto*, and the legality of its Constitution as corporation will not be inquired into collat ally. It has, as we know from the case *Ames* v. *Kansas*, been called in question in regular way by an information in the nature a *quo warranto*, and until that, or some oth case directly assailing the validity of the co solidation, is decided, the plaintiff in err must be regarded as a corporation organiz under and by virtue of the laws of the Unit States. And the whole being, capacities, a thority and obligations of the company th consolidated are so based upon, permeated and enveloped in the Acts of Congress referr to, that it is impracticable, so far as the ope tions and transactions of the company are co cerned, to disentangle those qualities and pacities, which have their source and foun tion in these Acts, from those which are deriv from state or territorial authority.

With regard to transactions occurring Nebraska, on the original line of the Uni Pacific Railroad Company, it is not disput that the present company derives all its c porate and other powers from the Acts of C gress and is strictly and purely a United Sta corporation; and the Texas and Pacific R way Company stands in the same predicam and occupies the same position in Texas, in lation to consolidation with state organizatio as the Union Pacific does in Kansas, and same considerations apply to both. It originally incorporated by the name of the Te Pacific Railroad Company, by Act of Cong approved March 3, 1871, 16 Stat. at L., with power to construct a railroad from M shall, Texas, to San Diego on the Pacific Co and to purchase or consolidate with any road company chartered by congressio state, or territorial authority on the same ro Under this Act, and by authority of the Le lature of Texas, a consolidation was effec with the Southern Pacific Railroad Comp and the Southern Trans-Continental Rail Company, corporations of Texas, and by of Congress of May 2, 1872, 17 Stat. at L., the name of the company was changed to Texas and Pacific Railway Company. powers, privileges and advantages given to company by Congress, and the duties imp upon it, are specified in the Acts referred t

was clearly within the reason and conclusion applied to the Union Pacific Railway Company.

If we are correct, therefore, in the conclusion to which we have come, that suits by and against such corporations are "suits arising under the laws of the United States," then they are, in terms, embraced in the second section of the Act of March 3, 1875, and the cases now under consideration were removable to the respective circuit courts of the United States, to which it was sought to remove them, unless any of them were obnoxious to some other objection peculiar to the individual cases.

The point suggested by the Supreme Court of Iowa in the case of Harwood, that the petition was not verified by oath, would not be available if it were raised by the defendant in error, since it was evidently waived by him at the time, having never been raised or mentioned in any way. The same may be said of the delay in filing the petition in the case of Murphy. See *Ayers* v. *Watson*, 113 U. S., 594 [Bk. 28, L. ed. 1093].

In the Kansas City case, of proceedings for opening a street running through the depot grounds of the company at that place, brought here by writ of error to the Circuit Court of the United States, for the Western District of Missouri, it is contended by the City of Kansas, the defendant in error, first, that the consolidated railway company must be regarded as having the same status as if it were still the Kansas Pacific Railway Company, a corporation of the State of Kansas; secondly, that the case had already been tried once before the mayor and a jury, and an appeal had been taken to the Circuit Court of Jackson County before the petition for removal was filed, and, therefore, the application came too late: and, thirdly, that the proceeding was not a separate one against the railway company, but a joint one against the company and many other persons, and the removal of the railway company and other parties carried the whole case into the Circuit Court of Jackson County to be tried *in toto;* and a removal of the case by the railway company to the Circuit Court of the United States must be a removal of the whole case, and not merely the case of the railway company, which would cast upon the federal court an administrative function in a local matter, for which it was incompetent and destitute of jurisdiction.

The first of these points has already received consideration. But it may be added, as bearing on this particular case, that the original Kansas company was authorized by the 9th section of the Pacific Railroad Act of July 1, 1862, to extend its road into the State of Missouri—that is, "to construct a railroad and telegraph line from the Missouri River, at the mouth of the Kansas River, on the south side thereof [which is in the State of Missouri], so as to connect with the Pacific Railroad of Missouri, at the aforesaid point on the one hundred and twelfth meridian of longitude," namely: the point where the Union Pacific was to commence. The provision looked to the establishment of a continuous line of railroad from the Mississippi River at St. Louis (the eastern terminus of the Pacific Railroad of Missouri), to the Pacific Ocean. The power assumed by Congress in giving the authority to the Kansas company was undoubtedly assumed to be within the power "to regulate commerce among the several states"; and, although by an Act of the Legislature of Missouri, passed in February, 1865, the consent of that State was also given to the extension of the road into its territory, and to its connection with the Missouri road, the fact remains that the company claimed and assumed to exercise its powers under the Act of Congress, as well as by the consent of the Legislature of Missouri. So that the right of appropriating the very property in question in this case was claimed under authority of an Act of Congress. This circumstance adds strength to the claim of the plaintiff in error that the case was one "arising under the laws of the United States."

The second ground of objection, that the cause had been once tried before the mayor by a jury, and an appeal taken, before a petition for removal was filed, and therefore the application was too late, is answered by the reasoning of this court in the case of *Boom Co.* v. *Patterson*, 98 U. S., 403 [Bk. 25, L. ed. 206], which was a case very similar in this respect to the present. It was there held that the preliminary proceedings were in the nature of an inquest to ascertain the value of the property condemned, or [19] sought to be condemed by the right of eminent domain, and was "not a suit at law in the ordinary sense of those terms," consequently not "a suit" within the meaning of the Removal Acts; but that "when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents." In that case, "the point in issue on the appeal was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the district court." The court, therefore, considered the case to be within the rule laid down in *Gaines* v. *Fuentes*, 92 U. S., 20 [Bk. 23, L. ed. 528], in which it was held that a controversy between citizens of different States is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination." And, in this view, the case of *Boom Co.* v. *Patterson*, was held to be removable to the federal court. That case, we think, governs the present, so far at least as relates to the trial before the mayor, which was in its nature an inquest of valuations and assessments, not having the character of a suit.

A more embarrassing question arises under the third objection raised by the defendant in error, to wit: that the whole case relating to the widening of the street was carried before the Circuit Court of Jackson County by the appeal, and must also be carried to the Circuit Court of the United States in the same condition if the application for a removal is sustained, whereby the latter court will be called upon to exercise administrative functions of a local character to which it is incompetent.

To understand the bearing of this objection it is necessary to inquire, first the condition of the case in the Circuit Court of Jackson County on the appeal; and, secondly, the rules which must govern the case on its removal to

the federal court, if such a removal should be effected.

The condition of the case in the Circuit Court of Jackson County on the appeal depends upon the statute of Missouri under which the proceedings were had for widening the [20] street. This statute was an amendment to the city charter of the City of Kansas, passed in 1875. We have carefully examined its provisions. After giving very full directions as to the preliminary proceedings, such as the ordinance for opening or widening a street, the notices to be given, the summoning of jurors, and the duties to be performed by them, the recording of their verdict, etc., the 6th section declares: "In case the city, or any defendant to such proceedings, shall feel aggrieved by the verdict of the jury, such party so aggrieved may, within twenty days from the time the verdict of the jury is confirmed by the common council, appeal to the Circuit Court in and for the County of Jackson in this State. If the appeal is taken by either party, the same shall be taken and perfected by the filing with the clerk of the city, within the time aforesaid, such an affidavit as is required by law, in appealing from the judgment of a justice of the peace. If any appeal is so taken, the clerk of the said city shall, within six days from the taking of such appeal, file a complete transcript of the proceedings, and all papers filed and used in the trial, certified by him, with the clerk of the circuit court; and said circuit court shall thereupon become possessed of the cause, and said cause, unless dismissed, shall be tried *de novo* in said court, and the parties thereto shall have a speedy trial thereof; and to that end said causes shall have precedence over all other causes, and if necessary to a full determination of any question arising in the said cause, the circuit court shall have power to make and bring in other parties to such proceedings, on service of notice upon them for six days, or by publishing a notice to them for the same length of time, in any daily newspaper printed in said City of Kansas; and the parties so made by either kind of notice, and all persons claiming under them, shall be bound by such proceedings; * * * and the judge of said circuit court shall have power, and it shall be his duty to hold a sitting of his court for the speedy trial thereof, at the court-house in said city, at any time in vacation, and summon a jury before him (unless a jury is waived) for the trial of such appeals only, such trials to be had in all respects, and subject to the same rules and the same law as other trials had in the circuit [21] court and the same record thereof made and kept. The verdict of the jury, or the finding of the circuit judge sitting as a jury, as the case may be, shall conform in all respects to the requirements of section 8 of this Act for the government of the jury making the first assessment, and the verdict shall have the same force and effect as is provided in regard to said first verdict, and shall be binding on the parties; and the assessments against private property shall be paid in the same time, and until paid bear the same rate of interest as is above provided; and the amount assessed by the jury against property shall be a lien on the several parcels of property, charged from the day the ordinance for the improvement takes effect until paid. * * * On appeal under this section the jury shall consist of six men, freeholders of the city, and be chosen by the judge; and any finding or verdict in that court shall, unless set aside for good cause, be confirmed, and judgment entered thereon; that the city have and hold the property sought to be taken for the purposes specified in the ordinance providing for the improvement, and pay therefor the amount assessed against the city, and full compensation assessed therefor; and that the several lots and parcels of private property assessed to pay compensation by the verdict or finding stand charged and be bound respectively for the payment of assessments, with interest, as provided in this Act. * * * "

We have not been furnished by the counsel on either side with reference to any decision of the Missouri courts giving construction to this section. Whether the direction that the cause shall be tried *de novo* requires that all the valuations and assessments are to be retried, or only those affecting the appellants, is not expressly stated. The principle of valuation and assessment to be followed by the jury is laid down in the 3d section of the Act, as follows:

"Sec. 3. The jury shall first ascertain the actual damages done to each person or corporation in consequence of the taking of their property for such purposes, without reference to the proposed improvement, as the just compensation to be made therefor; and, second, to pay such compensation, assess against the city the amount of benefit to the city and public generally, inclusive of benefit to any property of the city, and against the several lots and parcels of private property deemed benefited; as determined according to the last section, by the proposed improvement, the balance of such compensation, each lot or parcel of ground to be assessed with an account bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed. Parties interested may submit proof to the jury, and the latter shall examine personally the property to be taken and assessed. * * *"

From this it would seem that the balance of damages for property taken, after deducting the amount to be paid by the city, is to be divided and assessed *pro rata* upon those whose property is benefited, in proportion to the benefit to each. But each piece of property taken is valued by itself, "without reference to the proposed improvement," and the amount of benefit to each piece of property benefited is ascertained separately without reference to the other pieces benefited. It is only after this has been done that the aggregate amounts are ascertained and the damages are assessed *pro rata* against the pieces of property benefited according to the benefit to each, which is the result of a mere arithmetical calculation. In the state circuit court the jury ascertains and finds all these facts, and reports them in one general verdict.

What, then, is the relation in which the Railway Company, as an appellant, stands towards the City of Kansas, in this litigation? Clearly it has two distinct issues, or grounds of controversy: first, the value of its property taken for the street; secondly, the amount of benefit which the widening of the street will create

[illegible] property, not so taken. It may [illegible] a third issue, and judging from the course [illegible] the argument, it has a third issue, still more [illegible] to it than either of the others, to [illegible] the right of the city to open a street at all [illegible] depot grounds. Now this controversy involving these three issues, is a distinct controversy between the company and the city. It may be settled in the same trial with the other appeals, and by a single jury; but the controversy is a distinct and separate one, and is capable of being tried distinctly and separately from the others. If the state circuit court had equity powers, it might direct a separate issue for the trial of this controversy by itself. It might try the other appeals without a jury (the parties waiving a jury), and try this controversy by a jury.

If this view of the subject is correct, we see no difficulty in removing the controversy between the City of Kansas and the railway company for trial in the Circuit Court of the United States. The proceedings for widening the street, pending in the state court, may have to await the decision of the case in the federal court; and the result of those proceedings may be materially affected by the decision of that case; but that consideration does not affect the separate and distinct character of the controversy between the city and the railway company, although it might raise a question of proper parties in a pure chancery proceeding as between the city and the company. This controversy is to all intents and purposes "a suit." The indirect effect upon the general proceedings for widening the street which would ensue if the federal court should determine that the City of Kansas had no right to widen the street in the company's depot grounds, or that the valuation of its property was much too small, or the assessment for benefits against it was much too large, furnishes no good reason for depriving the company of its right to remove its suit into a United States court. We think that the case was removable to that court under the Act of March 3d, 1875.

The disposal of all the cases now before us, does not make it unnecessary to inquire whether the allegations in the several petitions of removal were, or were not, sufficient to bring the case within the 640th section of the Revised Statutes, or whether this section still remains in force.

The judgments are reversed in all the cases, and the causes will be remanded, with instructions to enter judgment in accordance with this opinion.

Chief Justice **Waite**, dissenting:

I am unable to agree to these judgments. In my opinion Congress did not intend to give the words "arising under the Constitution or laws of the United States," in the Act of 1875, the [illegible] meaning they have when used by *Chief Justice Marshall* in the argument of the opinion in *Osborn v. Bank*. I do not doubt the power of Congress to authorize suits by or against such corporations to be brought in the courts of the United States. That was decided in *Osborn's Case*, and with it I have no fault to find. Neither do I doubt that Congress did, in the charters under which these corporations were created, authorize suits by or against them to be brought in the courts of the United States as well as in the courts of the States; but I cannot believe that, if the charters had given jurisdiction to the courts of the United States in only a limited class of actions, and had provided that in all others the suits must be brought in the courts of the proper State, the Act of 1875 would have extended the jurisdiction of the courts of the United States to all suits by or against such corporations when the value of the matter in dispute exceeded five hundred dollars.

The Acts of incorporation made no provision for the removal to the courts of the United States of suits begun in a state court. The Act of July 27, 1868, ch. 255, sec. 2, 15 Stat. at L., 227, now sec. 640 of the Revised Statutes, did, however, give authority for that purpose in suits brought against the company in a state court "upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the Constitution or of any treaty or law of the United States." If all suits by or against, and all defenses by, a federal corporation necessarily arise under the laws of the United States "because the charter of incorporation not only creates it, but gives it every faculty which it possesses," why require the corporation, when asking for a removal, to cause an oath to be filed with its petition that it has a defense in the suit which arises under the Constitution or laws? If, "because the power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter a law of the United States," every suit by or against, and every defense to such a suit by, a federal corporation must arise [25] under the laws of the United States, why require it to set forth in its petition for removal that its defense does arise under such a law? If such a corporation cannot "have a case which does not arise literally, as well as substantially, under the law," what the necessity for saying more than that it is such a corporation?

The Act of 1868 (sec. 640) related specifically to this class of corporations and this class of suits and it shows distinctly that the words "arising under the laws of the United States" were there used in a restricted sense. I see no evidence of any intention by Congress to use them in any other sense in the Act of 1875, when applied to the same kind of suits and to the same kind of corporations.

I am authorized to say that *Mr. Justice* **Miller** unites with me in this dissent.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[56]

W. H. CRUMP, *Appt.*,

v.

H. K. THURBER.

(See S. C., Reporter's ed., 56-61.)

Removal of causes—citizenship—Act of 1875.

* A suit in equity brought by C., a citizen of one State, against a corporation of the same State and T., a citizen of another State, and W., to obtain a decree that C. owns shares of the stock of the corporation, standing in the name of W., but sold by him to T., and that the corporation cancel on its books the shares standing in the name of W., and issue to C. certificates therefor, cannot be removed by T. into the Circuit Court of the United States, under § 2 of the Act of March 3, 1875 (18 Stat. at L. 470); because the corporation is an indispensable party to the suit, and is a citizen of the same State with C.

[No. 267.]

Submitted Apr. 22, 1885. Decided May 4, 1885.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The history and facts of the case appear in the opinion of the court.

Messrs. **Gabriel C. Wharton** and *Emmet Field*, for appellant.

Mr. **E. More**, for appellee.

[57] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This suit was commenced by the filing in the Louisville Chancery Court, in the City of Louisville, Kentucky, on the 26th of November, 1880, of a petition in equity, by W. H. Crump against James Wilson and the Southern Dairy Company, a Kentucky corporation. The substance of the petition was, that Crump had, under a contract with Wilson, assisted him in selling rights under a patent which he controlled; that, by the terms of the contract, Wilson was to receive $12,000 for the right for Kentucky, and $8,000 for the right for Indiana, and all received above those sums for either State was to be divided equally between Crump and Wilson; that the rights for Kentucky and Indiana were disposed of to the Southern Dairy Company, and 1,000 shares of its capital stock, of $100 each, out of 2,000 shares, were issued to Wilson, in payment for the rights, of which he had sold 100 shares for $5,000; that he had received more in value than the $20,000; that he refused to give to Crump any part of the stock or of the money; that a large amount of the stock issued to Wilson still stood on the books of the corporation in his name; and that Crump was entitled to 300 shares thereof. The petition prayed that Crump be adjudged to own 300 shares of the stock; and that the corporation be ordered to cancel on its books the stock standing in the name of Wilson, to that extent, and to issue to Crump certificates for 300 shares.

The corporation was served with process. The petition was then amended by stating that not less than 250 shares of the stock still stood in the name of Wilson; and process on that was served on the corporation. It then filed an answer, stating that 250 shares of its stock stood, when the petition was filed, in the name of Wilson, on its books, and had not since been transferred thereon; that, before the suit was brought, one H. K. Thurber bought the 250 shares from Wilson, and received from him the certificates thereof, by indorsement and delivery, and still held and owned them and he had notified the president of the corporation of that fact, and claimed the right to have the stock transferred into his own name and that it was willing to obey the judgment of the court, but ought not to be ordered to cancel or transfer the stock, unless Thurber should be brought before the court, to litigate with Crump the true ownership of the stock.

Crump replied to the answer of the corporation, and filed an amended petition, making Thurber a party to the suit, and paying the same relief as in his original petition. Wilson and Thurber were then each personally served with process in the City of New York. Thurber then came into the State Court and filed petition and a bond for the removal of the suit to the Circuit Court of the United States for the District of Kentucky, and the State Court made an order removing the cause, under the objection and exception of the plaintiff. The petition proceeded on the ground that Crump was a citizen of Kentucky and Thurber a citizen of New York, and that there was a controversy in the suit between them, which was wholly between citizens of different States and could be fully determined between them. Nothing was said in the petition for removal about Wilson or the corporation.

Thurber then filed an answer in the Circuit Court, setting forth that he had, on the 26th of October, 1880, purchased the 250 shares from Wilson, for value, and received from him certificates therefor, three in number, issued by the corporation to and in the name of Wilson with blank forms of assignment and power of attorney on the back, which Wilson signed and delivered to Thurber with the certificates that he was entitled to fill the blanks and render the certificates, and have the shares transferred and new certificates issued to him by the corporation; and that he purchased the shares without any knowledge or information of any claim by Crump against Wilson. The answer prayed that the shares be decreed to be the property of Thurber and not of Crump, and that the corporation be ordered to cancel the certificates issued to Wilson, and to issue to Thurber new certificates in their place. There was a replication to this answer.

Thurber also filed a cross bill in the Circuit Court, making as a defendant only the corporation, but not Crump, setting forth himself as a citizen of New York and the corporation as a citizen of Kentucky, and averring the facts as to his purchase of the stock from Wilson for value, and as to the indorsement and delivery of the certificates by Wilson to him, praying for judgment against the corporation that it receive and cancel the certificates issued to Wilson, and issue to Thurber other certificates, in their stead, for the 250 shares.

The corporation answered this cross bill, stating that it was a mere stakeholder between the parties to suit, and praying for a proper

* Head note by *Mr. Justice* BLATCHFORD.

NOTE.—*Removal of causes under Act of 1875—citizenship.* See Del., etc., Co. v. Meyer, 100 U. S., bk. 25, 592, *note*.

[illegible] which should protect it. There was a replication to that answer.

Then Crump filed in the Circuit Court an amended bill, setting forth that the transaction between Wilson and Thurber was for the fraudulent purpose of protecting the stock for Wilson, and that the certificates were held in secret trust by Thurber for Wilson. Thurber answered that amended bill, denying its allegations. To that answer there was a replication.

Proofs were taken, and, on a hearing, a decree was made dismissing the bill of Crump, and adjudging that Thurber was the true owner of the 250 shares, and was entitled to have the certificates issued to Wilson therefor canceled, and other certificates issued in lieu thereof, on his application; and it was ordered that the corporation cancel the certificates, and issue or deliver to Thurber, or his order, such new certificates, and that Thurber and the corporation recover of Crump their costs. Wilson had never appeared or answered. Crump has appealed to this court.

It is assigned for error, that the Circuit Court did not have jurisdiction of this cause, under § 2 of the Act of March 3, 1875 (18 Stat. at L., 470), and ought to have remanded it to the state court. This objection is well taken. It is true that there is, in the suit, a controversy between Crump and Thurber, but it is a controversy to which the corporation is an indispensable party. Crump brought the controversy into court as one between himself on one side, and Wilson and the corporation on the other side; and throughout Crump maintained that Thurber had no right to take the place of Wilson, because the transactions between Wilson and Thurber gave Thurber no greater right than Wilson had. The controversy which Crump asked to have adjudicated was one in which he could be declared to be the owner of the shares, and in which, to give him the fruition of such decree, and enable him to stand as the true owner of the shares and be recognized as such on the books of the corporation, there should be a decree ordering the corporation to insert on its books the evidence of the ownership by Wilson, and to issue to Crump certificates for the shares. The jurisdiction of the Circuit Court must be determined, for the purposes of this case, by the status of the parties, and the nature of the relief which had been asked by the plaintiff at the time of the application for removal. If the decree of the Circuit Court had been in favor of Crump, it would have adjudged a right in favor of a citizen of Kentucky against a corporation of Kentucky. That corporation could not have removed the suit, by showing that a citizen of New York was the other claimant of the stock. The event of the suit, a decree in favor of Thurber, on the merits, against Crump and the corporation, is not a proper test of the jurisdiction. If Thurber had brought the suit originally in the state court, against Crump and the corporation, it could have been removed; or he might have brought it originally against them in the Circuit Court. But, in the present decree, Crump's bill is dismissed on the merits, and of course he is adjudged to have no rights against the corporation, and costs are decreed against him in favor of the corporation.

This case falls distinctly within a series of rulings made by this court. *Blake* v. *McKim*, 103 U.S., 336 [Bk. 26, L. ed. 563]; *Hyde* v. *Ruble*, 104 Id., 407 [Bk. 27, L. ed. 823]; *Winchester* v. *Loud*, 108 Id., 130 [Bk. 27, L. ed. 677]; *Shainwald* v. *Lewis*, Id., 158 [Bk. 28, L. ed, 691]; *Ayres* v. *Wiswall*, 112 Id., 187 [Bk. 28, L. ed. 693]; *Hancock* v. *Holbrook*, Id., 229 [Bk. 28 L. ed. 714]; *Thayer* v. *Life Association*, Id., 717 [61]
Bk. 28, L. ed 864]; *R. R. Co.* v. *Mills*, 113 Id., 249 [Bk 28, L. ed. 949]; *Sully* v. *Drennan*, Id., 287 [Ba. 28, L. ed. 1007]; *R. R. Co.* v. *Ide*, 114 Id., 52 [*ante*, 63]; *R. R. Co.* v. *Wilson*, Id., 60 [*ante*, 66]; *Putnam* v. *Ingraham*, Id., 57; [*ante*, 65]; *Pirie* v. *Tvedt* [*post*, 331].

The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to remand it to the State Court, for want of jurisdiction, with costs to Crump against Thurber, in the Circuit Court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ANDREW STEWART ET AL., Partners as STEWART BROTHERS & Co., *Appts.*, [61]

v.

JAMES H. DUNHAM ET AL., Partners as DUNHAM, BUCKLEY & CO.; EDWIN BATES ET AL., Partners as EDWIN BATES & CO. ET AL.

(See S. C., Reporter's ed., 61-67.)

Removal of causes—introduction of new parties subsequent to removal—fraud—transfer to defraud creditors.

1. After a cause has been properly removed, the introduction of new parties as co-complainants cannot oust the jurisdiction of the court, already lawfully acquired.

2. Where a bill has been filed on behalf of the complainants and all other creditors who may come in, the court, in exercising jurisdiction between the parties, may incidentally decree in favor of all other creditors who come in under the bill.

3. An appeal from a decree adjudging separate sums to various appellees will be dismissed as to any appellee in whose favor the decree is for less than $5,000.

3. The conveyance by a debtor in failing circumstances, of his property, in trust, to secure certain of his creditors, though void, does not affect the validity of a subsequent sale to such creditors, made in good faith to pay an actual debt.

4. The sale by a debtor in failing circumstances, of his property to certain of his creditors sustained, the evidence of fraud being held insufficient by this court.

[No. 1240.]

Dismissed Dec. 8, 1884; Motion to rescind dismissal argued Jan. 29, 1885; Rescinded Feb. 2, 1885; Submitted Apr. 20, 1885. Decided May, 4, 1885.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The history and facts of the case appear in the opinion of the court.

On December 8, 1884, this appeal was dismissed, the appellants having failed to perfect their appeal by filing a bond or making a deposit to cover costs in this court. A motion to rescind the order of dismissal was granted February 2, 1885.

Mr. **T. C. Catchings**, for appellants.

Messrs. **John F. Hanna** and **James M. Johnson**, for appellees.

[62] *Mr. Justice* **Matthews** delivered the opinion of the court:

The appellees, who composed the firms of Dunham, Buckley & Co., who were citizens of New York, and of Edwin Bates & Co., who were cititizens of New York and South Carolina, filed their bill in equity, on July 14, 1881, in the Chancery Court of Jefferson County, Mississippi, against John W. Broughton, and Andrew Stewart, Andrew D. Gwynne, and P. H. Haley, composing the firm of Stewart Bros. & Co., and others, all of whom were citizens either of Mississippi or of Louisiana.

On September 16, 1881, the complainants filed a petition for the removal of the cause from the state court to the Circuit Court of the United States for that district, on the ground of citizenship, the amount in controversy being in excess of five hundred dollars in value, and presented a bond in conformity with the provisions of law. This was denied, notwithstanding which a certified transcript of the proceedings in the cause was filed in the Circuit Court on November 3, 1881, and that court proceeded thereon to final decree.

The complainants in the bill were creditors severally of Broughton, and its object and prayer were to set aside a conveyance of a stock of merchandise, made by him to the defendants Stewart Bros. & Co., alleged to be fraudulent as against his creditors, and was filed on behalf of the complainants and all other creditors who might come in and share the costs of the litigation.

After the cause was removed into the Circuit Court, the bill was amended by permitting Sigmond Katz, Jacob Katz, Nathaniel Barnett, and Selvia Barnett, partners as Katz & Barnett, and John I. Adams and W. H. Renaud, composing the firm of John I. Adams & Co., creditors respectively of Broughton, to become co-complainants. The members of the firm of Katz & Barnett are described as "resident citizens of and doing business in the City of New Orleans, State of Louisiana, and in the City of New [63] York, State of New York." The citizenship of those who constitute the firm of John I. Adams & Co. does not appear.

On final hearing, on November 25, 1882, a decree was rendered in favor of the complainants; finding that the transfer and conveyance of his property by Broughton to Stewart Bros. & Co., described in the pleadings, was made with the intent to hinder, delay and defraud the complainants and other creditors of Broughton with the knowledge and connivance of Stewart Bros. & Co., and the same was thereby canceled, set aside, and declared to be null and void. The decree proceeds as follows: "It appears to the court that the complainants, at and before making of said pretended transfer and conveyance, were, and still are, creditors of the said John W. Broughton, and that the amount due each of them respectively, including interest to to this date, is as follows: Dunham, Buckley & Co., ten thousand two hundred and twenty-two $\frac{50}{100}$ dollars ($10,222.50); Edwin Bates & Co., four thousand three hundred and ninety-one $\frac{08}{100}$ dollars ($4,391.08), John I. Adams & Co., seven hundred and six $\frac{87}{100}$ dollars ($706.87); and Katz & Barnett, nine hundred and thirty $\frac{82}{100}$ dollars ($930.82). Total, sixteen thousand two hundred and fifty $\frac{77}{100}$ dollars ($16,250.77). It appears to the court that the defendant John W. Broughton is insolvent, and without property or means, and that the defendants Stewart Bros. & Co., had in their hands and possession, at the time of filing the bill of complaint in this cause, and still have, property, assets, and money, being the same fraudulently transferred and conveyed to them by the defendant John W. Broughton, as aforesaid, and the proceeds of the same, amounting to a sum largely in excess of the said sum of $16,250.77, due complainants as aforesaid. It is, therefore, ordered, adjudged and decreed, that the defendants John W. Broughton and Andrew Stewart, Andrew D. Gwynne, and P. H. Haley, composing the firm of Stewart Bros. & Co., do pay to the complainants the above-mentioned sums respectively due them, with interest thereon at the rate of six (6) per cent per annum from this date until paid, that is to say: To Dunham, Buckley & Co., ten thousand two hundred and twenty-two $\frac{50}{100}$ dollars ($10,222.50); to Edwin Bates & Co., four thousand three hundred and ninety-one $\frac{08}{100}$ dollars ($4,391.08); to Katz & Barnett, nine hundred and thirty $\frac{82}{100}$ dollars ($930.82); and to John I. Adams & Co., seven hundred and six $\frac{87}{100}$ dollars ($706.87); for which amounts and costs executions in favor of said creditors respectively may issue as at law." The appeal is from this decree.

The appellants assign as error, that the court proceeded to decree, after admitting Katz & Barnett and John I. Adams & Co. as co-complainants, alleging that, as the case then stood, it was without jurisdiction, as the controversy did not appear to be wholly between citizens of different States. This, of course, could have furnished no objection to the removal of the cause from the state court, because at that time these parties had not been admitted to the cause and their introduction afterwards as co-complainants did not oust the jurisdiction of the court, already lawfully acquired, as between the original parties. The right of the court to proceed to decree between the appellants and the new parties did not depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and it would be merely matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. If the latter course had been adopted no question of jurisdiction could have arisen. The adoption of the alternative is, in substance the same thing.

It is, however, objected by the appellees Edwin Bates & Co., Katz & Barnett, and John I. Adams & Co., that, as to them respectively, this court has no jurisdiction of the appeal, for the reason that the decrees in their favor are several, and that the amounts adjudged to be paid to them respectively do not exceed the sum or value of five thousand dollars.

On the authority of *Seaver* v. *Bigelow*, 5 Wall. 208 [72 U. S., bk. 18, L. ed. 595]; *Schood* v. [illegible], 106 U. S., 188 [Bk. 27, L. ed. 156]; [illegible] & T. Co. v. *Waterman*, 106 U. S., 265 [Bk. [illegible] L. ed. 115]; *Adams* v. *Crittenden*, 106 U. S., [illegible] Bk. 27, L. ed. 99]; *Hawley* v. *Fairbanks*, [illegible] U. S., 543 [Bk. 27, L. ed. 820]; and *Nat. Bk.* v. *Shed*, 113 U. S. 684 [Bk. 28, L. ed. 1152] the motion to dismiss the appeal as to all the creditors, except Dunham, Buckley & Co., must be granted.

As to the remaining appellees, the cause must be disposed of on the merits. An outline of the transactions involved in the controversy is as follows: Broughton carried on business as a merchant in Rodney, Mississippi, and became indebted, by reason of advances made on account of cotton purchases, to the appellants, Stewart Bros. & Co., merchants in New Orleans in about the sum of $34,000. Being pressed for payment, on May 26, 1881, he gave his two promissory notes therefor, payable one in six, the other in eight months after date, with interest at the rate of eight per cent per annum; and, to secure the payment of the same, a written instrument of that date was executed, by which Broughton conveyed to C. J. Pintard all his stock of merchandise and assets and property, in trust, in case he should make default in the payment of the principal or interest of the notes, to sell the property conveyed, at public auction, for cash, to the highest bidder, at the request of the holder of the notes, on twenty days' notice. The instrument also contained the following provision: "It is understood and agreed between the parties hereto, that the said party of the first part shall have the right to carry on the business as heretofore, for the purpose of selling off the stock of goods and collecting in the notes and accounts due and to become due, and, in order to enable said party of the first part to carry on said business, the said parties of the third part hereby agree to advance to him the further sum of one thousand dollars, which last amount is to be understood and agreed to be included in and covered by this deed in trust, and to be due and payable six months after this date, the maturity of the first note." This paper, executed by all the parties, was recorded on May [illegible], 1881.

On June 13, 1881, having been advised that the conveyance was probably ineffectual as to other creditors, by reason of its form and contents, Broughton and Pintard, the latter, united in a conveyance of the same property unconditionally to Stewart Bros. & Co., in satisfaction of the debt represented by the notes, and the latter took possession of the property conveyed; and on the same day Broughton executed also a bill of sale, for the same property, upon the same consideration, to Stewart Bros. & Co.

It is contended by the appellees that these conveyances, the last as well as the first, are void as against creditors, *per se*, and void on their face, and such was the ground of the decree appealed from, as stated in the opinion of the court. To this we cannot accede. Assuming that the conveyance to Pintard, in trust, was of that character, according to the law of Mississippi, it does not follow that the subsequent sale and transfer, followed by delivery of possession, is tainted by the vice of the original transaction. The objection we are considering assumes that the whole transaction, from the beginning, was free from actual and intended fraud, and was meant to be a mode of securing and paying an actual debt, in good faith, without any design injurious to other creditors, beyond that implied in obtaining a preference, which is not forbidden by law. In this view, the admission that the conveyance to Pintard was illegal does not affect the subsequent sale, which, on the contrary, being free from objection, on account of its own nature and form, served to remedy the defects in the original security. It was quite competent for the parties to rescind and cancel the first conveyance, and unite in the execution of another, free from objection. This is all they did.

It is further urged, however, that the sale to Stewart Bros. & Co., however formally correct, and technically legal on its face, was made in pursuance of a design, participated in by both parties, actually to hinder, delay and defraud the creditors of Broughton. On this point we have examined and weighed the evidence, with attention and care, and are of opinion that it does not sufficiently establish the case of the appellees. It would not be profitable to rehearse the testimony, and point out the facts and circumstances relied on, on the one hand, to establish the fraud charged, and those, on the other, adduced to rebut the suspicions of dishonest and unlawful combination to defeat the claims of honest creditors. [67]
It is sufficient, we think, to say, that the proof falls short of that which the law requires to establish so grave a charge.

It follows that the decree in favor of James H. Dunham, William T. Buckley and Charles H. Webb, partners as Dunham, Buckley & Co., must be reversed and the cause remanded, with directions to dismiss the bill as to them; and it is so ordered. As to all the other appellees, the appeal is dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN S. PIRIE ET AL., Partners as CARSON, PIRIE, SCOTT & CO., *Plffs. in Errr.*, [41]
v.
EVAN J. TVEDT ET AL., Partners as TVEDT BROTHERS.

(See S. C., Reporter's ed., 41-45.)

Removal of causes—joint action in tort, not severable into separate parts.

1. In a suit for malicious prosecution (brought by citizens of one State against citizens of the same State and citizens of another State), there is no such separate controversy as entitles the citizens of the other State to remove the cause, even though they answered separately, from their co-defendants setting up a separate defense.
2. Where the cause of action is several as well as joint, the plaintiff may elect to sue each defendant separately, or all jointly, and the defendants are not permitted to object.
3. The fact that judgment may be rendered against a part of the defendants only, does not divide a joint action in tort into separate parts any more than it does a joint action on contract.

[No. 287.]

Submitted Apr. 24, 1885. Decided May 4, 1885.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

The history and facts of the case appear in the opinion of the court.

Mr. **Gordon E. Cole,** for plaintiffs in error.

No counsel appeared for the defendants in error.

[41] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This is a writ of error brought under section 5 of the Act of March 3, 1875, ch. 137, 18 Stat. at L., 470, for the review of an order of the Circuit Court remanding a cause which had been removed from a state court. The suit was brought by Tvedt Brothers, citizens of Minnesota, against Carson, Pirie, Scott & Co., citizens of Illinois, and Owen J. Wood and Theodore S. Stiles, citizens of Minnesota, to recover damages for a malicious prosecution, it being averred in the complaint that "the said defendants, confederating together, and with a malicious and unlawful design and intent had and entertained by them, and each of them, to injure, oppress, and harass these plaintiffs and to break them up in business, wrongfully, ma-
[42] liciously, unlawfully, and without any reason or provocation, or probable cause, caused a certain action to be commenced against these plaintiffs, in which said Carson, Pirie, Scott & Co. were plaintiffs, for the pretended recovery of money, * * * and then and there wrongfully, unlawfully and maliciously, and with the aforesaid intent so had and entertained by each and all of said defendants wickedly and maliciously conspired together, and without probable cause, caused to be issued * * * a writ of attachment upon the stock of goods, wares and merchandise of these plaintiffs; * * * that, under said writ of attachment, and by direct instruction of the defendants, the sheriff of said county levied the same upon the stock of goods and closed up the store, and stopped and broke up the business of these plaintiffs." The defendants, Wood & Stiles, answered separately from their codefendants, denying all malice and conspiracy, and saying that they, as attorneys at law, and acting for and under the instructions of Carson, Pirie, Scott & Co., brought the action and sued out the attachment in good faith, and not otherwise. The other defendants also filed a separate answer, admitting that they caused the action to be brought and the attachment to be issued, and that the attachment had been vacated, though the action itself was still pending and undisposed of.

Upon these pleadings Carson, Pirie, Scott & Co. filed a petition under the second clause of section 2 of the Act of 1875, for the removal of the cause to the Circuit Court of the United States, on the ground that as the action was in tort and therefore in its nature severable, there was in it "a controversy which is wholly between citizens of different States, to wit: between the plaintiffs and Pirie, Scott & M'Leish, * * * and that said controversy can be fully determined as between them."

After the case got into the Circuit Court on this petition, it was remanded because there was but one controversy in the suit, and that between the plaintiffs, citizens of Minnesota, on one side, and all the defendants, citizens of Minnesota and Illinois, on the other. This ruling is the only error assigned.

It has been decided at this term in *R. R. Co.* v. *Ide* [*ante*, 63], that in a suit on a contra brought by a citizen of one State against citizen of the same State and a citizen another State, there was no such separate co troversy as would entitle the citizen of the oth State to remove the cause, even though he a swered separately from his codefendant se ting up a separate defense, and the statut regulating the practice, pleadings and form and modes of proceeding in the State where th suit was brought, allowed judgments to b given in actions *ex contra tu* for one or mo plaintiffs and for one or more defendants. I that case it was said: "A defendant has no rig to say that an action shall be several which plaintiff elects to make joint. *Smith* v. *Rine* 2 Sumn., 358. A separate defense may defe a joint recovery, but it cannot deprive a plai tiff of his right to prosecute his own suit to final determination in his own way. The cau of action is the subject-matter of the contr versy, and that is for all the purposes of th suit, whatever the plaintiff declares it to be his pleadings. Here it is certain joint co tracts entered into by all the defendants f the transportation of property. On the one si of the controversy upon that cause of action the plaintiffs, and on the other all the defen ants."

We are unable to distinguish this case principle from that. There is here, accordi to the complaint, but a single cause of actio and that is the alleged malicious prosecution the plaintiffs by all the defendants acting concert. The cause of action is several as w as joint, and the plaintiffs might have sued ea defendant separately, or all jointly. It was f the plaintiffs to elect which course to pursu They did elect to proceed against all jointl and to this the defendants are not permitted object. The fact that a judgment in the a tion may be rendered against a part of the d fendants only, does not divide a joint action tort into separate parts any more than it do a joint action on contract.

The order remanding the case is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.

Mr. Justice **Harlan,** dissenting:

Mr. Justice **Woods** and myself dissent fro the opinion and judgment in this case. A though the action is, in form, against all of t defendants jointly, it is practically, a separa one against each defendant; for it is conced that, by the laws of Minnesota, it would not wholly defeated if the plaintiffs failed to esta lish a cause of action against all of the defen ants. They would be entitled to judgme against the defendant or defendants agai whom a case was made. Had the suit be only against the defendants who are citize of Illinois, as it might have been, the right the latter to remove it into the Circuit Court the United States would not be questione But it seems, by the present decision, that th right of removal has been defeated by the of the plaintiffs in uniting with them as defe ants, citizens of Minnesota, against whom,

[illegible] it was not necessary to introduce any evidence whatever in order to entitle the plaintiffs to a judgment against the other defendants. As in most, if not in all the States the local statutes dispense with the verification of pleadings in actions of tort, this convenient [illegible] will be often employed. When, for instance, a citizen of New York has a cause of action, sounding in damages, against a citizen of New Jersey, who happens to go within the jurisdiction of the former State, the plaintiff can join a citizen of New York as a codefendant, charging them jointly with liability to him for the damages claimed. And when the citizen of New Jersey asks a removal of the suit to the federal court, he is met with the suggestion that it is for the plaintiff, in his discretion, to sue him separately, or jointly with others. Upon his application to remove the cause the state court may not institute a preliminary inquiry as to whether the plaintiff had, in fact, a cause of action against the defendant citizen of New York. It is not for that court, in advance, to determine the good faith of the plaintiff in making a citizen of New York a codefendant with the citizen of New Jersey. The removal statutes make no provision for such an inquiry, and the state court, by the decision just rendered, must look alone to the cause of action as set out in the petition or complaint. When, in the case supposed, the evidence is concluded, and it appears that there is, in fact, no cause of action against the defendant citizen of New York, it is too late for the removal to occur; for, it must be had, if at all, before the suit could be tried in the state court. It seems to us that where the plaintiff is a suit against several defendants in tort, is not required to prove a joint cause of action against all of them, but may have judgment as to those against whom he makes a case, there is, within the meaning of the Act of Congress, a controversy in the suit, which is wholly between the plaintiff and each defendant, and finally determinable as between them without the presence of the other defendants as parties in the cause. The suit, therefore, belongs to the class which, under the Act of [illegible] may be removed into the federal court. The decision in this case, it seems to us, restricts the right of removal, under the Act of [illegible], by citizens of States other than that in which the suit if brought, within much narrower limits than those established by previous legislation; and this, notwithstanding it was intended by that Act to enlarge the right of removal, especially in respect of controversies between citizens of different States.

Trans-copy. Test:

[illegible] H. McKenney, Clerk, Sup. Court, U. S.

[illegible] U. S., [illegible], [illegible], [illegible].

[illegible] HADDEN ET AL., Surviving Partners, *Plfs. in Err.*,

v.

[illegible] A. MERRITT, Collector of the PORT OF NEW YORK.

([illegible] C., Reporter's ed., 25-28.)

[illegible] of foreign coins—official estimate of—how [illegible]—correction of errors.

1. The value of foreign coins, as ascertained by the estimate of the director of the mint and proclaimed by the Secretary of the Treasury, is conclusive upon custom-house officers and importers.

2. Alleged errors in the estimate cannot be shown in judicial proceedings to affect the rights of the government or individuals.

3. As the duty of ascertaining and declaring the value of such coins is an executive function, which requires skill and the exercise of judgment and discretion, errors can only be corrected by an appeal to the department itself.

4. Sections 2838 and 3564 R. S., construed. The case of Cramer v. Arthur, bk. 26, 259, affirmed.

[No. 269.]

Argued Apr. 23, 1885. Decided May 4, 1885.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Messrs. **Mason W. Tyler,** *Henry E. Tremain* and *Wm. B. Coughtry*, for plaintiffs in error.

Mr. **S. F. Phillips,** *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

This was an action brought by plaintiffs in error against the Collector of the Port of New York, to recover an excess of duties, alleged to have been illegally exacted and paid under protest. A verdict was returned for the defendant under instructions to that effect by the court, and judgment rendered accordingly. To this ruling of the court exceptions were duly taken, and it is now assigned for error. [26]

The plaintiffs' case was this: In the year 1879 they imported from China several invoices of merchandise, subject to an *ad valorem* duty, the value of which was stated in the invoices in Mexican silver dollars, the currency of the country whence the goods were exported. In converting the value of the invoices, as expressed therein, from Mexican silver dollars into the value by which the actual *ad valorem* duty upon them was to be ascertained, the dutiable value was arrived at in each case by estimating the value of the Mexican dollar in accordance with the value of such coin as estimated by the director of the mint, and proclaimed by the Secretary of the Treasury on the 1st day of January of the year during which the importations were made; and the value of the Mexican dollar so ascertained, estimated and proclaimed was $1.01\frac{5}{10}$, and duties were assessed upon the importations accordingly.

The plaintiff offered to prove that this valuation of the Mexican dollar, as estimated and proclaimed, was erroneous in this, to wit: that it was based on the value of the Mexican dollar as compared with the silver dollar of the United States, whereas it ought by law to have been estimated and proclaimed by relation to the value of the gold dollar of the United States, and that this would have diminished the dutiable value of the goods imported, by the difference between from $84\frac{8}{10}$ cents to $86\frac{7}{10}$ cents, and $101\frac{5}{10}$ cents, as the value of the Mexican dollar, varying, according to the dates of the several importations, with the commercial difference in value between gold and silver. The evidence offered on this point was rejected, and the ruling of the court, in its instruction to the

jury to return a verdict for the defendant, was based on the proposition that, in assessing the duties collected on the value of the invoices, reduced from the Mexican silver dollars to the money of account of the United States, the collector and importer were concluded by the estimate of the director of the mint, proclaimed by the Secretary of the Treasury, and then in force.

[27]

In opposition to that, it is contended that such estimate is not conclusive, in a case where it can be shown that it is based on the value of the foreign silver coin computed in terms of the silver dollar, instead of the gold dollar, of the coinage of the United States, in violation, it is argued, of the statutory rule prescribed for making such estimate, which requires that the value of the foreign coin, so estimated, shall be expressed in the money of account of the United States, the standard unit of value of which is assumed to be the gold dollar and not the silver dollar.

Section 2838 R. S. requires all invoices of merchandise, subject to a duty *ad valorem*, to be made out in the currency of the place or country from whence the importation shall be made, and that they shall contain a true statement of the actual cost of such merchandise in such foreign currency or currencies, without any respect to the value of the coins of the United States, or of foreign coins, by law made current within the United States, in such foreign place or country.

Section 3564 R. S. is as follows: "The value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint and be proclaimed on the first day of January by the Secretary of the Treasury."

The value of foreign coins, as ascertained by the estimate of the director of the mint and proclaimed by the Secretary of the Treasury, is conclusive upon custom-house officers and importers. No errors alleged to exist in the estimate, resulting from any cause, can be shown in a judicial proceeding to affect the rights of the government or individuals. There is no value, and can be none, in such coins, except as thus ascertained; and the duty of ascertaining and declaring their value, cast upon the Treasury Department, is the performance of an executive function requiring skill and the exercise of judgment and discretion, which precludes judicial inquiry into the correctness of the decision. If any error, in adopting a wrong standard, rule or mode of computation, or in any other way, is alleged to have been committed, there is but one method of correction; that is, to appeal to the department itself. To permit judicial inquiry in any case is to open a matter for repeated decision, which the statute evidently intended should be annually settled by public authority; and there is not, as is assumed in the argument of the plaintiff in error, any such positive and peremptory rule of valuation prescribed in the statute, as serves to limit the discretion of the Treasury Department in making its published estimate, or would enable a court to correct an alleged mistake or miscalculation. The whole subject is confided by the law exclusively to the jurisdiction of the executive officers charged with the duty; a their action cannot be otherwise questioned.

[28]

Such was the principle announced in the ca of *Cramer* v. *Arthur*, 102 U. S., 612 [Bk. 26, ed. 259]. It was there said, p. 616 [261]: "Th valuation, so long as it remained unchange was binding on the collector and on importe —just as binding as if it had been in a perm nent statute, like the statute of 1846, for e ample. Parties cannot be permitted to go b hind the proclamation, any more than th would have been permitted to go behind t statute, for the purpose of proving, by parol by financial quotations in gazettes, that its v uations are inaccurate. The government g at the truth as near as it can, and proclaims Importers and collectors must abide by the r as proclaimed. It would be a constant sou of confusion and uncertainty if every impor could on every invoice, raise the question the value of foreign moneys and coins. * * P. 619 [262]: If existing regulations are fou to be insufficient, if they lead to inaccurate sults, the only remedy is to apply to the Pr dent, through the Treasury Department, change the regulations."

There was no error in the ruling of the C cuit Court, and the judgment is affirmed.

True copy. Test:

J. H. McKenney, Clerk, Sup. Court, U

JOHN S. MAYFIELD, *Plf. in Err.*,

v.

MARY E. RICHARDS ET AL.

(See S. C., Reporter's ed., 137-142.)

Limitation of actions—Act of Congress of J 11, 1864—application of, to proceeding State Courts—administration of estates.

1. The Act of Congress of June 11, 1864, con ing the limitation of actions, applies to cause proceedings in the courts of the States as well those in the courts of the United States.

2. Where the payees of certain notes were d ciled in New Orleans after the authority of United States was re-established, the executri the succession of the maker being domiciled w the confederate lines, an action on said not within the Act.

3. Stewart v. Kahn, Bk. 20, 176, affirmed.

[No. 2647.]

Submitted April 22, 1885. Decided May 4, 1

IN ERROR to the Supreme Court of the S of Louisiana.

The history and facts of the case appe the

Statement by *Mr. Justice* **Woods:**

The facts shown by the record were as lows: On March 30, 1860, Walter O. Win the Parish of Rapides, in the State of Louisi made and delivered to the firm of Rotchf Brown & Co., of the City of New Orleans nine promissory notes, each for the payme their order of $5,000, four of which we become due and payable on Novembe 1860, and five on December 10, 1860. W died in 1861, leaving a last will, which afterwards duly proven, by which he mad

NOTE.—*Statute of Limitations—Suspension of ing war.* See Hanger v. Abbott, 73 U. S. bk. 2 *note.*

with Mary E. Winn, his universal heir and legatee and executrix. As such she took possession of the estate. The nine notes payable to order of Rotchford, Brown & Co. were presented to Mrs. Winn, as executrix, for her acknowledgment thereof as a debt against the succession of Winn, and she indorsed on each of them such acknowledgment, with a promise to pay the same in due course of administration. These indorsements all bore date November 1, 1865. Mrs. Winn continued in the office of executrix until September 30, 1873, when, by the order of the District Court for the Parish of Rapides, she was "destituted"—that is to say, removed—"from said executorship of the estate of Winn," and J. M. Wells, was appointed dative testamentary executor of said succession.

On July 5, 1880, Wells, as such executor, filed a provisional account of his administration in the District Court for the Parish of Rapides, which had probate jurisdiction. In his account he recognized the nine notes above mentioned payable to the order for Rotchford, Brown & Co., which, in January, 1866, had been transferred by the payees to the appellant, John S. Mayfield, as valid claims against the succession, and proposed to apply the assets in his hands to their payment.

Mrs. Winn, under the name of Mary E. Richards, she having intermarried with A. Lane Richards, filed, with the authorization of her said husband, on January 11, 1881, her opposition to the allowance and payment of the notes, and stated her ground of opposition as follows: "The notes are prescribed and were prescribed at the date they were accepted by the executrix, the date of acceptance being written on the back of the notes long before they were accepted by the executrix, and accepted in error."

One John D. DuBose, a creditor of the succession, also opposed the recognition and payment of the notes, because "said nine notes were prescribed long before they were pretended to be acknowledged by the executrix, Mrs. Mary E. Winn, and the acknowledgment was made by her in the City of New Orleans, Louisiana, in January or February, 1866, and not on the 1st day of November, 1865, as it appears."

There was no charge, and no attempt to prove that the antedating of the acknowledgment of the executrix had been fraudulently procured, and, if the notes were not prescribed at any time after January, 1866, as contended by Mayfield, there was no motive to antedate the acknowledgment, and nothing to be gained by it.

The contention that these notes were prescribed was based on Article 3540 of the Civil Code of Louisiana, which declares that "notes payable to order or bearer * * * are prescribed by five years' reckoning from the day when the payments were payable." Mayfield contended that the notes had been admitted as valid claims against the succession of Winn by the executrix, on November 1, 1865, as appears by her indorsement thereon, and, as such indorsement was made before the expiration of five years after the maturity of the notes, it was effectual to suspend prescription, and the notes were, therefore, not prescribed.

Upon the opposition of Mrs. Winn and DuBose the question whether the nine notes were prescribed was tried by the judge of the District Court in which the opposition was filed. He admitted evidence to show, and upon it decided, that the acknowledgment of Mrs. Winn, as executrix, indorsed upon the notes, and purporting to be dated November 1, 1865, was not in fact made on that day, but some time between the first and tenth days of January, 1866. As this was more than five years after the maturity of the notes, it was not competent for the executrix to acknowledge them, and they were apparently barred by the prescription of five years provided by the law of the State.

But the appellant, Mayfield, contended that the notes were saved from the prescription of five years, by (the Act of Congress of June 11, 1864, 13 Stat. at L., 123), entitled "An Act in Relation to the Limitations of Actions in certain cases," which provided that "whenever during the existence of the present rebellion any action, civil or criminal, shall accrue against any person who, by reason of resistance to the execution of the laws of the United States or the interruption of the ordinary course of judical proceedings, cannot be served with process, * * * the time during which such person shall so be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

To bring the notes in controversy within the terms of this statute, Mayfield offered to the District Court evidence tending to show that Rotchford, Brown & Co., the payees, were domiciled in the City of New Orleans, and were doing business there when the city was taken by the Federal forces in 1862, and that Shepherd Brown, one of the members of the firm, was in the city in 1864, and that Mayfield, the appellant, was also a resident of New Orleans.

He also introduced testimony tending to show that the United States had no jurisdiction over the Parish of Rapides during the war, except a military one, and that such military jurisdiction lasted for but a short time; that the Federal troops came to Alexandria, the county seat of Rapides Parish, about March 17, 1864, and remained in possession thereof until about May 15th, when they departed; that before leaving they burned the Town of Alexandria, including the court house, after which there was a state of disorganization; there was no court and there were no officers in the parish until after July 9, 1865; that Mrs. Winn, the executrix, had gone as a refugee to Texas, and no service could have been made on her from the time the court house was burned until she returned to Rapides Parish, in December, 1865. This testimony was uncontradicted. [140]

Upon this evidence the District Court decided that, conceding that the acknowledgment of Mrs. Winn as executrix was not indorsed on the nine notes until some day between the first and tenth of January, 1866, yet the prescription of the notes were suspended by the Act of Congress above recited for a period sufficient to save them from the bar of Article 3540 of the Code of Louisiana, and thereupon rendered judgment that the claim of Mayfield was a valid

and legal debt due from the succession of Winn, and was properly placed in the provisional account as an ordinary claim.

Mrs. Winn and DuBose carried this judgment to the Supreme Court of Louisiana for review. That court, assuming that the facts which the evidence introduced in the District Court tended to prove were established, reversed the judgment of the district court on the ground that the Act of Congress on which Mayfield relied to suspend prescription applied only to causes and proceedings in the courts of the United States, and not to causes and proceedings in the courts of the States, and that the claim of Mayfield was therefore prescribed when Mrs. Winn, the executrix, undertook to acknowledge it in January, 1866.

The present writ of error, sued out by Mayfield brings the judgment of the Supreme Court of Louisiana under review.

Messrs. **E. T. Merrick** and *R. M. Hunter*, for plaintiff in error.

Mr. **Gus A. Breaux**, for defendants in error.

[141] *Mr. Justice* **Woods** delivered the opinion of the court:

It is well settled in Louisiana that when a claim against a succession has been formally acknowledged by the executor or administrator, no suit should be brought upon it, and no suit or other proceeding is necessary to prevent prescription as long as the property of the succession remains in the hands of the executor or administrator under administration. *Renshaw* v. *Stafford*, 30 La. Ann., 853; *Maraist* v. *Guilbeau*, 31 La. Ann., 713; *Heirs* v. *Hornsby*, 32 La. Ann., 337; *Cloutier* v. *Lemée*, 33 La. Ann., 905; *Johnson* v. *Waters*, 111 U. S., 640 [Bk. 28, L. ed. 547]. If, therefore, the acknowledgment of Mrs. Winn, execurix, made in January, 1866, were made before the notes were prescribed, prescription has been suspended ever since, for the succession of Winn is still under administration. The notes were all barred in November and December, 1865, by the prescription of five years established by Article 3,540 of the Civil Code of Louisiana, unless prescription was suspended by the Act of Congress above recited. The case, therefore, turned in the Supreme Court of Louisiana upon the question whether the Act of Congress was applicable. That court decided that it was not, and denied to the appellant the right set up and claimed by him under that statute. If the decision of the Supreme Court of Louisiana was wrong upon this point, this court has jurisdiction to review and reverse its judgment. U. S. Revised Statutes, § 709.

The facts of the case, as shown by the record, bring it within the terms of the Act of Congress. The parish of Rapides was within the Confederate lines during the entire period of the civil war, except for a few weeks, when it was occupied by the Federal troops. The authority of the United States was re-established over the City of New Orleans on May 1, 1862. The payees of the notes were shown to have been domiciled in the city at that time, and as there is no evidence that they afterwards changed their domicil, the presumption is that it continued unchanged. *Desmare* v. *U. S.*, 93 U. S., 605 [Bk. 23, L. ed. 959]. Mayfield is shown to have been a resident in New Orleans. It appear therefore, that the executrix of the successi of Winn was within the Confederate lines, a the payees and the endorsee of the notes with the Federal lines. Under these circumstanc they could not lawfully institute proceedin against the succession of Winn, in the pari of Rapides, to enforce the payment of the not for intercourse across the military lines w forbidden by law. Moreover, while the p scription of five years was running, the cou of the parish, which alone had jurisdiction the succession of Winn, were closed for m than a year, a period well described by L Coke: "So, when by invasion, insurrection, bellion, or such like, the peaceable course justice is disturbed and stopped, so as the cou of justice be, as it were, shut up *et silent l inter arma*, then it is said to be time of wa Co. Lit., 249 *b*.

The case, therefore, falls within the letter of the Act of Congress; and if that app to and governs cases in the courts of the Sta the judgment of the Supreme Court of Lou ana was erroneous.

The question thus raised was expressly cided by this court in the case of *Stewart Kahn*, 11 Wall., 493 [78 U. S., bk. 20, L. 176], where it was held that the Act applie cases in the courts of the States as well a the United States, and that thus construed Act was constitutional. We are satisfied the judgment of the court in that case, and unwilling to question or re-examine it. decision in *Stewart* v. *Kahn* was followed the Supreme Court of Louisiana in *Aby* v. *ham*, 28 La. Ann., 840.

These cases are conclusive of the present troversy, and, adhering to the ruling ma them, we are of opinion that the notes hel Mayfield were not prescribed, and that *the ment of the Supreme Court of Louisiana sh therefore, be reversed, and the cause remand that court, with directions to enter judgment the claim of Mayfield, based on the nine no Walter O. Winn, is a legal and valid deb from his succession, and that it was pro placed in the provisional account of the testamentary executor as an ordinary claim; it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court.

JAMES S. PHILIPPI, *Appt.*,
v.
ANTONIO PHILIPPE ET AL.

(See S. C., Reporter's ed., 151-160.)

Statute of Limitations—application trusts—law of Alabama.

1. When a trust is repudiated by clear equivocal words and acts of the trustee, who the property as his own, and such repudiatio claim are brought to the notice of the bene

NOTE.—*Limitation of actions in equity; tion of statute to trusts.*

As to when lapse of time will bar actions in see Pratt v. Carroll, 12 U. S. (8 Cranch), 471, bk *note*; Thomas v. Brockenbrough, 23 U. S. (10 W 146, bk. 6,287, *note*; Elmendorf v. Taylor, 23 U Wheat.), 152, bk. 6, 287, *note*.

As a general rule, the Statute of Limitations run against express trusts. Prevost v. Gratz

in such a manner that he is called upon to assert his equitable rights, the general rule that the Statute of Limitations does not run against an express trust does not apply, and the statute begins to run from the time of such notice to the beneficary.

2. The general rule that, in the absence of a statute of limitations, if twenty years are allowed to elapse without the commencement of proceedings or the recognition or admission of the trust, a presumption of settlement arises, is sustained by the decisions of the Supreme Court of Alabama.

3. A promise to render an account of partnership and trust affairs and make a final settlement of the same, is not an acknowledgment that anything is due. A bill for such settlement, which contains no averment that anything is due the complainant, is insufficient.

[No. 268.]

Appeal Apr. 22, 1885. Decided May 4, 1885.

APPEAL from the Circuit Court of the United States for the Southern District of Alabama.

The history and facts of the case appear in the

Statement by *Mr. Justice* **Woods:**

The appellant was the plaintiff in the Circuit Court. The original bill was filed October 20, 1876. It was demurred to and the demurrer sustained. The plaintiff having obtained leave to amend, filed an amended bill, in which he stated his case substantially as follows:

The plaintiff is the son of Angelo M. Philippi, deceased. Some time previous to the year 1845 the said Angelo M. Philippi and Antonio Philippe, his brother, one of the defendants, were equal partners in carrying on in the City of Mobile, in the State of Alabama, a boarding-house and saloon, in which business they prospered. In 1845 Angelo decided to revisit his native country, the Island of Corsica. Before leaving Mobile he placed all his affairs, business, money and property in the keeping of his brother Antonio to manage for him, and the latter having accepted the trust, Angelo left the United States and went to Corsica. Antonio, after the departure of his brother, continued the partnership business for the joint benefit of both. He managed his brother's affairs and property and the partnership business with such skill and success that in May, 1847, he had in his possession the sum of $10,000 belonging to Angelo, upon which he agreed to pay interest. For the year ending November, 1847, the profits of the joint business were $8,000, and the joint income from their slaves for the same period was $4,500. For a time Antonio kept true accounts of these profits and incomes, fixing Angelo's share therein. He invested these accumulated gains of himself and his brother, Angelo, in real estate, taking, however, the titles in his own name.

In the year 1848 Antonio held, as the joint property of himself and Angelo, six houses and lots in the City of Mobile, valued at $26,000; subsequently to 1848 he bought a large amount of real estate, which he paid for out of the profit and incomes derived from the trust funds and from the slaves, and business jointly owned by himself and his brother.

During their long separation the relations of the brothers continued harmonious, and a correspondence was kept up between them.

By letters dated, respectively, May 5, 1847, and March 7, 1848, written in the Italian language, addressed by Antonio to Angelo, translations of which, marked Exhibits D and E, are attached to the bill, the former acknowledged the trust.

Angelo returned from Europe in December, 1856. Antonio did not deny the admissions made in the letters of May 5, 1847, and March 7, 1848, or repudiate the trusts therein acknowledged, but promised to render a true and just account of the partnership and trust affairs to Angelo, and to make a final settlement of the same; but he delayed doing so, from time to time, and never made said statement of account or final settlement. Subsequently, by papers marked Exhibits F and G, attached to the bill as parts thereof, Antonio expressly acknowledged the trust. [153]

Angelo being of foreign birth, and imperfectly acquainted with the English language, and being also a man of few associates, and those few foreigners, ignorant as he himself was, of the English language, never became fully informed of his rights and remedies under the laws of this country against his brother Antonio, and was averse to litigating with his brother, and repeatedly declared that the thought of a law suit with his brother was re-

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L. (9 Wheat.), 481, bk. 5, 311, *note*; Boone v. Chiles, 35 U. S. (10 Pet.), 177, bk. 9, 398; Oliver v. Piatt, 44 U. S. (3 How.), 333, bk. 11, 623; Zeller v. Eckert, 45 U. S. (4 How.), 289, bk. 11, 979; Seymour v. Freer, 75 U. S., 22 wal. 8, 248; Antice v. Brown, 6 Paige, 448; Kimball v. Jones, 17 Vt., 430; Kane v. Bloodgood, 7 Johns. Ch. 90; Murray v. Coster, 20 Johns., 576; Glass v. Hulbert, 102 Pa. St., 290; McCandless' Estate, 61 Pa. St., 436; Farmer v. Leiman, 52 Md., 710; Manion v. Titsworth, 9 B. Mon., 592; Farnam v. Brooks, 9 Pick., 212; Sparrow v. Heard, 31 Miss., 426; Fisk v. Wilson, 3 Sc. Ga., 68; Norton v. Ladd, 22 Conn., 203; Simms v. Jones, 71 Ga., 196; Wilmarding v. McKesson, 28 Cal., 632; People v. White, 38 Hun, 239; Neilly v. Duffy, 25 Hun, 603; Mathes v. Bennett, 21 N. H., 54; Pickston v. Brewster, 14 Ala., 315; Albretch v. Sussmann, 2 W. & S., 100; Carpenter v. Cushman, 105 Mass., 92; Woolhouse v. Woodhouse, L. R. 8 Eq., 514; Smith v. Garrick, L. R. 5 Ch. App., 233; Chalmer v. Bradley, 1 J. & W., 51; Shields v. Atkins, 3 Atk., 234; Hall v. Arthur, 26 Beav., 210; Beckford v. Wade, 17 Ves., 97; Beaumont v. Boultbee, 5 Ves., 485. The statutes not apply where the trust is repudiated by clear and unequivocal words and acts of the trustee who claims the trust estate as his own, and such repudiation and claim are brought to the knowledge of the cestui que trust in such a manner that he is called upon to assert his equitable rights. In addition to the above cases of Philippi v. Philippe and authorities cited in the opinion, see Halsey v. Tate, 52 Pa. St., 311; Neel v. McElhenney, 69 Pa. St., 300; Baker v. Whiting, 3 Sumn., 486; Hunter v. Hubbard, 26 Tex., 537; Hubbell v. Medbury, 53 N. Y., 98; Mabie v. Bailey, 16 Week. Dig., 557; Davis v. Coburn, 128 Mass., 377.

To the effect that twenty years will bar an action under such circumstances, see the authorities last above cited.

There must be no doubt of the adverse holding or that knowledge of it was brought home to the *cestui que trust*. In addition to the authorities last above cited, see Zeller v. Eckert, 45 U. S. (4 How.), 289, bk. 11, 979; Cunningham v. McKindley, 22 Ind., 149; Lewis v. Castleman, 27 Tex., 407; Scott v. Haddock, 11 Ga., 258; Moffatt v. Buchanan, 11 Humph., 369; Lister v. Pickford, 34 L. J. Ch., 582; Whitehead v. Lord, 11 Eng. L. & Eq., 587.

The statute runs against constructive trusts. Prevost v. Gratz, 19 U. S. (6 Wheat.), 481, bk. 5, 311; McClane v. Shepherd, 21 N. J. Eq., 76; Howell v. Howell, 15 Wis., 55; Strimpfler v. Roberts, 18 Pa. St., 300; Weaver v. Leiman, 52 Md., 710; Ashhurst's Appeal, 60 Pa. St., 290; Portlock v. Gardner, 1 Hare, 594; Atty-Gen. v. Fishmongers' Co., 5 Mylne & C., 16. See also Board of Supervisors v. Herrington, 50 Ill., 232; German-Am. Sem. v. Kiefer, 43 Mich., 105.

See, generally, Perry, Trusts, §§ 863-867, and authorities cited; Story, Eq. Jur., §§ 1520a-1520c.

pulsive to him, and chose rather to hope that his brother would ultimately fulfill his promise to account to him and render to him what was his due.

Upon his return from Europe in December, 1856, Angelo was possessed of but scanty immediate means, whilst the defendant, Antonio, had at his disposal much wealth. Angelo remained in Mobile after his said return until his death, which occurred May 1, 1874, and was in a condition of poverty, and at times almost of distress, and died leaving his family in want.

The translation of the letter of May 5, 1847, (Exhibit D,) written by Antonio to Angelo, contained the following passage: "2. Further, the certificate made by the hand of a notary as (that) I hold $10,000 of thine in my hands, which I pay thee interest." This is the only part of the letter pertinent to the case. The translation of the letter of March 7, 1848 (Exhibit E), contains the following passage, which is the only one referring to the present controversy:

"Now let us speak a little of our affairs. I will tell thee that I have arranged the accounts the first of November, on which the profit of the affairs which we hold together are $8,000; $4,000 I have marked them for thee to thy credit, which I wish that thou make me know what I must do with it. If thou wishest that I send them to thee, or wishest that I should do business with them for thy account. Since thou hast left I have made purchases; the house in which I am, $18,000. I have had a very beautiful one built on Dauphin street, cost $7,000; bought one in the same street, which thou knowest, where Colobo keeps his barroom, cost $6,000, thus counts 6 houses which we hold. The negroes give me of interest the sum of $4,500 a year without our trade. Thus, dear brother, [154] thou knowest well what is mine has been and always will be thine, and thou I am persuaded thy sentiments are the same. For this I wish to tell thee thou hast no need that the interest should keep thee melancholy."

Exhibit F, appended to the bill, is a copy of a petition filed by Antonio, in a suit brought against him in the Chancery Court of Mobile County by the administrator and heirs of Angelo, to enforce the same trust set up in this case. Antonio in this petition, which was under oath, after denying that he was indebted to his brother Angelo at the time of his death, in any amount whatever, stated that the bill filed against him required him to admit or deny the making of a writing under his hand acknowledging the trust set up in the bill; and as the writing was alleged to have been made more than thirty years before, he could not answer the averment of his having executed a writing of the effect charged without seeing it and prayed that the plaintiffs in that case might be required to submit the same to his inspection.

Exhibit F, attached to the amended bill, was an affidavit made and filed in the present cause by Antonio, in which he stated that it was wholly untrue that he was in any manner in indebted to the heirs of Angelo, as charged in the bill; that Angelo returned from Europe to Mobile in the year 1853, a fact not mentioned in the bill, and that while so in Mobile, and before he left again, a full settlement was made between him and the affiant of all matters of account, and that in such settlement a balance over $900 was found to be due the affiant from Angelo, which he had never paid. The affidavit further stated that about the year 187 Angelo had a claim upon an insurance compan for property destroyed by fire, which became subject of litigation; that, being destitute means, Angelo applied to affiant to lend hi money to support his family until he could recover the insurance money, and affiant le him $800 on his agreement to repay the loa out of the insurance money when collected that Angelo compromised his demand agains the insurance company for $3,000, and h creditors set up their claims against the fun in the chancery court, and that in that pr ceeding Angelo filed the following affidavit:

"That he is entirely destitute of property, e cept the money and proceeds coming to hi from the said policy of insurance. That it co stituted all the property he had in the worl except a few articles of household furnitu and wearing apparel for his family, which h is advised by law is exempt from execution an levy. And this affiant," Angelo, "now show to the court that he is advised by counsel th he is entitled to $1,000 as exempt from attac ment, levy or garnishment, and he claims th amount shall be left to him unaffected by cre itors or any of their proceedings in this cause, etc.

The affidavit of Antonio (Exhibit F) furth stated that he received out of said insuran money, on his claim for the money lent to Ang lo, the sum of $829.27, and the other credito got a like *pro rata* share out of the same fun

Antonio Philippe, Angela F. Philippi, i dividually and as administratrix of the esta of Angelo M. Philippi, and the brothers an sisters of the plaintiff, children and heirs Angelo M. Philippi, were made defendants the bill. The prayer was for a settlement the partnership, and an account of its propert profits and gains, and for a settlement of t trust, and that Antonio Philippe might be d creed to pay over to Angela F. Philippi, th administratrix, the one half of all the gains an profits of the partnership, with interest, and deliver to the plaintiff and to the defendant heirs at law of Angelo M. Philippi, all the re estate purchased by him in his own name, wi the trust funds belonging to Angelo, or wit his share of the profits of the partnership, an for a partition between Antonio Philippe an the heirs of Angelo M. Philippi of all lan held by the former in his own name, purchas with the joint funds of himself and Angelo M Philippi, and for other relief.

The defendant, Antonio Philippe, demurre to the bill, and for grounds of demurrer, b sides others, alleged that the cause of actio set out in the bill was stale and barred by t Statute of Limitations of Alabama, and th the plaintiff, being merely one of the heirs law of said Angelo M. Philippi, was not en tled to the relief prayed in the bill. The Ci cuit Court sustained the demurrer and di missed the bill, and the plaintiff appealed.

Messrs. **Frederick C. Bromberg,** *Luth R. Smith* and *W. Hallett Phillips,* for app lant:

The trusts charged in the bill were created before January 1?, 1853, the date when the Code went into effect in Alabama.

Power v. Bice, 28 Ala., 431.

Parols to said date trusts in lands could be proved by parol in Alabama.

Pickens v. Buckler, 62 Ala., 579.

Besides, it was unnecessary to set out the writings evidencing a trust. They are evidence.

Bishop v. Bishop, 128 Ala., 475; 1 Perry, Trusts (8 ed., sec. 84.

The letters written by the appellee are sufficient evidences of trusts charged in the bill.

1 Perry, Trusts (3 ed.), sec. 82; Browne, Stat. of Frauds (3 ed.), secs. 98, 99; 4 Kent, Com. (11 ed. 305, 1 Washb. R. P. (3 ed.), 468; *Barrel* v. Joy, 16 Mass., 221.

Limitations are purely creatures of statute.

Ott v. Thompson, 98 U., 489 (Bk. 25, L. ed. 95.)

There is no statute, and there never has been in Alabama a Statute of Limitations applicable to an express trust.

Grumlow v. Grumlow, 62 Ala., 330; *Coyle* v. Wilson, 57 Ala., 108.

Such trust can only be barred by the open and notorious holding of the trustee, adversely to the cestui que trust, long enough to raise the presumption of settlement.

1 Perry, Trusts (3 ed.), secs. 863, 866, 871; Lewis v. Bowman's Ex., 18 Wall., 509 (85 U. S., bk. 21, L. ed. 906); *Alexander* v. *McMurry*, 1 Wall., 189; *Wedderburn* v. *Wedderburn*, 4 Myl. & Cr., 32.

If he has been running adversely to Angelo, it could not have commenced to do so earlier than December, 1856. From December, 1856, to October 20, 1879, the date of filing of the bill, the period of the war must be deducted, from April 19, 1861, to April 2, 1866:

Hodges v. Abbott, 6 Wall., 582 (73 U. S., bk. 18, L. ed. 909); *Semmes* v. *Hartford Ins.* 2 Wall., 158 (50 U. S., bk. 20, L. ed. 490); Hornung v. Charleston, 96 U. S., 432 (Bk. 24, L. ed. 700); *Williams* v. *Bruffy*, 96 U. S., 176 (Bk. 24, L. ed. 716); *Ross* v. *Jones*, 22 Wall., 576 (89 U. S., bk. 22, L. ed. 733); *Brown* v. Allen, 25 Wall., 177 (82 U. S., bk. 21, L. ed. 9 The Protector, 12 Wall., 700 (79 U.S., bk. 20, L. ed. 469); *S. C.* 9 Wall., 687 (76U. S., bk. 19, L. ed. 822); *Bird* v. *Louisiana State Bk.*, 98 U. S. (Bk. 25, L. ed. 818).

Twenty years are required in Alabama to raise the bar of a presumption of a settlement of a implied trust.

Ingram v. Wilkins, 57 Ala., 108; *Harrison* v. Sterne, 16 Ala., 539; *McArthur* v. *Carrie*, 82 Ala., 2.

And moreover, in that State, courts of equity follow the Statute of Limitations at law.

Ryan v. Barker, 61 Ala., 530; *Bizzell* v. *Nix*, 61 Ala., 326.

And courts of equity generally do not follow the law even as to limitations, when manifest wrong and injustice would be wrought by so doing.

Ayer v. R. R. Co., 17 Fed. Rep., 873.

Nor do federal courts follow the state courts in matters of limitation in equity.

Bowman v. Campbell, 3 Wheat., 212; *Payne* v. Hook, 7 Wall., 429 (74 U. S., bk. 19, L. ed. Hawkins v. Rice, 1 McCrary, 162.

An account will be opened for fraud after a settlement, even after a lapse of twenty-three years."

1 Dan. Ch. Pr. (4 Am. ed.), 667; *Michoud* v. *Girod*, 4 How., 561; *Marks* v. *Pell*, 1 Johns. Ch., 594.

Messrs. **John A. Campbell** and *H. Pillans*, for appellees:

The causes of demurrer assigned are the Statutes of Limitations of the State of Alabama. By the Code of Alabama the statutes are the same in chancery as at law, and actions for accounts and bills for account are subject to the same limitation.

Code of Alabama, secs. 3224, 3274, 3758; *Nettles* v. *Nettles*, 67 Ala., 599; *Goodwyn* v. *Baldwin*, 59 Ala., 127; *Askew* v. *Hooper*, 28 Ala., 636; *Philippi* v. *Philippi*, 61 Ala., 41; *Wagner* v. *Baird*, 7 How., 234; 2 Story, Eq., secs. 1884, 1520; *Noyes* v. *Crawley*, L. R. 10 Ch. D., 31; *Caudrey* v. *Gilliam*, 60 Mo., 86.

The plaintiff is bound by the lapse of time * * * laches * * * the absence of valid evidence of title or of a trust.

Philippi v. *Philippi*, *supra*.

Mr. Justice **Woods** delivered the opinion of the court: [156]

We think that, upon the face of the amended bill, it is apparent that the plaintiff is not entitled to relief.

It appears from Exhibit G that Antonio Philippe contended that in the year 1853 he made a full settlement with Angelo, his brother, and that in such settlement there was a balance due to him from Angelo of over $900, which the latter had never paid. There is no averment in the bill that after 1853 there was anything due to Angelo, from Antonio Philippe on account of the trust property or partnership business. It is true the bill alleges that in 1856, when Angelo returned to Mobile from Corsica, Antonio promised to render an account of the partnership and trust affairs, and make a final settlement of the same, but this falls short of an acknowledgment that there was anything due to Angelo, either on account of the trust or partnership property. The bill is bare of any averment that on a settlement of the trust and the partnership there would have been anything due to Angelo. The complaint of the bill is simply that, upon the return of Angelo M. Philippi to Mobile in 1856, Antonio promised to render an account and make a final settlement of their joint affairs, but had never done so.

But aside from this defect in the bill, we think it sufficiently appears on its face that, if any ground for relief is therein set forth, it is stale and prescribed by lapse of time, and therefore not entitled to the favor of a court of equity.

Conceding what is contended for by the counsel for plaintiff that the Statute of Limitations does not run against an express trust, it must be borne in mind that this rule is subject to the qualification that when the trust is repudiated by clear and unequivocal words and acts [157] of the trustee who claims to hold the trust property as his own, and such repudiation and claim are brought to the notice of the beneficiary in such manner that he is called upon to assert his equitable rights, the Statute of Limitations will begin to run from the time such repudiation and claim came to the knowledge of the bene-

ficiary. *Prevost* v. *Gratz*, 6 Wheat., 481; *Oliver* v. *Piatt*, 3 How., 333; *Badger* v. *Badger*, 2 Wall., 87 [69 U.S., bk. 17, L. ed. 836]; *Kane* v. *Bloodgood*, 7 Johns. Ch., 90; *Bright* v. *Legerton*, 2 De G. F. & J., 606; *Wedderburn* v. *Wedderburn*, 4 M. & Cr., 52; *Merriam* v. *Hassam*, 14 Allen, 522; *Atty-Gen.* v. *Federal Street Meeting House*, 3 Gray, 1; *Williams* v. *First Presby. Soc.*, 1 Ohio St., 478; *Turner* v. *Smith*, 11 Tex., 620.

The rule applicable to cases of this kind has been declared by the Supreme Court of Alabama in the case of *Nettles* v. *Nettles*, 57 Ala., 599, to be as follows: "It is true, as a general rule, that when the relation of trustee and *cestui que trust* is uniformly admitted to exist, and there is no assertion of adverse claim or ownership by the trustee, lapse of time can constitute no bar to relief. But when the trust relation is repudiated, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief on the ground of lapse of time, and its inability to do complete justice." See also, *Goodwyn* v. *Baldwin*, 59 Ala., 127; *Philippi* v. *Philippi*, 61 Ala., 41; *Maury* v. *Mason*, 8 Port., 211; *Landsdale* v. *Smith*, 106 U. S., 391 [Bk. 27, L. ed. 219].

It is plain upon the face of the bill that Antonio Philippe, from and even prior to the year 1856, claimed as his own all the property which the bill alleged had been originally bought with trust or partnership funds, and that the knowledge of this claim was brought home to Angelo M. Philippi. When the latter returned to Mobile in 1856 he found Antonio Philippe in the possession and enjoyment, and holding by title in his own name, all the property charged to be trust and partnership property. And, although, [158] according to the averments of the bill, he promised to render an account of the parnership and trust affairs and make a final settlement thereof, he never did so; but from the year 1856, down to the death of Angelo M. Philippi, a period of eighteen years, and down to the commencement of this suit, a period of over twenty-three years, he maintained his possession and used and enjoyed as his own the property and its issues and profits. During all the period between 1856 and his death, Angelo M. Philippi lived in the same city with Antonio Philippe, in poverty, and some of the time in distress for want of means; but, so far as appears by the averments of the bill, the latter never paid him any part of the proceeds of the large property which the bill avers he was holding in trust. There could be no clearer line of conduct on the part of Antonio Philippe to show his repudiation of the alleged trust and his claim of title to the alleged trust property; and all was of necessity known by Angelo.

This claim of title was acquiesced in by Angelo, for, notwithstanding his poverty and distress for want of means, so far as appears by the bill, he never after the year 1856 requested of Antonio a settlement of the trust or demanded from him any part of the trust or partnership property, or the proceeds of either, but applied for and accepted money from him as a loan, and repaid it as far as his means would allow.

It is not averred that he was ignorant of any of the facts on which his rights rested, or that they were fraudulently concealed from him but merely that he was not fully informed of his rights and remedies under the law, and the bill plainly intimates that he declined to sue his brother, not because he was not informed of the facts of his case, but because a suit with a near a relative was repulsive to him and because he trusted in his brother to do him justice.

It appears from the bill that the present suit was not brought for more than twenty-three years after the claim of title to the alleged trust and partnership property was thus set up by the acts of Antonio, and after an acquiescence therein of Angelo during the residue of his life, a period of eighteen years.

The longest period prescribed by the law of Alabama within which actions may be brought is twenty years. Code of Alabama of 187[illegible] sections 3223 to 3231, inclusive. And by the provision of section 3758, the same limitation apply to suits commenced by bill in equity.

It is well settled by the decisions of the Supreme Court of Alabama, that, even in the absence of a statute of limitations, if twenty years are allowed to elapse from the time which proceedings could have been instituted for the settlement of a trust without the commencement of such proceedings, and there has been no recognition or admission within the period of the trust as continuing and undischarged, a presumption of settlement would arise operating as a positive bar. *Rhodes* v. *Turner*, 21 Ala., 210; *Blackwell* v. *Blackwell*, 33 Ala., 57; *Worley* v. *High*, 40 Ala., 171; *Rolland* v. *Morton*, 41 Ala., 344; *Harrison* v. *Hallin*, 54 Ala., 552; *Greenlees* v. *Greenlees*, 62 Ala., 330; *McCarty* v. *McCarty*, 74 Ala., 546.

The same general rule has been laid down by this and other courts as the settled law of equity jurisprudence. *Elmendorf* v. *Taylor*, 10 Wheat., 152; *Bowman* v. *Wathen*, 1 How., 189; *Wagner* v. *Baird*, 7 How., 234; *Kane* v. *Bloodgood*, 7 Johns. Ch., 90; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef., 636; *Marquis Cholmondeley* v. *Clinton*, 2 Jac. & Walk., 1[illegible] These authorities are pertinent and conclusive of the present case.

We have been referred by counsel for appellant to section 2 of ordinance No. 5, adopted on September 27, 1865, by the Alabama Constitutional Convention, then assembled, which provided that, "in computing the time necessary to create the bar of the Statutes of Limitation and non-claim, the time elapsing between the 11th of January, 1861, and the passage of this ordinance shall not be estimated"; and it is insisted that, after deducting the period mentioned, the defense of the staleness of the plaintiff's claim is not sustained. The authorities already cited are an answer to this contention. But it has been expressly held by the Supreme Court of Alabama that the time during which the Statutes of Limitation were suspended by the ordinance above mentioned is not to be deducted from the period of twenty years, the lapse of which raises the presumption of payment and satisfaction, and creates a positive bar, unless within that period there has been some recognition of the liability which is

[illegible] to enforce. *Harrison* v. *Heflin, McCarty* v. *McCarty*, *ubi supra*. No such recognition is [illegible]

The plaintiff's case appears, therefore, upon the face of his bill, to be stale and unworthy the [illegible] of a court of equity.

Decree affirmed.

[illegible] Test:

James H. McKenney, Clerk, Sup. Court, U. S.

E. S. WHEELER & CO., *Plffs. in Errr.*

v.

NEW BRUNSWICK AND CANADA RAILROAD COMPANY.

(See S. C., Reporter's ed., 29-40.)

Contracts—construction of—how annulled or set aside—option as to quantity.

[illegible] or modify a contract, fairly made, [illegible] the consent of both parties; the same meeting of minds that was necessary to make it.

[illegible] in an action upon a contract for the sale of a [illegible] quantity of old rails by a railroad company, [illegible] upon a review of the evidence, that a contract [illegible] between the parties; that it had not been [illegible] or set aside; that the company was not [illegible] from setting it up; and that it had the [illegible] to insist upon its own construction and refer [illegible] performance to the courts if necessary.

[illegible] agreement to accept from two to six hundred tons, is an agreement to accept any number [illegible] the expressed limits, the option being with [illegible]

[No. 279.]

[illegible] *Apr. 16, 1885. Decided May 4, 1885.*

[illegible] ERROR to the Circuit Court of the United States for the District of Connecticut.

[illegible] history and facts of the case fully appear in the opinion of the court.

[illegible] E. J. Phelps, J. K. Beach and J. [illegible], for plaintiffs in error.

[illegible] was an actual misunderstanding between the plaintiffs in error and the agent of [illegible] in error at the time the written [illegible] was made, in reference to the kind [illegible] intended by its language, the one understanding the word to mean gross tons, and [illegible] understanding it to mean net tons, [illegible] contract resulted.

[illegible] *Co* v. *Carrington*, 3 Conn., 357; *R. R.* v. *Joslin*, 34 Conn., 516; *Eliason* v. *Henshaw*, 4 Wheat., 225; *Usley* v. *Donaldson*, 94 U. S. (Bk. 24, L. ed. 56); Pollock, Cont. 418.

[illegible] statements in the vote and in the letter [illegible] defendant in error are to be taken as [illegible] and as intended to deceive the plaintiffs [illegible] as the Circuit Court has found them [illegible] been, then the defendant in error is estopped from denying their truth, after they have been acted on by the plaintiffs in error to [illegible] instrument. One is estopped from setting [illegible] a contract that can only be established by [illegible] of the untruth and fraudulent purpose of [illegible]

[illegible] v. *Ely*, 25 Conn., 259; *Winton* v. [illegible] Conn., 20; *Dickerson* v. *Colgrove*, 100 U. S. (Bk. 25, L. ed. 618); *Baker* v. *Humphrey*, [illegible] U. S. 494 (Bk. 25, L. ed. 1065).

[illegible] of the plaintiffs in error fairly [illegible] for a reply. And failing to receive it [illegible] and a right to understand, as they did, [illegible] agreement was reached.

Louisiana v. *Mayor of N. O.*, 109 U. S., 288 (Bk. 27, L. ed. 937).

Messrs. **C. R. Ingersoll** and **John W. Alling**, for defendant in error:

"It is notorious that the transaction of the ordinary business of railways, banks and similar corporations in this country, is without any formal meetings or votes of the board of directors.

Hence there follows a necessity of giving effect to the acts of such corporations, according to the mode in which they choose to allow them to be transacted."

Bk. of Middlebury v. *R. R. Co.*, 30 Vt., 159; *R. Co.* v. *Bastian*, 15 Md., 494; Angell, Corp., §§ 281-284-291; Pierce, Railroads, 373 (1st ed.); *Martin* v. *Webb*, 110 U. S., 7 (Bk. 28, L. ed. 49); *Mining Co.* v. *Bank*, 104 U. S., 192 (Bk. 26, L. ed. 707).

The act of Murchie, in making "an absolute and final unconditional sale," shows that he regarded himself, then, as having power to bind the company.

Melledge v. *Iron Co.*, 5 Cush., 179.

A mere misunderstanding, as to the construction of the terms of the contract, the same being fairly made, and the misunderstanding being unknown at the time, is no sufficient reason for annulling the contract.

Miller v. *Lord*, 11 Pick., 11.

The statutory definition of the "ton" is conclusive, and all the parol evidence to show a different meaning was inadmissible.

Evans v. *Myers*, 25 Pa. St., 114; *Weaver* v. *Fegely*, 29 Pa. St., 27; 2 Taylor, Ev., § 1064.

A treaty and negotiation for a variation of an agreement will not amount to a waiver of it, unless the circumstances show an intention of the party that there should be an absolute abandonment and dissolution of the contract.

Murray v. *Harway*, 56 N. Y., 347; *Schuchardt* v. *Allens*, 1 Wall., 359 (68 U. S., bk. 17, L. ed. 642); *Allcott* v. *Mill Co.*, 9 Cush., 17; *Ulley* v. *Donaldson*, 95 U. S., 29 (Bk. 24, L. ed. 54); *Holton* v. *McPike*, 27 Kan., 286; *Robinson* v. *Page*, 3 Russell, 114.

An act by one party to a contract, which is to be regarded as an act of repudiation, must be of a clear and positive character. It must carry with it the distinct idea that the party will not perform the contract on his part.

Hochster v. *De La Tour*, 2 E. & B., 689; *Smoot's Case*, 15 Wall., 36 (82 U. S., bk. 21, L. ed. 107); *Avery* v. *Bowden*, 5 E. & B., 714; *Reid* v. *Hoskins*, 5 E. & B., 729; *Barrick* v. *Buba*, 2 C. B. (N. S.), 563; *Price* v. *Dyer*, 17 Ves., 356; *Joyce* v. *Swann*, 17 C. B. (N. S.), 84.

And this intention to repudiate is a question of evidence and not of law.

Mersey Steel & Iron Co v. *Naylor*, L. R. 9 Q. B. Div., 648; *Freeth* v. *Burr*, L. R. 9 C. P., 208.

[30]

Mr. Justice **Miller** delivered the opinion of the court:

The case was submitted to the court without a jury, and the question to be decided here is, whether on the finding of facts the judgment for plaintiff below is right.

The action was brought by the Railroad Company on the following agreement:

"New Haven, Jan'y 31, 1880.

James Murchie, Esq.,

V. Pres't N. Brunswick & Canada R. R.

[illegible]

"[illegible]

E. S. Wheeler & Co."

"New Haven, [illegible]

E. S. Wheeler & Co., New Haven.

We [illegible] your letter of the date and will [illegible] as [illegible]

[illegible]

New Brunswick & Canada R. R. Co.

James Murchie, V. Pres't."

There was a tender of the rails by the railroad company and a refusal to receive or pay for them by Wheeler & Co.

The court finds as a matter of fact that the contract was a valid contract and that Murchie had authority to make it in behalf of the company. The authority in the case grows out of the following correspondence [illegible] the making of the contract by the execution and delivery of the foregoing papers:

"St. Stephen, Feb. 11th, 1880.

Mess. E. S. Wheeler & Co., New Haven.

Dear Sirs: I herewith enclose a copy of resolution passed at our meeting of directors yesterday.

[31] This confirmed the sale 'made by me to you' by the company, which was done on my arrival home.

The car wheels and chains that we had on hand were sold before I came home. We will have a large quantity by the time we ship our rails.

Please acknowledge the above.

Yours truly,

James Murchie.

New Brunswick & Canada Railroad Company.

Minute of a resolution passed at a directors' meeting February 16, 1880.

Resolved, That the following sale of old rails, made by Mr. James Murchie to Messrs. E. S. Wheeler & Co., New Haven, Conn., be confirmed: Sold Messrs. E. S. Wheeler & Co. one thousand tons of old rails, for delivery in New York or New Haven, at their option, before August the 1st next, at thirty dollars ($30) per per ton of 2,000 lbs., the duty to be paid by Wheeler & Co., and also two hundred to six hundred tons, for delivery in New York or New Haven between August 1st and October 1st, at twenty-eight ($28) per ton of 2,000 lbs., the duty to be paid by Wheeler & Co. In each case cash against invoice bill of lading. Insurance policy in satisfactory company.

True copy: F. H. Todd, *Pres.*"

"New Haven, Feb. 28, 1880.

James Murchie, Esq., *Vice-Pres't*

New Brunswick & Canada R. R. Co.

St. Stephens, Canada.

Dear Sir: We received duly your favor of the 17th inst., enclosing what purports to be a certified copy of a resolution adopted by the directors of the N. B. & C. R. R. Co., in reference to the sale of old rails, made by you in behalf of that company to us on the 31st ult. We assume that this resolution was passed merely as a matter of form, and [illegible] has been sent to us for our information [illegible] as no mention was made at the time of the negotiations that you acted subject to any approval by your company. We understood then, and understand now, that the sale made at that time on behalf of your company was an absolute and final, unconditional sale. We do not understand, further, that the resolution was forwarded to us with the view of in any way modifying that sale in any of its terms.

Furthermore, we understood at the time, and now understand, that the number of pounds in each ton of this contract, there being no contrary specification when the contract was made, was not 2,000 but 2,240. Old rails, like other scrap and like pig iron, are bought and sold by the gross ton, not only in this market but in every foreign market. The custom of the trade fixing 2,240 as the standard number of pounds in a ton of old rails is universal, and can be excluded from operating on contracts only by distinct conditions fixing some other quantity. No such conditions were mentioned in the contract of your company with us, and we look, therefore, for the delivery of the rails within the dates named in the contract of your company, and in 'gross' not 'net' tons. We make no doubt but that your understanding of that contract is in accord with our, and that in so far as this resolution fixes a different number of pounds for each ton, that it so fixes them by an oversight on the part of the directors. We hope to hear from you at your early convenience.

Very truly yours,

E. S. Wheeler."

No answer was made to this letter, nor was any further correspondence had until June 14th, when the railroad company notified Wheeler & Co. by letter that they had the 1,000 tons of old rails ready for delivery and added—

"In your letter to James Murchie, as vice-president of our company, of February 28 last, you construe the contract as meaning the ton of rails specified in that contract 2,240 lbs., or the gross ton; now, without waiving any of our rights under that contract, but to avoid dispute, we tender you the delivery of the thousand tons, at gross weight of 2,240 lbs. to the ton, and ask your determination whether the delivery shall be made at New Haven or New York.

New Brunswick & Canada Railroad Co.

By F. A. Pike,

Special Agent."

To which reply was made by the plaintiff in error as follows:

"New Haven, June 15th, 1880.

New Brunswick & Canada Railroad Co.

Gentlemen: Your letter of yesterday, advising us that you are ready to deliver to us 1,000 tons of old rails, and asking us to designate a port of delivery, is received.

As we do not recognize the existence of any such contract of sale as your letter contem-

[illegible], we have no instructions to offer upon the subject.

It is true that we tried last winter to buy [illegible] 1,000 gross tons of old rails at a price which would have netted us a large profit; but [illegible] we had to lose, as your company insisted that they were selling net tons, and no contract [illegible] upon which we could base our [illegible]. Very truly yours,

E. S. Wheeler & Co."

A similar correspondence took place between the parties in August, in reference to the six hundred tons tendered by the Railroad Company under the clause of the contract for [illegible] six hundred tons to be delivered in [illegible] month.

The court finds as a fact that each of the parties at the time the contract was made, understood that the word "tons" meant tons of 2,240 pounds and there was no misunderstanding between said persons (Wheeler and Murchie) as to the true intent and meaning of the contract. The court also finds that Murchie was duly authorized to make the contract on behalf of his company, and it rendered judgment for the plaintiff.

1. It is assigned for error that no legal contract between the parties to the action was established.

2. That, if any contract existed at any time, the defendant in error was estopped from setting it up as against the plaintiffs in error by the pleadings and by the facts proved.

3. If such contract existed, it was repudiated and terminated by the defendant in error in such manner as to discharge the plaintiffs in error from further obligation.

4. Damages were more than plaintiff was entitled to recover.

As regards the first of these propositions, it is sufficient to say that the circuit court finds as a fact that there was a contract made. It also finds other facts which establish that proposition beyond controversy, namely: that Murchie and Wheeler, who signed and delivered the papers which constituted the written agreement had authority to do so and to bind the parties to their action. The agreement, on its face, makes a contract. The court finds that there was no mistake or misunderstanding between Wheeler and Murchie as to the number of pounds which the ton should contain.

It is, therefore, to be taken as the foundation in this case, that when these papers were signed and delivered at New Haven, January [illegible], a valid and completed contract, the one on which this suit was brought, existed between the parties to the suit.

The second and third grounds of error may be considered together. What was done by the railroad company which repudiated and terminated the contract and discharged Wheeler & Co. from its obligation, or estopped the railroad company from setting it up against them?

It is to be observed that to annul or set aside the contract, fairly made, requires the assent of both parties to it, as it did to make it. There must have been the same meeting of minds, the same agreement to modify or abandon it, that was necessary to make it. All that was said or done, on which reliance is placed, for that purpose, is in the two letters, one written several days after the contract was completed and the other twenty-eight days afterwards.

The first of these, that of Murchie to Wheeler & Co., inclosing the resolutions of the directors of the railroad company, so far from repudiating the contract or denying its force and validity, by this resolution, in express terms, affirms it. Though the contract needed no ratification to make it binding, the company here ratifies what its vice president had done. In doing this, it thought proper to place its own construction on the word "ton," as used in the contract; but neither in the resolution of the directors nor in the letter of Mr. Murchie is there the slightest intimation that a difference of opinion on this matter would be relied on as [35] impairing the obligation of the contract. If they believed that their construction was the right one, it was the simplest piece of justice and precaution to suggest it, leaving the question, as by law it must be left, to a court to construe, if the difference was insisted on by either party. Finding that Wheeler & Co. did not concur in this construction, the railroad company waived their view of it, and tendered performance in accordance with the view of the other party.

Looking now to what was said by Wheeler & Co. in reply to this, it is still clearer that they did not entertain for a moment the idea of an abandonment or rescission of the contract; but, on the contrary, that they insisted on its continued existence and on performance of it according to their understanding of its meaning. After stating that they did not understand that the contract needed the ratification of the company to make it valid, they say: "We understood then, and understand now, that the sale made at that time on behalf of your company was an absolute and final, unconditional sale. We do not understand, further, that this resolution was forwarded to us with the view of in any way modifying that sale in any of its terms." Certainly this was a fair construction of the resolution. Then, after commenting on the commercial meaning of the word "tons," which could only be varied by express conditions in the contract, they say: "No such conditions were mentioned in the contract of your company with us, *and we look, therefore, for the delivery of the rails within the dates named in the contract of your company*, and in 'gross' not 'net' tons."

They then add their belief that Murchie, to whom the letter was addressed, understood the contract as Wheeler did as to the number of pounds to the ton.

The correspondence ceased here until the time for delivery of the rails arrived. Nothing more was said or done by either party during this time. The last word from each to the other was a clear assertion of the existence of a valid contract, and the very last words of the correspondence was the assertion of Wheeler & Co. that "we look for the delivery of the rails [36] within the dates named in the contract." When, therefore, on the 14th of June, the Railroad Company notified Wheeler & Co. that it was ready to comply with the contract by delivering tons of 2,240 pounds, and requested to know whether it should be made at New York or New Haven, they must have been surprised by the letter of Wheeler & Co., denying the exist-

ence of the contract, and treating the matter as a negotiation from which no contract resulted. The contrast between this and their last letter of February 28th is indeed remarkable.

By this letter of June 14th Wheeler & Co. do not place their refusal to receive on the ground now set up by counsel, namely: that though a contract was made, it had been waived or abandoned by the parties, or by the railroad company, or that the company was estopped from enforcing it; but on the broad ground that the negotiations for the sale and purchase of the iron had failed, and had never become a contract because of the disagreement as to the difference between net and gross tons.

As there *was* a contract, as neither party had abandoned it, or expressed any purpose to do so, Wheeler & Co. were bound to accept and pay for the rails when tendered, unless they have some other good reason for not doing so.

It is said such reason is to be found in the silence of the railroad company after the receipt of the letter of Wheeler & Co. to Murchie of the 28th February, by which the railroad company is estopped from enforcing the contract. It would be difficult to make out such an estoppel from mere silence, since nothing remained to be done by either party until the time for performance came. If the letter of Wheeler & Co. had expressed any doubt of the binding force of the contract, or had made any proposal for its modification, or had suggested a willingness to reconsider the question of weight of the tons, there might be some reason why the railroad company should have responded, and why a failure to respond might be some small evidence of want of good faith.

But these letters show a determination on both sides to insist on their rights under the contract, and Wheeler & Co.'s letter left no answer to be made unless the other party should [37] yield its construction of the contract. It was not bound to do this. It had a right to insist on the contract, and to refer its performance of it to the courts in case it became necessary. The railroad company could, when the time for delivery of the rails came, deliver the one thousand tons by either standard. If the other party accepted there was an end of the matter. If it did not, it could accept *pro tanto*, and sue for the balance, or it could refuse to accept at all. But in all this the contract would remain, and would be the measure of the rights of the parties in court or out of it.

There was, therefore, no necessity for the Railroad Company to reply to the letter of Wheeler & Co. It was not bound to say any more than it had said as to the true meaning of the contract. There was no demand in the letter of Wheeler & Co. that the railroad company should accept its construction. There was no intimation that if this was not done the contract was at an end, or would be abandoned.

Let us suppose that the price of iron had risen instead of declining during this three or four months, and the railroad company had failed to deliver, would Wheeler & Co. have lost their right of action by anything in their letters, or by the cessation of the correspondence? Clearly not. And yet, if that correspondence released one party, it must have released both. There remained no obligation, unless it was mutual. The right to deliver and require payment, and the right to require delivery, were correlativ rights, one of which could not exist without th other.

The judgment of the court that plaintiff wa entitled to recover is right.

The objection to the amount of the recover rests upon the contention of defendants, th they were only bound by the contract for th October delivery to accept two hundred ton while the court held them bound for the diffe ence in price for six hundred tons.

We concur with the circuit court in holdin that when Wheeler & Co. say we have bougl of you (the railroad company) "from two (2) t six hundred tons for delivery in New York c New Haven between August 1st and Octob 1st" that they agreed to accept any amount c old rails between those limits. The Compan was selling old rails. It knew that by Augu it would have a thousand tons. It did not kno how much more they would have by Octob 1st. It intended to secure the sale of what might have, between two hundred and six hu dred tons.

Besides, as it was bound to do the first act performance of the contract by delivering t iron, the option, if there was one, wac with t railroad company. The defendants were nev in condition to exercise this option, if one e isted. *Townsend* v. *Wells*, 3 Day, 327; *Patch* v. *Swift*, 21 Vt., 292; *M'Nitt* v. *Clark*, 7 John 465.

The judgment of the Circuit Court is affirme

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U.

Mr. Justice **Blatchford**, dissenting:

Justices Field, Harlam, Matthews and m self are unable to concur in the judgment the court in this case. When the directors the Railroad Company came to consider, a Board, the transaction between Murchie a Wheeler & Co., they took it up, as their re lution states, as a sale by Murchie to Wheel & Co., and confirmed it on behalf of the Ra road Company, as a sale of tons of 2,000 l When Wheeler & Co. received Murchie's l ter inclosing a copy of the resolution of t board, their letter of reply of February 28, 188 states their understanding to be, that the s was not made subject to approval by the Ra road Company, and that the ton was 2,240 lb and that they look for the delivery of the ra in gross and not net tons. But the resoluti of the board expressed the contrary view, as the ton, and so the letter proceeds to say, t Wheeler & Co. make no doubt that Murchi understanding of the contract, as he had ma it, is in accord with that of Wheeler & Co., a that, in so far as the resolution of the Bos fixed 2,000 pounds for each ton, it did so by oversight on the part of the directors. T was a plain appeal to Murchie, to bring his u derstanding of the contract to bear on t directors, to induce them to change their vi and their statement of the contract, in resp of the tons: and it was followed up by the cl ing words of the letter: "We hope to hear fr you at your earliest convenience." The wh tenor of this letter was to throw the matter i the field of negotiation and arrangement, wh the Railroad Company asked to have it p That Company plainly said to Wheeler & C

"If you regard the ton in this contract as a gross ton, we do not; and, if you do, we do not think there is any contract." Wheeler & Co. replied: "We do, and we think such was Mr. Murchie's view at the time, and that your minutes have committed an oversight in their resolution which 'fixes' the ton at 2,000 pounds, but, in view of all this, we ask to hear from you at your early convenience about it." At that date old rails were $33.50 to $34 a ton of 2,240 pounds, without duty. The contract price was $30 and $28, without duty. The contract was a good one for Wheeler & Co., if they could then sell the rails, for future delivery, at the market rate of that date, and if the ton of the contract were 2,240 pounds. So, it was important for them to know whether the Railroad Company would adhere to the view stated in the resolution or would recede from it, and they sought to learn. But they received no reply from Murchie or his Company. They had a right to take the Company at its word and to act on its solemnly announced understanding of the contract. They did so and refrained from turning the contract to any benefit by a resale of the rails. They were dealers in rails and bought only to resell. They did not buy to use otherwise. This the Railroad Company and Murchie knew.

Now, what is the finding of the Circuit Court? It is, that Murchie in fact understood that the ton of the contract were 2,240 pounds, as did Wheeler & Co.; that the Company, while not misunderstanding, intended to induce Wheeler & Co. to think it misunderstood, for the purpose of having Wheeler & Co. agree that the tons should be 2,000 pounds; that this conduct was "disingenuous"; and that the natural effect of a failure to reply to Wheeler & Co.'s letter was to create "great uncertainty" on the part of Wheeler & Co., and to cause "insurance and pecuniary loss" to them. On these facts, it is held, that, when the market price of the rails has fallen to one half of the contract price, the Company can insist on compelling Wheeler & Co. to take the rails at the contract price, because the Company then has to turn around and say: "The ton was not a 2,000 pounds. We were wrong all the time, and you were right; and we now reply to your letter, by saying that we did commit an oversight in our resolution, as you suggested."

We can sanction no such view of the rights of the parties to a commercial transaction. The Company made statements, in its resolution and letter which the Circuit Court finds were not in accord with its understanding regarding the ton; statements which that court finds it knew were not true and which that court finds it intended should be regarded by Wheeler & Co. as honestly made; and which it is clear it intended Wheeler & Co. should act upon; and which they did act upon, to their injury. The actual ground of recovery by the Company in this case is based on proof of the untruth of the assertions made by the Company, followed by proposition that Wheeler & Co. had no right to believe and rely on those assertions. Every element exists to estop the Company from denying the truth of those assertions, and from claiming that Wheeler & Co. should not have relied on them. There is not a suggestion impeaching the good faith and fair dealing of Wheeler & Co. They were not guilty of any deceit or misrepresentation; they held out no false lights; they did not attempt to procure an advantage by an untrue statement of their understanding of the contract; they did not mislead the other party to his injury. Their letter to Murchie of February 28th was a model of mercantile candor and fair dealing. It demanded a reply. The absence of a reply was no ground for supposing that the Company had abandoned the position it took in the resolution, for Wheeler & Co. did not then know, what they learned afterwards—that the resolution was a sham and a false pretense.

The conclusion seems to us to follow inevitably, under the findings of the Circuit Court, that the Company had lost its right to recover on the contract; and we, therefore, dissent from the judgment of affirmance.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—117 U. S., 501.

MORRIS RICHTER, *Appt.*,
v.
GEORGE JEROME ET AL. [55]

(See S. C., Reporter's ed., "*Richter* v. *Union Trust Co.*," 55, 56.)

A motion for a commission to take depositions *de bene esse*, pending an appeal, is denied, there being a remedy under § 866, R. S.

[No. 839.]

Argued Apr. 20, 1885. Decided May 4, 1885.

APPEAL from the Circuit Court of the United States for the Western District of Michigan.

On motion for a commission to take testimony *de bene esse*.

The appellant files his motion, supported by his affidavit for the issue of a commission out of this court, to take the testimony of four witnesses alleged to be aged and infirm, said testimony, when taken, not to be used in this court but in the court below, provided the decree dismissing the bill is reversed.

Messrs. **J. P. Whittemore** and *Wm. P. Wells*, for appellant.

Mr. **H. H. Wells**, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court: [56]

This motion is denied. Equity Rule 70 has no application to this case, and the affidavits presented do not show such facts as render it necessary for this court to make any special order in the premises. Under section 866 of the Revised Statutes "any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matter that may be cognizable in any court of the United States." There is nothing in the motion papers to indicate that the appellant may not proceed, under this statute, to take and perpetuate his testimony, if he has reason to fear that it will otherwise be lost.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[67] HENRY EHRHARDT, *Plff. in Errr.*,

v.

MANERVA HOGABOOM.

(See S. C., Reporter's ed., 67–69.)

Public lands—ejectment—evidence—decisions of Land Department—how far conclusive.

*1. In an action of ejectment for lands in California, where the plaintiff traces title to the lands from a patent of the United States issued to a settler under the preemption laws, oral evidence is inadmissible on the part of the defendant to show that the lands were not open to settlement under those laws, but were swamp and overflowed lands, which passed to the State under the Act of September 28, 1850.

2. It is the duty of the Land Department, of which the Secretary of the Interior is the head, to determine whether land patented to a settler is of the class subject to settlement under the preemption laws, and his judgment as to this fact is not open to contestation, in an action at law, by a mere intruder without title.

[No. 265.]

Submitted Apr. 22, 1885. Decided May 4, 1885.

IN ERROR to the Supreme Court of the State of California.

The history and facts of the case appear in the opinion of the court.

Mr. **J. H. McKune**, for plaintiff in error.

No counsel appeared for the defendant in error.

[67] *Mr. Justice* **Field** delivered the opinion of the court:

This is an action for the possession of a tract of land in Sacramento County, California, designated as the northeast quarter of section six [68] of a certain township, which is described. The plaintiff below, the defendant in error here, deraigns her title, through a patent of the United States embracing the demanded premises, bearing date June 10, 1875, issued to one Elkanah Baldwin, a settler under the preemption laws, and his conveyance to her of the land patented to him. On the trial, the patent and the conveyance to the plaintiff were produced and given in evidence. The defendant thereupon admitted that he was in possession of twenty acres of the tract covered by the patent, lying south of a certain fence, but contended that these twenty acres were swamp and overflowed lands, which passed to the State of California under the Act of Congress of September 28, 1850. This character of the land as swamp and overflowed he offered to prove by parol, but the offer was rejected, and, we think, correctly. He did not connect himself in any way with the title to the twenty acres. The certificate of purchase from the register of the State land-office, which he produced, related to different land—to what constituted a portion of the southeast quarter of section six, whereas the land in controversy is part of the northeast quarter of that section. He was, as to the twenty acres, a simple intruder, without claim or color of title. He was, therefore, in no position to call in question the validity of the patent of the United States for those acres, and require the plaintiff to vindicate the action of the officers of the Land Department in issuing it. It does not appear that the twenty acres formed a part of any land selected by the State or claimed by her as swamp and overflowed land. A patent of the United States, regular on its face, cannot, in an action at law, be held inoperative as to any lands covered by it, upon parol testimony that they were swamp and overflowed, and therefore unfit for cultivation, and hence passed to the State under the grant of such land on her admission into the Union. In *French* v. *Fyan*, 93 U. S. 169 [Bk. 23, L. ed. 812], this court decided that by the 2d section of the Swamp Land Act the power and the duty devolved upon the Secretary of the Interior, as the head of the department which administered the affairs of the public lands, of determining what lands were of the description granted by that Act, and made his office the tribunal whose decision on that subject was to be controlling. And he was to transmit a list of such lands to the Governor of the State, and at the latter's request issue a patent therefor to the State. In that case, parol evidence to show that the land covered by a patent to Missouri under the Act was not swamp and overflowed land, was held to be inadmissible. On the same principle parol testimony to show that the land covered by a patent of the United States to a settler under the preemption laws was such swamp and overflowed land must be held to be inadmissible to defeat the patent. It is the duty of the Land Department, of which the Secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the preemption laws, and his judgment as to this fact is not open to contestation, in an action at law, by a mere intruder without title. As was said in the case cited of the patent to the State, it may be said in this case of the patent to the preemptioner, it would be a departure from sound principle and contrary to well considered judgments of this court to permit, in such action, the validity of the patent to be subjected to the test of the verdict of a jury on oral testimony. "It would be," to quote the language used, "substituting the jury or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey."

The judgment is therefore affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JAMES GRANT, *Appt.*,

v.

GEORGE H. PARKER.

(See S. C., Reporter's ed., 51–55.)

Mining corporations—"syndicate" to purchase controlling interest in stock—bill to enforce previous agreement concerning management.

1. An agreement between the members of a "syndicate" formed to purchase the controlling interest in the stock of a mining corporation, that one of them should "control the management of the mine," is necessarily subject to such reasonable rules and regulations as the stockholders or directors may adopt for the government of the office of the company.

2. A bill in equity, to restrain a member of the "syndicate" from acting as a stockholder and d

*Head notes by *Mr. Justice* FIELD.

[illegible] in the company in enforcing such regulations does not lie.

[No. 273.]

Submitted Apr. 24, 1885. Decided May 4, 1885.

APPEAL from the Circuit Court of the United States for the District of California.

Appeal from the decree of the court below, dismissing the complainant's bill.

The case is stated by the court.

Mr. **Whitaker Grant** and **James Grant**, for appellant.

Mr. **John Johns**, **John N. Rogers** and **W. Penn Clarke**, for appellee.

Mr. *Chief Justice* **Waite** delivered the opinion of the court:

This is a bill in equity filed by a stockholder and director of the Fresno Enterprise Company, a California corporation owning the Enterprise mine, against another stockholder and director, to restrain him "from attending any meeting of the board of directors to enforce" certain resolutions passed at a previous meeting, "which give the vice-president authority to sign checks or certificates of stock," when the complainant, the president of the company, is "not in the City of San Francisco, or which authorize the superintendent to draw drafts on the company when" the complainant is "not at the mine," and also restraining the defendant "from voting on * * * five thousand six hundred and sixty shares of stock issued to him under the contract of 3d May, 1881, or any other shares of stock owned by him, at any meeting of the stockholders for electing directors or amending the by-laws"; and "that on the final hearing" the complainant "be decreed to have a continuing proxy for said five thousand six hundred and sixty shares."

The general ground on which complainant asks his relief is this:

In May, 1881, an association of capitalists, called in the bill a "syndicate," to which both the complainant and defendant belonged, bought 51,660 of the 100,000 shares of the capital stock of the company, and in the contract under which the syndicate was formed it was agreed that the complainant was "to control the management of the mine." In the purchase the complainant became the owner of 17,000 shares, and the defendant of 5,660. Other persons divided the remaining 28,340 shares between them. The 49,000 shares not purchased were held by persons outside of the syndicate. At a meeting of stockholders, held a few days after the purchase, for the election of directors, the complainant and the defendant, with one other member of the syndicate, were elected directors, as the representatives of the purchasers, and two others not in the syndicate as representatives of the minority stockholders. The complainant was elected president of the board of directors and general manager of the mine. The defendant and the directors who were elected in the interest of the minority stockholders seem to have been of opinion that some additional rules for the government of the affairs of the company were necessary, and so, as is alleged, on their representations, the defendant, in December 1881, induced some of the members of the syndicate to agree to the adoption of the following resolutions by the directors:

"*Resolved*, That the Bank of California, the treasurer of this company, be, and is hereby, instructed to pay only such checks as are signed by the president or vice-president and countersigned by the secretary.

"*Resolved*, That all orders for supplies and materials from San Francisco for the company shall be made through the head office in San Francisco, and payment for the same shall be made by checks signed by the president or vice-president and countersigned by the secretary, at the office in San Francisco.

"*Resolved*, That in the absence of the president from the office of the company in San Francisco, the vice-president, in accordance with the by-laws, be, and is hereby, authorized to sign all certificates of stock that are legally issued by the secretary, as well as all papers requiring the signature of the president, if he were present at the office.

"*Resolved*, That in the absence of the president from the mine, the superintendent at the mine be, and is hereby, instructed to draw drafts on the company at San Francisco for all indebtedness accruing at the mine."

These resolutions were adopted by the board on the 4th of January, 1882, at a regular meeting held that day, of which the complainant had knowledge, but which he did not attend. A quorum of directors was present at the meeting and the defendant voted for the resolutions. [54] It was to restrain the defendant from aiding the directors in the enforcement of these resolutions, and from voting his shares acquired under the syndicate contract, except in accordance with the will of the complainant, that this bill was brought.

We are unable to discover any ground for equitable relief in the case made by the bill. It is undoubtedly true that the defendant was anxious to have the complainant interested in the mine, and was willing to become one of a number of persons, of whom the complainant should be one, to purchase enough of the stock to make the aggregate of their holdings a majority of the entire capital of the company. It is also true that the defendant, and all the other members of the syndicate, yielded to the condition insisted on by the complainant—that "he should have the control of the management of the mine" if the purchase of the majority of the stock was made; but this was necessarily subject to such reasonable rules and regulations as should be adopted in a proper way, either by the stockholders or the directors, for the government of the conduct of the officers of the company. No attempt has been made to remove the complainant from his office of general manager. He still "controls the management of the mine," so far as anything appears in the bill. All that the directors have done by their resolutions, of which complaint is made, is to prohibit the Bank of California, the treasurer of the company, from paying any checks of the company except such as are signed by the president or vice-president and countersigned by the secretary; to direct that all orders for supplies and materials from San Francisco should be made through the head office in San Francisco, and paid for in checks signed and countersigned as above; to authorize the vice-president to sign certificates of stock and all other papers requiring the signature of the president, when

the president was away from the office, and authorizing the superintendent at the mine, in the absence of the president, to draw drafts on the company at San Francisco for debts incurred there. We see nothing in this inconsistent with the control of the mine itself by the complainant "as if he owned it."

[55] Without, therefore, deciding whether, if the members of the syndicate should undertake to remove the complainant from the control of the management of the mine without just cause, he could have preventive relief in equity, we affirm the decree.

Affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[45]

GWILLIM R. GWILLIM, *Plff. in Errr.*, *v.* JOHN F. DONNELLAN ET AL.

(See S. C., Reporter's ed., 45-51.)

Mining law—adverse claims—location—how defeated.

1. The locator of a mining claim who does not interpose an adverse claim, in proceedings instituted by another to obtain a patent for a claim, including part of his claim, thereby waives his rights and loses the benefit of his location. All lands embraced in his location not covered by the patent are thrown open to exploration and subject to claim for new discoveries.

2. In proceedings to obtain a patent for a mining claim, where an adverse claim is not interposed, the United States may assume that no such claim exists, and the holder thereof is barred, he being in law a party to the proceedings.

[No. 222.]

Submitted Apr. 1, 1885. Decided May 4, 1885.

IN ERROR to the Circuit Court of the United States for the District of Colorado.

The history and facts of the case appear in the opinion of the court.

Messrs. **E. T. Wells** and **Amos Steck,** for plaintiff in error.

Messrs. **Enoch Totten, Charles H. Toll** and **Edward O. Wolcott,** for defendants in error.

[46]

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit begun July 7, 1881, under section 2326 of the Revised Statutes, to determine the rights of adverse claimants to certain mining locations. Donnellan and Everett, the defendants in error here, and also the defendants below, were the owners of the Mendota claim, or location, and Gwillim, the plaintiff in error here and the plaintiff below, the owner of the Cambrian. The two claims conflicted. The defendants applied, under section 2325 Rev. Stat., for a patent of the land covered by their location, and the plaintiff filed in due time and in proper form his adverse claim. To sustain this adverse claim the present suit was brought, which is in form an action to establish the right of the plaintiff to the premises in dispute, and to the possession thereof as against the defendants, on account of a "prior location thereof as a mining claim in the public domain of the United States."

The question in the case arises on this state of facts:

Upon the trial the plaintiff gave evidence tending to show that Isaac Thomas, on the 16t of May, 1878, discovered in the public domai and within the premises described in the com plaint, a vein of rock in place, bearing gold an silver, and sunk a shaft to the depth of ten fe or more, to a well defined crevice, and locate the premises under the name of the Cambria Lode and performed all the acts required b law for a valid location. The plaintiff got h title from Thomas. In the answer of the d fendants they set up title under the Mendo claim, located, as they allege, November 1 1878. The plaintiff, in presenting his case the jury, stated in effect that, after the locatio of the claim by Thomas and before his conve ance to the plaintiff, one Fallon instituted pr ceedings to obtain a patent from the Unite States for another claim, including that part Thomas' claim wherein was situated the di covery shaft sunk by him; that no adverse clai was interposed, and Fallon accordingly entere his claim and obtained a patent therefor; an before any new workings or developments do or made by Thomas upon any part of his clai not included in this patent, the defendants e tered therein and located the same as a minin claim in the public domain. Upon this stat ment the court "ruled that, inasmuch as th part of the claim of said Thomas, wherein w situated his discovery shaft, had been patent to a third person, the plaintiff was not entitl to recover any part of the premises, and instruc ed the jury to find for the defendants." Th instruction is assigned for error.

Thomas made his location as the discover of a vein or lode within the lines of his clain He made but one location, and that for fiftee hundred feet in length along the discover vein. All his labor was done at the discove shaft. There was no claim of a second discove at any other place than where the shaft w sunk.

Section 2320 of the Revised Statutes provid that "A mining claim located after the 10th May, 1872, * * * shall not exceed one thousan five hundred feet in length along the vein lode; but no location of a mining claim sha be made until the discovery of the vein or lod within the limits of the claim located." Sectio 2322 gives "the locators of all mining location * * * so long as they comply with the laws of th United States, and with the state, territorial an local regulations not in conflict with the law of the United States governing their possessor title, * * * the exclusive right of possessio and enjoyment of all the surface included wit in the lines of their locations, and of all vein lodes and ledges throughout their entire deptl the top or apex of which lies inside of such su face lines extended downward vertically, a though such veins, lodes or ledges may so f depart from a perpendicular in their cour downward as to extend outside the vertical sid lines of such surface location." The location made on the surface, and the discovery must b of a vein or lode, the top or apex of which within the limits of the surface lines of suc location. A patent for the land located co veys the legal title to the surface, and that ca ries with it the right to follow a discovered vei

apex of which is within the limits of the [illegible] inwards even though it may pass out[illegible] the vertical side lines of the location. The [illegible] to the vein depends on the right to the occupancy or the ownership of its apex within the [illegible] of the right to the occupation of the surface. This right may be acquired by a valid [illegible] and continued maintenance of a mining [illegible] or by a patent from the United States for the land.

To keep up and maintain a valid location [illegible] work of labor must be done, or improvements made, during each year until a patent has been issued therefor. Sec. 2324.

By section 2325 it is provided that a patent may be obtained for land located or claimed for valuable deposits. To accomplish this a locator, who has complied with all the statutory requirements on that subject, may file in the proper land-office an application for a patent under oath, showing such compliance, together with a plat and field notes of his claim, made by or under the direction of the Surveyor-General of the United States, showing accurately the boundaries of the claim, which must be distinctly marked by monuments on the ground. He must also post a copy of his plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat, previous to filing his application for a patent, and he must also file an affidavit of at least two persons that such notice has been duly posted. A copy of the notice must be filed in the land office.

Upon the filing of such papers, the register of the land-office is required to publish a notice that the application has been made, for the period of sixty days in some newspaper to be by him designated as published nearest to the claim, and he must also post a similar notice for the same time in his own office.

If no adverse claim shall have been filed with the register and receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, and that no adverse claim exists; and thereafter no objection from such parties to the issue of the patent shall be heard, except to show that the applicant has failed to comply with the law. Where an adverse claim is filed within the time, all proceedings upon the application in the land-office, except in reference to the publication and proof of notice, are to be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It is then made the duty of the adverse claimant to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same to final judgment. After such judgment shall have been rendered, the party entitled to the possession of the claim may, without further notice, file a certified copy of the judgment roll with the register of the land-office, together with the certificate of the Surveyor-General that the requisite amount of labor has been expended, or improvements made thereon, and the description required as in other cases. When this has been done and the proper fees paid, the whole proceedings and the judgment roll must be certified to the Commissioner of the General Land Office, and a patent shall issue for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision that several parties are entitled to separate and distinct portions of the claim, each party may pay for his portion of the claim, together with the proper fees, and file the certificate and description by the Surveyor-General, and then the register must certify the proceedings and judgment roll to the commissioner as in the preceding case, and patents shall issue to the several parties according to their respective rights. Sec. 2326.

A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as bar to the second. *Belk* v. *Meagher*, 104 U. S., 284 [Bk. 26, L. ed. 737].

To entitle the plaintiff to recover in this suit, [50]
therefore, it was incumbent on him to show that he was the owner of a valid and subsisting location of the lands in dispute, superior in right to that of the defendants. His location must be one which entitles him to possession against the United States, as well as against another claimant. If it is not valid as against the one, it is not as against the other. The location is the plaintiff's title. If good, he can recover; if bad, he must be defeated.

A location on account of the discovery of a vein or lode can only be made by a discoverer, or one who claims under him. The discovered lode must lie within the limits of the location which is made by reason of it. If the title to the discovery fails, so must the location which rests upon it. If a discoverer has himself perfected a valid location on account of his discovery, no one else can have the benefit of his discovery for the purposes of location adverse to him, except as a relocator after he has lost or abandoned his prior right. *Belk* v. *Meagher*, *supra*.

In this action the plaintiff must recover on the strength of his own title, not on the weakness of that of his adversary. The question to be settled by judicial determination, so far as he is concerned, is as to his own right of possession. He must establish a possessory title in himself, good as against everybody. If there had not been a patent to Fallon, it would have been competent for the defendants to prove on the trial, that when Thomas entered Fallon held and owned a valid and subsisting location of the same property, and was the first discoverer of the lode the apex of which was within the surface lines of Thomas' claim. Had this been done, the location of Thomas would have been adjudged invalid, because the land on which his alleged discovery was made was not open to exploration, it having been lawfully located and claimed by Fallon. The admission made by the plaintiff at the trial, and on which the court acted in instructing the jury to find for the defendants, is the equivalent of such proof. It showed that after May 16, 1878, and before November, 19, 1878, Fallon had applied for a patent of the land on which Thomas' alleged

discovery was made, and where he had sunk
[51] his discovery shaft; that Thomas set up no adverse claim, and that in due time Fallon got his patent, and this because under the law the United States had the right to assume that no adverse claim existed. Having failed to assert his claim, he lost his title as against the United States, the common source of title to all. The issue of the patent to Fallon was equivalent to a determination by the United States, in an adversary proceeding to which Thomas was in law a party, that Fallon had title to the discovery superior to that of Thomas, and that consequently Thomas' location was invalid. This barred the right of Thomas to apply to the United States for a patent, and of course defeated his location. From that time all lands embraced in his location not patented to Fallon were open to exploration and subject to claim for new discoveries. The loss of the discovery was a loss of the location. It follows that the court did not err in its instructions to the jury, *and the judgment is consequently affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[96]

JOHN F. WOLLENSAK, *Appt.*,

v.

FRANK A. REIHER.

(See S. C., Reporter's ed., 96-102.)

Patent law—reissues—delay—whether reasonable—decision of patent office not conclusive.

1. A patentee, who has claimed less than that to which he was entitled, is bound to discover the defect within a reasonable time or he loses his right to a reissue; and the court may declare a reissue subsequently granted to correct such supposed mistake, *pro tanto* void, in any suit founded upon it.
2. Where it appears from the bill that the sole object of the reissue was to enlarge and expand the claims of the original patent, and that a delay of two or more years has taken place in applying for the reissue, not explained by special circumstances showing it to be reasonable, a general demurrer lies to the bill, for want of equity.
3. The decision of the Patent Office as to the reasonableness of the delay is not conclusive.
4. The delay being *prima facie* unlawful, it is incumbent on the party seeking to establish the jurisdiction of the Patent Office to grant the reissue, to show the facts on which it rests.

[No. 1242.]

Argued Apr. 14, 15, 1885. Decided May 4, 1885.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Messrs. **L. L. Bond, Ephraim Banning** and **Thomas A. Banning,** for appellant.

Messrs. **Wm. A. McKenney** and **Charles T. Brown,** for appellee.

[96] *Mr. Justice* **Matthews** delivered the opinion of the court:

This is a bill in equity to restrain by injunction the alleged infringement by the defendant below of reissued letters patent No. 10264, issued to the complainant December 26, 1883, upon the surrender of original letters patent No. 148538, dated March 10 1874, granted to the

complainant for a new and useful improvemen
in transom lifters. There was exhibited wit
the bill, as parts thereof, copies of the origina
and reissued letters patent. The defendant de
murred to the bill for want of equity; the de
murrer was sustained, and the bill dismissed
From that decree this appeal was taken.

The original patent was confined to tw
claims, which are also the first two in the r
issued patent. The latter, which in its specif
cation and drawings is substantially the sam
with the original, adds seven additional claim
making nine in all. Of these, the bill alleges i
fringement as to the third, fourth, fifth, sixt
and ninth.

The bill, after averring the issue of the ori
inal patent, and referring to the copy set out
an exhibit, contains the following averments

"That said letters patent, being afterwar
found to be inoperative or invalid by reason
an insufficient or defective specification, whic
insufficiency or defect had arisen through ina
vertence, accident or mistake, and without a
fraudulent or deceptive intention on the part
your orator, were afterwards surrendered a
duly canceled by the Commissioner of Paten
that thereupon, and upon due application the
for, reissued letters patent of the United Stat
No. 10264, were issued to your orator, dated t
26th day of December, 1882, granting to hi
his heirs or assigns, for the term of sevente
years from the said 10th day of March, 18
the full and exclusive right of making, usi
and vending to others to be used, the said
vention, as by reference to said reissued lett
patents here in court to be produced, and
copy of the specification and drawings of whi
is hereto attached, will more fully appear; t
said reissued letters patent were applied for
good faith and not for any fraudulent or i
proper purpose; that, as your orator verily
lieves, no other person, firm or corporation,
acting under his authority, ever began the m
ufacture, sale or use of transom lifters conta
ing or embodying said inventions or impro
ments until long after your orator had cons
ed counsel and taken steps toward applyi
for said reissue, and until long after y
orator had applied for and obtained a
issue of his previous patent on trans
lifters, having broader claims than any n
contained in said reissue No 10264; th
in making said application for said last m
tioned reissue, your orator presented to the
tent Office a full, sworn statement of facts
circumstances connected with his applying
and obtaining said original patent No. 1485
and with his delay in applying for said reiss
that at the first said reissue application was
jected, on the ground that such statement did
show or furnish any sufficient explanation
excuse for said delay, and that your orator
lost his rights to such a reissue by reason th
of, the examiner citing *Miller* v. *Brass Co.*,
U. S., 350 [Bk. 26, L. ed. 783], and other ca
that, on appeal, said decision or rejection
reversed by the examiners in chief constitut
the Patent Office Board of Appeal; that, i
long and full opinion, said examiners in c
expressly held that your orator had s
ciently and satisfactorily explained said d
and was still entitled to such a reissue, and
a part of said opinion, referring to claims app

[illegible] is said reissue, and now in controversy, was as follows:

"All the above claims, moreover, have been rejected upon a supposed legal bar to enlargement of claim, found in certain recent decisions of the courts, mainly of the Supreme Court of the United States, on which the other decisions cited are based. * * * We find upon review that there was a grave defect in applicant's patent and claims, whereby it was inoperative to protect the invention disclosed by him, to the full extent to which he was entitled. * * * We do not find any evidence of such laches or delay, after ascertaining the defects of his patent, as to debar or estop him from the benefits of the statute. We do not find in his renewed application any attempt to enlarge the scope of his invention beyond what was originally disclosed, but, on the contrary, an attempt to secure protection for the invention contained in the patent.'"

For the purpose of deciding the question of law arising on the demurrer to the bill, it is not necessary to set out the several claims in the original and reissued patents, with a view to a comparison. It is sufficient to say, that it is not claimed that the defendant is guilty of an infringement of either of the claims in the original patent as repeated in the reissue; and it is admitted that the claims in the reissued patent, infringement of which is averred, are expansions of the original claims, not covered by them, but alleged, nevertheless, to be embraced within the invention as described in the original patent. This is to say, that if, as a matter of fact, the patentee was the first and original inventor of the parts and combinations covered by these claims, the language of the specification to the original patent would sufficiently embrace them.

It follows from this, that if, at the date of the issue of the original patent, the patentee had been conscious of the nature and extent of his invention, an inspection of the patent, when issued, and an examination of its terms, made with that reasonable degree of care which is habitual to and expected of men, in the management of their own interests, in the ordinary affairs of life, would have immediately informed him that the patent had failed fully to cover the area of his invention. And this must be deemed to be notice to him of the fact, for the law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it.

Not to improve such opportunity, under the circumstances of self-interest, with reasonable diligence, constitutes laches which in equity disclose the party who seeks to revive a right which he has allowed to lie unclaimed, from enforcing it, to the detriment of those who have, in consequence, been led to act as though it were abandoned.

This general doctrine of equity was applied with great distinctness to the correction of alleged mistakes in patents, by reissues, in the case of *Miller* v. *Brass Co.* [*supra*]. It was there declared, that where the mistake suggested was merely that the claim was not as broad as it might have been, it was apparent upon the first inspection of the patent, and, if any correction was desired, it should have been applied for immediately; that the granting of a reissue for such a purpose, after an unreasonable delay, is clearly an abuse of the power to grant reissues, and may justly be declared illegal and void; that, in reference to reissues made for the purpose of enlarging the scope of the patent, the rule of laches should be strictly applied, and no one should be relieved who has slept upon his rights, and has thus led the public to rely on the implied disclaimer involved in the terms of the original patent; and that when this is a matter apparent on the face of the instrument, upon a mere comparison of the original patent with the reissue, it is competent for the courts to decide whether the delay was unreasonable and whether the reissue was, therefore, contrary to law, and void. [100]

This doctrine has been reiterated in many cases since, and at the present term has been reconsidered and emphatically repeated as the settled law, in the case of *Mahn* v. *Harwood*, 112 U. S. 354 [Bk. 28, L. ed. 665], where it is said, by *Mr. Justice* Bradley, delivering the opinion of the court: "We repeat, then, if a patentee has not claimed as much as he is entitled to claim, he is bound to discover the defect in a reasonable time, or he loses all right to a reissue; and if the Commissioner of Patents, after the lapse of such reasonable time, undertakes to grant a reissue for the purpose of correcting the supposed mistake, he exceeds his power and acts under a mistaken view of the law; and the court, seeing this, has a right and it is its duty to declare the reissue *pro tanto* void, in any suit founded upon it." It was also there said that, while no invariable rule can be laid down as to what is reasonable time within which the patentee should seek for the correction of a claim which he considers too narrow, a delay of two years, by analogy to the law of public use before an application for a patent, should be construed equally favorable to the public, and that excuse for any longer delay than that should be made manifest by the special circumstances of the case.

In the present case the delay in applying for the reissue was more than five years. No special circumstances to account for or excuse the delay are set out in the bill. In lieu of such a statement, the complainant avers that he presented to the Patent Office a full, sworn statement of facts and circumstances connected with his applying for and obtaining his original patent, and with his delay in applying for the reissue, and that the examiners in chief decided that he had sufficiently and satisfactorily explained the delay, and was entitled to the reissue. But this does not satisfy the law. The question as to whether the delay had been reasonable or unreasonable is for the court to determine, upon the special circumstances brought to its attention; and it cannot substitute the decision of the Patent Office upon that question for its own. The very question is, whether the Patent Office has decided rightly; and, as it is a question of power and jurisdiction, in which the delay shown is *prima facie* unlawful, it is incumbent on the party seeking to establish the jurisdiction of the Patent Office to grant the reissue, to show the facts on which it rests. In every case of a reissue, that office either expressly or implicitly decides the question of diligence on the part of the patentee; and the grant of a reissue is a decision that the delay [101]

has not been unreasonable. That, therefore, is the very question for judicial review, in every suit to enforce a reissued patent in which the question is made; and, as we have seen, the settled rule of decision is, that if it appears in cases where the claim is merely expanded, that the delay has been for two years or more, it is adjudged to invalidate the reissue, unless the delay is accounted for and excused by special circumstances, which show it to have been not unreasonable.

When, therefore, the injunction bill sets out or exhibits both the original and the reissued patent, and it appears from inspection that the sole object of the reissue was to enlarge and expand the claims of the original, and that a delay of two or more years has taken place in applying for the reissue, not explained by special circumstances showing it to be reasonable, the question of laches is a question of law arising on the face of the bill, which avails as a defense, upon a general demurrer for want of equity.

This rule of equity pleading applies in analogous cases; as where, it otherwise appearing on the face of the bill that the claim is stale, or is barred by lapse of time, and it is sought to avoid the effect of such a bar on the ground that the fraud complained of was concealed and has been only recently discovered, it is necessary that "the particular acts of fraud or concealment should have been set forth by distinct
[102] averments, as well as the time when discovered, so that the court may see whether, by the exercise of ordinary diligence, the discovery might not have been before made." *Beaubien* v. *Beaubien*, 23 How., 190 [64 U. S., bk. 16, L. ed. 484]; *Stearns* v. *Page*, 7 How., 819 [48 U. S., bk. 12, L. ed. 928]; *Moore* v. *Greene*, 19 How., 69 [60 U. S., bk. 15, L. ed. 533]; *Marsh* v. *Whitmore*, 21 Wall., 178, 185 [88 U. S., bk. 22, L. ed. 482, 485]; *Godden* v. *Kimmell*, 99 U. S., 201 [Bk. 25, L. ed. 431]; *Badger* v. *Badger*, 2 Wall., 87, 95 [69 U. S., bk. 17, L. ed. 836, 838]; *Wood* v. *Carpenter*, 101 U. S., 135 [Bk. 26, L. ed. 807]; *Lansdale* v. *Smith*, 106 U. S., 391 [Bk. 27, L. ed. 219].

The decree of the Circuit Court dismissing the bill for want of equity was correct and is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[79]

JAMES B. CLARK, *Appt.*,
v.
BEECHER MANUFACTURING COMPANY ET AL.

(See S. C., Reporter's ed., 79-87.)

Patent law—infringement.

*1. Letters patent No. 66130, granted to James B. Clark, June 25, 1867, for an "improvement in the manufacture of blanks for carriage thill shackles," are not infringed by the manufacture of blanks for shackles in accordance with letters patent No. 106225, granted to Willis B. Smith, August 9, 1870.

2. The features of the Clark patent are: that, by dies, the arms of the blank are bent into an oblique direction and the body into a curved form, so that the parts where the arms join the body are rounded on the outside as well as the inside; and that when subsequently the curved body is straightened, there will be in it sufficient metal to form sharp outside corners, by being pushed out into them.

3. The arms of the Smith blank are not bent in an oblique direction, its body is not curved, the parts where the arms join the body are not rounded either on the inside or on the outside, and, in afterwards straightening the back, surplus metal is not pushed towards or into the corners, to form them, but the existing corners, already formed, are forced further apart, by driving surplus metal into the back, between the corners.

4. In view of the state of the art, and the terms of the Clark patent, it must be confined at least to a shape which, for practical use, in subsequent manipulation, has a disposition of metal which causes a sharp corner to be formed in substantially the same way as by the use of his blank.

[No. 259.]

Argued Apr. 17, 1885. Decided May 4, 1885.

APPEAL from the Circuit Court of the United States for the District of Connecticut.

The history and facts of the case fully appear in the opinion of the court.

Mr. **Wm. Edgar Simonds**, for appellant.
Mr. **O. H. Platt**, for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

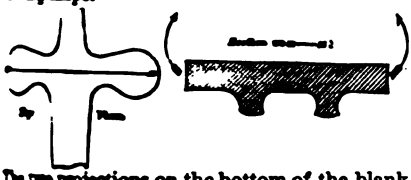
This is a suit in equity, brought in the Circuit Court of the United States for the District of Connecticut, by James B. Clark against The Beecher Manufacturing Company, a Connecticut corporation, and D. F. Southwick, for the infringement of letters patent No. 66130, granted to the plaintiff, June 25, 1867, for an "improvement in the manufacture of blanks for carriage thill shackles." The main defense in the suit is non-infringement. The Circuit Court, after a hearing and two rehearings, dismissed the bill, holding that infringement had not been proved. 7 Fed. Rep., 816. The plaintiff has appealed.

A history of the state of the art, and of the progress of invention in making shackle blanks will conduce to a determination of the questions involved. A carriage thill shackle is a device by which the thills of a carriage are hinged to the axle. The finished shackle is a horizonal plate, with a pair of vertical ears rising therefrom, one at each end of the back. The cockeye on the end of the thill is received between the ears, and a bolt passing through the ears and the cockeye secures the parts. The flat back or body part of the article is formed with a projection at each side, forming what is commonly called the "clip," by which the article is secured to the axle. In forming the shackle it is necessary that the outside corners, where the ears join the back, should be sharp, full and square, to obtain a good bearing on the axle, or the article will not be salable. The old style of shackle was of this shape:

It was formed by bending up the two ears from a piece of metal of equal thickness, so the outer corners became round, and the bearing on the axle was not firm and true. It was desirable to obtain in some way a reservoir for surplus of metal, which could be utilized, by the bending, by being thrown out into or remaining in the corners, to make them full and square on the outside. To attain this result,

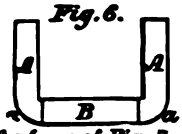
*Head notes by *Mr. Justice* BLATCHFORD.

James P. Thorp made an invention for which he obtained letters patent No. 28114, granted May 1, 1860, which were reissued to his assignees H. D. Smith and others, as No. 2362, September 18, 1866. Thorp's blank was of the following shape:



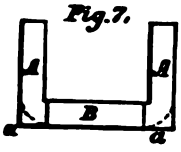
The two projections on the bottom of the blank were intended to furnish sufficient metal to make the outer corners of the shackle square and sharp, when the ears were bent in the direction indicated by the arrows. The projections were at the places where the arms joined the body. Thorp's patent showed a die for making the blank, constructed with recesses or [illegible] to form the projections, and stated that, after the arms were bent up, the blank, instead of being of the old form, Fig. 6, with rounded corners, *a*, *a*, thus:

Fig. 6.



would be of the form of Fig. 7, with square or right-angled corners, *a*, *a*, thus:

Fig. 7.



the blank being stronger at the junction of the arms and body, and the expansion of the metal, in making the arm, being compensated for by a natural contraction of the metal, which operated to prevent the destruction of the cohesion of the particles of the metal, and the consequent weakening of the blank at the parts where it was bent.

The next step is shown in letters patent No. [illegible], granted June 11, 1867, to Leander Burns and Joseph Wilcox, on the invention of Burns. This patent shows, in Fig. 7, an upper die M and a lower die N, and the blank made between them, with square corners, L, L, thus:

Fig. 7.

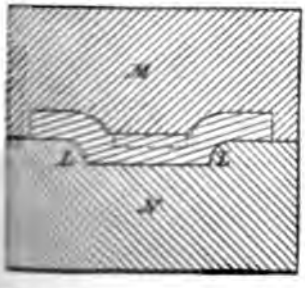
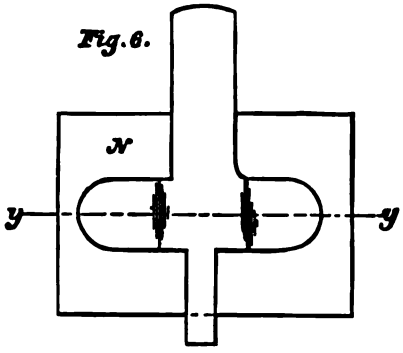


Fig. 7 is a transverse vertical section taken in the plane of the line *y y*, in Fig. 6. Fig. 6 is a face view of the lower die N, and shows also the blank after it is acted on by the dies. The specification states that if the arms of the blank are bent up at right angles, in a direction towards each other, perfect square corners will

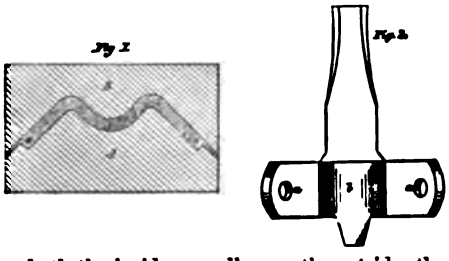
Fig. 6.



be left at L, L, with the metal through those corners and the other parts of a uniform thickness.

Then followed the patent to the plaintiff, the [83]
specification and drawings of which are as follows:

"This invention relates to the construction of carriage shaft shackles from solid blanks, and to the shape of the dies for forming the same, so that, with the least amount of labor and power, the said shackle may be gradually formed into the required shape. In the annexed drawings this invention is illustrated. Figure 1 is a vertical sectional view of a shackle blank, showing it between the dies. Figure 2 is a top or plan view of a shackle blank, as the same is formed by the dies. Similar letters of reference indicate like parts. The blank, which is made in the shape of a cross, in the usual manner, is placed upon the lower die A, and the upper die B is then forced down upon it, whereby the arms, *a*, *a*, of the blank are bent into an oblique direction, and the body, *b*, is curved, as shown in the figure. The portion of the blank where the arms join the body is rounded, as shown, [84]

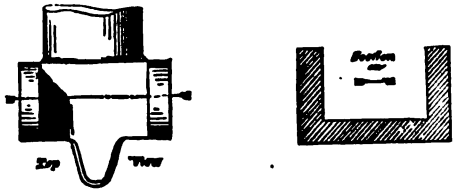


on both the inside as well as on the outside, the straightening of the body of the shackle pushing out sufficient material for forming the sharp corners, without having any hindersome and impracticable projections. The dies are formed so as to give the blank the required shape. This process of forming shackle blanks has proved, by practice, to be the most expeditious and simple yet performed, as it requires the least amount of machinery, and forms each part of the shackle with just the required amount

and thickness of metal for completing the article."

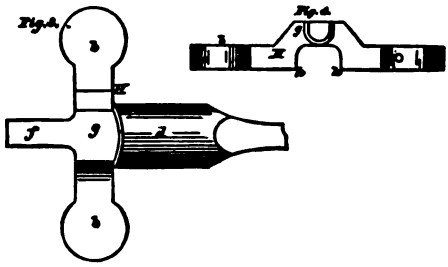
The claims, two in number, are these: "1. The carriage shaft shackle blank, so formed between dies that the body *b* of the blank is curved, substantially as herein shown and described. 2. The dies A and B, for making the said blank, when so constructed and arranged as to form the rounded corners and the curved body of the said blank, substantially as herein shown and described."

The plaintiff, according to his description, takes a blank in the form of a cross and, by dies of proper shape, bends the arms of the blank into an oblique direction, and the body into a curved form, the result being that the parts where the arms join the body are rounded on the outside as well as the inside; and when subsequently the curved body is straightened, there will be in it sufficient metal to form sharp outside corners, by being pushed out into them. The plaintiff's patent stops with the curved blank shown in Fig. 1 of his drawings. That blank is, in practice, afterwards formed, by other dies, into the following shape: Putting



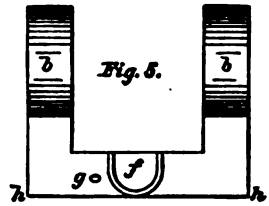
[85] the blank into that shape is what the specification refers to when it speaks of "the straightening of the body," and "forming the sharp corners."

The defendants make shackle blanks by dies, under letters patent No. 106225, granted to Willis B. Smith, August 9, 1870. Fig. 3 of that patent is a plan view of the blank which the dies forge, and Fig. 4 is an end view of the



blank. In these figures, *b*, *b*, are the ears; *d* is the clip; *f* is the shaft; *g* is the body of the blank; *h*, *h*, are the corners at the junction of the ears and the body; H is the whole blank. The corners *h*, *h*, are formed at right angles to each other. The specification says, that the blank H is then placed in a trimming die, and the surplus metal which projects from its edges is removed; and that the blank is then heated, and the oblique portions of the body, *g*, are

[86] bent, so as to throw the ears, *b*, *b*, upward, in the form shown in Fig. 5, in which operation the corners, *h*, *h*, previously formed at right angles, remain unmolested, and are square and full. The specification says: "I am aware



that dies for the same purpose have been previ ously used, as shown in the patents to L. Burns June 11, 1867, and J. B. Clark, June 25, 1867 In Burns' dies, the body of the shackle is forme straight, while the ears are curved, the curv commencing at the plane where the ears are t be bent to form the corners, and therefore sai corners are not right angled, neither is it possi ble for curved ears to be both on one and th same line. In Clark's dies, the ears are forme straight, but were arranged on different line so that the edge of the blank at the side of eac ear was drawn out of a vertical line, whic seriously interferes with trimming off the su plus metal. I make no claim to either of th above or similar dies." Smith's patent claim the blank so constructed and formed, and als the dies for forging it.

The Circuit Court was of the opinion that i straightening the angularly bent back of tl defendants' blank, to get it into the shape Fig. 5 of the Smith patent, surplus metal w not pushed towards or into the corners to for them, but the existing corners were forc further apart, to the extent of one fourth of inch, by driving surplus metal into the bac between the corners.

We are of opinion that this view is corre Besides this, the arms of the defendants' blar are not bent in an oblique direction, its body not curved, and the parts where the arms jo the body are not rounded, either on the insi or on the outside. The defendants' blank, in Fig. 4 of the Smith patent, has abundan of material near the corners *h*, *h*, which are be sharp and square and are already forme while the plaintiff's blank, by reason of rounded corners, has a deficiency of materi near the points where the square corners to formed are to be.

In the efforts to make, by dies, a shack blank, which should ultimately have sharp o side corners, the inventors, in succession, h the idea of a reservoir or surplus of met Thorp had it in the downward projectio Burns had it in his sharp lower corners w curved arms. The plaintiff had it in his curv body and rounded corners. Smith has it in shape. But, in view of the state of the art, a the terms of his patent, the plaintiff must confined to a curved body, rounded corners a oblique arms, or, at least, to a shape which, practical use, in subsequent manipulation, a disposition of metal which causes a sh corner to be formed in substantially the sa way as by the use of his blank. The defe ants' blank does not have such a shape.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U

JOHN F. WOLLENSAK, *Appt.*,

v.

FRANK A. REIHER.

(See S. C., Reporter's ed., 87-96.)

Patent law—construction—state of art.

In the construction of letters patent reference [illegible] to the existing state of the art at the time of the invention.

[illegible] letters patent No. 9307, original patent No. [illegible], limited to the combination claimed.

[No. 249.]

Argued Apr. 14, 15, 1885. Decided May 4, 1885.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Mssrs. L. L. Bond, Ephraim Banning and Thomas A. Banning, for appellant.

Mssrs. Wm. A. McKenney and Charles T. Brown, for appellee.

Mr. Justice Matthews delivered the opinion of the court:

The bill in equity was filed by the appellant to restrain the alleged infringement by the defendant, of reissued letters patent No. 9307, dated July 20, 1880; the original patent, No. [illegible], dated March 11, 1878, having been issued to John F. Wollensak, the appellant, for an alleged new and useful improvement in transom lifters. This appeal is from a decree dismissing the bill for want of equity.

The specification and drawings of the patent are as follows:

"Figure 1 is a perspective view, showing one means for carrying my invention into operation. Fig. 2 is a side elevation of the same, and Fig. 3 is a detached sectional view.

"Similar letters of reference in the several figures denote the same parts.

Fig. 1.

Fig. 2

Fig. 3.

"Transom lifters have heretofore been constructed with a long upright rod or handle jointed at its upper end to a lifting arm which extends to and is connected with the side or edge of the transom sash, the sash being opened or closed by a vertical movement of the long rod. When thus constructed the upright rod is liable to be bent by the weight of the transom, owing to the want of support at or near [89] the point of junction between the long rod and the lifting arm.

"The object of my invention is to remedy this difficulty; and to such end it consists in providing the proper support, or support and guide, for the upper end of the lifting rod during its vertical movements and while at rest.

"This may be accomplished in a variety of ways, one of which I will now proceed to describe in detail, although I wish it clearly understood that I do not limit my invention to this construction, but regard it as covering broadly any construction, combination or arrangement of parts which shall support the long or operating rod and prevent it from being bent or displaced by the weight of the transom.

"In the drawings, D is the door; T, the transom sash, pivoted at top, bottom or middle, as preferred; A, the lifting arm that connects the sash to the upright rod; U, the upright rod, passing through two guides, G G′, one above and one below the point of junction with the lifting arm; R, a friction roller, secured to the lifting rod so as to bear against the wall and support said rod at its point of junction with the lifting arm; *n*, *n*, notches, cut in the upright rod to receive the end of the set screw; and *s*, a set screw arranged, in connection with the lower guide and the rod U, so as to be convenient of operation for the purpose of fixing the transom at any required angle. The upright rod is thus supported at three points, to wit: above, below and at the joint where it sustains the weight of the transom. It can also be adjusted and securely fastened so as to open the sash as much or as little as may be desired, and to lock it in that position.

"Having thus described my invention, what I claim as new is:

"1. The combination, with a transom, its lifting arm and operating rod, of a guide for the upper end of the operating rod, to prevent it from being bent or displaced by the weight of the transom.

"2. The roller R, arranged at the junction of the lifting arm A and upright rod U, in a transom lifter, substantially as and for the purpose described.

"The guide G′, arranged above the junction [90] of the lifting arm and upright rod, in combination with the prolonged rod U, the guide G, and arm A, substantially as and for the purpose specified."

The defenses relied on were, that the alleged invention was not patentable; that it had been anticipated by Bayley and McCluskey, to whom a patent had been granted, dated July 7, 1868, No. 79541, for an improvement in railroad car ventilators; and that the defendant's device, secured to him by a patent dated April 6, 1880, No. 226353, did not infringe that of the appellant.

The specification and drawings of the appellee's patent are as follows: [91]

"My object is to construct a lifter which will always be ready for use and answer equally well for all kinds of transoms, no matter how the same may be hinged, without exchanging or altering any of the parts, in a simple and durable manner.

In the drawings forming part of this specification, Figures 1 and 2 show a front view and side elevation of my lifter attached to a transom hinged below. Figs. 3 and 4 show the lifter for transoms hinged above. Fig. 5 shows a front view of the lifter attached to a ventilating opening hanging obliquely. Fig. 6 shows the lifter attached to a transom hinged sidewise. Fig. 7 shows the lifter attached to a skylight. Fig. 8 shows a front view, Fig. 9 a vertical longitudinal section, and Fig. 10 an inverted [92] plan, of the casing. Figs. 11 and 12 show the top of lifting rod with adjusting block. Fig. 13 shows the lower part of the lifting rod with handle attachment.

Like letters of reference indicate like parts.

The casing A, which is screwed to the door frame, is provided on the front plate with a long slot, *a*. Sliding loosely up and down in this casing, A, is the adjusting block B, which protrudes by the ear *b*, forming part of this block, through slot *a*. Affixed to block B is the lifting rod C, in such a manner as to allow the rod to turn in said block. For this purpose the block is provided with a wide slot, as shown in Figs. 9 and 12, into which fits loosely the pin *d*, which penetrates the rod C

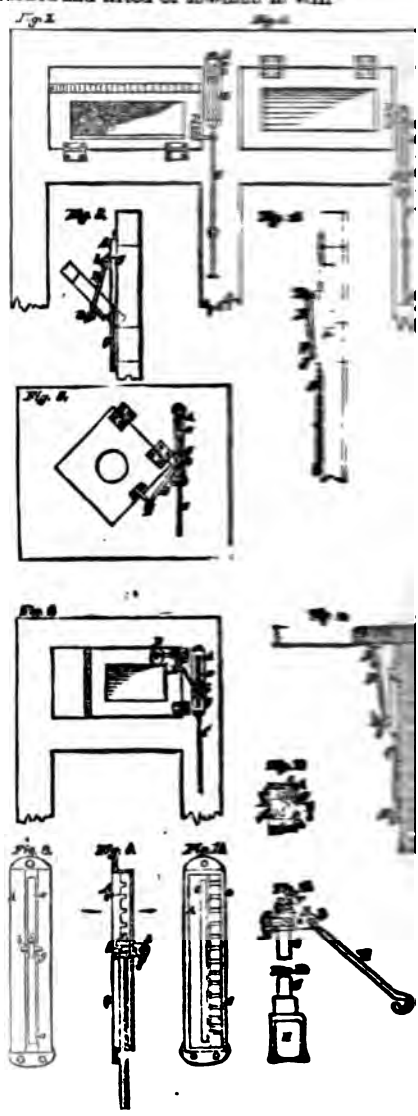
Attached to the transom in a position which is regulated by and depends upon the manner of hinging the same, at about midway between the outer swinging point and the center of hinge, is the bracket or loop D. Attached to this loop is the connecting link or arm E, which connects at its other end to the ear *b* of the adjusting block.

A look at the drawings will show that the upward or downward movement of the adjusting block, caused by the respective movement of the lifting rod, will be followed by a swinging movement of the transom on its hinges, through the agency of the universal link or arm E.

The inner face of the casing A (shown in Fig. 9) is provided with a series of notches, *e*. The upper end of the rod C is provided with a spiral spring, F, which, resting at one end in the hole *f* of the adjusting block B, is affixed at its other end in a groove, *f'*, at the top of rod C. This spring F has the tendency to hold the rod C, which turns loosely in the block B, in such a position as to cause the pin *d*, which projects on both sides of the block B, to fall into one of the notches *e* provided in the casing. Thus the rod, with block B and universal link E, is held in place by the action of spring F and pin *d*, and can be moved only by turning the rod C slightly on its axes, so as to disengage the pin *d* from the notch *e*.

It will be seen that, whenever the hand of the operator should happen to loose its hold [93] upon the rod, the spring F will cause the pin *d* to fall into the next notch and arrest the further movement of the block B, and thereby the movement of the transom. The transom may thus be locked at any desired position.

The rod C is provided at its lower end with handle H, arranged with an opening for the finger, so that the rod may be with convenience turned and lifted or lowered at will.



For transoms hinged at the lower edge of frame (shown in Figs. 1 and 2) the transom w loop D hangs in the universal link E. casing A with adjusting block is fixed abo When operating the same, the block bears w its shoulders *h* upon the inner face of casing

For transoms hinged at the upper frame, shown in Figs. 3 and 4, the casing is faste below, so that the adjusting block may be l by the lowest notch *e*. While the transom closed, the universal link hangs downward f the loop D. In this case, when operated, bearing between block and casing is rever and is taken up by a pin *g*, penetrating thro the ear of the block and resting upon the o face of the casing A.

For oblique transoms the lifter is affixed as shown in Fig. 5. Fig. 6 shows a transom hinged at the side. The casing or lifter is affixed vertically at the hinged side, the adjusting block being in the highest notch when the transom is closed.

For transoms hinged in the middle, the lifter may be affixed either above or below the hinged center. For skylights, the lifter is affixed as shown in Fig. 7.

It will be seen that the universal link E, with its two swiveling loop ends, will always be ready to form a connection between the transom long D and the ear *b* of the adjusting block, no matter which way the transom may be hinged.

What I claim as my invention, and desire to secure by letters patent, is:

1. The casing A, with slot *a*, containing the adjusting block B, with upright rod C, in combination with chain link E and loop D, all arranged and constructed in the manner as shown, and for the purpose specified.

2. The adjusting block B, rod C, pin *d*, and spring F, in combination with casing A, provided with slot *a* and notches *e*, *e*, for the purpose set forth."

The specification of the complainant's patent undertakes broadly to describe the invention, intended to embrace in it, as "any construction, combination or arrangement of parts which shall support the long or operating rod and prevent it from being bent or displaced by the weight of the transom." But, having reference to the state of the art at the date of the alleged invention, and the claims of the patent, the patentee must be limited to the combination, with a transom, its lifting arm and operating rod, of a guide for the upper end of the operating rod, arranged beyond the junction with the lifting arm, so as to prevent the operating rod from being bent or displaced by the weight of the transom.

Putting by the question whether this is a patentable invention, in view of the existing state of the art, the claim must be regarded as a narrow one and limited to the particular combination described. In that view, the defendant's arrangement is no infringement. The difference between the two devices is pointed out, and, as we think, satisfactorily, by Mr. Dayton, an expert witness on behalf of the defendant. He says: "When the sash is opened in the Reiher transom not an ounce of its weight falls upon, either laterally or obliquely, the upright rod. The Reiher transom is provided at its lower end with a block which runs in a guide, and which is constructed, with inner flanges and an external pin, arranged to bear respectively upon the inner and outer faces of the slotted guide which he employs, and which is fixed on the frame, so as to receive all the pressure resulting from the weight of the transom. The handle of the long upright rod in the said Reiher transom is designed and serves wholly as a means of raising the foot of the lifting arm and pushing it upward or drawing it downward. As I before stated, not a particle of inward or lateral pressure falls upon the end of this rod by reason of the weight of the transom. In my judgment such upright rod may, for this purpose, be left as shown at present. I stated that the sole purpose of the long upright rod was to reach and lift the foot of the block with the end of the lifting rod. To be accurate, I also state that it serves, additionally, to operate a [95] novel locking device with which said foot piece of the lifting arm is provided.

So far, then, as the function of the guide G′ in the Wollensak patent, or the upper guide in the numbers 1 and 8 of the Wollensak transom model, is concerned, I find that the Reiher transom presents a totally different structure, operating on a totally different principle, from that exhibited in the Wollensak transom model.

In my judgment the improvements of Mr. Reiher, as exemplified in the Reiher transom exhibit, are based upon and proceed from a totally different point in the state of the art of transom lifters, from that admitted to be old in the passage quoted from Wollensak's patent specifications, and upon which Wollensak's improvements are based. It is a matter of common knowledge, I believe, and it is certainly within my personal knowledge, that transoms or flap windows were, long prior to the date of Wollensak's original patent, provided with a pivoted brace, the foot of which was movable against the frame of such window or door. This is precisely the point in the art to which Mr. Reiher in his transom lifter has applied his improvements. His improvements do not involve the removal of the weight of the transom from a direct bearing against the frame at the foot of the lifting arm, and have not that object. Mr. Reiher sought, evidently, only to provide a ready locking device by which the foot of the lifting arm may be secured at any point quickly, and by which he may at once reach the locking device and lift the transoms through the medium of the long upright rod. Said long upright rod in his case is not, therefore, made stronger or weaker with a view to prevent its bending, and is only strong enough in any case to enable him to push up the foot of the lifting arm, and, by rotating the rod, to unlock his novel fastening device. There was no fault in the old structure upon which Mr. Reiher has made his improvements like that assigned to the old device upon which Wollensak has improved, namely: the bending of the vertical rod having a lifting rod connected therewith, because said lifting arm did not, in the old device attacked by Reiher, have any vertical rod at all, and because the lifting arm dis- [96] tinctly bore against the frame instead of against the rod."

It follows that the decree of the Circuit Court, dismissing the bill for want of equity, was correct. *It is accordingly affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

BEN. H. SMITH AND L. H. SPRINGER, as Admr. of WILLIAM H. TODD, Deceased, *Appts.*, [143]

v.

JOSEPH H. WOOLFOLK.

(See S. C., Reporter's ed., 143-150.)

Practice—final decree—subsequent proceedings—service of process—Statute of Limitations.

1. After a final decree the parties are not bound to take notice of subsequent proceedings, unless

they are served with process or enter their voluntary appearance.

2. Where a petition, filed subsequent to a decree, instituted a new litigation on new and distinct issues not raised by the original pleadings, and which could not have been properly raised by amendment, and between parties who were complainants in the original cause, service of process on the parties against whom relief is sought is necessary.

3. The statutes of Arkansas do not authorize service of process by letter or on the attorney of a party.

4. A complainant can have a decree against another complainant upon a supplemental or amended bill only upon notice to the latter, if at all.

5. A decree against a party who has not been heard, and has had no chance to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other court.

6. Under the decisions of the Supreme Court of Arkansas, to bar a suit for the foreclosure of a mortgage there must not only be an adverse possession for such a length of time as would bar an action of ejectment, but there must be an open and notorious denial of the mortgagee's title.

[No. 241.]

Argued and submitted Apr. 9, 1885. Decided May 4, 1885.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

The history and facts of the case appear in the

Statement by *Mr. Justice* **Woods**:

[143] The bill in this case was filed by Joseph S. Woolfolk to foreclose a mortgage executed to him by William H. Todd, the intestate of L. H. Springer, one of the appellants, upon the Belleview plantation, situate in Chicot County, Arkansas.

The record discloses the following facts. Junius W. Craig, a citizen of Arkansas, and the owner of the Belleview plantation, had, on December 5, 1856, mortgaged it to Mrs. Lucy D. Craig, the widow of his brother, to secure $41,666 owing by him to her. Some time after the date of the mortgage, Mrs. Craig intermarried with Joseph H. Woolfolk, the appellee. Junius W. Craig died on September 17, 1858. On March 16, 1866, Joseph H. Woolfolk and Lucy D., his wife, William H. Frazier, assignee of A. D. Kelly & Co., William H. Todd and others, in [144] behalf of themselves and all other creditors of the estate of Junius W. Craig, filed their bill in equity in the Circuit Court of Chicot County, Arkansas, against Emma J. Wright, executrix of the last will of Junius W. Craig, and others, for the settlement of his estate. The case is styled in the record, "*The Creditors of Junius W. Craig* v. *Emma J. Wright*, Executrix, and others." The bill alleged that many debts had been proven against the estate, amounting in all to the sum of $236,289.34, among which was the debt above mentioned due to Mrs. Lucy D. Woolfolk, a debt due to Frazier, assignee of A. D. Kelly & Co., for $45,607.76, and a debt due to Todd for $47,181.60. The prayer of the bill was that the lands of the estate might be sold and the proceeds distributed among the creditors.

On August 30, 1867, the plaintiffs in the original bill, including William H. Tood and Joseph S. Woolfolk and Lucy D., his wife, filed a supplemental bill of revivor, in which, among other things, they averred the pendency of an intervention filed by Woolfolk and wife in the Chancery Court of Jefferson County, in the State of Kentucky, praying to have the debt due them satisfied out of the property of the estate of Craig in Kentucky. The supplemental bill prayed the same relief as the original bill. The lands of the estate were brought to sale in accordance with the prayer of the bill, and most of them, including the Belleview plantation, were purchased by Todd. Upon a report of the sale, the share of Mrs. Woolfolk in the proceeds was found by the court to be $9,831, and Todd, having paid a small part of this sum, Woolfolk, for the residue, took the two notes of Todd, payable to himself, for $4,243.20 each, to secure which Todd executed to him a mortgage on the Belleview plantation. The court having distributed the proceeds of the sales of the lands, directed the receiver to collect the available assets of the estate and report to the next term of the court. By his reports subsequently made it appeared that the receiver had been able to collect only the sum of $157, which the court allowed him to retain as his compensation, so that nothing remained of the original cause in which Woolfolk and his wife were in any way concerned.

Afterwards, on April 12, 1869, during a vacation of the court, Todd, who had become by assignment the owner of the claim of A. D Kelly & Co., filed a petition in the case of *The Creditors of Craig* v. *Emma J. Wright*, Executrix, and others, in which he alleged, among other things, that Woolfolk and wife had brought suit in the Chancery Court of Louisville, Kentucky, against Todd and the heirs o Craig, to subject to the payment of the balanc due Mr. Woolfolk from the estate of Craig, cer tain real estate in the City of Louisville. Th petition averred that the proceeds of the Louis ville real estate should be first applied to th satisfaction of the claim of A. D. Kelly & Co. which had been classed as a preferred debt b the Probate Court in Arkansas, and prayed tha Woolfolk and wife might be required to ac count for any proceeds of the Louisville real e tate received by them, according to the right of creditors as declared by the Arkansas Pr bate Court; the purpose of the petition being t subject the money arising from the sale of th Louisville property to the payment first of th claim of A. D. Kelley & Co., owned by Todd

Upon this petition the Chicot Circuit Cou made an order that Woolfolk and wife answ the same on or before the third day of the ne term, and that in default thereof the petitio should be taken as confessed, and that servi of the order, "by letter or on attorneys of sa parties, be sufficient service thereof."

The statutes of Arkansas do not authori service of process in either of the methods d rected by the order. Nevertheless, the sheri returned that he had served the order by ma ing a copy thereof to Woolfolk and wife, d rected to their address, without naming it. H. Carlton, upon whom, as attorney of Wo folk and wife, it appeared that a copy of t order had been served, filed a writing in t case, in which he said he was not their att ney, but the attorney of Todd, the petition and disclaimed any interest in the cause on b half of Woolfolk. Upon these facts the co decided that there had been sufficient service the order.

Todd having died, the Chicot County Circ Court, on January 23, 1890, by its order ente in the case of *The Creditors of Craig* v. *Emma*

Wright, executrix, and others, made L. H. Springer, his administrator, plaintiff in his stead, and upon the same day decreed, among other things, that said L. H. Springer, as administrator of Todd, "have and recover of and from Lucy D. Woolfolk and Joseph H. Woolfolk the sum of $37,995.65 out of the said funds and assets in their hands" of the estate of Junius W. Craig, "and that payment thereof be enforced by execution as upon executions at law."

This decree was based upon the report of a master who returned into court none of the evidence, if there was any, upon which it was based.

Before the decree just recited was made, Todd, on October 27, 1879, brought in the Circuit Court of the United States for the Eastern District of Arkansas the present suit, to enforce, by the foreclosure of the mortgage made to secure them, payment of one of the two notes for $4,262.20 (the other having been paid), given by Todd to him for the share of Mrs. Woolfolk in the proceeds of the sale of the Belle-view plantation. L. H. Springer, the administrator of Todd's estate, and Ben. H. Smith, who before the death of Todd had acquired all his title to the mortgaged premises, were made defendants.

Smith in his answer insisted upon his right to set off the decree rendered against Woolfolk and wife, in favor of the administrator of Todd's estate, by the Circuit Court of Chicot County, on January 28, 1880, and set up the seven years' statute of Limitations of the State of Arkansas as a bar of the suit.

Springer, the administrator, adopted the answer of Smith, and offered to set off so much of the decree in favor of Todd mentioned in the answer of Smith, as would satisfy the demand of the plaintiff.

Woolfolk, whose deposition was taken, testified that since October, 1868, Carlton, on whom the order of the court above mentioned was served, had not been his attorney, and that he himself had never heard of the petition of Todd and that the final decree had been rendered against him, and that his wife, Lucy D. Woolfolk, died in 1876, four years before the entry of the decree; that from the year 1856 until her death she had resided in Kentucky, and that he had resided there all his life.

The deed of the receiver to Todd for the Belleview plantation was executed on October 9, 1868. It appeared from the evidence that Todd and the appellant Smith, who claimed under him, had been in possession of the mortgaged premises ever since that date.

Upon final hearing, the Circuit Court, on November 1, 1881, rendered a decree in favor of the plaintiff for $9,743, to bear interest from the date of the decree, and in default of payment a sale of the mortgaged premises to satisfy the same. From this decree the defendants, Benjamin H. Smith and Springer, administrator of Todd, have appealed.

Messrs. P. W. Compton and A. H. Garland, for appellants.

Mr. R. H. Rose, for appellee.

Mr. Justice Woods delivered the opinion of the court.

The decree of the Circuit Court was justified by the facts appearing of record, unless one or both of the defenses set up in the answers of Smith were maintained.

We shall consider first the defense of set-off based upon the record of the proceedings and decree of the Circuit Court of Chicot County.

We are of opinion that the decree of the Chicot Circuit Court, made on the 28th day of October, 1868, was, so far as it concerned Joseph H. Woolfolk and Lucy D., his wife, a final decree in the cause, and they were bound to take no notice of the subsequent proceedings, unless they were served with process or entered their voluntary appearance. By that decree the rights of the parties then before the court, as stated in the original bill, and all the assets of the estate of Craig actually or constructively within the jurisdiction of the court, were disposed of. It is true the receiver was directed by the decree to proceed to collect the available assets of the estate. But, as has been stated, only a small sum barely sufficient to pay the receiver's compensation, was collected by him, and this he was allowed to retain by the decree of the court. The petition filed by Todd, and the proceedings thereon subsequent to the decree of October 28, 1868, had no reference to any additional assets collected by the receiver after that date. [148]

If the matter set up in the petition of Todd had been offered as an amendment to the original bill when the latter was on final hearing and Woolfolk and wife were before the court, there is no rule of equity pleading and practice or of the jurisprudence of Arkansas by which such an amendment could have been allowed and have become the basis of a decree. *Shields* v. *Barrow*, 17 How., 130 [58 U. S., bk. 15, L. ed. 158]; *Hardin* v. *Boyd*, 113 U. S., 756 [Bk. 28, L. ed. 1141]; *Walker* v. *Byers*, 14 Ark., 246. As was said by this court in *Shields* v. *Barrow*, *ubi supra*, "it is far better to require the complainant to begin anew. To insert a wholly different case is not properly an amendment and should not be considered within the rules on that subject." So that even if the decree made on the original bill was not final, the petition filed by Todd was so radical a departure from the case made and relief prayed by the original bill as to be a new suit and require service of process on the parties made defendant thereto. It instituted a new litigation on new and distinct issues not raised by the original pleadings, and between parties who were complainants in the original cause.

It is settled that one defendant cannot have a decree against a codefendant without a cross bill, with proper prayer, and process or answer, as in an original suit. *Walker* v. *Byers* [*supra*]; Gantt's Dig., § 4559; *Cullum* v. *Erwin*, 4 Ala., 452; *Cummings* v. *Gill*, 6 Ala., 562; *Shelby* v. *Smith*, 2 A. K. Marsh, 504. It follows, from the reason of this rule, that if one complainant can, under any circumstances, have a decree against another upon a supplemental or amended bill, it must be upon notice to the latter. After a decree disposing of the issues and in accordance with the prayer of a bill had been made, it is not competent for one of the parties, without a service of new process or appearance, to institute further proceedings on new issues and for new objects, although connected with the subject-matter of the original litigation by merely giving the new proceedings the title of

the original cause. If his bill begins a new litigation, the parties against whom he seeks [149] relief are entitled to notice thereof, and without it they will not be bound. For the decree of a court rendered against a party who has not been heard, and has had no chance to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other court. *Windsor* v. *McVeigh*, 93 U. S., 274 [Bk. 23, L. ed. 914].

Upon the original bill, filed in the Chicot Circuit Court by Todd, it was not possible, therefore, for Todd to get a valid money decree against Woolfolk and his wife without new and adversary pleadings and service of process on Woolfolk and giving him his day in court. Woolfolk and wife had the right to reply on these principles of law, and were not bound to take notice of the petition of Todd and the proceedings thereunder.

Todd and his counsel appear to have seen the necessity of notice to Woolfolk and his wife, and made an attempt to give them notice of the petition filed by Todd. But the record shows that no lawful notice was served on them. It fails to show notice of any kind.

The only service which the defendants assert to have been made on Woolfolk and wife was the service on Carlton as their attorney, who was not their attorney, but, as he averred, the attorney of Todd, the petitioner, and the mailing to their address, by the sheriff, of the copy of the order. Conceding that these kinds of service, if executed according to law, were good under the Statute of Arkansas, which they are not, they would have been but substituted service, and could not support a personal decree against Woolfolk and wife. *Pennoyer* v. *Neff*, 95 U. S., 714 [Bk. 24, L. ed. 565]; *Harkness* v. *Hyde*, 98 U. S., 476 [Bk. 25, L. ed. 237]; *Brooklyn* v. *Ins. Co.*, 99 U. S., 362 [Bk. 25 L. ed. 416]; *Empire* v. *Darlington*, 101 U. S. 87 [Bk. 25, L. ed. 878].

It follows that the record of the proceedings and decree of the Circuit Court of Chicot County, subsequent to the decree made in the case of *Craig* v. *Wright*, executrix, and others, on October 28, 1868, was not binding upon Woolfolk and wife, and could not be received in evidence against them. As this record contained the only proof offered by the appellants, of any set-off in behalf of any one whatever against the mortgage debt due from Todd to [150] Woolfolk which the present suit was brought to enforce, it follows that the defense of set-off pleaded in the answers of the appellants failed for want of proof, even conceding that they were entitled to make the set-off.

It remains to consider the plea of the Statute of Limitations. The note secured by mortgage, which is the basis of this suit, fell due October 30, 1870, and the suit was brought October 27, 1879. It is insisted that the suit to foreclose the mortgage was, under the law of Arkansas, barred in seven years from the maturity of the note. In the case of *Birnie* v. *Main*, 29 Ark., 591, it was declared by the Supreme Court of Arkansas, that, "to bar a suit for the foreclosure of a mortgage, there must not only be an adverse possession for such length of time as would bar an action of ejectment, but there must be an open and notorious denial of the mortgagee's title; otherwise the possession of the mortgagor was the possession of the mo gagee." And in *Coldcleugh* v. *Johnson*, 34 Ar 312, it was said by the same court, that "t possession of a mortgagor is not to be deem adverse until he makes some claim or does so open and notorious act adverse to the rights the mortgagee." See also *Hardin* v. *Boyd* [*pra*]. The only evidence in the record of a such act, by either Smith or Todd, was the nial by Todd, in his answer filed on Ap 18, 1876, in a suit brought by Woolf against him in the Circuit Court of Ow County, Kentucky, on one of the mortg notes, that he was indebted to Woolfolk th on. Up to that date, at least, the possess of Todd and Smith was the possession of Wo folk. This suit to foreclose the mortgage w not, therefore, barred.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U

G. DE ROSSET LAMAR, Executor of G AWAY B. LAMAR, Deceased, *Plff. in Err.*

v.

HUGH McCULLOCH.

(See S. C., Reporter's ed., 163-188.)

Captured or abandoned cotton—construction statutes affecting action of trover—bar.

*Under sec. 2 of the Act of July 27, 1868, chap (15 Stat. at L. 243), now embodied in sec. 1059 of Revised Statutes, in an action of trover brou against a former Secretary of the Treasury of United States, in a court other than the Cour Claims, to recover a sum of money as the valu certain cotton, alleged to have been the pri property of the plaintiff, the defendant plea that the cotton had, in an insurrectionary S been taken, received and collected, as capture abandoned property, into the hands of a spe agent appointed by the defendant while such Se tary, to receive and collect captured or abando property in that State, under sec. 1 of the Ac March 12, 1863, chap. 120 (12 Stat. at L., 820); tha provisions of that Act were carried out in re to the cotton, as being captured or abandoned tor; that all the acts done by the defendant resp ing the cotton were done by him throughsuch ag in the administration of and in virtue and u color of the Act of 1863; and that, by force of of the Act of 1863, and of sec. 3 of the Act of the action was barred, and was exclusively w the jurisdiction of the Court of Claims. It appe that the cotton had been taken, so far as the de ant was concerned, as being captured or aband property, under a claim, made by him in good f to that effect, in the administration of and u color of the Act of 1863; *Held*, that, without r ence to the question whether the cotton w fact abandoned or captured property withi Act of 1863, the fact that it was taken as being under such claim, made in good faith, was a b the action, under the Act of 1868, and sec. 1059 o Revised Statutes.

[No. 828.]

Argued Oct. 15, 16, 1885. Decided Oct. 26,

IN ERROR to the Circuit Court of the U States for the Southern District of York.

The history and facts of the case app the opinion of the court.

Messrs. **George Ticknor Curtis** an *ward N. Dickerson*, for plaintiff in error.

Mr. **A. H. Garland**, *Atty-Gen.*, for de ant in error.

*Head notes by *Mr. Justice* BLATCHFORD.

Mr. Justice Blatchford delivered the opinion of the court:

This is an action of trover, originally brought by Gustavus R. Lamar, against Hugh McCulloch in the Supreme Court of New York, in September, 1873, and removed into the Circuit Court of the United States for the Southern District of New York, by the defendant. The declaration was framed to recover $150,280, as the value of 378 bales of cotton, known as the Thomasville cotton, and $110,760, as the value of 426 other bales of cotton, known as the Florida cotton. The suit was afterwards discontinued as to the Thomasville cotton. The defendant pleaded (1) the general issue; (2) that the defendant was the Secretary of the Treasury of the United States, and the 426 bales had, in the State of Florida, which had been designated as in insurrection against the lawful government of the United States by the Proclamation of the President of the United States, dated July 1, 1862 (12 Stat. at L., 1,266), "been taken, received and collected, as abandoned or captured property, into the hands of certain special agents, duly appointed by the Secretary of the Treasury, to recover and collect captured or abandoned property" in said State, in pursuance of the provisions of the last section of the Act of Congress approved March 12, 1863, chap. 120 (12 Stat. at L., 820), and the Acts amendatory thereof and supplementary thereto; that "all the other provisions of said Act of Congress were carried out in regard to said bales of cotton, as being captured or abandoned cotton"; that all acts done by the defendant "respecting said cotton, were done by him, through the agents aforesaid, as such officers of the United States as aforesaid, and in the administration of and in virtue and under color of the aforesaid Acts of Congress"; and that, by force of § 3 of the said Act of March 12, 1863, and § 3 of the Act of Congress approved July 27, 1868, chap. 276 (15 Stat. at L., 243), the plaintiff "has no legal cause of action herein, and is barred from such action, which, by force of the statutes aforesaid, is exclusively within the jurisdiction of the Court of Claims"; (3) that this action is brought against the defendant "for or on account of private property taken by him as an officer or agent of the United States, in virtue or under color of" said Act of March 12, 1863, and the Acts amendatory thereof and supplementary thereto; that the acts done by the defendant, "in regard to said private property, were done by him as an officer or agent of the United States, in the administration of and in virtue and under color of said Act" of March 12, 1863, and said Acts amendatory thereof and supplementary thereto; and that, by force of § 3 of said Act of July 27, 1868, the plaintiff has no legal cause of action against the defendant. There were other pleas to which it is not necessary to refer.

To the general issue the plaintiff put in a replication. To the second plea he put in two replications: (1) That the defendant seized and detained the cotton mentioned in the plea in his own wrong and without the cause alleged, concluding to the country; (2) that the cotton was not property abandoned or captured in the State of Florida, "and had not been taken, received and collected, as abandoned or captured property, into the hands of special agents duly appointed by the Secretary of the Treasury, to receive and collect captured and abandoned property" in said State, in pursuance of the statutes cited, and was "not seized by any agent or officer of the United States as such abandoned or captured property, and that all acts done" by the defendant "respecting the said cotton, were not done by him through the agents aforesaid, as the Secretary of the Treasury of the United States, and in the administration of and in virtue and under color of" the Acts of Congress set forth in the plea, concluding to the country. To the third plea the plaintiff replied, that the cotton was not private property taken by the defendant "as an officer or agent of the United States in virtue or under color of" the Acts of Congress mentioned in the plea, and that the acts done by him in regard to the cotton "were not done by him as an officer or agent of the United States, in the administration of and in virtue and under color of" said Acts of Congress, concluding to the country.

To these replications the defendant put in *similiters*. The case was at issue in March, 1874. In October, 1874, Mr. Lamar died, and, the present plaintiff having been appointed and qualified as his executor in November, 1874, an order was made in November, 1875, continuing the action in his name as executor. The cause was tried before a jury in November, 1884. At the close of the plaintiff's evidence, and without any evidence being put in by the defendant, the court directed the jury to find a verdict for the defendant, "upon the ground that the Court of Claims had exclusive jurisdiction of the cause of action set forth in the plaintiff's declaration, and in the evidence as given thereunder, by virtue of the statute of March 12, 1863, and the statutes passed amendatory thereof." The plaintiff excepted to this ruling, and a verdict was rendered for the defendant, followed by a judgment in his favor, to review which the plaintiff has brought this writ of error. [166]

The case made out by the plaintiff by his evidence set forth in the bill of exceptions, as applied to the pleadings above set forth, was this, so far as such evidence is material, in the view we take of the case:

On the 16th of November, 1865, one Samuel G. Cabell, being in Washington, addressed to the defendant, who was then the Secretary of the Treasury of the United States, a written application or petition, asking for compensation for certain services performed by him "in collecting and securing for the Government of the United States certain captured property therein enumerated." No copy of this letter is put in evidence, and its tenor is to be gathered from subsequent correspondence.

On the 17th of November, 1865, the defendant sent to Mr. Cabell the following letter:

"Treasury Department, November 17th, 1865.

Sir: I have received your application for compensation for certain services performed by you under an appointment from J. H. Alexander, Esq., ass't special agent at Pensacola and Apalachicola, Fla., in collecting and securing for the Government of the United States certain captured property therein enumerated.

In fixing the amount of your compensation Mr. Alexander transcended his authority, and promised you an amount larger than has been approved by me in any case, and much larger, in my opinion, than the circumstances in these cases would justify. [167]

[illegible] question [illegible] may agent [illegible] from the [illegible] however, [illegible] and [illegible] the [illegible] return [illegible] cotton [illegible] ro- [illegible] day; [illegible] com- [illegible] and [illegible] and [illegible] you [illegible] [illegible] [illegible]

of Sept. 6th last, I have now the honor to make the following report:

"It will be seen by an official transcript of the books of the 'custom-house,' Jacksonville, Fla., collector's office, January 25th, 1866, and herewith submitted, marked 'Exhibit A,' I shipped on board the brig Lewis Clark one hundred and seventy-two (172) bales of cotton, weighing ninety-two thousand one hundred and one (92,101) pounds; also shipped on board the schooner Queen of the West, ninety-five (95) bales of cotton, weighing forty-eight thousand three hundred and twenty-one (48,321) pounds, all of which cotton was marked 'S. G. C.' and consigned by me to Simeon Draper, Esq., cotton agent, New York City.

"The above mentioned cotton which was seized by me, as, was owned by the Exporting and Importing Company of Georgia (president, G. B. Lamar), a company engaged in the sole business of blockade running, and holding said property for the purpose of aiding and abetting the rebellion, as stated in my communication to you of the 16th of Nov. last.

"Most of the cotton purchased for the above company in Florida and Southern Georgia was made by one who signs himself as 'W. W. Cheever, agent for G. B. Lamar,' as will more fully hereafter appear when reference is made to certain lots of cotton by me seized and shipped. It also appears that the said cotton was purchased by the agents of Mr. Lamar and left on the plantations subject to their order."

This letter proceeds to give an account of the various lots of cotton making up the 272 bales, stating where in Florida they were seized or taken by Mr. Cabell, and transmitting various documents, and among them, an account showing that he had paid out $6,654, as expenses relative to the cotton, before it was shipped to New York. The letter says: "It will thus be seen, from the papers submitted, that I have been engaged since July last, in seizing and otherwise obtaining this two hundred and seventy-two (272) bales of cotton for the Government"; and concludes with asking a compensation for the services, one third of the cotton, or 90¾ bales.

On the 27th of February, 1866, Mr. Cabell presented to the Treasury Department a petition, setting forth that, on the 22d of July, 1865, J. H. Alexander, then acting assistant supervising special agent of the United States Treasury Department for the 9th special agency, "under the regulations of said department for the collection of captured and abandoned property in the disloyal States," had appointed Mr. Cabell acting aid to the assistant special treasury agent for the District of Florida, "to collect and receive all the cotton, tobacco and other property belonging to the United States"; that, in July, 1865, one Douglas shipped from Tallahassee to one Ottman, a reputed treasury agent at Jacksonville, Florida, 268 bales of "Government cotton," which Mr. Cabell then claimed were taken from his district and should of right be under his control; and that, in August, 1865, Mr. Cabell paid the expenses of preparing the cotton for shipment, which Ottman had not paid, being $6,883.89. The petition prayed that Mr. Cabell be paid the $6,883.89, and be allowed compensation for his services in the matter.

On the 4th of May, 1866, the defendant sent the following letter to Mr. Draper, the United States Cotton Agent at New York:

"May 4, 1866.

"Application is made to me by S. G. Cabell, Esq., for the allowance to him of a portion of certain two hundred and seventy-two (272) bales of cotton collected by him, and shipped to you from Jacksonville, Fla., on the 25th of January last, and for a portion also of certain two hundred and sixty-eight (268) bales alleged to have been collected by him and turned over or shipped to Reuben Ottman, Esq., assistant special agent at Jacksonville, Fla.

I am not at present prepared to make a division of either lot, but it appearing, to my satisfaction, that Mr. Cabell has paid, as expenses incidental to securing the first lot, the sum of six thousand six hundred and fifty-four dollars ($6,654), and on the second the sum of six thousand eight hundred and eighty-three dollars and eighty-nine cents ($6,883,89), which amounts should probably be reimbursed, you are hereby authorized and directed to pay to his attorneys, Messrs. Hughes, Denver & Peck, the two amounts named, charging the first as an item of expense against the two hundred and seventy-two bales above referred to, and the second as a similar item against the shipment of cotton received by you from Mr. Ottman at Jacksonville.

Mr. Cabell also asks a per diem allowance as a compensation for his time, personal services, and expenses in connection with the cotton named; for this purpose you are also authorized and instructed to pay his attorneys, Messrs. Hughes, Denver & Peck, the sum of three hundred and fifty dollars ($350), being at the rate of five dollars ($5) per day from the 17th of Nov. last, the date of my letter authorizing him to take action in the premises, to the 25th of January, the date of the shipment by him of the two hundred and seventy-two (272) bales mentioned, from Jacksonville, making a charge of this amount, also, as an item of expense against the two hundred and seventy-two (272) bales.

These several sums should be charged against Mr. Cabell on your books, and will be deducted from any portion of cotton hereafter allotted, or any allowance made to him, on a final settlement of his claims.

You will, of course, require proper receipts for the money thus paid, and promptly report your action hereunder to the Department. [174]

Very respectfully. H. M'Culloch,
Secretary of the Treasury.

Simeon Draper, Esq., U. S. Cotton Agent, New York."

The $13,887.89 was paid by Mr. Draper, May 7th, 1866. The 272 bales of cotton were sold at auction by Mr. Draper, at New York, September 12, 1866, and produced the net sum, above expenses of sale, of $28,792.19, which sum was paid into the Treasury of the United States. When the 268 bales were sold does not appear, but the net proceeds of it, at New York, above expenses, appear to have been $42,883.76, and it is assumed they were paid into the Treasury.

On the 25th of May, 1867, the defendant sent to the Commissioner of Customs the following letter:

"May 25, 1867.

Sir: In compliance with the promise made to him in my letter of November 17th, 1865, I have decided to pay to Mr. Samuel G. Cabell, as full compensation for information furnished, services performed, and expenses incurred by him, in the collection, putting in order and shipment to New York of certain 272 and 268 bales of cotton, ex brig Lewis Clark, and schooners Queen of the West, Julia Crawford, and R. E. Pecker, etc., and for information furnished and expenses incurred by him touching the cottons captured at Thomasville, Ga., and other cottons claimed by the Georgia Exporting and Importing Company, or by G. B. Lamar, and held by Government as captured or abandoned property, the sum of four thousand eight hundred and eighty-one dollars and ten cents ($4,881.10).

You will, therefore, please issue your requisition upon F. E. Spinner, Esq., Treasurer, U. S., special agent, the same to be satisfied out of any funds in his hands as proceeds of captured and abandoned property, for the amount named, viz.: $4,881.10, in favor of George Peabody Este, whose full power of attorney to act in the premises is on file in this office. [175]

The draft, therefore, when issued, should be handed to Mr. S. H. Kauffman, a clerk in this office,

for delivery to the payee, under such instructions relative thereto as he may have or receive.

Very respectfully, H. M'Culloch,
Secretary of the Treasury.

Nathan Sargent, Esq're. Commissioner of Customs."

This settlement was made on the basis of giving to Mr. Cabell one fourth part of the gross value of the cotton as sold at New York, and deducting therefrom the $6,654 and the $6,883.80, and also one fourth part of the expenses on the cotton before its shipment at Jacksonville, and for its transit from there to New York, and at New York, and adding $500 in respect of the Thomasville cotton, making a total allowance of $4,881.10, which sum was paid to Mr. Este, for Mr. Cabell, by Mr. Spinner, as special agent, by a draft on the Treasurer of the United States, May 27, 1867.

[181] The foregoing written documents show the connection of the defendant with the case. Mr. Cabell's application or petition of November 16, 1865, claimed compensation for having collected or secured cotton, cedar timber and cattle. It enumerated the property. The defendant, in his letter of November 17, 1865, to Mr. Cabell, refers to it all as "captured property," but says that as none of it had been actually placed in the possession of any agent of the Treasury Department, or removed from the places where it had been discovered, he desires that Mr. Cabell will return South and do all in his power "to secure to the Government the cotton named" by him, and "to transport the same to a proper place of shipment." Only cotton was to be secured; and it is a fair interpretation of the letter, that the cotton was to be secured as having been "captured property," and that it was referred to by the defendant as a part of the "captured property" enumerated by Mr. Cabell. Mr. Cabell, in his letter to the defendant of December 11, 1865, speaks of the 170 bales he had already shipped as cotton "formerly owned by the Exporting and Importing Company." The defendant, in his letter to Mr. Cabell of December 29, 1865, says that his letter of November 17, 1865, was intended to empower Mr. Cabell to take into his possession "any cotton belonging to Government not in the custody of any other officer of the department, and which might not otherwise be secured by them"; that a perusal of that letter will show that it was not intended to do more than secure his services in connection with the lots of property which had been specified by him; and that "no indiscriminate seizures and collections were contemplated by it." Mr. Cabell's letter to the defendant, of February 17, 1866, says that the 272 bales he had shipped from Jacksonville to New York on January 25, 1866, were "owned by the Exporting and Importing Company of Georgia (president, G. B. Lamar), a company engaged in the sole business of blockade-running and holding said property for the purpose of aiding and abetting the rebellion." In his petition of February 27, 1866, to the defendant, Mr. Cabell states that he had been appointed by Mr. Alexander, in July, 1865, to "collect and receive all the cotton, tobacco and other property belonging to the United States," and speaks of the 268 [182] bales as "government cotton," and speaks of Mr. Alexander as agent of the Treasury Department, "under the regulations of said department for the collection of captured and abandoned property in the disloyal States." In his letter of May 25, 1867, to Mr. Sargent, the defendant speaks of the 272 and 268 bales as being "held by Government as captured or abandoned property," and directs the $4,881.10 to be paid out of the "proceeds of captured and abandoned property."

By section 1 of the Act of March 12, 1863, chap. 120 (12 Stat. at L., 820), the Secretary of the Treasury was authorized to appoint special agents "to receive and collect all abandoned or captured property" (with specified exceptions), in any State designated as in insurrection by the Proclamation of the President, of July 1, 1862 (12 Stat. at L., 1266). Florida was such a State. By section 2, the property collected, if not appropriated to public use, was to be forwarded to a place of sale in the loyal States, and sold at auction, and the proceeds paid into the Treasury of the United States. By section 3, the Secretary of the Treasury was to cause "books of account to be kept, showing from whom such property was received, the cost of transportation, and proceeds of the sale thereof." Section 3 further provided as follows: "And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court, of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

By section 3 of the Act of July 27, 1868, chap. 276 (15 Stat. at L., 243), it was declared to have been the true intent and meaning of the Act of March 12, 1863, "that the remedy given in cases of seizure made under said Act, by preferring claim in the Court of Claims, should be conclusive, precluding the owner of any property taken by agent, of the Treasury Department as abandoned or captured property, in virtue or under color of said Act, from suit at common law, or any other mode of redress whatever, before any court or tribunal other than said Court of Claims; and in all cases in which suits of trespass, replevin, detinue, or any other form of action, may have been brought and are now pending, or shall hereafter be be brought, against any person, for or on account of private property taken by such person as an officer or agent of the United States in virtue or under color of the Act aforesaid," "the defendant may and shall plead or allege in bar thereof, that such act was done or omitted to be done by him as an officer or agent of the United States, in the administration of one of the Acts of Congress aforesaid, or in virtue or under color thereof, and such plea or allegation, if the fact be sustained by the proof, shall be, and shall be deemed and adjudged in law to be, a complete and conclusive bar to any suit or action." This statute was in force when the suit was brought, and when the issues in were joined and the provision as to the jurisdiction of, and conclusive remedy in, the Court

of Claims, is re-enacted, in substance, in section [illegible] of the Revised Statutes, which gives jurisdiction to the Court of Claims to hear and determine all claims for the proceeds of captured or abandoned property, as provided by the Act of March 12, 1863, or by the Act of July 2, [illegible], chap. 226 (13 Stat. at L., 375), and then adds: "*Provided*, That the remedy given in cases of seizure under the said Acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property seized by agents of the Treasury Department as abandoned or captured property, in virtue or under color of said Acts, from suit at common law or any other mode of redress whatever, in any court other than said Court of Claims."

The occasion for the enactment of the provisions of section 3 of the Act of July 27, 1868, appears to have been this: "One Elgee brought a suit in a state court in Missouri, against one Lovell, to recover the possession of some bales of cotton. Lovell removed the case into the Circuit Court of the United States for the Districts of Missouri, on the ground that he was in possession of the cotton as agent for the Government of the United States, which claimed it as abandoned property, under the Act of March 12, 1863. Elgee having died, the suit was continued in the name of his administrator. It was decided by the Circuit Court, held by *Mr. Justice* Miller and *District Judges* Treat and Krekel, in October, 1865, and is reported in 1 Wool. 1 in *Elgee's Admr.* v. *Lovell*. The opinions of the court, for there were two, were given by *Mr. Justice* Miller. To the ordinary decisions in defence the defendant pleaded that the cotton had, before the suit was brought, and in March, 1864, been taken, received and collected in the State of Mississippi, as abandoned property, into the possession of one Hart, a special agent, appointed by the Secretary of the Treasury to receive and collect abandoned or captured property, under the Act of March 12, 1863, Mississippi having been designated as an insurrection, by the Proclamation of July 1, 1862, that the cotton was in possession of the defendant, at St. Louis, as agent of the United States, in his transit to a place of sale, and he was holding it for and on behalf of the United States and not otherwise; and that the cotton was claimed by the United States as abandoned property, under said Act. The plaintiff demurred to this plea, and the demurrer was overruled. The Circuit Court said, in regard to the plea: 'It shows that the cotton mentioned in the declaration was seized as abandoned property in one of the districts declared by the Proclamation to be in a State of insurrection, by a duly appointed agent of the Treasury Department for that district, and that, when this suit was brought, it was held by the defendant as an officer of the Government, with a view of disposing of it under the Act. The objection taken is, that it does not aver that the property, when taken possession of by the treasury agent was captured or abandoned property, or in any other manner show that it was rightfully seized. * * * The question is, whether Congress intended to make the remedy given by the Act exclusive of all others, or to permit the Treasury agents to be sued for the possession of such property wherever the party aggrieved might find a court of general jurisdiction. * * * The Act evidently contemplates that, in some instances at least, property will be seized which ought to be returned to its owner, or for which compensation should be made by paying him the proceeds. Otherwise it were unnecessary to provide any means of determining when a return should be made. And the remedy applied to property taken by mistake, or by the unjustifiable act of the agent, equally as to property which has been abandoned or captured. * * * I am of opinion that Congress intended to prescribe to all claimants who should prove their loyalty and their right to the property, this remedy for all cases of seizure by agents, under this law, whether made in a strict accordance with its provisions or not." Upon this decision, the plaintiff filed a replication to the plea, which averred that the cotton before it came into the possession of Hart, was the property of Elgee; that by the Proclamation of the President, of December 8, 1863 (13 Stat. at L. 737), there was promised a full pardon and amnesty, with restoration of all their rights of property, except as to slaves, to all those living in the insurrectionary districts, except certain classes of persons therein mentioned, who should thereafter take, subscribe and keep inviolate a certain oath therein prescribed; that, before the suit was brought, Elgee, then living in said insurrectionary districts, not being one of the excepted persons, took and subscribed the oath required and had kept it inviolate; and that his rights of property in the cotton were thereby restored to him. The defendant demurred to this replication. The demurrer was sustained by the Circuit Court, which held, in its decision, that as the Act of March 12, 1863, contemplated that the property of loyal citizens might and would be taken under it, and as the only remedy of a loyal citizen of a loyal State, in respect to property owned by him, seized by a treasury agent in an insurrectionary district, as abandoned property, was by an application to the Court of Claims, pardon and amnesty could not place the disloyal citizen in any better position than that occupied by the loyal citizen.

[185]

There was a final judgment against the plaintiff, and the case was brought into this court by a writ of error sued out by Elgee's administrator, and was No. 63 on the docket of December Term, 1867. Briefs for both parties were filed, and the case was argued orally. The court was equally divided in opinion, eight judges sitting, and the judgment was consequently affirmed on the 27th of January, 1868. Subsequently the bill which became a law on the 27th of July, 1868, was introduced into the House of Representatives and passed by it and by the Senate, and was approved by the President. It is proper to assume, from this history and the contents of the Act, that it was introduced and passed because of the difficulties which had attended the decision of this court in the *Elgee Case*.

[186]

It is manifest, we think, that section 3 of the Act of July 27, 1868, was intended to cover, and does cover, a case like the present. The Act, in terms, includes a suit for what is in fact private property, taken by an agent of the United States, as being abandoned or captured property, in the administration of the Act of

March 12, 1863, or in virtue thereof, or under color thereof. Whatever doubt there may have been before the Act of July 27, 1868, was passed, on facts such as those in *Elgin's Case*, there can be none as to this case, on its facts, under the language of that Act. Even though the property taken was private property, if it was taken by an officer or agent of the United States, under a claim that it was abandoned or captured property, in the administration of the Act of March 12, 1863, or in virtue thereof, or under color thereof, the jurisdiction of every court but the Court of Claims, in respect to every mode of redress, is taken away, when it is pleaded or alleged, in defense, that the property was taken by the defendant, as such officer or agent, in the administration of the Act, or in virtue or under color thereof, and that fact is sustained by the proof. The fact to be sustained by the proof is, not that the property was in fact abandoned or captured property, but that it was in fact taken as being such, on a claim to that effect, in the administration of the Act, or in virtue of it, or under color of it. Of course, there must be good faith, or there can be no color. The claim must not be made in bad faith. In *McLeod* v. *Callicott*, Chase's Decisions, 443, *Chief Justice* Chase, in speaking of section 3 of the Act of July 27, 1868, says
[187] that, if a person proceeds in good faith, believing himself to be warranted, as an officer of the Government, in taking charge of property under the Act, he is covered by its provisions; and that, in such case, although the acts he does as such officer are done under a mistake as to the character of the property, he is protected by the Act against a private suit. This we believe to be the proper interpretation of the statute. In *Lammon* v. *Feusier*, 111 U. S., 17 [Bk. 28, L. ed. 337], where a marshal, having an attachment against the property of one person, levied it on the property of a stranger, it was held by this court that the sureties on the official bond of the marshal were liable to the stranger, because the marshal had acted *colore officii*, although he had acted without sufficient warrant.

This suit is not against Mr. Cabell. No accusation of bad faith against Mr. Cabell can affect the defendant, except so far as the acts of Mr. Cabell were authorized in advance by the defendant, or sanctioned or approved or ratified by him with full knowledge. Starting out with the fact that it cannot be held that in the beginning the defendant gave any authority to Mr. Cabell except in regard to "captured property," we find that he impressed upon Mr. Cabell the fact that he was authorized only to take cotton belonging to the Government, and nothing beyond the specific cotton which Mr. Cabell had named; that the proceedings Mr. Cabell was authorized to take in regard to such cotton were proceedings under the Act of March 12, 1863, to collect it and ship it, so that it might be sold; and that the representations made in regard to all the cotton, by Mr. Cabell to the defendant, after it was shipped to New York, were such as to indicate that it was "government cotton," and to warrant the defendant in fairly regarding it as cotton which had been "captured," within the Act; and we think the defendant had the right to treat it as cotton to be sold under the Act, and to see that its proceeds were paid into the Treasury to await adjudication by the Court of Claim
called upon to take upon himsel
bility of restoring the cotton or
Mr. Lamar, under any represen
are shown to have been made t
Lamar in regard to the ownership
or in regard to its *status* as not b
or abandoned property, or in
status of Mr. Lamar as having tak
oath on January 6, 1865, under
tion of December 8, 1863 (13 St
Nor do we think these conclusio
by the contents of the written op
Mr. Eames, in December, 1866.

As to the general instructions is
of the Treasury Department, by
of the Treasury, on the 27th of
are of opinion that, notwithstan
structions, the Secretary of the
the right to give to Mr. Cabell t
thority which he gave to him.

Under these views, the instruc
to find a verdict for the defendant,
stated in the instruction, was co

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, S

ARTHUR NORRINGTON, *
v.
JAMES A. WRIGHT E

(See S. C., Reporter's ed., 1

*Mercantile contracts—time or pl
as a warranty or condition
scission.*

*1. In a mercantile contract, a sta
tive of the subject matter, or of so
cident, such as the time or place
ordinarily to be regarded as a war
tion precedent, upon the failure o
ance of which the party aggrieve
ate the whole contract.

2. Under a contract made in Ph
the sale of "5,000 tons iron rails, for
a European port or ports, at the ra
tons per month, beginning Febr
whole contract to be shipped befor
at $45 per ton of 2,240 lbs. custom-h
ship Philadelphia; settlement cash
of bills accompanied by custom-h
of weight; sellers not to be compe
any parcel lost after shipment";
bound to ship 1,000 tons in each mon
ary to June inclusive, except that
important deficiencies may be m
and if only 400 tons are shipped in
885 tons in March, and the buyer a
for the February shipment on its ar
at the stipulated price and above it
and in ignorance that no more has
February, and is first informed of
the arrival of the March shipment
cepting or paying for either of t
scind the contract by reason of th
about 1,000 tons in each of the mon
and March.

[No. 13.]

*Argued Jan. 20, 21, 1885. De
1885.*

IN ERROR to the Circuit Cour
States for the Eastern Distri
vania.

*Head notes by *Mr. Justice* GRAY

NOTE.—*Sales; warranty or cond
breach; rescission.*
See Pope v. Allis and note, post.

The history and facts of the case appear in the opinion of the court.

Mr. Samuel Dickson and John C. Bullitt, for plaintiff in error:

A partial failure in the performance of a divisible contract does not justify the other party in refusing to go on with it. If the covenant broken goes to the entire consideration, the object of the contract is defeated, but if capable of compensation, the only remedy is in damages.

The leading American case is *Milldam Foundry Co.* v. *Hovey*, 21 Pick., 417, where the entire subject of dependent covenants and conditions precedent is discussed and the authorities reviewed.

See also *Johnson* v. *Johnson*, 3 Bos. & Pul., [illegible]; *Stoddart* v. *Smith*, 5 Binn., 355; *Graver* v. [illegible] 80 Pa. St., 88; 2 Chit. Cont., 1092, citing *Franklin* v. *Miller*, 4 Adol. & E. 268, 599; *Johnson* v. *Young*, 4 B. & S., 296; *Weaver* v. [illegible], 6 Taunt., 155; *Keenan* v. *Brown*, 21 [illegible]; *Simson* v. *Crippin*, L. R. 8 Q. B., [illegible]. For a full discussion, see 21 Am. Law Reg., [illegible], note by Lucius S. Landreth.

Mr. Richard C. McMurtrie, for defendants in error:

Where the contract intends that there shall be performance in distinct parcels at different times, a breach in respect of any installment at the option of the other side absolves him from any further performance.

[illegible] v. *Burness*, 3 Best & S., 755; *Canal Co.* v. [illegible], 6 Wall., 562 (73 U. S., bk. 18, L. [illegible]); *King Phillip Mills* v. *Slater*, 12 R. [illegible]; *Doe* v. *Dey*, 3 Wend., 361; *Catlin* v. [illegible], 26 N. Y., 217; *Elting Woolen Co.* v. [illegible], 5 Daly, 417; *Hill* v. *Rewee*, 11 Met., [illegible]; *Miner* v. *Bradley*, 22 Pick., 459; *Reynold* v. *Voorhees*, 30 Pa. St., 116; *Shinn* v. [illegible], 60 Pa. St., 182; *Dwinel* v. *Howard*, 30 [illegible]; *Tyson* v. *Doe*, 15 Vt., 571; *Haines* v. [illegible], 30 N. H., 309; *Bradley* v. *King*, 44 [illegible]; Chit. Cont., 913, *note*, stating this to be the American rule. See also Benj. Sales, [illegible] note, in Corbin's ed. of 1883; 1 Whart. Cont. § [illegible].

Mr. Justice Gray delivered the opinion of the court.

This was an action of *assumpsit*, brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Company, against James A. Wright and other citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract:

"Philadelphia, January 19, 1880. Sold to [illegible] Peter Wright & Sons, for account of A. Norrington & Co., London: Five thousand [illegible] tons old T iron rails, for shipment from a European port or ports, at the rate of about [illegible] thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880, at forty-five [illegible] per ton of 2,240 lbs. custom-house weight, ex ship Philadelphia. Settlement cash on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

Edward J. Etting, Metal Broker."

The declaration contained three counts. The first count alleged the contract to have been for the sale of about 5,000 tons of T iron rails to be shipped at the rate of about 1,000 tons a month, beginning in February, and ending in July, 1880. The second count set forth the contract *verbatim*. Each of these two counts alleged that the plaintiffs, in February, March, April, May, June and July, shipped the goods at the rate of about 1,000 tons a month, and notified the shipments to the defendants; and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom-house certificates of weight, according to the contract, and the defendants' refusal to accept them. The third count differed from the second only in averring that 400 tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiffs at the rate of about 1,000 tons a month in March, April, May, June and July. The defendants pleaded *non assumpsit*. The material facts proved at the trial were as follows: [190]

The plaintiff shipped from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment.

The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on their arrival; but on May 14, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March and April, gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract; and in answer to a letter from him of May 16, wrote him on May 17 as follows: "We are advised that what has occured does not amount to an acceptance of the iron under the circumstances and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter a complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to or could not make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to [191]

make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18 Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other things: "In respect to the objection that there had not been a complete delivery in due time, of the stipulated article, I beg to call your attention to the fact that while the contract is for five thousand tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of one thousand tons per month." "As to April, while it seems to me 'too plain to require any remark,' I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or, for that matter, to make the delivery of precisely one thousand tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and if so upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract, but as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19 the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about one thousand tons, beginning in February, and that the six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be; and certainly neither the February, March or April shipments are within the limits." "As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give, and cannot afterwards vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required." "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application."

[192]

On June 10 Etting offered to the defendants the alternative of delivering to them 1,000 tons strict measure on account of the shipments in April. This offer they immediately declined.

On June 15 Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments (designated by the names of the vessels), had been erroneously notified to them, and that about 900 tons had been shipped by a certain other vessel on account of the May shipments. S
day, the defendants replied that the
as to April shipments could not be
this late date, and after the terms
tract had long since been broken.

From the date of the contract to
its rescission by the defendants,
price of such iron was lower than
lated in the contract, and was
falling. After the arrival of the c
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the benefit of whom it might conc

At the trial the plaintiff contend
under the contract he had six mont
to ship the 5,000 tons, and any defic
earlier months could be made up su
provided that the defendants coul
quired to take more than 1,000 ton
month. 2. That, if this was not
tract was a divisible contract, and
of the defendants for a default in
was not by rescission of the whole
only by deduction of the damages
the delays in the shipments on the
plaintiff.

But the court instructed the jur
defendants, at the time of acceptin
ery of the cargo paid for, had no r
failure of the plaintiff to ship abou
in the month of February, and i
upon learning that fact gave notice
tention to rescind, the verdict sh
them.

The plaintiff excepted to this
and, after verdict and judgment for
ants, sued out this writ of error.

In the contracts of merchants, ti
essence. The time of shipment is t
convenient means of fixing the prol
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for the goods, or of fulfilling co
third persons. A statement descri
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precedent, upon the failure or non-p
of which the party aggrieved ma
the whole contract. *Behn* v. *Burne*
751; *Bowes* v. *Shand*, 2 App. Cas.
v. *Bangs*, 2 Wall. 728 [69 U. S., bk
768]; *Davison* v. *Von Lingen*, 113 U
28, L. ed. 885].

The contract sued on is a single
the sale and purchase of 5,000 tons
shipped from a European port or po
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each shipment upon its delivery, do
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9 App. Cas. 434, 439. The furthe
that the sellers shall not be comp
place any parcel lost after shipmen
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to be delivered and paid for.

The times of shipment, as desig
contract, are "at the rate of abou
per month, beginning February, 188
contract to be shipped before Aug

These words are not satisfied by shipping one sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill; in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure or weight." *Brawley* v. *United States*, 96 U. S. 168, 171, 172 [Bk. 24, L. ed. 622, 623, 624].

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should have been delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February and 885 tons in March. His failure to fulfill the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the boat; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of *Lyon* v. *Bertram*, 20 How., 149 [61 U. S., bk. 15, L. ed. 827], in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons, we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on [206] the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that, upon a careful examination of the cases referred to, they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of *Hoare* v. *Rennie*, 5 H. & N., 19, which was an action upon a contract of sale of 667 tons of bar iron, to be shipped from Sweden in June, July, August and September, and in about equal portions each month, at a certain price, payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped; but the defendants refused to receive it, and gave notice to the plaintiffs that they would not accept the rest. The defendants pleaded that the shipment in June was of about 20 tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross action. But judgment was given for the defendants, *Chief Baron* Pollock saying: "The defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that in the events that have happened one fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset, the plaintiffs failed to tender the quantity according to the contract; they tendered a much less quantity. The defendents had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the ac- [207] tion." 5 H. & N., 28. So in *Coddington* v. *Paleologo*, L. R. 2 Ex., 193, while there was a division of opinion upon the question whether a contract to supply goods "delivering on April 17th, complete 8th May," bound the seller to begin delivering on April 17th, all the

judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand, in *Simpson* v. *Crippin*, L. R. 8 Q. B., 14, under a contract to supply from 6,000 to 8,000 tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for twelve months, the buyers sent wagons for only 150 tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in *Brandt* v. *Lawrence*, 1 Q. B. D., 344, in which the contract was for the purchase of 4,500 quarters, ten per cent more or less, of Russian oats, "shipped by steamer or steamers during February," or, in case of ice preventing shipment, then immediately upon the opening of navigation, and 1,139 quarters were shipped by one steamer in time, and 3,361 quarters were shipped too late, it was held that the buyer was bound to accept the 1,139 quarters, and was liable to an action by the seller for refusing to accept them.

Such being the condition of the law of England as declared in the lower courts, the case of *Bowes* v. *Shand*, after conflicting decisions in the Queen's Bench Division and the Court of Appeal, was finally determined by the House of lords. 1 Q. B. D., 470; 2 Q. B. D., 112; 2 App. Cas., 455.

In that case, two contracts were made in London, each for the sale of 300 tons of "Madras rice to be shipped at Madras or coast, for this port, during the months of March and/or April, 1874, per Rajah of Cochin." The 600 tons filled 8,200 bags, of which 7,120 bags were put on board and bills of lading signed in February; and for the rest, consisting of 1,080 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the House of Lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months.

[208]

In the opinions there delivered, the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Lord Chancellor Cairns said: "It does not appear to me to be a question for your Lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." 2 App. Cas. 463. "If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning; it is no observation which can dispose of

or get rid of or displace that litera
to say that it puts an additional bur
seller, without a corresponding be
purchaser; that is a matter of which
and the purchaser are the best judg
it any reason for saying that it w
means by which purchasers, witho
cause, would frequently obtain an
rejecting contracts when prices ha
The nonfulfillment of any term in a
is a means by which a purchaser is
rid of the contract when prices hav
but that is no reason why a term
found in a contract should not be
Pp. 465, 466. "It was suggested t
the construction of the contract be
stated, still if the rice was not put o
the particular months, that would n
son which would justify the appell
ing rejected the rice altogether,
might afford a ground for a cros
them if they could show that any
damage resulted to them from the n
ing been put on board in the mont
tion. My Lords, I cannot think t
any foundation whatever for that
If the construction of the contract b
said, that it bears that the rice is to
board in the months in question, th
the description of the subject matte
sold. What is sold is not 300 tons
gross or in general. It is 300 tons
rice to be put on board at Madras
particular months." "The plaintiff
upon that contract, has not launch
until he has shown that he has te
thing which has been contracted for
unable to show that, he cannot clai
ages for the nonfulfillment of the
Pp. 467, 468.

Lord Blackburn said: "If the de
the article tendered is different in s
it is not the article bargained for, a
party is not bound to take it. I th
case what the parties bargained fo
shipped at Madras or the coast
Equally good rice might have bee
little to the north or a little to the
coast of Madras. I do not quite kn
boundary is, and probably equally
might have been shipped in Febru
shipped in March, or equally as goo
have been shipped in May as was
April, and I dare say equally good
have been put on board another s
which was put on board the Rajah
But the parties have chosen, for r
known to themselves, to say: We
take rice shipped in this particula
that particular time, on board that
ship; and before the defendants c
pelled to take anything in fulfillm
contract it must be shown not mere
equally good, but that it is the sam
they have bargained for; otherwis
not bound to take it." 2 App. Cas

Soon after that decision of the
Lords, two cases were determined i
of Appeal. In *Reuter* v. *Sala*, 4 C.
under a contract for the sale of "ab
five tons (more or less) black pepp
and/or November shipment, from Pens
don, the name of the vessel or ves

[illegible] particulars to be declared to the buyer [illegible] within sixty days from date of bill [illegible] the seller, within the sixty days, de[illegible] twenty-five tons by a particular vessel, [illegible] only twenty tons were shipped in [illegible], and five tons in December; and it [illegible] that the buyer had the right to refuse [illegible] any part of the pepper. In *Honck* v. *Muller*, 7 Q. B. D., 92, under a contract for the [illegible] of 2,000 tons of pig iron, to be delivered to [illegible] free on board at the maker's wharf [illegible] November, or equally over November, De[illegible] and January next," the buyer failed to [illegible] any iron in November, but demanded de[illegible] of one third in December and one third [illegible] January; and it was held that the seller was [illegible] in refusing to deliver, and in giving [illegible] to the buyer that he considered the con[illegible] as concluded by the buyer's not taking any [illegible] in November.

The plaintiff in the case at bar greatly relied [illegible] the very recent decision of the House of [illegible] in *Mersey Co.* v. *Naylor*, 9 App. Cas., 434, [illegible] the judgment of the Court of Appeal [illegible] Q. B. D., 648, and following the decision [illegible] Court of Common Pleas in *Freeth* v. *Burr*, [illegible] C. P., 208.

[illegible] the point there decided was that the fail[illegible] of the buyer to pay for the first installment [illegible] goods upon delivery does not, unless the [illegible] evince an intention on his part [illegible] no longer bound by the contract, entitle [illegible] to rescind the contract and to decline [illegible] further deliveries under it. And the [illegible] of the decision, as stated by *Lord* [illegible] Selborne in moving judgment in [illegible] House of Lords, are applicable only to the [illegible] of a failure of the buyer to pay for, and [illegible] of a failure of the seller to deliver, [illegible] installment.

[illegible] Lord Chancellor said: "The contract is [illegible] purchase of 5,000 tons of steel blooms [illegible] company's manufacture; therefore it is [illegible] contract for the purchase of that quantity [illegible] blooms. No doubt there are subsidiary [illegible] the contract, as to the time of the delivery [illegible] delivery, 1,000 tons monthly commencing [illegible] next;—and as to the time of payment, [illegible] payment net cash within three days after [illegible] of shipping documents';—but that does [illegible] cut up the contract into as many contracts [illegible] shall be deliveries for the purpose, of [illegible] distinct quantities of iron. It is quite [illegible] with the natural meaning of the con[illegible] that it is to be one contract for the pur[illegible] of that quantity of iron to be delivered at [illegible] and in that manner, and for which [illegible] is to be made. It is perfectly clear [illegible] particular payment can be a condition [illegible] of the entire contract, because the de[illegible] under the contract was most certainly to [illegible] payment; and that being so, I do not [illegible] without express words, it can possibly [illegible] a condition precedent to the subse[illegible] fulfillment of the unfulfilled part of the [illegible], by the delivery of the undelivered [illegible]." 9 App. Cas., 436.

[illegible], although in the Court of Appeal [illegible] were uttered tending to approve the de[illegible] in *Simpson* v. *Crippin*, and to dispar[illegible] the decisions in *Hoare* v. *Rennie* and *Honck* [illegible] *Muller*, above cited, yet in the House of [illegible] *Simpson* v. *Crippin* was not even referred to, and *Lord* Blackburn, who had given the leading opinion in that case, as well as *Lord* Bramwell, who had delivered the leading opinion in *Honck* v. *Muller*, distinguished *Hoare* v. *Rennie* and *Honck* v. *Muller* from the case in judgment. 9 App. Cas., 444, 446.

Upon a review of the English decisions, the rule laid down in the earlier cases of *Hoare* v. *Rennie* and *Coddington* v. *Paleologo*, as well as in the later cases of *Reuter* v. *Sala* and *Honck* v. *Muller*, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson* v. *Crippin* and *Brandt* v. *Lawrence*, and to accord better with the general principles affirmed by the House of Lords in *Bowes* v. *Shand*, while it in nowise contravenes the decision of that tribunal in *Mersey Co.* v. *Naylor*.

In this country, there is less judicial authority upon the question. The two cases most nearly in point that have come to our notice are *Hill* v. *Blake*, 97 N. Y., 216, which accords with *Bowes* v. *Shand*, and *King Phillip Mills* v. *Slater*, 12 R. I., 82, which approves and follows *Hoare* v. *Rennie*. The recent cases in the Supreme Court of Pennsylvania, cited at the bar, support no other conclusion. In *Shinn* v. *Bodine*, 60 Pa. St., 182, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, "coal to be delivered on board vessels as sent for during months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In *Morgan* v. *McKee*, 77 Pa. St., 228, and in *Scott* v. *Kittanning Coal Co.* 89 Pa. St., 231, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one installment was denied, only because that right had been waived, in the one case by unreasonable delay in asserting it, and in the other by having accepted, paid for and used a previous installment of the goods. The decision of the Supreme Judicial Court of Massachusetts in *Winchester* v. *Newton*, 2 Allen, 492, resembles that of the House of Lords in *Mersey Co.* v. *Naylor*. [212]

Being of opinion that the plaintiff's failure to make such shipments in February and March, as the contract required, prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1,000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See *Busk* v. *Spence*, 4 Camp. 329; *Graves* v. *Legg*, 9 Exch., 709; *Reuter* v. *Sala*, above cited.

Judgment affirmed.

Mr. Chief Justice **Waite** was not present at the argument and took no part in the decision of this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—115 U. S., 360, 362.

[213]

OLIVER B. FILLEY, *Plff. in Err.*,
v.
THOMAS J. POPE ET AL.

(See S. C., Reporter's ed., 213-221.)

Mercantile contracts—time or place of shipment as a warranty or condition precedent.

*1. In a mercantile contract, a statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.

2. Under a contract for the sale of "500 tons No. 1 Shott's (Scotch) pig iron, at $26 per ton cash in bond at New Orleans; shipment from Glasgow as soon as possible; delivery and sale subject to ocean risks"; shipment from Glasgow is a material part of the contract, and the buyer may refuse to accept such iron shipped as soon as possible from Leith, and arriving at New Orleans earlier than it would have arrived by the first ship that could have been obtained from Glasgow.

[No. 21.]

Argued Apr. 6, 7, 1885. Decided, Oct. 26, 1885.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The history and facts of the case fully appear in the opinion of the court.

Mr. **Henry Hitchcock,** for plaintiff in error:

The non-performance by the vendor, of a condition precedent on his part, releases the vendee. *Jones* v. *U. S.* 96 U. S. 24 (Bk. 24, L. ed. 644); *Slater* v. *Emerson*, 19 How. 224 (51 U. S. bk. 15, L. ed. 626); *Smoot* v. *U. S.* 15 Wall. 46 (82 U. S. bk. 21, L. ed. 109); *Gouverneur* v. *Tilotson*, 3 Edw. Ch. 348.

Nor does it matter that such condition is difficult or foolish.

Story, Cont. §§ 47, 587; 2 Benj. Sales, §§ 858, 864; *Dermott* v. *Jones*, 2 Wall. 1, 7 (69 U. S. bk. 17, L. ed. 762, 764); *Smoot* v. *U. S.* 15 Wall. 46 (82 U. S. bk. 21, L. ed. 109); *Milldam Foundry* v. *Hovey*, 21 Pick. 417, 441; *Harmony* v. *Bingham*, 12 N. Y. 99; *Eddy* v. *Clement*, 38 Vt. 486; *Bacon* v. *Cobb*. 45 Ill. 47; *School District* v. *Dauchy*, 25 Conn. 530; *Bettini* v. *Gye*, 1 Q. B. Div. 187; *Jones* v. *St. Johns Coll.*, L. R. 6 Q. B. 115.

Plaintiff's agreement to ship from Glasgow was a condition precedent.

Cadwell v. *Blake*, 6 Gray, 402; *Bowes* v. *Shand*, 2 App Cas. L. R. (H. of L.) 473; *Bank of Col.* v. *Hagner*, 1 Pet. 464 (26 U. S. bk. 7, L. ed. 222); *Lowber* v. *Bangs*, 2 Wall. 728 (69 U. S. bk. 17, L. ed. 768); *Roberts* v. *Brett*, 11 H. of L. Cas. 337; *Cutter* v. *Powell*, 2 Smith, Lead. Cas. 1, *notes;* 2 Benj. Sales, §§ 854, 855.

Mr. **Edward Cunningham, Jr.,** for defendants in error:

The question whether shipment from Glasgow is a condition precedent, or mere matter of explanation, is to be determined by the intention and meaning of the parties as it appears in the instrument, and by the application of common sense to this particular case.

Lowber v. *Bangs*, 2 Wall. 728 (69 U. S. bk. 17, L. ed. 768); *Tileston* v. *Newell*, 13 Mass. 406; *Todd* v. *Summers*, 2 Gratt. 169.

*Head notes by *Mr. Justice* GRAY.

NOTE.—*Sales; warranty or condition precedent; breach; rescission.*

See Pope v. Allis and note, *post.*

When mutual covenants go to
sideration, on both sides, they a
ditions precedent. But unless th
ance alleged in breach of a cont
whole consideration, the coven
not to be considered a condition
as a distinct, independent cov
breach of which the party injur
pensated in damages.

Davidson v. *Gwynne*, 12 East,
Eyre, 1 H. Bl., 273, *note; Lou*
supra.

Shipment from Glasgow is n
precedent here.

Bettini v. *Gye*, 1 Q. B. Div.,
Legg, 9 Ex., 716.

Mr. Justice **Gray** delivered t
the court:

This action was brought by T
and James E. Pope, citizens
and partners under the name
Pope & Brother, against Oliver
zen of Missouri.

The petition alleged that on
1880, the defendant bargained f
of the plaintiffs and they sold t
of number one Shott's (Scotch)
price of $26 per ton, to be paid
defendant upon the delivery to
in bond at New Orleans; the iro
from Glasgow, Scotland, as so
and the delivery and sale to be s
risks; and the defendant agree
iron as aforesaid, and to pay the
for the sum of $13,000; and th
lars of the sale and agreement w
a note and memorandum thereof
defendant, as follows:

"St. Louis, February 20, 188
Pope & Bro., New York: Hav
account to Mr. O. B. Filley, St.
No. 1 Shott's (Scotch) pig iron,
cash in bond at New Orleans.
Glasgow as soon as possible. D
subject to ocean risks. Very tr
"Willard

Across the face of this was w
cepted, O. B. Filley."

The petition further alleged th
and as soon as possible, the plain
iron to be shipped from Glasg
leans; that upon its arrival at N
May 26, 1880, they offered to de
defendant in bond at that port,
him to receive and pay for it, bu
do so, and the plaintiffs were fo
a loss.

The defendant, in his answer
contract and his refusal to ac
denied the other allegations o
and alleged, as the ground of his
a defense to the action, that the
to ship the iron from Glasgow a
ble after the date of the contra
tiffs filed a replication, denying
in the answer.

The testimony of the witness
plaintiffs at the trial, tended to p
ing facts: Immediately after n
tract, the plaintiffs by telegraph
of John Anderson of Glasgow,
him to ship it to New Orleans.

[illegible] the works of the Shott's Iron Company [illegible] instead, equidistant and equally accessible [illegible] railway from the ports of Glasgow on the west coast and of Leith on the east coast; and such iron was sometimes shipped from Glasgow and sometimes from Leith. Anderson at [illegible] made diligent inquiry and efforts to secure transportation from Glasgow, and from Leith, and from other Scotch ports, to New Orleans, [illegible] owing to the great scarcity of ships at that time could only secure one vessel, the barque [illegible], which was then discharging her cargo at Leith. This vessel he chartered on February 21, 1860, three days after the contract in question was made at St. Louis. No vessel or transportation could be obtained from Glasgow to New Orleans then or for weeks afterwards. The iron was sent down from the works of the Shott's Iron Company to Leith as fast as the [illegible] could receive it. With all speed, she discharged her cargo, took in the iron, and sailed from Leith for New Orleans, where she arrived about May 26. The distance by sea was greater from Leith to New Orleans than from Glasgow to New Orleans. If The Alpha had come round to Glasgow and shipped the iron there, it would have taken from six to twenty-[illegible] days, according to the winds, and she would have had to take in ballast at Leith and discharge it at Glasgow, involving considerable delay and expense.

The court instructed the jury that the provision of the contract that the iron was to be shipped from Glasgow was not a material provision of the contract, so far as this controversy was concerned; that the purpose of the contract was the sale by the plaintiffs to the defendant of a certain quantity of iron, to be delivered in a certain time at a certain place, and the fact that it was shipped from Leith instead of Glasgow was not material to the rights of the parties in the case, if the other provisions of the contract were complied with; and that if the jury found that it was impossible for the plaintiffs to obtain a vessel from Glasgow, and that it was practicable to obtain one from Leith, and that shipping from Leith was a more expeditious way of putting the iron to New Orleans than waiting for a vessel from Glasgow would have been, and the plaintiffs were justified in shipping the iron from Leith instead of from Glasgow. 8 [illegible] 190.

The defendant excepted to the admission of evidence relating to the shipment from Leith, and to the instruction to the jury, and, after verdict and judgment for the plaintiffs in the sum of $8,155, sued out this writ of error.

The contract between these parties belongs to the same class as that sued on in the case last decided, of *Norrington* v. *Wright*, *ante*, [illegible] and likewise falls within the rule that, in a mercantile contract, a statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. The provision in question in that case related to the time; in this, it relates to the place of shipment.

The thing sold, and described in the contract, was "[illegible] No. 1 Shott's (Scotch) pig iron," to be shipped "from Glasgow as soon as possible." It is not merely 500 tons of iron of a certain quality; nor is it such iron to be shipped as soon as possible from any Scotch port or ports; but it is iron of that quality to be shipped from the particular Port of Glasgow as soon as possible. The court has neither the means nor the right to determine why the parties in their contract specified "shipment from Glasgow," instead of using the more general phrase "shipment from Scotland," or merely "shipment," without naming any place; but is bound to give effect to the terms which the parties have chosen for themselves. The term "shipment from Glasgow" defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment, nor does the buyer agree to accept iron shipped, at any other port. The buyer takes the risk of delay in getting shipment from Glasgow, or of delay or disaster in prosecuting the voyage from Glasgow to New Orleans. But he does not take the risk of delay or of sea perils which may occur in the course of the different voyage from Leith to the same destination.

One or two illustrations may help to make this clear. If the sellers had shipped the iron by the first opportunity from Glasgow, the buyer could not have refused to accept it, even if it could have been shipped sooner from Leith. Again; the buyer would have an insurable interest in the iron during the voyage, by reason of the title which would accrue to him under the contract on arrival and delivery, and of the profits that he might make in case of a rise in the market. 3 Kent, Com. 276; *French* v. *Hope Ins. Co.* 16 Pick. 397; *Eastern Railroad* v. *Relief Ins. Co.* 98 Mass. 420, 423. But a [221] policy of insurance upon the iron for a voyage from Glasgow would not cover a voyage from Leith. *Murray* v. *Columbian Ins. Co.*, 4 Johns. 443; *Manly* v. *United Ins. Co.* 9 Mass. 85.

This view of the case renders it unnecessary to consider the other questions raised at the trial and argued at the bar, and requires the *judgment of the Circuit Court to be reversed and the case remanded with directions to order a new trial.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—115 U. S., 372.

RICHARD D. LANCASTER, *Plff. in Err.*, [222]
v.
HENRY C. COLLINS.

(See S. C., Reporter's ed., 222-227.)

Appeal and error—weight of evidence—variance between proof and answer—rulings on admission of evidence, sustained—error without prejudice, not a ground for reversal.

*1. The bill of exceptions in this case contained all the evidence, and the charge to the jury. There was no exception to the charge. The court refused to direct a verdict for the plaintiff, it being asked for on the ground of a variance between the proof and the answer; and there was a verdict for the defendant; *Held*, that there was no such variance, and

*Head notes by *Mr. Justice* BLATCHFORD.

that the question of the existence of the defense set up was fairly put to the jury, on conflicting evidence.

2. This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff, on the question of variance, or because there was no evidence to sustain the verdict.

3. The question as to which party shall make the closing argument to the jury is one of practice, and is not the subject of a bill of exceptions or of a writ of error.

4. Rulings on the admission of evidence sustained.

5. No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the ruling was made.

[No. 14.]

Submitted Oct. 23. Decided Nov. 2, 1885.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is sufficiently stated by the court.

Mr. **George A. Castleman,** for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

[222] On the 29th of September, 1873, Henry E. Collins executed and delivered to the Big Muddy Iron Company his promissory note, payable ninety days after date, to its order, for $10,000. It was indorsed successively by the company, by Thomas O'Reilly, by Amelia Collins and by Richard D. Lancaster. From the latter it passed to the National Bank of the State of Missouri. The bank obtained a judgment on it against the company, and O'Reilly and Henry E. Collins and Lancaster, for $11,290.68 and costs. O'Reilly paid to the bank one half of the amount due on the judgment, and Collins refunded it to him. Lancaster paid to the bank the other half of the amount due on the judgment, and then brought this suit against Collins to recover from him the sum so paid.

Collins, in his answer to the petition, set up the following defense: "That the Big Muddy [223] Iron Company was a corporation, duly organized under the laws of the State of Missouri, and that, on the day of the execution of said note and the delivery thereof to the said company, the plaintiff in this suit was the president thereof; that said note was given in part consideration for 130 shares of stock of the said Big Muddy Iron Company; that the plaintiff solicited this defendant to subscribe for said stock at its par value; that, yielding to the solicitation of the said plaintiff in that behalf, this defendant did subscribe for said stock, and paid in cash the sum of $3,000 and executed the before-mentioned note for the balance; that, before the defendant would agree to subscribe for said stock, and execute the said note, and pay the said sum of $3,000, it was agreed and understood, between the plaintiff and defendant, that the defendant should pay cash the sum of $3,000, and execute his note at ninety days for $10,000, with the privilege, upon the part of this defendant, to renew the same, from time to time, as it became due, and that the 130 shares of stock in the said Big Muddy Iron Company, the par value of which was $13,000, should be held by the said plaintiff as collateral security for the payment of said note, with the right, upon the part of this defendant, if he saw proper to avail himself of it, wit from the date of said note to forfe in cash and the said 130 shares of relieved from further liability o that, in pursuance of said agreem 130 shares of stock was placed wit as collateral security, the $3,000 paid, and the said note for $10,000 and delivered; that defendant, be piration of said year, notified the that he would forfeit said $3,000 a that the note would not be paid b fendant says that the said stock turned or offered to be returned t plaintiff, or any one for him. W fendant says that the plaintiff has action against him, that he owes nothing, and prays to be dismisse his costs."

Issue being joined, the action w jury, which found a verdict for there was a judgment in his favo Lancaster brought this writ of err

There is a bill of exceptions c the evidence in the cause. It al the charge to the jury, but there is to the charge. The plaintiff, quested the court, after the evide to instruct the jury to render a v plaintiff, which request was refu plaintiff excepted. This refusal is error, on the alleged ground of tween the proof and the answer tended that the answer alleges t ment made by Collins with Lancas with the latter as president of t and that it does not allege any Lancaster personally, to take th scribed for by Collins and pay th the verdict was rendered for the the theory that there was such an Lancaster personally. We thin construction of the answer, in vi tory of the case, as given in the that it alleges such an agreement received from Collins the certif stock, with a transfer of it in bla Collins, and indorsed the note, a counted for the benefit of the co question of the existence of such by Lancaster personally was fair jury in the charge of the court. conflicting evidence in regard to it cannot review the weight of the can look into it only to see whet error in not directing a verdict f tiff, on the question of variance there was no evidence to sustai rendered.

It is also assigned for error, t refused to permit the counsel fo to make the closing argument to contention on the part of the p that the affirmative was with him purely a question of practice, to only by a motion for a new tri court, and is not the proper subje exceptions or of a writ of error, b not affect the merits of the contr v. *Woodworth*, 18 How., 363, 370 14, L. ed. 181, 184].

The plaintiff, as a witness at asked, on cross examination by t

what was the value of the 130 shares of stock, or whether it was good security for the $[illegible] note. The question was objected to as immaterial and irrelevant, but was admitted. The answer was, that if it had been paid up he would have thought it good security, but it was not paid up and he thought it was not good security. The answer did not tend to prejudice the plaintiff, but the contrary; for he was seeking to prove that he had not taken the stock personally as security for his indorsement, and the fact that the stock was inadequate security to him went rather to show that he was not looking for security for his personal liability. Besides, the question was put on cross examination, and was proper as showing the character of the stock, in view of the evidence the plaintiff had given, on his direct examination, as to the transaction respecting the stock.

The defendant was allowed, under objection, to put in evidence, from the book of minutes of the board of directors of the company, the proceedings of the board at four meetings held between the time of the original transaction in regard to the stock and the date of the note on which the judgment was recovered, that note being a renewal of prior notes. These proceedings were in the handwriting of the defendant, who was the secretary of the company, and the plaintiff, who was a director of the company, was present at all of the meetings in question. The proceedings contained nothing which appeared to relate to this controversy, but referred only to the purchase of property by the company, and to the mode of paying for stock, and the powers of the secretary, and sundry minor matters. The objection made at the time to the introduction of these minutes was, that they were irrelevant, incompetent and immaterial, and tended to confuse in the minds of the jury the true issue to be tried, and could not throw any light upon the question on trial. The same objection was made to the putting in evidence of the proceedings of a meeting of the stockholders of the company, at which the plaintiff was present, held prior to the date of the note on which the judgment was recovered, and of the proceedings of nine meetings of the board of directors and one meeting of the stockholders, held after that date, at all of which the plaintiff was present. These proceedings contained nothing which appeared to relate to this controversy, but they showed the pecuniary embarrassment of the company, and the execution by it of a deed of trust to secure its indebtedness, and the final sale of its property. The only matter in all these proceedings which could possibly have operated to the prejudice of the plaintiff was the fact that the stock had become worthless, it being argued that the jury might have been induced thereby to relieve the defendant from paying any more of the amount of the worthless stock, after he had paid the $[illegible] to the company, and the one half of the judgment to O'Reilly. But we think it sufficiently appears from other testimony that the stock became worthless. Aside from this, there is not one anything in the proceedings objected to which could possibly have harmed the plaintiff more than the defendant, or have misled the defendant to the prejudice of the plaintiff. To show that the stock was worthless, showed that neither party could derive any advantage from it, and left the case between the plaintiff and the defendant to be decided without reference to any value in the stock. No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the ruling was made. *Deery* v. *Cray*, 5 Wall., 795, 803 [72 U. S., bk. 18, L. ed. 653, 655]; *Gregg* v. *Moss*, 14 Id. 564, 569 [81 U. S., bk. 20, L. ed. 740–742]; *Lucas* v. *Brooks*, 18 Id., 436, 454 [85 U. S., bk. 21, L. ed. 779, 782]; *Allis* v. *Ins. Co.*, 97 U. S., 144, 145 [Bk. 24, L. ed. 1008]; *Cannon* v. *Pratt*, 99 Id., 619, 623 [Bk. 25, L. ed. 446, 448]; *Mining Co.* v. *Taylor*, 100 Id., 37, 42 [Bk. 25, L. ed. 541, 542]; *Hornbuckle* v. *Stafford*, 111 Id., 389, 394 [Bk. 28, L. ed. 468, 470].

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[260]

BRUTUS J. CLAY AND WIFE, *Plffs. in Err.*,

v.

DAVID I. FIELD.

(See S. C., Reporter's ed., 260–263.)

Administrator's sales—ejectment—parties—Mississippi Code of 1871—construction of sections 2173, 2506 and 2512.

*1. The Mississippi Code of 1871, § 2173, by which any action to recover property, because of the invalidity of an administrator's sale by order of a probate court, must be brought within one year, "if such sale shall have been made in good faith and the purchase money paid," does not apply to an action brought by the heir to recover land bid off by a creditor at such a sale for the payment of his debt, and conveyed to him by the administrator, and not otherwise paid for than by giving the administrator a receipt for the amount of the bid.

2. Under the Mississippi Code of 1880, §§ 2506, 2512, a tenant in common who has been ousted by his cotenant may maintain ejectment against him, and recover rents and profits in the same action.

[No. 571.]

Submitted Oct. 19, 1885. Decided Nov. 2, 1885.

IN ERROR to the District Court of the United States for the Northern District of Mississippi.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **William L. Nugent,** for plaintiff in error.

Messrs. **Frank Johnston** and **J. E. McKeighan,** for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court: [260]

This was an action of ejectment, brought November 27, 1880, to recover possession of an undivided half of a tract of land, and the rents and profits thereof. Both parties claimed title under David I. Field, who died in 1869. At the time of his death, he and his brother, Christopher J. Field, owned in fee simple and occupied the land as tenants in common, and were partners in the business of planting thereon. The plaintiff, who came of age within a year before bringing the action, was the only son and heir at law of David I. Field. The defendants were in possession and claimed title under

*Head notes by *Mr. Justice* GRAY.

a sale and conveyance made by his administrator to the female defendant on December 20, 1869, by virtue of an order passed by the probate court on April 18, 1869, upon a petition filed by the administrator for the sale of the [261] land to pay a debt due from the partnership to Christopher J. Field and by him probated in the usual form. The judgment below was for the plaintiff, and the defendants sued out this writ of error.

As appears by a uniform series of decisions of the Supreme Court of Mississippi, and is not denied by the defendants, that sale was invalid as against the heir, because the administrator never gave bond to account for the proceeds of the sale, as required by the statute of the State. *Currie* v. *Stewart*, 26 Miss., 461, and 27 Miss., 52; *Washington* v. *McLaughan*, 34 Miss., 304; *Heth* v. *Wilson*, 55 Miss., 587.

The other objections urged by the plaintiff against the validity of the sale need not therefore be considered; and the case turns on the effect of section 2178 of the Code of Mississippi of 1871; which is in these words:

"No action shall be brought to recover any property heretofore sold by any administrator, executor or guardian, by virtue of the order of any probate court in this State, on the ground of the invalidity of such sale, unless such action be commenced within one year after this chapter shall take effect, if such sale shall have been made in good faith, and the purchase money paid; nor shall any action be brought to recover land or other property, hereafter sold by order of a chancery court, where the sale is in good faith and the purchase money paid, unless brought within one year after such sale."

This is a remedial statute, the object of which is to shorten litigation over the estates of deceased persons, and to quiet the titles of those who have in good faith paid the purchase money for lands sold under defective and invalid proceedings in the probate court; and the courts of the State have given it full effect, according to its terms, even against heirs who are infants or under other disability. *Morgan* v. *Hazelhurst Lodge*, 53 Miss., 665; *Hall* v. *Wells*, 54 Miss., 289; *Summers* v. *Brady*, 56 Miss., 10.

But it protects no one who is not proved to have purchased the land in good faith, and to have actually paid the purchase money.

In the case at bar, Mrs. Clay (the daughter and sole heir of the brother and partner of the intestate, who had probated against the estate a debt due to him from the partnership) bid off [262] the land at the administrator's sale, and received a deed thereof from the administrator. But the court, before which the case was tried (a jury having been waived in writing by the parties), has expressly found that "no money was ever paid on the bid," and "no credit was ever entered upon the probated indebtedness." It is indeed found that "a receipt was given to the administrator for the amount" of the bid; and, although by whom that receipt was given does not appear, it may be presumed to have been given by some one authorized to represent her father's estate and herself. But a mere receipt, acknowledging payment of money, is not conclusive evidence against the person giving it. It is not shown that any release of the probated debt was ever executed, or that the administrator ever accounted in the probate court for the amount of the bid. could not have been compelled t amount; and, if she bought withou the invalidity of the sale, could ha sale set aside in equity. *Miller* v. Miss., 323. In short, no act appears t done by herself, by the administrato probate court which, on the one han her condition or estopped her, or sentative of her father, to deny th probated by him had been paid or or to assert any right which existed sale; or, on the other hand, estopp ministrator to deny that the purchas the land had been paid to him.

Under such circumstances, to ho purchase money is proved to have would be to disregard both the wo intent of the statute.

The case of *Summers* v. *Brady*, a on which the defendants relied, is guishable. The facts of that case, in the opinion, and more fully bro *Sivley* v. *Summers*, 57 Miss., 712, w lows: The land was sold by order bate court, for the payment of sever bated by Sivley, the administrat Drone, and by various other perso bought by and conveyed to Drone name, but in fact for himself and Si Drone immediately conveyed two t land to Sivley, and the two afte veyed the whole to a third person, u the defendants claimed title. The tor settled his final account, charg with the whole of the purchase mo hands; the court ordered that mon vided *pro rata* on all the probated all the creditors but Drone and Siv tually paid their dividends out of and Sivley were estopped to den debts had been extinguished by t conveyance of the land to them, b had not only taken possession of t had conveyed it away; and Sivley, trator, was estopped to deny that paid the whole purchase money u iginal sale, because he had char with it in his final account allowed bate court.

In the other case cited for the de *Callicott* v. *Parks*, 58 Miss., 528, the not show that any question of the n ment was presented or considered.

The title in the land being in the Mrs. Clay as tenants in common, e an undivided half, and she having and claiming title to and holding p the whole land, he has the right, Mississippi Code of 1880, § 2506, mon law, to maintain ejectment ag well as to sue her for a share of th profits. Co. Lit., 199 *b*; *Goodtitle* Wils., 118; *Corbin* v. *Cannon*, 31 *Letchford* v. *Cary*, 52 Miss., 791. tion 2512 of that Code, mesne profi any defendant in ejectment is lia sued for and recovered, either in t ejectment, or by a subsequent sepa

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup

WILLIAM H. HENDERSON, as Executor of the last will and testament of ELEANOR ANN HENDERSON, deceased, *Plff. in Err.*,
v.
H. ESTELLE WADSWORTH.

HOWARD L. HENDERSON, *Plff. in Err.*,
v.
H. ESTELLE WADSWORTH.

WILLIAM H. HENDERSON, *Plff. in Err.*,
v.
H. ESTELLE WADSWORTH.

WARREN N. HENDERSON, *Plff. in Err.*,
v.
H. ESTELLE WADSWORTH.

VICTORINE S. McCARTHY ET AL., *Plffs. in Err.*,
v.
H. ESTELLE WADSWORTH.

(See S. C., Reporter's ed., 264-284.)

Jurisdiction—suit against heirs—separate judgments—liability of widow under Civil Code of Louisiana on partnership note of husband's firm—prescription—evidence.

1. Where suit is brought against heirs to enforce their liability for the payment of a note on which their ancestor was bound, and they plead neither compensation nor set-off, and ask no affirmative relief, and separate judgment is rendered against each for his proportionate share, this court has jurisdiction in error only over those judgments which exceed $5,000.

2. Under the Civil Code of Louisiana, a widow, even where she has accepted the succession of her husband without benefit of inventory, is not liable in solido with the surviving partners for the payment of a note made by the firm of which her husband was a member; and payments made on the note by the surviving partners cannot be given in evidence to show interruption of prescription running in her favor.

[Nos. 337, 338, 339, 340, 341.]

Submitted Jan. 6, 1885. Decided Nov. 2, 1885.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

Statement of the case by *Mr. Justice* WOODS:

Mrs. H. Estelle Wadsworth, the defendant in error in these cases, was the plaintiff in the circuit court, where she brought a joint action at law against the several plaintiffs in error and John G. Gaines and Stephen Z. Relf. The facts shown by the record were as follows:

On and long before the 8th day of November 1860, William Henderson and the defendants, John G. Gaines and Stephen Z. Relf, were engaged in business as commercial partners in the City of New Orleans, under the name of Henderson & Gaines, and on the day above mentioned, for the consideration of $30,450, money sent to them by the plaintiff, they made and delivered to her their note, of which the following is a copy:

"New Orleans, 8th November, 1860.

"$30,450. On or before the fifth of May, 1861, we promise to pay, for value received, to the order of Mrs. H. Estelle Wadsworth, fifteen thousand dollars, and the further sum of fifteen thousand four hundred and fifty dollars, on or before the twentieth day of the same month and year (together thirty thousand four hundred and fifty dollars), with interest at the rate of eight per cent per annum, the interest to be paid semi-annually on the fifteenth day of May and November of each year.

Henderson & Gaines."

On July 1st, 1866, the firm of Henderson & Gaines was dissolved, Henderson retiring, and was succeeded by the firm of Gaines & Relf, composed of the other two members of the dissolved firm. The new firm, Gaines & Relf, bought all the personal property and assets of the old firm, assumed all its liabilities, including the note above mentioned, and agreed to exonerate Henderson.

The firm of Henderson & Gaines, while it continued, paid the interest as it fell due on the note above mentioned up to May 15, 1867, and Gaines & Relf thereafter up to May, 1877.

William Henderson died on May 1, 1870, in the City of New Orleans, where he had been domiciled since the year 1860 and before. He left as his widow Eleanor Ann Henderson, and as his sole heirs at law the defendants, William H. Henderson, Howard L. Henderson, Warren N. Henderson and Victorine S. Henderson, the latter of whom had intermarried with the defendant M. C. McCarthy, all of full age, and all domiciled in the City of New Orleans. The widow and children subsequently removed to the State of Kentucky, where, on July 27, 1880, the widow died. Her son, William H. Henderson, was qualified as executor of her last will and testament.

In June, 1877, the firm of Gaines & Relf was adjudicated bankrupt. On April 10, 1882, the present suit was brought by Mrs. H. Estelle Wadsworth, the payee, on the note of Henderson & Gaines, against William H. Henderson individually and as the executor of the last will of the widow, Eleanor Ann Henderson, and against the other persons above mentioned, as the heirs of William Henderson, and against John G. Gaines and Stephen Z. Relf. M. C. McCarthy was joined as a defendant with his wife, Victorine S. McCarthy. The petition alleged that the widow and heirs of William Henderson had accepted his succession, purely and simply, without the benefit of inventory, and had taken and upon their own petition had been put in possession of his estate, the said Eleanor Ann, as widow, in community of one half, and the heirs of the other undivided half of the community property subject to the usufruct of the same in favor of their mother, the said Eleanor Ann Henderson, whereby the said widow and heirs became personally liable for the payment of all the debts of said William Henderson, deceased, including the debt sued on, in the following proportions: the widow, Eleanor Ann Henderson, for one half, and each of the above-mentioned heirs for one fourth. The petition, therefore, prayed for judgment against Gaines and Relf for the whole amount due on the note; for judgment against William H. Henderson, as executor of Eleanor Ann Henderson, for one half; and for judgment against each of the heirs of William Henderson for one fourth of said amount.

[266]

The defendants, except Gaines and Relf, who never appeared or made any defense, filed a joint and several answer to the petition, in which they denied that they had accepted the

* Read notes by *Mr. Justice* WOODS.

succession of William Henderson, purely and simply, without benefit of inventory; but, as this issue was specially found against them by the verdict of the jury, it must be taken as a fact in the case that they did so accept the succession.

They also, by way of defense, made the following averments:

"[illegible] and for further answer, these defendants say the pretended note sued on herein was made, and on its face made payable, in New Orleans and State of Louisiana, and by its terms matured and fell due not later than the [illegible] and twenty-third days of May, A. D. [illegible], while said William Henderson and John [illegible] and Stephen E. Relf resided in said city and State, and plaintiff's supposed cause of action, [illegible] accrued to her [illegible] William Henderson, in the [illegible] and not elsewhere, but did not ac-
[illegible] within five years next before the bringing [illegible] all which time, as was and [illegible] plaintiff, all these defendants [illegible] Henderson resided in said [illegible] New Orleans and State of Louisiana, [illegible] of said State, in force at the [illegible] pretended note and continuously [illegible] in force therein, said pretended [illegible] and is prescribed in five years next [illegible] the date of the maturity thereof, as aforesaid, and being so prescribed, no action thereon [illegible] be maintained in Kentucky under her [illegible]. Wherefore these defendants plead and [illegible] on the lapse of time and Statute of Limitation in bar of plaintiff's right of recovery herein against them."

The plaintiff replied to this defense, that the prescription and limitation so pleaded in bar had been interrupted and prevented from running against her right of recovery, in each and every year from the maturity of said note up to the time of bringing the action, by frequent acknowledgments of said debt by the firm of Henderson & Gaines and its members, and by the firm of Gaines & Relf, and by defendants Gaines and Relf, debtors bound *in solido* with William Henderson for the payment of said debt.

The defendants rejoined, taking issue on the replication of the plaintiff.

Upon the trial of the cause, the court, against the objection of the defendants, admitted evidence tending to show payments made upon the note by the firm of Gaines & Relf, after the death of William Henderson, and by the assignee of Gaines & Relf, after their bankruptcy, the purpose of such evidence being to show interruption of the prescription set up by the defendants against a recovery on the note.

When the testimony was closed, the defendants moved the court to charge the jury as follows: "That any payments made on the paper sued on herein by the firm of Gaines & Relf, or the assignee or liquidator of said firm, after William Henderson's death, did not interrupt prescription as to said Henderson, nor would any acknowledgment of said paper by said firm after said Henderson's death have that effect;" but the court overruled the motion, and refused to charge the jury as prayed for by the defendants; to which ruling of the court the defendants, and each of them, then excepted.

[268]

The jury returned a verdict in f
plaintiff and assessed separate and d
ages against each of the defendant
this verdict the court rendered sep
ments in favor of the plaintiff, agai
H. Henderson, as executor of E
Henderson, for $17,172.25, and agai
H. Henderson individually, Howa
derson, and Warren N. Henderso
$4,293.18; and against Victorine S
and M. C. McCarthy, her husband
sum.

The parties defendant to these
prosecuted separate writs of error t
ment, and each gave a separate bo
cute the writ of error to effect and
damages and costs on failure to ma
plea. But one record was brought t
to which all the writs of error had

In each of the cases, except the o
William H. Henderson, executor, w
in error, the defendant in error fil
to dismiss the writ of error "for w
diction, because the amount in disp
exceed five thousand dollars, and w
cient to sustain a writ of error."

Messrs. **Thomas L. Bayne** a
Evans, for plaintiff in error.

Messrs. **Agustus E. Wilson,**
Wilby and *Gustavus H. Wald,* fo
in error.

Mr. Justice **Woods** delivered th
the court:

We think the motion to dismiss
error must prevail.

The obligation upon which the
the heirs of William Henderson w
was based, not on the note made
upon the fact that they had, without
taken possession of the property
cession, and had thereby subjected
each to pay his proportionate share
of the succession.

This is evident from the followin
the Revised Civil Code of Louisian

"Art. 1422. The personal action
creditors of a succession can exer
the heirs has for its basis the oblig
the heirs are under to discharge the
deceased. This action is modifie
as the deceased has left one or sever

"Art. 1423. The heirs, by the f
the simple acceptance of a successio
contract the obligation to discha
debts of such succession to whateve
may amount, though they far excee
of the effects composing it. The
tion to this rule is when the heirs,
dling with the succession, have ca
and faithful inventory thereof to
* * * for in this case they are bour
the debts to the value of the effec
the succession."

"Art. 1425. But though the heir
universal sucessors who have not m
ventory, as is before prescribed, are
the payments of all the debts of the
to which they are called, even whe
exceed the value of the property
they are not bound *in solido*, and
other, for the payment of the debts.

"Art. 1427. If, on the contrary, t

he left two or more heirs, they are bound to contribute to the payment of those debts only in proportion to the part which each has in the succession. Then the creditors of the succession must divide among the heirs the personal action which they have against them, and cannot sue one for the portion of the other or one for the whole debt."

It is plain, from these provisions of the Civil Code, that the suit was brought to enforce against each of the plaintiffs in error a separate and distinct liability, which sprang from the succession of the succession of their ancestor, and that no joint judgment could be rendered against them. The petition was framed on this theory, and separate judgments were accordingly rendered against each of the plaintiffs in error. The note of Henderson & Gaines was introduced merely to prove the debt of the succession of Henderson.

The judgments against the four plaintiffs in error, whose writs of error we are asked to dismiss, are all less than the amount which authorizes a writ of error to this court. We have, therefore, no jurisdiction. For it is the settled rule that where a judgment or decree against a defendant, who pleads no counterclaim or set-off, and asks no affirmative relief, is brought by him to this court by writ of error or appeal, the amount in dispute on which the jurisdiction depends is the amount of the judgment or decree which is sought to be reversed. *Gordon* v. *Ogden*, 3 Pet. 33 [28 U. S. bk. 7, L. ed. 323]; *Oliver* v. *Alexander*, 6 Pet. 143 [32 U. S. bk. 8, L. ed. 349]; *Knapp* v. *Banks*, 2 How., 73 [43 U. S. bk. 11, L. ed. 184]; *Rich* v. *Lambert*, 12 How., 347 [53 U. S. bk. 13, L. ed. 1017]; *Walker* v. *United States*, 4 Wall., 163 [72 U. S. bk. 18, L. ed. 319]; *Merrill* v. *Petty*, 3 Wall., 338 [88 U. S. bk. 21, L. ed. 499]; *Troy* v. *Evans*, 97 U. S., 1 [Bk. 24, L. ed. 941]; *Hilton* v. *Robinson*, 108 U. S., 165 [Bk. 27, L. ed. 688]; *Railroad Company* v. *Higgins*, 112 U. S., 227 [Bk. 28, L. ed. 715]; *First National Bank of Omaha* v. *Rudick*, 110 U. S. 224 [Bk. 28, L. ed. 26].

It is also settled that neither codefendants nor coplaintiffs can unite their separate and distinct interests for the purpose of making up the amount necessary to give this court jurisdiction upon writ of error or appeal. *Rich* v. *Lambert*, *ubi supra*; *Seaver* v. *Bigelow*, 5 Wall., 848 [72 U. S. bk. 18, L. ed. 595]; *Paving Company* v. *Bickford*, 100 U. S. 147 [Bk. 25, L. ed. 581]; *Russell* v. *Stansell*, 105 U. S., 303 [Bk. 26, L. ed. 1090]; *Ex parte Balt., etc., R. R. Co.*, 106 U. S. 5 [Bk. 27, L. ed. 73]; *Farmers' Loan & Trust Company* v. *Waterman*, 106 U. S. 265 [Bk. 27, L. ed. 215]; *Adams* v. *Crittenden*, 106 U. S. 557 [Bk. 27, L. ed. 297]; *Hawley* v. *Fairbanks*, 106 U. S. 345 [Bk. 27, L. ed. 299]; *New Jersey Zinc Company* v. *Porter*, 108 U. S., 364 [Bk. 27, L. ed. 828]; *Tupper* v. *Wise*, 110 U. S., 398 [Bk. 28, L. ed. 189]; *Fourth National Bank* v. *Stout*, 113 U. S., 684 [Bk. 28, L. ed. 1123]. The cases cited are conclusive of the question of jurisdiction. The authorities mentioned in the note,* on which the plaintiffs in error rely, were discussed by the Chief Justice in *Ex parte Baltimore & Ohio R. R. Co.*, *ubi supra*, and were shown to have no application to cases like the present. The case of *Davies* v. *Corbin*, 112 U. S., 36 [Bk. 28, L. ed. 627], also cited for the plaintiffs in error, clearly belongs to the same class. The motions to dismiss for want of jurisdiction are, therefore, sustained.

It remains to consider, upon the merits, the writ of error of William H. Henderson, as executor of the last will of Eleanor Ann Henderson. [277]

The plaintiff in error in this case relied for his defense upon article 3540 of the Civil Code of Louisiana, which reads as follows: "Actions on bills of exchange, notes payable to order or bearer, except bank notes, those on all effects negotiable or transferable by indorsement or delivery, and those on all promissory notes, whether negotiable or otherwise, are prescribed by five years, reckoning from the day when the engagements were payable."

It was ruled by the circuit court that the prescription established by this article of the Code of Louisiana was by the law of Kentucky made the limitation in this case, and this was not disputed by counsel for the defendant in error. General Statutes of Kentucky, 1872, chap. 71, art. 4, § 19.

The suit against the executor of Mrs. Henderson was not brought until nearly fifteen years after the maturity of the note of Henderson & Gaines, and nearly twelve years after the death of William Henderson. The obligation on which the suit was based was, therefore, prescribed as against the executor of Mrs. Henderson's will, unless the prescription had been interrupted. But the defendant in error insisted, as already stated, that the prescription had been interrupted by acknowledgments of the debt made by the firm of Gaines & Relf, with which, as she claimed, William Henderson was bound *in solido* for the payment of the note of Henderson & Gaines. To prove these acknowledgments, she introduced evidence tending to show payments made by Gaines & Relf, after the death of William Henderson, of interest on the note. The contention of the defendant in error was that these acknowledgments were made competent to show an interruption of prescription, as against the present plaintiff in error, by article 3552 of the Civil Code of Louisiana, which provides as follows:

"A citation served upon one debtor *in solido*, or his acknowledgment of the debt, interrupts the prescription with regard to all the others, and even their heirs."

It is plain that, to make this article applicable to the case of the plaintiff in error, it must be shown that Mrs. Henderson, his testatrix, was bound *in solido* with Gaines & Relf to pay the debt evidenced by the note of Henderson & Gaines, or that she was the heir of her husband, William Henderson, who at the time of his death, was bound *in solido* with Gaines & Relf, lately his partners. Counsel for the defendant in error concede, as well they may, that Mrs. Henderson did not become bound for the debt as the heir of her husband, William Henderson. Her liability was that of widow in community, and it was so averred in the petition filed in this case in the circuit court. [278]

The only question for decision is, therefore, Was Mrs. Henderson, as the widow of William

*Thomas v. Thomas, 17 How. 3 [59 U. S. bk. 15, L. ed. 1]; Martin Co. v. Hoffman, 102 U. S. 112 [Bk. 25, L. ed. 79]; The Commerce, 102 U. S. 112 [Bk. 25, L. ed. 79]; The Minnie, 105 U. S. 773 [Bk. 26, L. ed. 1]; [illegible]

Henderson, bound *in solido* with Gaines & Relf, by whom the alleged acknowledgments were made, for the payment of the note of Henderson & Gaines? This question must be settled by the law of Louisiana. If it shall turn out that Mrs. Henderson was not bound *in solido* with Gaines & Relf, then the prescription as to her was not interrupted by any acknowledgments made by Gaines & Relf, and such acknowledgments were improperly admitted in evidence against her.

The articles of the Code bearing upon this question are as follows:

"Art. 2093. An obligation *in solido* is not presumed; it must be expressly stipulated. This rule ceases to prevail only in cases where an obligation *in solido* takes place of right, by virtue of some provision of law."

Such a provision is found in article 2872, which declares that "commercial partners are bound *in solido* for the debts of the partnership."

"Art. 2082. When several persons obligate themselves to the obligee by the term *in solido*, or use any other expressions which clearly show that they intend that each one shall be separately bound to perform the whole of the obligation, it is called an obligation *in solido* on the part of the obligors."

"Art. 2091. There is an obligation *in solido* on the part of the debtors when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them exonerates the others towards the creditor."

[279]

"Art. 2092. The obligation may be *in solido*, although one of the debtors be obliged differently from the other to the payment of one and the same thing; for instance, if the one be but conditionally bound, while the engagement of the other is pure and simple, or if the one is allowed a term which is not granted to the other."

These articles make it clear that it is an indispensable requisite to the obligation of debtors *in solido* that they should be bound to perform the same obligation and the whole of it. Applying this test, it is evident that Mrs. Henderson was not bound *in solido* with Gaines & Relf for the debt evidenced by the note of Henderson & Gaines.

The liability of Mrs. Henderson was based upon and was co-extensive with her obligation as a member of the partnership or community between herself and her husband to pay the debts of the community. What this obligation is, is shown by the following articles of the Civil Code:

"Art. 2405. At the time of the dissolution of the marriage all effects which both husband and wife reciprocally possess are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited."

"Art. 2406. The effects which compose the partnership or community of gains are divided into two equal portions between the husband and the wife, or between their heirs at the dissolution of the marriage."

"Art. 2409. It is understood that in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts

contracted during the marriage, a
quitted at the time of its dissolutio
"Art. 2410. Both the wife and h
assigns have the privilege of being
onerate themselves from the debts
during the marriage, by renouncing
ship or community of gains."

From these provisions of the Co
dent that if the widow, upon the di
the community by the death of he
fails to renounce the community
which, as the law stood at the t
death of William Henderson, was
to an acceptance of the community,
personally bound to pay one half
of the community, but no more.
therefore, bound *in solido* for the
the debts of the community, unless
upon which her obligation is based
stipulates. This will be clear from
ing authorities:

Pothier, in his Treatise on Oblig
graph 261, says: "An obligation i
in solido on the part of the debtors
of them is obliged for the whole, b
payment by one liberates them all."

The same author, in his work "
munauté," paragraph 729, speakin
band's obligations on behalf of the
says: "There is no difficulty when t
has contracted alone. But would it
if he was obligated jointly with his
out any expression of solidarity? W
this case, be debtor for the whole, as
creditor, after the dissolution of the
The cause of the doubt is, that if
gated jointly with any other pers
wife, without expression of solidari
be considered as having bound him
his own proportion. Nevertheless
monly held that even when the h
bound himself jointly with his w
expression of solidarity, he is oblig
whole, and remains, after dissolutio
munity, debtor for the whole as
creditor. The reason is, that whe
comes a party to the obligation of
the intention of the parties is to ob
security to the creditor rather th
and diminish the liability of the hu

But, with regard to the obligation
he says, in paragraph 731: "The w
dissolution of the community, whe
accepted the community or renou
tinues to be debtor for the whole
respects the creditors) of the debts
munity which proceed from her a
say, those which she herself has
whether before or after the marriag
of successions which have fallen t

He then adds:

"Par. 732. When the wife, duri
riage, has not contracted alone, but
her husband, without expression o
though the husband be regarded
the whole, the wife is not conside
bound for anything but the half,
debtor, as regards the creditors, fo

"Par. 733. In regard to all other
community which the wife has not
tracted, and for which she is only
character of member of the com
wife, after the dissolution of the

which she has accepted, is only debtor for a moiety as towards the creditors."

So, in his Coutumes D'Orleans, introduction to title 10, the same author says:

"Par. 136. The husband is held *in solido* towards the creditor, not only when he has contracted alone, but even when he has bound himself with his wife without expression of solidarity, although it would be otherwise if he had so bound himself with another person."

"Par. 138. The wife is held *in solido* towards the creditors for debts of the community which proceed from her act, that is to say, for those which she has herself contracted before the marriage, and for those which grow out of successions which have fallen to her. She is also held *in solido* for debts contracted by her husband when she has bound herself *in solido* with him. If she has bound herself for his debts without solidarity having been expressed, she is held even towards the creditor only for half."

See also Touillier's Commentary on the Code Napoleon, t. 13, pp. 310, 313; Duranton, t. 6, p. [illegible], par. 197, t. X., French ed. and t. 8, p. 222, par. 401, t. XIV., French ed.; Zachariæ, t. 3, p. [illegible], 304, § 520, art. 1, par. 2.

In accord with these views of the text writers, the Supreme Court of Louisiana, in the case of *Boulet v. Trepagnier*, 11 Rob. 266, said: "The obligation which the widow incurs by her acceptance of the community is an additional security for the creditors, but they have the right to look to the heirs and direct representatives of the husband for the whole debt, because it is with him they trusted, and it is to whom they trusted. *Ejus solius fidem secuti sunt*, says Touillier, vol. 13, No. 233; 2 Pothier Traité de la Communauté, No. 719. But, although the creditors have this option, the widow who has accepted the conjugal partnership or community becomes absolutely and personally bound to them for one half its debts."

In the present case the debt which is sought to be enforced against the estate of Mrs. Henderson is not one which she contracted herself before the marriage, nor did it grow out of successions which had fallen to her, nor did she bind herself *in solido* therefor with her husband, nor did the husband in contracting the debt use any words which bound his wife solidarily with him, if in his power to do so. It is, therefore, clear, upon the authorities cited, that she was not bound *in solido* with her husband, during the community or after its dissolution with its succession, for the debt evidenced by the note of Henderson & Gaines. In fact, the petition filed in this case, and the judgments rendered by the circuit court, are based on this fact. She was, therefore, not bound *in solido* with Gaines & Relf, the codebtors of her husband. The payments made on the note by them after the death of her husband should not, there fore, have been admitted in evidence to interrupt the prescription of five years, which began to run in her favor upon his death.

The only authority not already noticed to which we have been referred by counsel for defendant in error, to show that Mrs. Henderson was bound *in solido* with Gaines & Relf for the note of Henderson & Gaines, is the case of *Edwards v. Ricks*, 30 La. Ann. 928. In explanation of this case it may be stated that in Louisiana the succession of a deceased wrongdoer is liable for the actual damage resulting from his torts. Art. 25, Code of Practice. The suit was brought by Edwards to recover damages for a trespass upon his property and an assault on his family, committed by Ricks and one Vernado. Before suit brought, Vernado had died, and the action was against Ricks and the widow and the two children and heirs of Vernado, who, it was alleged, had taken possession of his property without inventory, and were, therefore, liable for the obligations of the deceased trespasser. The judgment of the lower court was against Ricks for $5,000, and against the widow of Vernado for $2,500, and against his two heirs for $1,250 each, "the judgment," as the report states, "being *in solido*." [283]

Upon appeal the Supreme Court of Louisiana decided that, while Ricks might be held for exemplary damages, the widow as well as the heirs of Vernado were liable only for the actual damages, and accordingly affirmed the judgment against Ricks for $5,000, which included exemplary damages, and rendered judgment for the actual damages "against the widow and heirs of Vernado in the sum of three hundred dollars (*in solido* with the judgment against Ricks); said three hundred dollars to be paid" one half by the widow, and one half by the two heirs jointly. In delivering its opinion the court said: "Ricks and the estate of Vernado, represented by the widow and heirs, are sued as cotrespassers and solidary obligors. To the extent that the estate of Vernado is liable, the judgment against it would be solidary with that against Ricks, but would divide itself as follows: one half against the widow, and one half against the two heirs, jointly."

It is to be observed that the case did not involve a construction of article 3552 of the Civil Code, which we now have under consideration, and is not authority to support the contention of the defendant in error that a payment by Gaines & Relf interrupted the prescription in favor of Mrs. Wadsworth. And whatever the court may have said about the estate of Vernado being liable *in solido* with Ricks, was merely *obiter*, for no judgment was asked or rendered against the estate, and it is clear that under articles 1425 and 1427, heretofore cited, the obligation resting upon Ricks and the widow and heirs of Vernado was not a salidary obligation; and the court did not treat it as such, for it rendered a separate judgment against Ricks for one amount, a joint judgment against the two heirs of Vernado for a different amount, and a third judgment against the widow for still another amount, and the judgment against Ricks was made up of $4,700 exemplary damages, and $300 actual damages; while the judgment against the widow and heirs were only for the actual damages. [284]

It seems plain, therefore, that the court, by calling the obligation and the judgments solidary, merely meant that a payment made by one of the judgment debtors would *pro tanto* exonerate the others towards the creditor. But this quality, as we have shown, is not the only one necessary to an obligation *in solido*, as defined by the Civil Code. The debtors must be "all obliged to the same thing, so that each may be compelled for the whole." These par-

ties were not under the same obligation, either in character or amount, and were not all bound for the whole.

Nor do we think it is a reasonable construction of article 3552 of the Civil Code to hold, that when two persons are jointly bound, one for the entire debt and one for only a part of it, the acknowledgment of the latter interrupts the prescription as to the former.

Therefore, as the Circuit Court admitted incompetent evidence upon a vital point of the case against the executor of Mrs. Henderson, and, when requested by him, refused, by its charge to the jury, to counteract the effect of the evidence thus admitted, the error is fatal to the judgment in favor of the defendant in error against the executor of Eleanor Ann Henderson.

The judgment against William H. Henderson, executor, is therefore reversed, and the cause remanded to the Circuit Court, with directions to grant a new trial, and the motions to dismiss the writs of error in the cases of Howard L. Henderson, William H. Henderson, Warren N. Henderson and Victorine S. and M. O. McCarthy are granted.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[291] HIRAM K. HAZLETT, *Appt.*,
v.
THE UNITED STATES.

(See S. C., Reporter's ed., 291-299.)

Contracts—contract with quartermaster's department to furnish transportation—rights of contractor.

*A person who by a contract made with him by the quartermaster's department of the army in behalf of the United States, agrees to furnish all the steamboat transportation required by the United States for officers and soldiers between certain places, and to certain Indian posts and agencies during a certain time, and to "receive from the officers or agents of the quartermaster's department all such military, Indian and government stores, supplies, wagons and stock, as may be offered or turned over to him for transportation * * * by said officers or agents of the quartermaster's department, and transport the same with dispatch, and deliver them * * * to the officer or agent of the quartermaster's department designated to receive them," at a certain rate, is not entitled to claim compensation for Indian supplies, never in the charge of the quartermaster's department for transportation, transported, between places named in the contract, by another person under a contract between him and the Commissioner of Indian Affairs; although during the same time some Indian supplies are delivered by the Commissioner of Indian Affairs to the quartermaster's department, and by that department turned over to the claimant for transportation at the rate specified in his contract.

[No. 17.]

Argued Oct. 23, 1885. Decided Nov. 2, 1885.

APPEAL from the Court of Claims.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Theodore H. N. McPherson** and **Enoch Totten**, for appellant:

The legal intention of the contracting parties may be ascertained and determined by reference to the subject-matter of the co surrounding circumstances.

Merriam v. *U. S.* 107 U. S. 437 *Towne*, 5 Wall., 689 (72 U. S. b 527); *Barreda* v. *Silsbee*, 21 Hov S., bk. 16, L. ed. 86); *Brawley* v S., 168 (bk. 24, L. ed. 622.)

Greater regard is to be had to t of the parties than to any pa which they may have used in the their intent.

1 Chit. Cont. 105; *Morey* v. *B* 565; *Gray* v. *Clark*, 11 Vt., 5 *Miller*, 6 B. Mon., 612.

Contracts should be supporte defeated.

Smith v. *Packhurst*, 3 Atk., 1 *Stacy*, 9 Q. B., 1033; *Broom* v. & N., 255; *Atkins* v. *Sleeper*, 7 *Mr.* **John Goode**, *Solicitor* pellee.

Mr. Justice **Harlan** delivere of the court:

The foundation of this actio agreement of February 17, 1870 United States and the appellant, v ant below, in relation to the tra him, at specified rates, of militar government stores, supplies, wag Full compensation was made fo actually performed by him. B that he was entitled to transport stores and supplies, which w against his protest, to the Northv tation Company for transportatio agencies included in his contract and stores last named were trans written contract made, without by the Commissioner of Indian tember, 1870, at higher rates than the claimant. If they had been him, under his contract, he woul a large profit, after deducting have cost to do the work, and als sum for being relieved from the responsibility and risk attend vice. Although fully prepared transport them, the officers of t reau refused to turn them over to contends, was a breach of his c court below adjudged that the the Government, and dismissed He now insists that the judgm upon an erroneous construction c and was also inconsistent with th terpretation given to its provisio of the Government immediately its execution.

We are of opinion that the cl cause of action against the Unite contract did not obligate the G deliver to him, nor did it bind h for transportation during the peri all Indian supplies or stores in t agents or officers, of whatever branch of the public service. It v the claimant by an officer of the q department, under directions fro master-General of the Army. By he became bound to furnish all transportation required by the U officers and soldiers on the Miss

*Head note by *Mr. Justice* HARLAN.

[illegible] certain named places, and for posts or Indian agencies between certain other named places, at any time from March 20, 1870, to October 31, 1870. He agreed to "receive, at any time during that period, from the officers or agents of the quartermaster's department, at St. Louis, or any point between St. Louis and Fort Benton," mentioned in the tabular statement annexed to the written contract, "all such military, Indian and government stores, supplies, wagons and stock as may be offered or turned over to him for transportation, in good order and condition, by said officers or agents of the quartermaster's department, and transport the same with dispatch, and deliver them in like good order and condition to the officer or agent of the quartermaster's department designated to receive them," etc. These words define the nature and extent of the obligations assumed by the contractor. It was entirely competent for the quartermaster's department to enter into an agreement whereby the contractor became bound to receive from its officers or agents all such military, Indian or government supplies as they might deliver to him for transportation. But it had no authority, without reference to the views of the Interior Department, and of the officers having special connection with Indian affairs, to control the transportation of Indian supplies or stores of every kind. Nor did the quartermaster's department assume to exercise such authority; for, it only stipulated with claimant that he should receive and transport such supplies and stores as were turned over to him by its officers and agents. As, therefore, the claimant was not bound to receive Indian supplies or stores turned over to him for transportation by the Indian Bureau, the employment by the Commissioner of Indian Affairs of others to effect the transportation of Indian stores and supplies—which were never, so far as the record discloses, in charge of the quartermaster's department for transportation—was not an infringement of his legal rights. There is no escape from this conclusion, unless it be that the quartermaster's department had, under the law, the sole power of making contracts for the transportation of Indian supplies and stores. But that proposition cannot be maintained.

It is also contended that the Government, in view of the conduct of its agents, subsequent to the making of the contract with claimant, cannot now be permitted to dispute the proposition that he was entitled by his contract to receive for transportation, during the period designated, all Indian supplies and stores, by whatever department held, which were to be sent to the several Indian posts or agencies designated in his contract.

This proposition arises out of the following facts found by the Court of Claims:

"It does not appear that either the Commissioner of Indian Affairs or the Secretary of the Interior had actual knowledge of the fact that a contract in suit existed with the claimant, relating to the transportation of Indian stores and supplies by or through the officers of the quartermaster's department; nor did they expressly authorize General Rucker to enter into a contract for the transportation of Indian stores or supplies nor did they ratify such contract, unless its ratification be implied from the following facts and circumstances: The Indian Bureau directed that two lots of Indian supplies be forwarded in April and May, 1870, amounting to 221,242 pounds, which was acccordingly done by Quartermasters Gilliss and Fury, at Sioux City, Iowa, turning them over to the claimant for transportation, and they were by him transported (under his contract with the quartermaster's department to include the transportation of the Indian supplies) to Whetstone and Big Cheyenne agencies; and the Indian Bureau reimbursed the War Department for this transportation. The Commissioner of Indian Affairs and the Secretary of the Interior directed the Secretary of War, June 21, 1870, to turn over the army subsistence stores collected at the instance of the Commissioner of Indian Affairs for the Indians at Forts Rice, Stevenson, Buford and Shaw, to the Indian agents at the Grand River and Fort Berthold agencies, and that the cost of transporting the stores from the forts to the agencies would be paid by the Indian Bureau. The claimant transported, September 27, 1870, 82,720 pounds of Indian stores and supplies from Fort Rice to Grand River agency, for which he was paid accordingly. The contract in suit was duly filed in the returns office of the Department of the Interior the 12th March, 1870." [299]

These facts give no support to the suggestion that the Government recognized claimant's right to transport all Indian supplies for the posts or agencies named in his contract. That contract did not forbid the quartermaster's department from receiving Indian supplies, in the first instance, from the Indian Bureau, and delivering them to the claimant for transportation under his contract. And that which was done in respect of the Indian supplies forwarded in April and May, 1870, and of those transported in September, 1870, to Grand River agency, so far from implying authority in the quartermaster's department to control the whole matter of the transportation of Indian supplies, was a recognition of the authority of the officers, having special charge of Indian affairs, to provide for the transportation of any Indian supplies in their hands, for the cost incurred in transporting Indian supplies to the Whetstone, Big Cheyenne and Grand River agencies was borne by the Indian Bureau. If the Indian Bureau chose to make arrangements with the War Department for the transportation of certain Indian supplies, under the contract made with the claimant, that fact falls short of proving that the purpose was to grant him the right to transport all Indian supplies, by whatever department or officers held, to the posts or agencies designated in his contract.

We perceive no error in the judgment, *and it is affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[228] PETER C. A. M. VAN WEEL, *Appt.*,

v.

FREDERICK H. WINSTON, THE CHICAGO AND SOUTHWESTERN RAILWAY COMPANY ET AL.

(See S. C., Reporter's ed., 228-247.)

Parties—the president of a railroad company, not personally liable to the purchasers of its bonds—fraudulent representations—equity jurisdiction.

1. The president of a railroad company is not personally liable for losses alleged to have resulted to the purchasers of its bonds through fraudulent representations contained in circulars of the company signed by him as president.

2. Representations contained in circulars issued by a railroad company, to advertise a new issue of bonds for the construction of a branch line, are held to have been superseded by the mortgage or trust deed given by the company on such branch line to secure the payment of said bonds, in so far as such representations differed from the terms of that instrument.

3. A provision that the branch line when located should not exceed fifty miles in length does not require that it should be of that length, especially as the bondholders were given, in addition to the mortgage on said branch line, a second mortgage on the company's main line.

4. There is no privity or trust relation existing between the president of a railroad company and the purchasers of its bonds. In this case the purchasers obtained in the mortgage the only security for which they contracted. For any improper or fraudulent appropriation of the proceeds of the bonds the president is only liable to the company or its stockholders, unless it be to a judgment creditor, with an execution returned *nulla bona*.

5. Unless the transactions to which charges of fraud or of a breach of trust refer, are such as in their essential nature constitute a fraud or breach of trust, a court of chancery cannot give relief.

[No. 2.]

Argued Oct. 21, 22, 1885. Decided Nov. 2, 1885.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Messrs. **James K. Edsall** and **William H. Moore**, for appellant.

Messrs. **W. C. Goudy** and **Melville W. Fuller**, for Frederick H. Winston and the executors of George C. Campbell, appellees.

[236] *Mr. Justice* **Miller** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the Northern District of Illinois, dismissing the bill of Van Weel, who was plaintiff below and is appellant here.

The original bill was filed December 12, 1876, [237] and several amended bills were filed, until, on May 22, 1880, complainant filed what he calls his amended and supplemental bill, substituting it in lieu of his previous bill and amended bills.

The defendants named in this bill are the Chicago and Southwestern Railway Company of Iowa and Missouri, Frederick H. Winston and George C. Campbell, citizens of Illinois, Calvin F. Burnes, a citizen of Missouri, and David Dowes and Frederick S. Winston, citizens of New York.

Mr. Van Weel describes himse
and a subject of the King of the
and a holder and owner of bond
cago and Southwestern Railway
$67,000, principal, and overdue in
to the amount of $35,175. H
suit, as his bill alleges, not only
but on behalf of numerous other
same issue of bonds, whose name
the amount, including interest, o

The bill was demurred to, the
sustained and a decree rendered
from which this appeal is taken.

The contest seems to be mainly
plainant Van Weel on one side,
H. Winston on the other. Calvin
zen of Missouri, has not been ser
cess within Northern District of
has not appeared by himself or a
same may be said of Frederick
who is a citizen of New York.

F. H. Winston has demurred s
if the bill cannot be sustained ag
obvious, from its character, that
against the other defendants. Th
Southwestern Railway Co. also

The bill is a long one, the alleg
classified, nor the true foundat
very clearly stated. It is full
fraudulent and corrupt, and gene
conspiracy and violation of trus
Mere words, in and of themselve
qualifying adjectives of more sp
are not sufficient grounds of equit
unless the transactions to which
such as in their essential nature
fraud or a breach of trust, for wh
chancery can give relief. *Ambl*
107 U. S., 590 [Bk. 27, L. ed. 32

The charges in this bill on w
sought may be arranged under tw

1. Fraudulent misrepresentati
fendant affecting the character an
security on which the bonds in
negotiated.

2. The violation of certain obli
nature of a trust, which he assu
to the security and ultimate pa
bonds.

A few of the most important
cable to both these charges as fo
may be thus stated:

A company had been incorpor
laws of Iowa to build a railroad f
of Washington in that State, on
Chicago, Rock Island and Pacific
in a southwesterly course to the M
or to the line of the State of Mi
direction. Another corporation
ganized under the laws of Misso
railroad in that State, from a poi
City of Leavenworth in Kansas,
state line, in the direction of th
Moines in that State.

These companies were consoli
under the name of the Chicago a
ern Railway Co., with the declar
building a single road from Was
Missouri River, at a point opp
worth. Of this Company Mr. W
the president, and a member of
committee of its board of d
Company issued bonds for fiv

dollars, which were guarantied by the Rock Island Co., and made a mortgage on the entire line of its road to secure their payment. The length of this line was 266 miles, and the money raised on these bonds secured its rapid completion. In the meantime another corporation had been organized in Missouri to build a road from the Missouri River, opposite the City of Atchison in the State of Kansas, to some point on the line of the Chicago and Southwestern Road. This road was called the Atchison Branch, and when the main branch of the Southwestern Road was nearly finished, lacking, as the bill avers, only fifty miles of its completion, a consolidation was effected between the company organized to build this branch road to Atchison and the original Chicago and Southwestern Co., in which consolidation the corporation retained the name of this latter company.

This company, as consolidated, at once determined to raise a new loan of $1,000,000, to be used mainly for the purpose of building the Atchison branch road, on which but little, if any, work had been done. As a security for the bonds of this loan, they made another mortgage, which was a first mortgage on the Atchison Branch and a second mortgage on the main line. These bonds were all sold, and the two lines of road completed within a reasonable time; and it may as well be added that both mortgages were forfeited in a few years for non-payment of interest, and the mortgages foreclosed by a sale of the roads under two different foreclosure suits.

The charge of actual fraud against Mr. Winston grows out of certain acts and representations made by him in connection with the sale of these bonds by the Chicago and Southwestern Co.

In order that no injustice may be done the complainant in regard to his allegations on this point, the language of the bill will be here given.

"Your orator further complains and states that the said Frederick H. Winston and his confederates afterwards, to wit: on or about the [illegible] day of June, A. D. 1871, contrived and agreed upon a scheme to secure a loan of the further sum of $1,000,000, for the ostensible purpose of building a branch line of road as hereinafter stated, but in reality to enable him and his confederates to get control of and convert to their own use a large part of the funds secured and advanced to build said branch road. And to that end, said Winston, as president of said Southwestern Company, caused a circular to be issued, a true copy of which is here annexed, marked 'Exhibit A,' to which reference is made as if it was incorporated herein, in which, among other things, speaking as president of said Southwestern Company, he said:

"'On the first day of May, 1871, the Chicago and Southwestern Railway, from Washington, Iowa, to Leavenworth, Kansas, a distance of [illegible] miles—now finished and in operation, 216 miles—will be fully completed and opened for business under the auspices and management of the Chicago, Rock Island and Pacific Railroad Company. The two roads, thus under one management, will constitute a through line, and the shortest through line, from Chicago and the great lakes of the north to the extreme southwest. Congratulating our friends and ourselves upon the prompt sale of our first issue of bonds, as well as their present established market value, both in this country and in Europe, we would present for sale, through the financial agents of the company, a second issue, for the purpose of constructing a branch railroad from the main line to Atchison, Kansas, a distance of about fifty miles."

Said Winston, after setting forth the advantages of Atchison as a commercial and railway center, continued as follows:

"To carry on the arrangements before stated, the Chicago and Southwestern Railway Company have issued one thousand bonds, dated June 1, 1871, each for $1,000, due thirty years after date, with semi-annual coupons annexed, at the rate of 7 per cent per annum, principal and interest payable in American gold coin, at the American Exchange National Bank, in the City of New York; all of which are equally secured by a first mortgage on the road to be built, its assets, rights of way, earnings and other property, as well as by a second mortgage upon the Chicago and Southwestern Railway, its property and franchises."

It was further stated in said circular that said mortgage would be "a safe and reliable security," the value of which would be better appreciated by the fact that the "Chicago, Rock Island and Pacific Railroad Company had already agreed to lease, and would, when completed, operate, the whole line," on terms that would pay a handsome dividend to the stockholders, and "which in no event" would be "less than the interest on all the bonds outstanding," and that the value and security of the contract aforesaid was "equal to a direct indorsement of the bonds" by the Rock Island Co.

It was further stated in said circular: [241]

"The Chicago and Southwestern Railway, for over two hundred miles west from Washington, is pointing almost directly to Atchison, so that its extension to that place involves less curvature than that of the established line to Leavenworth." "The Atchison Branch, through the populous Counties of Buchanan, Clinton and Platte, offers railroad facilities to wealthy agricultural communities, which in return must afford a heavy and lucrative local traffic. Every tract over which it will pass is a farm, teeming with the abundant products of the famous Platte purchase." "With the offering of the first loan of the Chicago and Southwestern Railway Company, we are admonished, as the originators of a new enterprise, to avoid the language of eulogy and enthusiasm. Difficult as was the task to those who knew its real merits, we have compensation now in a final and complete success, far beyond any expectation we dared to hope to excite by any statement in our former publication. Reviewing with a just pride all that was then written, we feel authorized to claim the confidence of the numerous friends, both in Europe and in this country, of the Chicago and Southwestern Railway Company, to whom we have more than verified all our statements." "To complete the connections of the Chicago and Southwestern Railway, to extend its power and usefulness, and to increase its business and earnings, by the construction of the Atchison Branch, we now offer this loan and commend it to our friends as a safe and de

[illegible] "New York, June, [illegible]," and signed "[illegible] Winston, President."

The [illegible] in these representations is in the alleged fact that the branch road, when built, was only twenty-nine miles, and not fifty, whereby the bondholders were deprived of the security of twenty-one miles of road which they had a right to expect, to make good their bonds, and that it was not known to Winston at the time that the road would not be as long as thus represented, and would not go through all the counties named. There was one of these counties, in point of fact, not touched by the road.

The first observation to be made on this subject is, that circulars, on which this allegation
[242] is founded, are exhibits to the bill, and in every instance they are clearly the circulars of the Chicago and Southwestern Railroad Co. They are signed by Winston, as president of that Company, and purported to be issued from its office, and in the charging part of the bill, copied above, and all through it, he is said "to be speaking as president of that Company." There is no allegation anywhere that Winston ever gave his personal pledge or statement to any one about to invest in the bonds of the Company, that the road would be fifty miles long, or any other length. It is obvious, from the nature of these circulars, that the branch road had not then been located, and Mr. Winston, as an individual, could give no pledge on that subject which would bind the Company, nor could he do so as president of the Company. The road had yet to be located, and this could only be done by the board of directors, of whom Mr. Winston was but one, of eight or ten.

A source of much safer reliance as to the security which these purchasers of the bonds were getting, was the mortgage given by the Company. This of course was made and recorded before the negotiation for the loan was commenced, and copies of it accompanied the bonds when offered for sale. Every prudent man knowing that this mortgage was his main security, would examine it, or his agent would, before investing his money.

In this mortgage or deed of trust, the trustees being David Dowes, Frederick S. Winston and Calvin F. Burnes, the property conveyed is described as "the branch railroad of said party of the first part, as the same now is or may be hereafter surveyed and being constructed, and leading from the Missouri River in the State of Missouri, at a point opposite the City of Atchison in the State of Kansas, by the most practicable route, not exceeding fifty miles in length, to a junction with the main line of the railroad of said party of the first part."

Whatever representations may have been made in the circulars of the Company was, according to all rules of evidence, superseded by this solemn instrument between the parties If they differed in any respect, the latter must be looked to as the security on which the bond-
[243] holders alone had a right to rely. This instrument, so far from giving any pledge or assurance that the branch road should be fifty miles long, or near that, is careful to say it shall not exceed that length. The limitation is in its length, not its shortness. The latter is provided for by saying that it should be by the most practicable route.

It is impossible to read this desc
line of road, conveyed as security f
without seeing clearly that the lin
located— that its future locatio
govered by two considerations:
should be the most practicable ro
Atchison and the main line of th
(2) that its length should not excee
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dently meant the best working line
pany who was building it, should re
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of a promise or suggestion that it s
so long, and no longer, as that req
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ceed fifty miles, there was a prote
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holders, on a long and unprofitabl
made only for the benefit of people
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But this line of road was not t
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Washington to Leavenworth, 266
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by means of the Chicago, Rock Islan
Co., then a rich and prosperous co
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that it had guaranteed $5,000,000
of the company. It was further
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of the sale of these bonds should
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only pay them out in the regular p
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gage that if any of these proceeds re
that company after the completio
it should be paid over to the presi
authorized agent of the Chicago an
ern Co.

It cannot be doubted that this
the main line, though a second lien,
as an important part of the securit
holders under it, and when taken
with the aid and interest of the
Co., the precise length of the bran
not have been held to be very im
fact, as the two lines belonged to o
and that company was liable for a
it was obviously the interest of the
and of the stockholders that the
should be so located as to make
profits of the entire enterprise on wh
holders held a lien.

In regard to the allegation of
matter, it is apparent:

1. That all that is charged against
is that he signed or permitted hi
affixed to a circular which stated
length of the branch road, then un
unlocated, as about fifty miles.

2. That the place of junction wi
western Road, which necessarily de
length of the branch road, was not
mentioned.

3. That in the mortgage which
said branch road, all that was said
should not exceed fifty miles.

4. That it is nowhere averred
was not properly located, or that it
been located otherwise.

1. That the security which the bondholders had upon that line and the other seemed to render the place of connection between the branch and the main line unimportant, as regards the security for their loan.

We are of opinion, therefore, that the complainants had no right to rely on the statement concerning the length of the line as materially affecting their security, and that Mr. Winston committed no fraud in the part he took in that matter. This view is reinforced by the admission of the bill, that the branch road was completed mainly out of the money arising from the bonds sold to plaintiff and others, and that several years after both it and the main line had been finished and in operation, both roads were sold under the two mortgages; that the branch line was sold under foreclosure proceedings instituted by Van Weel, and was bought in for $10,000 by Mr. Berg, one of Van Weel's associates as bondholder, and that they now, as far as appears, own the road their money was used to build.

Other transactions are mentioned as fraudulent, such as that Mr. Winston converted some of the money arising from these bonds to his private use, and not to the purpose of the Company. The answer to this is, that Mr. Winston came under no obligation to see to the application of this money as the bondholders might think it ought to be applied. They had bought their bonds, paid their money, and received their security. The money so diverted was the money of the Southwestern Co., and not their money.

The wrong done by Winston in that matter, if wrong there was, was done to that company and not to the bondholders. They had provided their own means of insuring the building of this branch road, by disbursing the money through the Rock Island Co., and it was successful. The road was built. There was no privity between Mr. Winston and these bondholders as to the use of money which they had loaned to the Company, which was no longer their money. The error which pervades the bill throughout is to treat this corporation, to which the bondholders loaned their money, as if it had no existence, as if they had loaned it to Mr. Winston and hold his personal obligation that it should all be honestly applied, and he be responsible for the misapplication of the loan. If Mr. Winston cheated the Company out of its money, the right to redress for that wrong is in the Company or in its stockholders. As a creditor of the Company, Mr. Van Weel has no right to interfere in the matter until he has a judgment against the Company, with an execution returned *nulla bona*. He has not in this suit shown any right to use the name of the Company or of its stockholders to obtain redress for a tort committed on them. [United States v. *Union Pacific R. R. Co.* 98 U. S. 569, 25 L. ed. 154].

There are probably other allegations of fraud, but they are no better founded than these, and we can give them no further attention.

2. As regards the matter of trust, which is one of the grounds of relief set up in the bill, we need not occupy much time in its consideration.

The trustees in the mortgage, which is the only express trust that we can find set out in the bill, were Frederick S. Winston, David Dows, and Calvin Burnes, neither of whom resides within the jurisdiction of the court, or has been served with process.

If, however, they were before the court, they are not charged with any breach of duty with which they were intrusted.

The application of the money arising from the mortgage bonds was not by the mortgagors intrusted to them, nor had they any control over it after the bonds were sold.

It is not alleged that they refused to foreclose the mortgage when it became forfeited by nonpayment of interest, or that they failed to perform any duty imposed upon them by the mortgage.

It is asserted, however, that Frederick H. Winston, as president of the company, was bound to see that the money raised on these bonds was used exclusively in the construction of the branch road, and that, in this regard, he was a trustee for the lenders of the money. We are unable to see any such trust in the matter.

The contracting parties, in regard to this loan, were the bondholders and the Southwestern Co. The one became debtor for the money loaned, the other became creditor. Mr. Winston, as the president of the Company, represented the Company, the borrower. The lenders desired a security for the payment of their money, which they obtained in the mortgage, and their trustees in that trust were Dows, Burnes, and F. S. Winston. They, in that instrument, undertook to secure the building of this road out of the money loaned, by requiring its deposit with the Rock Island Co., and its disbursement, for that purpose, under its supervision. But if the loan should produce more than was necessary for that purpose, what was to become of it? Was it to go back to the lenders? There is no hint of that kind. It was impracticable to do so, because the bonds would, many of them, have changed hands. As to the new owner, it would have been a mere gratuity to return it. And the original lender had no interest in the matter. Instead of this, it is expressly declared that the Rock Island Co. could relieve itself of further obligation in the matter by payment to the president of the Company. [247]

When thus paid, did he hold it as trustee for the bondholders? If so, under what trust or what obligation? Could he return it to the bondholders, with the bonds still outstanding against the Company? Or did he hold it merely as the representative of the Company of which he was president? We think it was clearly the money of the Company, and could have been used by it for the purchase of rolling stock, general equipment, or any other legitimate use of its own money.

This money belonged to the Company. The road was built—the only interest in the nature of a trust which the lenders had attempted to protect by the control of the funds. The obligation of Mr. Winston in the disposition of the money, if any of it came to his hands, was to the Company. If it was lost, it was the Company's loss, not appellant's. If he improperly or fraudulently converted it to his own use, he was liable to the Company and not to the plaintiff in this suit. There was no privity or trust relation between him and them in this regard.

We think appellant has shown no right to relief in this suit, that the demurrer was prop-

erly sustained, *and the decree of the Circuit Court dismissing the bill is therefore affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[248] JOHN H. STARIN, INDEPENDENT STEAMBOAT COMPANY ET AL., *Appts.*,

v.

MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

INDEPENDENT STEAMBOAT COMPANY

v.

SAME.

(See S. C., Reporter's ed., 248-259.)

Removal of causes—suit arising under Constitution or laws of the United States—separate controversy—ferries—right of City of New York to establish—whether exclusive.

1. Where it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case is one arising under the Constitution or laws of the United States.

2. A separate defense by one defendant in a joint suit against him and others upon a joint or joint and several cause of action, does not create a separate controversy so as to entitle him to removal under the Act of 1875.

3. The decision of the question whether the City of New York has, under its charter, the exclusive right to establish ferries between Manhattan Island and the shore of Staten Island on the Kill von Kull, and, if so, whether the defendants have, in law and in fact, interfered with that right by setting up and operating such a ferry, does not depend on the Constitution or laws of the United States.

[Nos. 836, 837.]

Submitted Apr. 22, 1885. Decided Nov. 2, 1885.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Charles McNamee, Roscoe Conkling** and **A.L. Pincoffs,** for appellants:

"If a part of a case turns on a federal law, the circuit court has jurisdiction."

Osborn v. *Bank of U. S.* 9 Wheat. 738 (22 U. S. bk. 6, L. ed. 204).

As to what are cases arising under the laws of the United States, see *R. R. Co.* v *Mississippi*, 102 U. S. 135 (Bk. 26, L. ed. 96); *West. U. Tel. Co.* v. *Nat. Tel. Co.* 19 Fed. Rep. 561.

In this case removal is claimed because provisions of the Constitution and federal laws are ingredients of the defense.

If there is any question whether the privileges claimed can come into collision with the rights secured by the coasting license, such question is a federal one.

Ry. Co. v. *Renwick*, 102 U. S. 180 (Bk. 26, L. ed. 51); *State of Ill.* v. *C. B. & Q. R. R. Co.* 16 Fed. Rep. 706.

The question raised as to the respective rights of the holders of a coasting license and the grantee of a ferry right such
by the City of New York, has n
termined or covered either by th
Conway v *Taylor*, 1 Black, 603 (
17, L. ed. 191), or by any of th
collected in *Cardwell* v. *Bridge*
207 (Bk. 28, L. ed. 960).

It does not follow from *Wiggi*
v. *East St. Louis*, 107 U. S. 365
ed. 419), that the holder of a co
has no right to complain when h
from traversing the waters of the
in any mode and for any pur
choose. On its face a coasting li
contain any restriction. If a su
claimed in virtue of a grant by a
power of the State to grant such
tested, it is a federal question.

Conway v. *Taylor*, 1 Black,
Bk. 17, L. ed. 191); Judiciary
709; *Wiggins Ferry Co.* v. *East*
U. S., 365 (Bk. 27, L. ed. 419).

This action being in tort is in i
eral.

Skinner v. *Gunten*, 1 Wm.
Hutchins v. *Hutchins*, 7 Hill, 1
Baker, 7 Cow. 445; *Boyd* v. *Gill*,
145; *Smith* v. *Rines*, 2 Sumn. 346

An examination of the authoriti
that it was the intention of Cong
ing the Act of 1875, to provide t
like the present, the suit could be

Smith v. *Rines*, 2 Sumn. 346; W
18 How. 468 (59 U. S. bk. 15,
Carneal v. *Banks*, 10 Wheat.
bk. 6, L. ed. 299); *Cameron* v.
Wheat. 591 (16 U. S. bk. 4, L. e
B. S. M. Co. v. *F. S. M. Co.*
579 (85 U. S. bk. 21, L. ed. 914, 9
Vose, 99 U. S. 545 (Bk. 25, L. ed
v. *Lowsdale*, 1 Deady, 288; *Frase*
106 U. S. 191 (Bk. 27, L. ed. 1
Wiswall, 112 U. S. 187 (Bk. 28,

Mr. **W. W. McFarland,** f
The case is not removable, as
pendent Steamboat Co. on the grou
is a separable controversy betwe
pany and the plaintiff.

Hyde v. *Ruble*, 104 U. S. 40
ed. 823); *Alum* v. *Thomas*, 16 F
Moore v. *Construction Co.* 19 Fed

There is but one cause of actio
against the defendants jointly.

L. & N. R. R. Co. v. *Ide*, 114
29, L. ed. 63); *Putnam* v. *Ingrah*
57 (Bk. 29, L. ed. 65).

"The authority to establish
ferries is not included in the pow
eral Government to regulate comm

Conway v. *Taylor*, 1 Black, 603
17, L. ed. 191).

It does not appear that the case
under the Constitution and laws
States.

Manhattan Ry. Co. v. *Mayor*, 1
195; *McFadden* v. *Robinson*, 22
Sawyer v. *Concordia Parish*, 4
Gold Washing Co. v. *Keyes*, 96 U
24, L. ed. 656); *McManus* v. *O'S*
S. 578 (Bk. 23, L. ed. 390; *Brow*
92 U. S. 327 (Bk. 23, L. ed. 511)
v. *B. & M. R. R. Co.* 112 U. S.
L. ed. 678).

Mr. Chief Justice **Waite** delivered the opinion of the court:

These are appeals from orders of the Circuit Court remanding a suit which had been removed from a state court under the Act of March 3, 1875, ch. 137, 18 Stat. at L. 470. The questions to be decided arise on the following facts:

The Mayor, Aldermen and Commonalty of the City of New York, a municipal corporation of the State of New York, commonly called the City of New York, brought a suit in equity on or about the 11th of August, 1884, in the Superior Court of the City of New York, against John H. Starin, Independent Steamboat Company, Starin's City, River & Harbor Transportation Company of New York, New York and Staten Island Steamboat Company, David Manson, Franklin Wilson, William Clark, John C. Bishop, James B. Corwin, Max Golden, Samuel Underhill and Frank Smith, to restrain them from using and employing the steam ferryboats "Pomona," "D. R. Martin," "Laura M. Starin" and "Castleton," or any other vessel or vessels of any kind, for and in the transportation of persons, animals, vehicles, freight, goods and chattels from or to pier No. 18, North River, or from or to any place in Manhattan Island, to or from certain landing places on the shore of Staten Island, without the license or permission of the plaintiffs; and also for account of moneys received by the defendants, or any or either of them, for such transportation. Both Manhattan Island and Staten Island are in the State of New York. The cause of action, as stated in the complaint, is that the City, under its charter granted originally January 15, 1730, by the Province of New York, and since confirmed by the State of New York, has the exclusive right of establishing ferries from Manhattan Island to the opposite shores, in such and as many places as the common council may think fit; that the defendants without the permission of the City, have set up and are maintaining a ferry between Manhattan Island and various landing places on Staten Island, and for that purpose employ the boats above named; that the defendant Starin is the owner of The Castleton and The D. R. Martin and the person chiefly interested in Starin's City, River and Harbor Transportation Company of New York, which owns The Laura M. Starin, and in the New York and Staten Island Steamboat Company, which owns The Pomona; that while the business is done in the name of the Independent Steamboat Co., that Company was organized and incorporated through his instrumentality and in his interest, and is composed of not three persons, all of whom are in his employ and under his control; that the incorporation of the Company was a devise for his own personal benefit; and that he is in fact the person actually operating the ferry. The certificate of incorporation, a copy of which is attached to the complaint, shows that the Company was organized under the laws of New Jersey July 28, 1884, with a capital of $5,000, divided into 500 shares of $10 each, all owned by three persons, for the transportation of persons and property upon water, as common carriers for hire; that the principal part of the business of the Company in New Jersey was to be transacted in Jersey City, and that the business out of that State was to be done in the Cities of New York and Brooklyn and the several villages, landing places, cities and towns on the Hudson River, Staten Island and Long Island, in New York, accessible by water.

The defendants, Starin, Independent Steamboat Co., Starin's City, River & Harbor Transportation Co. and New York & Staten Island Steamboat Co., each filed a separate answer to the complaint. All the other defendants, who are the masters or pilots or engineers employed in running the several boats, united in one answer. The answers all contained substantially the same defenses. They admit the ownership of the boats as set forth in the complaint, except that it is alleged The Castleton belongs to the New York & Staten Island Steamboat Co. instead of Starin. They admit the charter of the City, with words purporting to grant certain rights as to the establishment of ferries from Manhattan Island to the opposite shores, but deny that this grant extends to ferries between New York and that part of Staten Island which borders upon the Kill von Kull. They admit that the several boats mentioned in the complaint were run at stated times by the Independent Steamboat Co., under the management of the masters and engineers, without the license or permission of the City, for the transportation of persons and property between pier 18, North River, which is on Manhattan Island, and certain landing places on the shore of Staten Island, making daily fourteen trips or thereabouts; but they deny that, in so doing, the Company either operated a ferry or usurped any franchise belonging to the City. They also deny the allegations in the complaint as to the connection of the defendant Starin with the Independent Steamboat Co., and deny that Starin is the person who is actually operating the boats.

The answers then allege, "as a matter of special defense under the laws of the United States":

1. That the Independent Steamboat Company is a corporation, organized and incorporated under the laws of New Jersey, for the purpose of transporting persons and property [251] by water, as a common carrier for hire, in and over the waters of the Hudson River, Kill von Kull, Raritan Bay, and their tributaries, between places on such waters in New York and New Jersey, including Staten Island and Long Island, and the Cities of New York and Brooklyn; that the Company chartered the boats in question from the several owners thereof, and leased wharves and landing places in New York and on the shores of Staten Island bordering on the Kill von Kull, for the purpose of engaging in the business of transportation by water between such wharves and landings.

2. That all the boats in question are enrolled and licensed, under the laws of the United States for carrying on the coasting trade, as vessels of the United States, and that the individual defendants described as masters or engineers on the boats are all licensed under the laws of the United States to act as masters or pilots, or as engineers, on steam vessels upon the waters traversed by the boats in question.

3. That for a number of years, terminating in 1874, steamboats, similar to those operated by the Company, and doing a transportation busi-

ness similar to that in which the Company is engaged, had been, without any license or permission from the City, navigated from pier 18, New York, to the landing places on Staten Island made use of by the Company, and back; that large sums were realized therefrom, and that since 1874 this business has greatly increased.

4. That the waters of the Hudson River or Bay of New York, and the Kill von Kull, are waters of the United States, and public and common highways of interstate and international commerce; that the steamboats, as operated by the Company, do not constitute a ferry within the meaning of the laws of the United States, or of the State of New York, or of the city charter, but that the City seeks, under the cover of its charter and by this suit, to establish in itself, as and for a monopoly and as private property, the ownership of all rights to carry on commercial intercourse, consisting in the daily or regular interchange or transportation of passengers and property between Manhattan and Staten Islands, over such waters, and to [252] obstruct the navigation of such waters, although carried on by citizens of the United States in steam vessels duly enrolled and licensed under the laws of the United States, and navigated by masters, pilots and engineers duly licensed under the laws of the United States, thus practically nullifying the laws of the United States regulating commerce and navigation.

After the answers were filed, two petitions were presented for a removal of the suit to the circuit court, one by all the defendants, on the ground that the suit was one arising under the Constitution and laws of the United States, and the other, by the Independent Steamboat Co. alone, on the ground that there was in the suit a controversy wholly between that Company and the City as to whether the Company "had or had not the right to use and operate its steamboats" in the way contended for, and that this controversy could be fully determined as between them.

A copy of the record in the state court having been filed in the Circuit Court of the United States, that court remanded the cause, and thereupon these appeals were taken, one by all the defendants, and the other by the Independent Steamboat Co. alone. The two appeals were docketed in this court separately.

[257] We will first consider whether the suit is one which arises under the Constitution or laws of the United States; for, if it is not, the order to remand was right, so far as the removal upon the application of all the defendants is concerned.

The character of a case is determined by the questions involved. *Osborn* v. *Bank of U. S.* 9 Wheat. 824 [22 U. S. bk. 6, L. ed. 224]. If from the questions it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise, not. Such is the effect of the decisions on this subject. *Cohens* v. *Virginia*, 6 Wheat. 279 [19 U. S. bk. 5, L. ed. 284]; *Osborn* v. *Bank of United States*, 9 Wheat. 824 [22 U. S. bk. 6, L. ed. 224]; *Cooper*, 6 Wall. 252 [73 U. S. 852]; *Gold Washing & Water C* U. S. 201 [Bk. 24, L. ed. 658]; *T* *sis*, 100 U. S. 264 [Bk. 25, L. e *road Co.* v. *Mississippi*, 102 U. S L. ed. 98]; *Ames* v. *Kansas*, 111 28, L. ed. 487]; *Kansas Pacific* *R. Co.* 112 U. S. 416 [Bk. 28, *President Savings Soc.* v. *For* 641 [Bk. 29, L. ed. 261]; *U. Pa* *moval Cases*, 115 U. S. 11 [Bk. 2

The questions in this case, as pleadings, are (1) whether the City has, under its charter, the exclus tablish ferries between Manhatt the shores of Staten Island, on Kull; and, if it has, then (2) w fendants have, in law and in f with that right by setting up such a ferry. The determination tions depends (1) on the const grant in the charter of the City, character of the business in whi ants are engaged. It is not conte is anything either in the Const laws of the United States which right from the City, if it was in f the original charter before the which defines what a ferry is or s vides that enrolled and licens managed by licensed officers, ma public waters as ferry-boats, wit grants that may have been made authority of exclusive ferry privi is not the defense set up in the case. The question here is as t the ancient grant made to the the rights of the defendants in of the waters of the United Stat of this grant.

It is not pretended that the have in any manner attempted to the power of a State to grant privileges across public waters within its own jurisdiction. made by the City to control licensed and enrolled vessels of or their licensed officers, in any by preventing them from running tween the points named. The they please, and engage in any may be desirable, not inconsiste clusive ferry rights of the City. the City is based entirely on its seeks in its complaint to control of the navigation of the public tion which is connected with the and operation of ferries between the specified landing places on Although the prayer for judgme by itself, may appear to go furth construed in connection with th tion as stated in the complaint, a cordingly. The defense is that are not operating a ferry within the charter, or, if they are, that ferry as comes within the monopo If they are not operating such they are, and it appears that granted to the City does not incl tween New York and Staten Isla von Kull, they must prevail in t

[illegible] of the suit. The decision of these questions does not depend on the Constitution or laws of the United States. There is nothing in the Constitution or laws of the United States entering into the determination of the cause which, if construed one way will defeat the defendants, or in another sustain them.

It remains to consider the removal on the application of the Independent Steamboat Co. alone. The suit is against all the defendants jointly, on the allegation that, acting in common, they are all engaged in violating the rights of the City by keeping up and maintaining the ferry in question. The averment in the complaint is that the defendant Starin is in reality the person actually operating the ferry, and that he uses the other defendants as his instruments for that purpose. It is conceded that the Independent Steamboat Co. does not own the boats running on the route. They all belong to Starin or to companies in which he is the person chiefly interested. The Independent Co. was not organized until a few days before this suit was begun. It has a capital of only $5,000, and while it claims to have chartered the boats in question from their respective owners and to be engaged in running them on the route, it does not deny that the other defendants are directly interested in the establishment and maintenance of the ferry, if it be one, which is being operated by and in the name of the Company. The only controversy in the case, as stated in the complaint, is as to the right of the defendants to keep up and maintain a ferry on the route in question. Upon one side of that controversy is the plaintiff, and upon the other all of the defendants. There cannot be a full determination of this one controversy unless all the defendants are parties. The case as stated in the complaint makes Starin the principal defendant, and the Independent Co. only an instrument of his. The object is to prevent him, as well as the others, from using these boats or any others they may own or control, in the way they are being used. There is, according to the complaint, but a single cause of action, and that is the violation of the exclusive ferry rights of the plaintiff by the united efforts of all the defendants. The case is therefore within the rule established in *L. & N. Railroad Co.* v. *Ide*, [illegible] U. S. 52 [Bk. 29, L. ed. 63]; *Putnam* v. [illegible], 114 U. S. 57 [Bk. 29, L. ed. 65]; [illegible] v. *Tooth*, 115 U. S. 41 [Bk. 29, L. ed. [illegible]], that a separate defense by one defendant, to a joint suit against him and others upon a joint or a joint and several cause of action, does not create a separate controversy so as to entitle the defendant, if the necessary citizenship exists as to him, to a removal of the cause under the second clause of section 2 in the Act of [illegible].

It follows that the case was properly remanded, and the orders of the Circuit Court to that effect are affirmed.

This copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[illegible] U. S. 281.

SOLOMON MOSES ET AL., *Appts.* [285]

v.

GEORGE H. WOOSTER.

(See S. C., Reporter's ed., 285-288.)

Practice—death of appellant—appeal may proceed at the suit of survivors—sec. 956, R. S.

Upon appeal from a decree against all of the defendants jointly, upon a point cause of action, after the death of one of the appellants and failure of his representatives to appear, the appeal may proceed, under the Judiciary Act, sec. 31 (sec. 956, R. S.), at the suit of the survivors.

[No. 408.]

Argued Oct. 19, 1885. Decided Nov. 2, 1885.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

On motion to abate the suit as to deceased appellant and proceed at the suit of the survivors.

The case is sufficiently stated by the court.

Messrs. **W. F. Mattingly** and **Horatio P. Allen**, for appellants, in support of motion.

Messrs. **J. E. Hindon Hyde** and **Frederick H. Betts**, for appellee, *contra:*

Section 956, Revised Statutes U. S., is to be read in connection with section 955. The latter relates only to the death of a party before final judgment. Section 956, properly construed, relates also to the death of a party before final judgment.

Neither section applies to appeals from a final judgment.

Green v. *Watkins*, 6 Wheat. 260 (19 U. S. bk. 5, L. ed. 255).

A suit cannot abate after a final judgment in favor of a plaintiff, except through the fault of the plaintiff himself or his representatives.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The suit below was in equity and brought by George H. Wooster, the appellee, against Solomon Moses, Gotcho Blum and Solomon Weil, partners under the name Moses, Blum & Weil, for an infringement of letters patent. A final decree for an injunction and damages was rendered against the defendants, May 23, 1883. From this decree all the defendants appealed, and the appeal was docketed here October 12, 1883. Blum died January 2, 1884. On the 11th of April, 1885, Wooster appeared in this court and suggested his death, whereupon the usual order under Rule 15, sec. 1, was entered, that, unless his representatives should become parties within the first ten days of this term, the appeal would be dismissed. Proof of the due publication of a copy of this order has been made, but the representatives of the deceased appellant have not appeared. The surviving appellants now move that the action abate as to the decedent, but that it proceed at their suit as survivors. [285]

The Judiciary Act of 1789, 1 Stat. at L. 90, ch. 20, sec. 31, provided that "If there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be there- [287]

by abated, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."

This was re-enacted in the Revised Statutes as section [illegible], and is substantially a copy of the Act of 8 and 9 W. III., ch. 11, sec. 7, which, it was held in *Clarke* v. *Rippon*, 1 B. & A. [illegible], was applicable to writs of error. *Lord* Ellenborough, in giving that judgment, said: "The proceeding is an action which is commenced by a writ, and the cause of action is the damage sustained by the parties from the error in the previous judgment, and this damage equally attaches on the survivor in this as in any other action." This court gave the same effect to our statute in *M'Kinney* v. *Carroll*, 12 Pet. 66 [37 U. S. bk. 9, L. ed. [illegible]].

Appeals to this court from the circuit and district courts are "subject to the same rules, regulations and restrictions as are or may be prescribed by law in cases of writs of error." Rev. Stat. § 1012. The cause of action in this appeal, that is to say, "the damage sustained by the parties in the previous decree," attaches to the surviving appellants. All the defendants were enjoined from infringing the patented machine, and all were made liable for the payment of the damages which the patentee had sustained by their joint acts as partners. Clearly, therefore, the case is within the statute and may be proceeded with accordingly. The cause of action is one that survives to the surviving appellants.

Undoubtedly cases may arise in which the presence of the representatives of a deceased
[288] appellant will be required for the due prosecution of an appeal, notwithstanding the survivorship of others. If that should be so, the court can, with propriety, direct that the appeal be dismissed, unless it be properly revived within a limited time. The House of Lords made such an order in *Blake* v. *Bogle*, a note of which is found in Macqueen's App. Jur. H. of Lords, 244. Here, however, there is no need of a revivor, that substantial justice may be done. The decree below was against all the defendants jointly, upon a joint cause of action. It affected all alike, and the interest of the decedent is in no way separate or distinct from the others. If the representatives of a deceased appellant voluntarily come in and ask to be made parties, they may be admitted. Such a course was adopted by the House of Lords, in *Thorpe* v. *Mattingly*, 1 Phil. Ch. 200. In the present case, the representatives of the decedent, although notified, do not appear.

It is proper, therefore, that the appeal should proceed under the statute at the suit of the survivors, and an entry to that effect may be made.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[288] THOMAS M. JACKS, *Plff. in Err.*
v.
CITY OF HELENA.

SAME *v.* SAME.

(See S. C., Reporter's ed., 288, 289.)

Jurisdiction—federal question.

A motion to dismiss will be granted where it appears on the face of the opinion, wh[illegible] of the record, that the decision by th[illegible] not involve a federal question.

[No. [illegible]]

Submitted Nov. 2, 1885. Decid[illegible]

IN ERROR to the Supreme [illegible] State of Arkansas.

On motion to dismiss.

This case arose upon applica[illegible] of mandamus, filed in Phillips [illegible] Arkansas, to compel the proper [illegible] City of Helena to issue and [illegible] bonds alleged to be due upon a [illegible] said a certain railroad. The cou[illegible] subscription was without autho[illegible] and rendered judgments refu[illegible] These judgments having been [illegible] peal by the court below, the pl[illegible] these writs of error.

Mars. M. T. Sanders a[illegible] Clarke, for defendant in erro[illegible] motions.

Mars. J. C. Tappan and [illegible] for plaintiff in error, *contra*.

Mr. Chief Justice Waite del[illegible] ion of the court:

These motions are granted o[illegible] of *Detroit City Railway Co.* [illegible] U. S. 133 [Bk. 29, L. ed. 118] there cited. It appears distinctl[illegible] the opinion of the court below [illegible] laws of Arkansas, forms par[illegible] Rev. Stat. Ark. 1884, sec. 13[illegible] cision of the case was put, an[illegible] on a ground which did not inv[illegible] ation of the federal question th[illegible] have been presented by one of [illegible] fenses set up in the answer of [illegible] that the Constitution of 1874 [illegible] issue of the bonds in dispute. [illegible] timated in the opinion that, [illegible] rested on this defense alone, the [illegible] have been the other way.

Dismissed.

True copy. Test:
James H. McKenney, Clerk, [illegible]

BOSTON HYDRAULIC G[illegible] COMPANY, *Plff. i[illegible]*
v.
EAGLE COPPER AND SI[illegible] COMPANY.

(See S. C., Reporter's ed[illegible]

Practice.

In the absence of any assignm[illegible] counsel for plaintiff in error hav[illegible] appearance, the judgment will b[illegible]

[No. 3.]

Submitted Oct. 22, 1885. Deci[illegible]

IN ERROR to the Circuit Co[illegible] States for the District of C[illegible]

No counsel appeared for pl[illegible]

Mr. Geo. A. Nourse, [illegible] error.

Mr. Chief Justice Waite d[illegible] ion of the court:

When this cause was reached on the call of the docket, it was submitted by the defendant in error on a printed brief. An assignment of error was not annexed to or returned with the writ of error, as required by section 997 of the Revised Statutes. At the last term the counsel for the plaintiff in error was permitted to withdraw his appearance, and no one has taken his place. No argument has been submitted in behalf of the plaintiff in error, and no errors have been assigned in any form.

We therefore affirm the judgment without opening the record.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

THOMAS J. POPE ET AL., *Plfs. in Err.*,

v.

EDWARD P. ALLIS.

(See S. C., Reporter's ed. 363-373.)

Pleading—variance—averments under oath in another suit as evidence—weight of—sales—rescission.

1. Where the complaint alleged a contract for delivery of iron at one place, and the answer a contract for delivery at a different place, evidence offered by the plaintiff, which tended to support the contract of the answer, was properly admitted under § 1260 of the Revised Statutes of Wisconsin; the defendants having failed at the trial to prove that they were misled by the variance between the complaint and the proof.

2. Averments made under oath, in a pleading in a suit at law, are competent evidence in another suit against the party making them; and the fact that the averments are made on information and belief, goes only to their weight and not to their admissibility as evidence.

3. Where goods of a specified quality, not in existence or ascertained, are sold, and the seller undertakes to ship them to a distant buyer, and, when they are made or ascertained, delivers them to a carrier for the buyer, the latter, on their arrival, has the right, if they are not of the quality required by the contract, to reject them and rescind the sale, and, if he has paid for them, to recover back the price in a suit against the seller.

[No. 34.]

Argued Oct. 29, 1885. Decided Nov. 9, 1885.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

Statement by *Mr. Justice* **Woods:** [363]

Edward P. Allis, the defendant in error, was the plaintiff in the circuit court. He brought his suit to recover from the defendants, Thomas J. Pope and James E. Pope, now the plaintiffs in error, the sum of $17,840, the price of 500 tons of pig iron, which he alleged he had bought from them and paid for, but which he refused to accept because it was not of the quality [364] which the defendants had agreed to furnish. The plaintiff also demanded $1,750 freight on the iron, which he alleged he had paid.

The facts appearing upon the record were as follows: The plaintiff carried on the business of an iron founder in Milwaukee, Wisconsin, and the defendants were brokers in iron in the City of New York. In the month of January, 1880, by correspondence carried on by mail and telegraph, the defendants agreed to sell and deliver to the plaintiff 500 tons of No. 1 extra American and 300 tons No. 1 extra Glengarnock (Scotch) pig iron. The American iron was to be delivered on the cars at the furnace bank at Coplay, Pennsylvania, and the Scotch at the yard of the defendants, in New York. By a subsequent correspondence between the plaintiff and the defendants, it fairly appeared that the latter agreed to ship the iron for the plaintiff, at Elizabethport, New Jersey. It was to be shipped as early in the spring as cheap freights could be had, consigned to the National Exchange Bank at Milwaukee, which, in behalf of the plaintiff, agreed to pay for the iron on

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Head notes by Mr. Justice WOODS.

1 REF.—Compare Norrington v. Wright, *ante*, 366, Pope v. Pope, *ante*, 372.

2 REF. *warranty of quality; breach of; whether ground for rescission in the absence of fraud on the part of vendor; remedies of vendee.*

The cases which arise may be divided for convenience, although perhaps not with scientific accuracy, into three classes:

1. Sales of a specific ascertained article already in existence. (a) Where goods are inspected by vendee. (b) Where goods cannot be inspected. (c) Where goods might be but are not inspected.

2. Sales of an article not ascertained and specific, or not in existence.

3. Sales by sample. (a) Where goods are ascertained. (b) Where goods are not ascertained.

It may be premised that in cases of fraud by the vendor the vendee's right to rescind may rest upon that ground independently of other considerations.

It may also be stated that where the *property* in the subject matter of the contract *has not actually passed* to the vendee, his right to reject the goods when they do not correspond with the description or warranty under which they were sold is probably unquestionable.

Benj. Sales, § 1249; Story, Sales, § 421. But see Lyon v. Bertram, cited below; 61 U. S. (20 How.), bk. 15, 847.

3. Sale of specified, *ascertained article.*

It was formerly held in England that the vendee could avoid the contract for breach of warranty of quality.

Curtis v. Hannay, 3 Esp., 82.

This case was overruled in Street v. Blay, 2 B. & Ad. 456. It is to be observed that in neither of these cases was the decision of this question necessary to the decision of the case. In Street v. Blay, *supra*, the observations of the court on this point were stated to be confined to the purchase of a *specific article accepted and received by the vendee*, the property in which is completely vested in him. In Kennedy v. Panama, etc., Mail Co. (L. R. 2 Q. B., 587), it was said that "where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration."

See Couston v. Chapman, L. R. 2 H. L. Sc., 254.

In this country the authorities differ. In Thornton v. Wynn 25 U. S. (12 Wheat.) 196, bk. 6, 598, it is said that "if the sale be absolute and there be no subsequent agreement or consent of the vendor to take back the article the contract remains open and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article and the vendee tendered a return of it within a reasonable time." In Lyon v. Bertram, 61 U. S. (20 How.), 149, 154, bk. 15, 847, the question came up again but under such a state of facts that the court did not directly pass upon this question.

The doctrine of Thornton v. Wynn and Street v. Blay, *supra*, is supported by Day v. Pool, 52 N. Y., 416; Rust v. Eckler, 41 N. Y., 488; Muller v. Eno, 14 N. Y., 597; Freyman v. Knecht, 78 Pa. St., 141; West v. Cutting, 19 Vt., 586 (see Richardson v. Grandy, 49 Vt., 23); Buckingham v. Osborne, 44 Conn., 138; Dawson v. Pennaman, 65 Ga., 698; Wright v. Davenport, 44 Tex., 164; Briggs v. Hilton, 1 Cent. Rep., 313; Hoover v. Sidener, 98 Ind., 290.

In many of the other States the older English doctrine, as laid down in Curtis v. Hannay, 3 Esp., 82, has been followed: "He to whom property is sold

receipt of the bills of lading. That quantity of American iron was landed at Milwaukee and delivered to the plaintiff about July 15. Before its arrival at Milwaukee, the plaintiff had not only paid for the iron but also the freight from Coplay to Milwaukee. Soon after the arrival in Milwaukee, the plaintiff examined the 500 tons American iron, to which solely the controversy in this case referred, and refused to accept it on the ground that it was not of the grade called for by the contract, and at once gave the defendants notice of the fact, and that he held the iron subject to their order, and brought this suit to recover the price of the iron and the freight thereon.

The defenses relied on to defeat the action were (1) that the iron delivered by the defendants to the plaintiff was number one extra American iron, and was of the kind and quality required by the contract, and (2) that the title [365] having passed to the plaintiff when the iron was shipped to him at Elizabethport, he could not afterwards rescind the contract and sue for the price of the iron and the freight which he had paid, but must sue for a breach of the warranty.

It was conceded upon the trial that if the plaintiff was entitled to recover at all, his recovery should be for $22,315.40. The defendants pleaded a counterclaim for $5,311, which was admitted by the plaintiff. The jury returned a verdict for the plaintiff for $16,513.11, for which sum and costs the court rendered a judgment against the defendants. This writ of error brings that judgment under review.

Messrs. **George P. Miller** and **Wm. P. Lynde**, for plaintiffs in error.

Messrs. **Eppa Hunton, Jeff. Chandler** and **J. G. Jenkins**, for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

1. The first assignment of error relates to nine exceptions to the admission of evidence by the court against the objection of the plaintiffs in error. The complaint having alleged that the contract between the parties was for the delivery of the iron at Milwaukee, the plaintiffs in error objected to the introduction of evidence offered by the defendant in error which tended to show a contract for the delivery of the iron at Coplay or Elizabethport, because the proof offered did not support the averments of the complaint; and the court having overruled their objections and admitted the evidence, they now contend that the judgment should for that reason be reversed.

But it is clear that, under section 2669 of the Revised Statutes of Wisconsin, which constitutes a rule for the guidance of the federal

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with an express warranty, as well as he to whom it is sold with an implied warranty, may rescind the contract for breach of warranty by a reasonable return of the property, and thus entitle himself to a full defense to a suit brought against him for the price of the property, or to an action against the seller to recover back the price if it have been paid to him." Bryant v. Isburgh, 13 Gray, 607.

To same effect see Sparling v. Marks, 86 Ill., 125; Howe M. Co. v. Rosine, 87 Ill., 105 (but see Owens v. Sturges, 67 Ill., 366); Prickett v. McFadden, 8 Bradw., 197; Lane v. Lantz, 27 Md., 211; McCeney v. Duvall, 21 Md., 166; Warder v. Fisher, 48 Wis., 338; Churchill v. Price, 44 Wis., 540; Merrill v. Nightingale, 39 Wis., 247; Marston v. Knight, 29 Me., 341; Rogers v. Hanson, 35 Ia., 283 (in this case the court says: "The doctrine of the Massachusetts cases, though perhaps not sustained by the greater number of authorities, is, to our minds, the more reasonable and just. We know of no satisfactory reason why one who desired a good article and is willing to pay a price which will command it, should be required to keep an inferior article at a lesser price. Such a construction of the law substitutes for the parties' contract an agreement which he did not make, and requires him to accept an article which he would not have purchased if he had known of its defects"); Jack v. Des Moines, etc., Co., 53 Ia., 399; Dill v. O'Ferrell, 45 Ind., 268; Byers v. Chapin, 28 Ohio St., 300; Perry v. Johnson, 59 Ala., 648; Johnson v. Whitman Agr. Co., 2 West. Rep., 414; Brauson v. Turner, 77 Mo., 489.

It should be added that the right to rescind, where it exists, must be exercised within a reasonable time and the sale must be rescinded *in toto*.

See Harzfeld v. Converse, 105 Ill., 534.

An offer to return the goods, if rejected, or a notification that the vendee rescinds the sale and holds the goods subject to the vendor is usually held to have the same effect as an actual return of the goods. The rule that the sale must be rescinded *in toto*, if at all, or that the vendor must be put *in statu quo*, is subject to the exception that where the use of some of the goods is necessary to a proper test, the vendee may use the amount necessary to such test. This qualification has special application to sales by sample.

It will be seen that the authorities are about equally divided as to the right of the vendee in this class of cases to rescind for breach of warranty of quality.

In the English courts, where this right is denied, a distinction has been made or attempted, between cases of breach of warranty of quality and cases where the goods sold are found not to correspond with a *description*, the correspondence of the goods with such description being held to constitute a condition precedent, the breach of which avoids the sale.

"A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and though part of the contract collateral to the express object of it." Charter v. Hopkins, 4 M. & W. 399.

"If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if the condition be not performed the purchaser is entitled to reject the article, or if he has paid for it to recover the price as money had and received for his use; whereas, in case of warranty the rules are very different." Benj. Sales, § 917.

This distinction between warranty of quality and description as condition precedent, although sometimes laid down in such terms as to cover all cases, is seldom, if ever, applied to cases where goods are inspected by the vendee.

Perhaps the clearest statement of this doctrine is contained in Smith's Leading Cases, Vol. 2, p. [illegible] ed. 1879, quoted with approval, Benj. Sales, § 134: "A warranty properly so called can only exist where the subject matter of the sale is ascertained and existing, so as to be capable of being inspected at the time of the contract, and is a collateral engagement that the specific thing so sold possesses certain qualities; but the property passing by the contract of sale, a breach of warranty can not entitle the vendee to rescind the contract and revest the property in the vendor without his consent. But where the subject matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall when existing or ascertained possess certain qualities, is not a mere warranty but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted." Mr. Benjamin adds that the same reasoning would apply to goods beyond the reach of the buyer's inspection. Lord Abinger, in the case of Charter v. Hopkins, *supra*, regrets the confusion which has arisen from the failure to observe the distinction above mentioned, in the distinction between a sale with warranty of quality and a sale by particular description, the latter being held to constitute a condition precedent. This is concurred

courts in that State, this assignment of error is not well taken. The section mentioned provides "No variance between the allegations in pleading and the proof shall be deemed material unless it shall actually mislead the adverse party to his prejudice in maintaining his action or defense on its merits; whenever it shall be alleged that a party has been so misled, the fact shall be proved to the satisfaction of the court, in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as may be just."

The answer of the plaintiffs in error denied that the contract provided for the delivery of the iron in Milwaukee, and averred that the iron was to be delivered at Coplay. We do not think that evidence offered by the defendant in error, which tended to establish the averments of the answer rather than of the complaint, was such a variance as could mislead the plaintiffs in error to their prejudice in maintaining their defense upon the merits. But if they had been really misled, they should have proved the fact to the satisfaction of the court upon the trial. Having neglected to do this, they cannot now complain. It is clear that, under the Statute of Wisconsin, the plaintiffs in error had no just ground of exception to the admission of the evidence objected to. *Bonner* v. *Home Insurance Co.* 13 Wis. 677; *Leopold* v. *Van Kirk*, 29 Wis. 553; *Giffert* v. *West*, 33 Wis. 617. These cases show that the discrepancy between the pleading and the proof was a variance within the meaning of the Statute of Wisconsin, and that the section cited is applicable to the question in hand.

2. The next contention of the plaintiffs in error is that evidence was improperly admitted by the circuit court to show that the iron landed at Milwaukee was not of the quality required by the contract, the defendant in error not having shown or offered to show, as the plaintiffs in error insisted, that it was the same iron which the defendant in error had purchased, and which had been shipped at Elizabethport. And on the ground that the identity of the iron was not shown, the plaintiffs in error insist that the court erred in refusing to charge the jury, as requested by them, to return a verdict in their favor.

We think the assignment of error is not supported by the record. The defendant in error did introduce evidence and, as it seems to us, persuasive evidence, to show that the iron shipped for the defendant in error at Elizabethport was the iron landed and delivered to him at Milwaukee.

The testimony introduced tended to prove that one Hazard, on whose dock, at Elizabethport, New Jersey, iron belonging to the plain-

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is by Mr. Benjamin and the modern English authorities.

"Where there is a sale of goods by description, that is to say, where either goods *in genere* are sold under a certain description, or where the sale is of specific goods whose character is presumably only known to the buyer by the description under which they are sold to him (*e. g.*, bales of goods specified by marks in a bill of lading and described in the contract as being of a certain kind); it is of the essence of the contract that the goods furnished shall agree with the description." Campbell, Sales (London, 1871, p. 300, citing Tye v. Fynmore, 3 Camp., 462; Powell v. Horton, 2 Bing. (N. C.) 668; Barr v. Gibson, 3 M. & W., 390; Allan v. Lake, 18 Q. B., 560; Reid v. Godts, 10 Hurl. & Gord. Ex., 191; Josling v. Kingsford, 13 C. B. N. S. 447. (In this last case the article sold was "oxalic acid" and although the purchaser saw the bulk of the goods, yet a chemical analysis having shown the goods to be so inferior as not to be "oxalic acid" in a mercantile sense, the purchaser was held not bound to take the goods.) Compare Pettitt v. Mitchell, 4 M. & G., 819; Hopkins v. Hitchcock, 14 C. B. N. S., 65.

The distinction has not been made in many of the American cases.

"The right to repudiate the purchase for nonconformity of the article delivered to the description under which it was sold, is universally conceded. That right is founded upon the engagement of the vendor by such description that the article delivered shall correspond with the description. *Substantially the description is warranted.* It will comport with sound legal principles to treat such engagements or conditions in order to afford the purchaser more enlarged remedy by rescission than it would have on a simple warranty." Wolcott v. Mant, 38 N. J. L., 268. See Shields v. Reibe, 9 Iowa, 492.

1. Sale of articles not in existence or not ascertained.

The law as to this class of cases may be regarded as settled. See the statement of it and authorities cited in the opinion in the principal case. It is to be noted that the court says that in this class of cases the undertaking that an article shall possess certain qualities is not a *mere warranty* but a *condition precedent*. See the quotations and authorities cited under the first class. It will be seen that under the English rule there is practically no such thing as a mere warranty in this class of cases.

2. Sale by sample.

This class of cases is analogous to the second class the law touched upon in the opinion in the principal case. It has been said that in sale by sample it is one of the *conditions* of the contract that the goods shall equal the sample, that the vendee may examine the goods when tendered, and if not equal may reject them. Benj. Sales, § 910. In other parts of his work the author calls such sale a sale with warranty. § 969.

In Couston v. Chapman, L. R. 2 H. L. Sc., 254 (1872), it is said: "In England if goods are sold by sample and they are delivered and accepted by the purchaser, he cannot return them; but if he has not completely accepted them—that is, if he has taken the delivery conditionally—he has a right to keep the goods for a sufficient time to enable him to give them a fair trial, and if they are found not to correspond with the sample, he is then entitled to return them. As I understand the law of Scotland, although the goods have been accepted by the purchaser, yet if he find that they do not correspond with the sample he has an absolute right to return them." *Per Ld.* Chelmsford.

It is believed that a delivery before inspection would, in the absence of anything to show a contrary intention, be presumed to be on condition that the goods might be returned if not in accordance with sample. Story, Sales, § 456; Benj. Sales, § 910. And it will be a question for the jury whether the goods have been retained longer than is necessary for inspection. Benj. Sales, § 1380.

In Dawson v. Collis, 10 C. B. (1 J. Scott), 523, it was held that upon a sale of *specific goods* with a warranty that they were equal to the sample, the vendee could not refuse to receive them on the ground that they did not correspond with the sample, unless there was an express condition to that effect, but must resort to a cross action or rely on that fact in reduction of damages. In this case Street v. Blay is quoted from at length. See also Heyworth v. Hutchinson, L. R. 2 Q. B., 447 (1867), which was a sale by sample, of a specific quantity of wool to arrive. It was held that the buyer could not reject it for inferiority. Compare Toulmin v. Hedley, 2 C. & K. N. P. 845, 157. The principles laid down in these last two cases are believed to be irreconcilable. See also Azemar v. Casella, L. R. 2 C. P., 431, 677.

In Grimaldi v. White, 4 Esp., 95, it was held that if a party purchased a picture pursuant to a specimen shown, and on delivery the picture was found inferior in quality to the specimen, his *only remedy* was *to reject it*. In an action for the price he could not reduce the damages by showing its inferiority. But see Fielder v. Starkin, 1 H. Bl., 17; Poulton v. Lattimore, 9 B. & C., 259.

Notwithstanding the English authorities hold that a *breach of warranty of quality* does *not* authorize a

tiffs in error was stacked, shipped, between April 28 and May 12, at Elizabethport, on five canal boats, whose names are given, 500 tons of American iron, consigned to Thomas J. Pope & Brother, care National Exchange Bank, [369] Milwaukee, Wisconsin, and to be transported to Milwaukee by the river, canal and lakes; that about the same time there was shipped to the same consignees, and to the care of the same bank, the 300 tons of Scotch iron, which had been sold by the plaintiffs in error to the defendant in error.

It was further shown that on June 9 and 15 following, 800 tons of iron, 500 being American and 300 Scotch, were transferred from the dock at Buffalo to two schooners, and the bills of lading given by the schooners stated that the 500 tons of American iron were the cargo of canal boats of the same name as those on which the iron had been shipped at Elizabethport, and it appeared that both the American and Scotch iron transferred to the schooners was consigned to Thomas J. Pope & Brother, care National Exchange Bank, Milwaukee, Wisconsin. It was further shown that, about July 15, the two schooners above mentioned landed at Milwaukee 500 tons American iron and 300 tons of Scotch iron for the consignees mentioned in the bills of lading, and the iron was delivered to the defendant in error, and it was conceded that the 300 tons of Scotch iron was th
had been sold by the plaintiffs i
defendant in error and shipped
signees for him.

In addition to this evidence, t
in error introduced the deposition
Pope, one of the plaintiffs in erro
testified as follows: "There is a
between my firm, as plaintiff, a
Iron Company, as defendant, r
American Iron shipped to E. P.
As an exhibit to this deposition
copy of the complaint in the suit
James E. Pope, from which it a
the action was brought to recove
lay Iron Company, damages for t
contract by which that compa
that a certain 500 tons of iron, so
plaintiff in said suit, as No. 1 ex
of that quality; and it clearly a
the complaint referred to, that on
on which the cause of action w
that the 500 tons of iron sold and s
plaintiffs in error to the care of
Exchange Bank, for the defenda
No. 1 extra American iron, was
iron delivered for him to the ba
kee, and which he had purchased

We therefore repeat that there
sive evidence offered to show

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rescission of a contract, yet in cases of sales by sample it has in many cases, as seen above, been held that the *vendee could rescind* if the bulk did not correspond with the sample. But the law is laid down by Mr. Benjamin "that in a sale of goods by sample the *vendor warrants the quality* of the bulk to be equal to that of the sample." Benj. Sales, § 969.

"A sale by sample, properly so called, is merely a particular case of a sale by description. * * * If it turns out that the sample does not truly represent the bulk, the purchaser may reject the goods either before the delivery or (if the time for inspection as agreed on is subsequent to delivery) after delivery, provided the inspection is made in due time, and the rejection intimated at once. But in either case the purchaser may (if he does nothing to waive his objection) accept the goods tendered and, treating the stipulation as collateral, bring his action upon the warranty. This is at least the practical result of the cases." Campbell, Sales, 305. See Heilbutt v. Hickson, L. R. 7 C. P., 438 (an elaborate discussion); Johnson v. L. & Y. R. Co., 3 C. P. Div., 499; Lomi v. Tucker, 4 C. & P., 15; Parker v. Palmer, 4 B. & Ald., 387.

The American authorities sustain the right of rescission in sales by sample where the bulk does not correspond, without making distinction. See principal case *supra;* also Brigg v. Hilton, 10 Daly, 222; Gill v. Kaufman, 16 Kan., 571.

Conclusions.

In Massachusetts, Iowa and a large number of other States breach of warranty of quality is held to be sufficient ground for rescission of a contract of sale. The law in these States is believed to be in much the most satisfactory state. Distinctions of great complexity and of an almost inappreciable fineness between executory and executed contracts, between descriptions and warranties, etc., are avoided. And aside from the practical advantages, the law in these States is based upon sound principles. See quotations above from cases in Massachusetts and Iowa.

In England a breach of warranty of quality in the sale of a specific ascertained article, whether inspected by the vendee or not, does not authorize a rescission. A failure to comply with a description, compliance being a condition precedent, does authorize a rescission. This doctrine, although often laid down in general terms, is believed to have no relation to a sale where goods are ascertained and actually inspected by the vendee. The question, description or warranty, is determined rather by the circumstances than by the precise words used. In fact, in a sale of goods not *in esse*, for instance, the English courts, it is believed, would
of a descriptive nature as raising a
cedent, when in case of the sale of
article the same words would be
warranty merely. So in sales *by s*
cases, depending on the condition
the goods, there is held to be mere
that the bulk shall equal the sample
cases the correspondence is held to
precedent.

Our own view is that the distinc
sale by description and a sale wit
quality has no sound basis in princ
plication tends to confusion.

If adopted the line should be draw
where goods are inspected by the
one hand, and all other cases
hand. Where goods are actually ins
ranty may be regarded as collateral
essence of the contract. All other s
essence sales by description. This i
the article is yet to be made or is st
whether it is to be separated from a
cealed in a box in the presence of
sale by sample is a sale by descrip
equally true where the property is
where it is sold "to arrive," either
or indefinite part, or the whole, of a
it is stored in a warehouse, already
not inspected.

In Pope v. Allis, *supra*, the right of
class of cases under consideration is
eral terms to exist in sales by sampl
article not in existence, and in sale
not ascertained.

The facts in the case of Thornton v.
(12 Wheat.), 183, bk. 6, 594, are such
doubtful how far the language alres
be considered of binding authority;
by this court upon the question of
vendee to rescind a sale of a spec
article, whether inspected or not, wh
found not to correspond with the
warranty, will be awaited with intere
of authority is probably against suc
the right exists in all cases of sale
difficult to see why it should not e
sale by description or warranty of qu
article is not inspected.

Other remedies of vendee.

"In the note to Cutter v. Powe
Lead. Cases, 1, the annotator says:
Street v. Blay, 2 B. & Ad., 456, and P
more, 9 B. & C., 259, where an artic
and the warranty is not complied w

shipped at Elizabethport, for the defendant in error at Milwaukee, was the identical iron landed at Milwaukee and received by him. The assignments of error, based on the contention that there was no such evidence, must therefore fail.

1. The bill of exceptions shows that the complaint above mentioned, in the suit of the plaintiffs in error against the Coplay Iron Company, was sworn to by James E. Pope; that it contained an averment, on information and belief, touching the quality of the iron in controversy in this suit, and that the plaintiffs in error asked the court, on the trial of this case, to charge the jury that such complaint was not evidence of any facts therein stated on information and belief. The court refused the charge, but instructed the jury that, in determining what weight as an admission the complaint should have, they might consider the fact that the allegation in relation to the quality of the iron in question was made on information and belief.

The plaintiffs in error having excepted at the trial, now assign as error the refusal of the court to give the charge requested. We think the court did not err in its refusal.

When a bill or answer in equity or a pleading in an action at law is sworn to by the party, it is competent evidence against him in another suit as a solemn admission by him of the truth of the facts stated. *Studdy* v. *Sanders*, 2 Dow. & Ry. 347; *De Whelpdale* v. *Milburn*, 5 Price, 485; *Central Bridge* v. *Lowell*, 15 Gray, 106; *Bliss* v. *Nichols*, 12 Allen, 443; *Elliott* v. *Hayden*, 104 Mass. 180; *Cook* v. *Barr*, 44 N. Y. 156; Taylor, Ev. § 1753, 7th ed.; Greenl. Ev. §§ 552, 555.

When the averment is made on information and belief, it is nevertheless admissible as evidence, though not conclusive. *Lord* Ellenborough, in *Doe* v. *Steel*, 3 Campbell, 115. The authority cited sustains the proposition that the fact that the averment is made on information and belief, merely detracts from the weight of the testimony; it does not render it inadmissible. The charge given by the circuit court on this point, therefore, deprived the plaintiffs in error of no advantage to which they were entitled. [371]

4. The assignment of error mainly relied on by the plaintiffs in error is that the court refused to instruct the jury to return a verdict for the defendants. The legal proposition upon which their counsel based this request was that the purchaser of personal property, upon breach of warranty of quality, cannot, in the absence of fraud, rescind the contract of purchase and sale and sue for the recovery of the price. And they contended that, as the iron was delivered to defendant in error either at Coplay or Eliza-

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[illegible] three courses, any one of which he may pursue: (1) he may refuse to receive the article at all; (2) he may receive it and bring a cross action for the breach of the warranty; (3) he may, without bringing a cross action, use the breach of warranty in reduction of damages in an action brought by the vendor for the price.' * * * The second and third propositions of this learned author are indisputable and have received the sanction of this court." Lyon v. Bertram, 61 U. S., 149, bk. 15, 850. The court proceeds to say that the first proposition is an open question. But see first part of this note.

The second and third propositions are still in accord with the current of authority, although not universally admitted. In some of the cases it seems to be held that where the vendee has the right of rescission and fails to exercise it he waives his right to other remedies against the vendor. Some of the older cases in England hold this doctrine. See Grimwood v. White, 4 Esp., 95. The law may be regarded as settled in England, however. In Benjamin on Sales, § 1263 the second proposition is said to rest on authority—that it is taken for granted. As to the third proposition, in England before the Judicature Acts the vendee could set up defective quality in diminution of price, but he could not claim special or consequential damages except in a cross action. Mondel v. Steel, 8 M. & W., 858. See Jones v. Bright, L. R. 6 Q. B., 687. This was changed by statute. The English cases, so far as these remedies are concerned, seem to make no distinction between sales by description or sales with warranty.

In this country as a general rule the vendee may have the same remedy by way of recoupment on set-off as by cross action. This question is so largely regulated by statute that a citation of the authorities would be of little value.

A more important question is, Does the vendee, when he has the right to return the goods, or, in case of executory sales, reject them, waive all remedy by accepting and using them? "When the defects in the goods are patent and obvious to the vendee, where the purchaser has a full opportunity for examination and knows of such defects, he must, either when he receives the goods or within a reasonable time thereafter, notify the seller that the goods are not accepted as fulfilling the warranty; otherwise the defects will be deemed waived." Jones v. Williamson, 40 Wis., 377. See Ney v. Iowa Agricultural Works, 51 Iowa, 122.

The question has been much discussed in New York. See Sprague v. Blake, 20 Wend., 61; Harper v. Vigelius, 5 N. Y., 79; Muller v. Eno, 14 N. Y. 597; Reed v. Randall, 29 N. Y., 358; McCormick v. Brown, 45 N. Y., 265; Dutchess Co. v. Harding, 49 N. Y., 321; Day v. Pool, 52 N. Y., 416; Gaylord Mfg. Co. v. Allen, 53 N. Y., 515; Parks v. Morris Tool Co., 54 N. Y., 586; Gurney v. Atlantic, etc., R. Co., 58 N. Y., 358; Gautier v. Douglass, etc., Co., 13 Hun, 514; Marshuetz v. McGreevy, 23 Hun, 408; Walling v. Schwartzkopf, 44 N. Y. Super. Ct., 576; Marcus v. Thornton, Id., 411; Dounce v. Dow, 64 N. Y., 411; McParlin v. Boynton, 71 N. Y., 604; Bliss v. Locke, 9 Daly, 526; Provenzano v. Thayer Mfg. Co., 9 Daly, 90; Bach v. Levy, 50 N. Y. Super. Ct., 519.

Where there is a warranty as to quality, in a sale of chattels—although on inspection at the time of sale—if the property sold does not answer the warranty it may still be retained by the vendee and the sale affirmed, and he may sue upon the warranty. Houghton v. Carpenter, 40 Vt., 588.

An exception is noticed in some cases where the defect was known to the purchaser or readily discoverable. Henshaw v. Robbins, 9 Met., 83; Vandewalker v. Osmer, 65 Barb., 556; Benj., Sales, § 616.

Where no exception applies, the warranty is an independent contract and may be sued on when broken, like any other violated contract. Gilson v. Bingham, 43 Vt., 410, per Veazey, J.; Pennock v. Stygles, 54 Vt., 229, a sale by sample.

The offer to return must be within a reasonable time and must be unconditional. Use of property after offer to return is inconsistent. Reasonable time is a question for jury. Churchill v. Price, 44 Wis., 544.

Where property is not as warranted vendee may return it within reasonable time or may keep it and recoup damages in action for price. Warder v. Fisher, 48 Wis., 338; Smith v. Mayer, 3 Col., 207.

In support of the principle that the buyer may maintain action for breach of contract as to quality of goods or recoup in action for purchase money after he has accepted them, see further Tomlinson v. Quigley, 5 Del., 168; Polhemus v. Heiman, 45 Cal., 573; Youghiogheny Iron Co. v. Smith, 66 Pa. St., 341; Lewis v. Rountree, 78 N. C., 323; Perley v. Balch, 23 Pick., 283; Vincent v. Leland, 100 Mass., 432; Douglass Axe Mfg. Co. v. Gardner 10 Cush., 88; Taylor v. Cole, 111 Mass., 363. Compare Owens v. Sturges, 67 Ill., 366; Hollfield v. Black, 2 West. Rep., 601; Kent v. Friedman, 1 Cent. Rep., 718; Briggs v. Hilton, 1 Cent. Rep., 307.

If, however, a sale is held to be on a condition precedent, is not the acceptance or retention of the goods with knowledge that the condition has not been complied with, a waiver of the condition? And if the condition is *waived*, should the vendee or principal have any remedy?

bethport, and the sale was completed thereby, the only remedy of the defendant in error was by a suit upon the warranty.

It did not appear that at the date of the contract the iron had been manufactured; and it was shown by the record that no particular iron was segregated and appropriated to the contract, by the plaintiffs in error, until a short time before its shipment, in the latter part of April and the early part of May. The defendant in error had no opportunity to inspect it until it arrived in Milwaukee, and consequently never accepted the particular iron appropriated to fill the contract. It was established by the verdict of the jury that the iron shipped was not of the quality required by the contract. Under these circumstances the contention of the plaintiffs in error is, that the defendant in error, although the iron shipped to him was not what he bought and could not be used in his business, was bound to keep it, and could only recover the difference in value between the iron for which he contracted and the iron which was delivered to him.

We do not think that such is the law. When the subject matter of a sale is not in existence or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities being part [372] of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted. *Chanter* v. *Hopkins*, 4 M. & W. 404; *Barr* v. *Gibson*, 3 M. & W. 390; *Gomperts* v. *Bartlett*, 2 E. & B. 849; *Okell* v. *Smith*, 1 Stark. N. P. 107; Notes to *Cutter* v. *Powell*, 2 Smith, Lead. Cas. 37, 7th Am. ed.; *Woodle* v. *Whitney*, 23 Wis. 55; *Boothby* v. *Scales*, 27 Wis. 626; *Fairfield* v. *Madison Mfg. Co.* 38 Wis. 346. See also *Nichol* v. *Godts*, 10 Exch. 191.

So, in a recent case decided by this court, it was said by *Mr. Justice* Gray: "A statement" (in a mercantile contract) "descriptive of the subject matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." *Norrington* v. *Wright*, 115 U. S. 188 [Bk. 29, L. ed. 366]. See also *Filley* v. *Pope*, 115 U. S. 213 [Bk. 29, L ed. 372].

And so, when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the buyer, that all the goods are similar, both in nature and quality, to those exhibited, and if they do not correspond, the buyer may refuse to receive them, or if received, he may return them in a reasonable time allowed for examination, and thus rescind the contract. *Lorymer* v. *Smith*, 1 Barn. & C. 1; *Magee* v. *Billingsley*, 3 Ala. 679.

The authorities cited sustain this proposition, that when a vendor sells goods of a specified quality but not in existence or ascertained, and undertakes to ship them to a distant buyer, when made or ascertained, and delivers them to the carrier for the purchaser, t
bound to accept them without
The mere delivery of the goods
to the carrier, does not necessarily
dee to accept them. On their a
the right to inspect them to ascer
they conform to the contract, and
inspect implies the right to reject
are not of the quality required by
The rulings of the circuit court w
ance with these views.

We have been referred by the
error, to the cases of *Thornton*
Wheat. 184 [25 U. S. bk. 6, L.
Lyon v. *Bertram*, 20 How. 149
15, L. ed. 847], to sustain the pr
the defendant in error in this ca
rescind the contract and sue to re
price of the iron. But the cas
point. In the first, there was an
with, warranty and delivery to th
specific chattel, namely: a race
second, the sale was of a specifi
nated lot of flour, which the ve
cepted, and part of which he ha
ample means to ascertain whether
formed to the contract.

The cases we have cited ar
against the contention of the plai
The jury has found that the iron
quality which the contract requ
that ground the defendant in erro
opportunity, rejected it, as he had
His suit to recover the price was, t
brought.

Other errors are assigned, but, i
they present no ground for the re
judgment and do not require disc

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Su

Cited—117 U. S. 129.

WALTER H. SMITH,
v.
DAISY P. D. BLACK, T

(See S. C., Reporter's ed., 308

*Trust deed to secure payment of pr
—power of sale—execution of—
creditor—adequacy of price—se
trustee.*

*1. Under a deed of trust, covering l
trict of Columbia, made by a debtor, to
their heirs and assigns, to secure the
promissory note, with power by w
grantees were empowered, on defau
land at public auction, "on such ter
tions, and at such time and place, s
previous public advertisement," as th
signs or heirs," should deem adva
proper, and to convey the same in fe
purchaser, a sale was had by public
a notice of sale, signed by both of the
duly published in a newspaper; but a
one of the trustees was present. Th
at the sale were fair, both of the trus
a deed to the purchaser, and no gro
for setting the sale aside; *Held*, the
from the sale, of one of the trustees,
cient reason, of itself, for setting as
against the former owner of the land

*Head notes by *Mr. Justice* BLATC

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ice considered, and the
llegation.
e he took the deed from
of the trustees, on the
although the terms of
d, as holder of the note
nount of the net pro-
still due on the note.
rmer owner of the land

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Decided Nov. 9, 1885

preme Court of the

f the case appear in

and **Samuel Shel-**

ett, for appellee:
mployed for the pur-
urchaser.
ow. 503 (45 U. S. bk.
v. *Minchin*, 5 Mad.
s. 630, *note; Ex parte*

ut the knowledge of
, was void.
39; *Downes* v. *Glaze-*
v *Duff*, 4 Johns. Ch.
Cow. 543; *Wilder* v.
nan v. *Wilson*, 71 N.
5 Ind. 250; *Heard* v.
il v. *Jacobs*, 62 Mo.
ed. Eq. 336; *Powell* v.
v. *Smith*, 45 N. Y.
N. Y. 144; *Peay* v.
astian v. *Johnson*, 72
, 27 N. J. Eq. 145;
442; *Brickenkamp* v.

ion of the deed by
ct in the execution of

607 (34 U. S. bk. 9,
m Co. v. *Cumberland*
Trusts (ed. of 1856),

d delivered the opin-

2, John Stearns, be-
land in the City of
ict of Columbia, on
nire Avenue, and P
Circle, containing in
cuted, with his wife,
the land, as security
issory note for $5,500
lay 23, 1872, payable
t at the rate of 6 per
semi-annually, to the
the note being given
rchase money of the
deed were John F.
a, their heirs and as-
in the deed was ex-
ult being made in the
or interest as stipu-
charge, commission,
se, in and about the
me hereafter, to sell

the said piece or parcel of ground and premises, at public auction, upon such terms and conditions, and at such time and place, and after such previous public advertisement," as the said Fuller and Latta, "their assigns or heirs, in the execution of this trust, shall deem advantageous and proper, and to convey the same in fee simple to and at the cost of the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase money; and the proceeds of said sale or sales: first, to pay all proper costs, charges and expenses, and to retain as compensation a commission of 5 per cent on the amount of the said sale or sales; secondly, to pay whatever may then remain unpaid of the said note and the interest thereon, whether the same shall be due or not; and, lastly to pay the remainder, if any, to the said John Stearns, his heirs or assigns."

On the 19th of April, 1873, Mrs. Mary A. Derby purchased the premises from Stearns, at the price of $1 per square foot, making $19,886. She paid $6,000 in cash, gave her notes for $8,886, and assumed the payment of the $5,500 note, with interest from November 23, 1872. Stearns conveyed the land to her.

On the 14th of April, 1875, Linkins sold the $5,500 note to the defendant, Walter H. Smith. It fell due May 26, 1877, and was not paid. There was some negotiation between Mrs. Derby and Smith in the summer of 1877, in regard to providing for its payment. Mrs. Derby, being in ill health, on October 27, 1877, conveyed the land in question (with other land) to her daughter, Mrs. Black, the plaintiff in this suit, her heirs and assigns, in trust, to lease, sell and convey it; and, after paying expenses and commissions, to pay the proceeds to the grantor, her heirs, executors or administrators. There was further negotiation between Smith and Mrs. Black; but the note being past due, with interest from May 23, 1877, the following notice was published in the Evening Star, a newspaper in the City of Washington, the description of the land in the notice being the same as in the deed of trust to Fuller and Latta: [310]

"B. H. Warner, Real Estate Auctioneer.
Trustees' sale of valuable property bordering on the P Street Circle, New Hampshire Avenue and 20th Street.

By virtue of a deed of trust dated May 23, A. D. 1872, and duly recorded in liber No. 682, folio 405, one of the land records of the District of Columbia, and at the request of the party secured thereby, we will sell at public auction, in front of the premises, to the highest bidder, on Wednesday, January 30th, A. D. 1878, at 4 o'clock p. m., the following real estate in the City of Washington, in said District, to wit:" [Here follows the description.] "Terms of sale: Three thousand dollars in cash; the balance in equal installments in six and twelve months respectively, with interest at eight per cent until paid, secured by a deed of trust on the property. Conveyancing at the cost of purchaser. If the terms of the sale are not complied with in five days after the sale, we reserve the right to resell at the risk and cost of the defaulting purchaser.

James M. Latta
John F. Fuller,
J F. Caldwell, Salesman. Trustees."

The sale took place by public auction in

front of the premises, at the time named in the notice, and they were sold to the defendant Smith, he being the highest bidder, for $7,000. On the 13th of February, 1878, Latta and Fuller, the trustees, executed a deed conveying the land to Smith, his heirs and assigns. The deed contained this recital: "And whereas the period fixed for the payment of said note has expired without the same being liquidated, and the said party of the first part, at the written request of the legal holder of the said note, being the party secured by said trust, did, on the seventeenth day of January, A. D. 1878, according to the provisions of said trust, advertise the hereinafter described premises for 12 days in the Evening Star, a newspaper printed and published in the City of Washington, District of Columbia, to be sold on the thirtieth day of January, A. D. 1878, at the hour of four o'clock p. m., on the premises, at which public sale, the said Walter H. Smith being the highest bidder, the same was sold to him for the sum of seven thousand dollars, the terms of which sale being three thousand dollars in cash and the balance in two payments in six and twelve months, with interest at 8 per cent; and whereas the said Walter H. Smith, having complied with the terms of said sale, the said party of the first part executes these presents."

[311]

On the 25th of March, 1880, the bill in this suit was filed by Mrs. Black, in the Supreme Court of the District of Columbia. The defendants are Smith, Fuller and Latta, and the trustees in two deeds of trust, each to secure $3,000, which Smith has executed, covering the premises, since they were conveyed to him; but it is stated in the bill that the plaintiff does not seek to disturb the rights acquired by those trustees. The bill alleges that in March, 1880, Smith dedicated to public use a part of the land fronting on P Street Circle, and sold to one Page, for $14,200, another part of it, receiving $8,200 in cash, and an agreement to pay the $6,000 secured by the two deeds of trust above named; and that the plaintiff does not seek to disturb the rights acquired by Page.

The bill prays for a decree that, as to so much of the land as Smith did not convey to Page (excepting what was dedicated to public use), the sale by Fuller and Latta be set aside, and their deed to Smith be canceled; that an account be taken of the proceeds of the sale by Fuller and Latta, and of the amount due on the $5,500 note at the time of the sale, and of all taxes on the property chargeable to the plaintiff; that the proceeds of the property, whether from the sale to Page, or from rents collected by Smith, be accounted for by him, and be brought into court to constitute a trust fund for the benefit of the plaintiff; that the amount properly payable on the $5,500 note and all costs and charges properly to be added thereto, be ascertained; that the same be paid in liquidation of the note and charges, and the plaintiff and the land be released from liability therefor; and that the balance of the fund be paid to her. There is also a prayer for general relief.

[312]

The bill alleges that Fuller knew nothing about the advertisement, or that the property was to be sold, or had been sold, until the day on which he executed the deed to Smith; that Latta acted on his own sole responsibility in fixing on the place and time and terms and conditions of the sale, and was the
present at it; that Fuller signed
Smith, at the request of the latter,
it to him when he was ill in bed,
that it was satisfactory to Linkins;
did not authorize Smith to repres
kins was satisfied with the sale;
took place at 4 o'clock in the afte
inclement day, few persons being
one person asked if a lot could be
privilege, and was told it could n
he was ready to make a bid therefo
was no competition; that the price
a foot, at which it was knocked do
was wholly inadequate; that in vie
sence of his cotrustee, the absenc
and the low price offered by Smit
duty of Latta to adjourn the sale;
property, even at a forced sale,
brought, with the least competition
foot.

The bill further alleges that B
was intrusted with looking after t
that Smith knew this fact; that
learned from a letter sent by W
January 24, 1878, that the sale w
for January 30, 1878; that she th
ative to Washington to see what co
and he sent back word that he coul
nothing, and that the holder of
purchased the property at the sal
that she being at a distance and
with business, relied on the fact th
regularity had existed in the sale,
would have been communicated b
the advertisement showed that th
be conducted by an auctioneer fr
establishment; that she supposed
longer had any rights in the premi
had never received any account or
tion from the trustees; that she had
a few days past accidentally learn
were suspicious transactions at t
that it was irregularly conducted;
soon as she heard it she took step
the facts.

Smith answered the bill, as di
Latta. Proofs were taken and,
the court at special term on the
ruary, 1881, made a decree setti
sale, except as to the land sold to P
dedicated to public use, and refer
to an auditor to state an account
parties, as prayed in the bill. T
ported, March 24 1881, that there
Smith to the plaintiff $5,860.30.
excepted to the report as to items in
but the court, at special term, over
ceptions and confirmed the report
rendered a decree on April 12, 1881,
there was due on that day from
plaintiff $5,860.30; and ordering
twenty days he pay her that sum,
from that day, and that Fuller and
thirty days execute to her a deed
that part of the premises as to w
was set aside. The decree impo
of the suit on the plaintiff. Sm
from the decree, to the general t
plaintiff appealed to it from so mu
cree as omitted to allow her inte
date of filing the bill, and from
overruled her exceptions to the aud

ith costs. Both appeals
rt in general term; and,
882, it rendered a decree
crees of the special term,
that Smith join with
conveyance to the plain-
d to pay the costs of the
cree Smith has appealed

ecial term on the merits,
s Cox (MacArthur &
the ground that Latta
onducted the sale, and
took no part in it; and
y the sale by signing the
d it without any consul-
without any information
at the sale, or any other
urnished by the recitals
as presented to him by
his request. The Judge
oper further to remark,
g in the evidence involv-
eproach against the fair-
purchaser." It is stated
he general term was by
justices, and proceeded
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operty as to have become
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tta and Fuller in regard
t see anything, in what
preparations for the sale,
from becoming the pur-
agent or trustee for the
orney for the trustees or
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g the note, had acted for
ught it with her money,
, though taking the title
s her agent and trustee
. Latta was selected as
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not know him or where
mith insisting on a sale,
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tta, and was signed by
took to find Fuller, and
his signature to the no-
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oyed by Mrs. Derby and
r to sell the property or
pay the note held by
e to find any cause in
anything else developed
der the most rigid rule,
becoming a purchaser
court held, in *Richards*
[59 U. S. bk. 15, L. ed.
f trust like the present,
isfaction of whose debt
ght to compete fairly at

the sale, and may become the purchaser. No fraud in fact is alleged in the bill or shown in the evidence, no effort to keep bidders away from the sale, or to have a surreptitious sale, no want of the usual notice of sale, nor any conduct on the part of Smith inconsistent with what was due from him, as a creditor, to Mrs. Derby and the plaintiff. He waited nearly eight months after the principal of the note and the install- [316]
ment of interest payable at the date of its maturity became due, before he took measures for a sale. He allowed Mrs. Derby and the plaintiff to make every effort to sell the land at private sale, or to raise the money at a higher rate of interest than 6 per cent, to pay off the note. In July, 1877, Mrs. Derby wrote to him that she had tried in vain to get the money at a lower rate than 10 per cent, and asked him to have the debt extended at that rate at least until the fall, when she would sell the property if it brought no more than enough to pay the debt. In December, 1877, the plaintiff wrote to him that she had people working for her all the time trying to sell the ground, but she had failed so far to receive any offer which she thought more to her advantage than a sale under a foreclosure, and that she would sell the land to him at fifty cents per square foot, he paying enough in cash to repay his sister-in-law and the taxes on the property, and giving her his note for the rest at 8 per cent interest, secured on the property. But the general taxes on the property were unpaid, and it had been sold for their nonpayment, and there were special taxes against it, and Mr. Smith declined to purchase at the price asked. Prior to that, and in August, 1877, as his sister-in-law was pressing for some money, and in order to allow the plaintiff time to see if she could arrange the debt, he signed a note for $1,000 at 60 days, which Mr. Warner indorsed, and it was discounted and the money sent to the sister-in-law. This note was renewed for sixty days more; but, the plaintiff having accomplished nothing, proceedings for a sale were taken.

The question as to whether the signature "John F. Fuller" to the notice of sale, the original of which was produced in evidence, was genuine and made by Fuller, received some prominence in the proofs. Fuller's real name was "John E. Fuller." But he was called "John F. Fuller" in the deed of trust, and there is no dispute that he signed his name "John F. Fuller" to the deed to Smith, and to a paper he executed at the same time assigning to Smith his interest in the trustees' commissions. His testimony as to his not signing the notice of sale, amounts only to this: that he does not recollect [317]
signing it, and does not recollect the conversations and interviews with Smith, to which Smith testifies. His denial of the signature appears to be based on the fact that his name is John E. Fuller; and his ultimate answer is that he will not swear he did not sign the notice. Smith testifies positively that he saw him sign it, and gives details and circumstances. The evidence satisfies us that the notice was signed by Fuller. It also appears that the deed to Smith was fully read to and understood by Fuller before he signed it. The recitals in the deed, which were true, gave Fuller all the information it was necessary he should have, as a basis for his signature to it.

We come now to consider the alleged inadequate price obtained at the sale. In May, 1872, Stearns sold the land to Linkins at 45 cents per square foot. In April, 1873, Mrs. Derby purchased at $1 per square foot. At the time Mrs. Derby purchased, and during the summer of 1873, speculation in real estate in the neighborhood of this land was rife, and prices were high; but in the fall of 1873 came a revulsion, and a depression of prices, which continued until after the sale in this case. In March, 1880, Smith sold a little over 15,000 feet of the land to Page for $14,200, or about 92 cents per square foot. The price which Smith paid was a little over 35 cents per square foot. But, in view of the efforts which had been made by the plaintiff to sell the property or to raise money on it, and of all the facts of the case, it cannot be said that the property sold for less than it could have been reasonably expected to bring at public auction at the time. Smith made the first bid, at $4,500. The bidding reached $6,000 by $500 bids, and then either $6,500 or $6,900 by $100 bids, every alternate bid being Smith's. The $6,500 bid or the $6,900 bid was made by Mr. John W. Thompson. Then Smith bid $7,000. Latta, who was present, endeavored to induce Mr. Thompson to bid more, but he would not. Shailer, the person who visited Washington by the plaintiff's desire, was present at the sale. It was held at the usual hour of the day for such sales. The evidence shows that Smith immediately offered the property at his bid to several persons, including Mr. Thompson, but no one would take it. We see no ground for setting [318] aside the sale because of inadequacy of price. The bill in the case was filed a few days after Smith had sold to Page. The period of depression had passed. The price had gone up again to nearly what Mrs. Derby had paid. But the fact of depression in value is no ground in itself for not upholding a sale under the trust deed, nor is a subsequent rise in value a ground for setting aside the sale. Those who speculate in real estate on credit take the risk of depression in value at the time the credit expires, and those who buy for cash in time of depression are entitled to the benefit of a subsequent rise in value.

The principal question discussed at the bar was the validity of the sale in the absence of Fuller. Latta, the other trustee, was present. No objection, at the time of the sale, to the absence of Fuller was made on behalf of the plaintiff, although she actually knew of the time and place of sale and in consequence sent Shailer to Washington, and he attended the sale. The question of the necessity of the presence of a sole trustee at a sale under a deed of trust like the present was before the Circuit Court of the United States for the District of Columbia, in 1838, in *Connolly* v. *Belt*, 5 Cranch, C. C. 405, on a bill filed by the grantor in the deed of trust, to set aside a sale under it. It was contended that the sale was void because the sole trustee was not present, though he was represented at it by an agent. The objection was not made at the sale, but was raised by a bill filed by Belt, the debtor, against the creditor and Semmes, the trustee, and the purchaser. The court was held by *Chief Judge* Cranch and *Assistant Judge* Morsell. The case of *Heyer* v. *Deaves*, 2 Johns. Ch. 154, was cited

to it as holding that under a stat
York, which required all sales o
premises, under a decree, to be ma
ter, a sale was invalid which was
competent agent of the master, in
Chief Judge Cranch says, in deliver
ion of the court: "Neither that sta
case is applicable to the present ca
a sale under a common deed of
time, place, terms and conditions
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est of all the parties concerned in t
as appears by the answer of the tr
sale made by an agent of the truste
to the terms and conditions, and at
place prescribed, is a sale by the t
being no law requiring him to b
present at the auction. No obje
been made by Mr. Belt or his fri
count of the absence of Mr. Semm
tee, who was represented by Mr. C
agent, at the sale, and their suffer
to go on is, I think, a waiver of th
if it would have been otherwise val
objection, in itself, is of no avail."
advised of any decision since that
District of Columbia, holding to t
until the one now before us. I
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both trustees, at a sale under a dee
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The creditor has rights as well as
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is conducted, as in this case, in pu
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erk, Sup. Court, U. S.

Exr. of RICHARD
and MARY H.
OMAS J. DURANT,

DDINGS.

ed., 300-307.)

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[No. 25.]

Argued Oct. 23, 26, 1885. Decided Nov. 9, 1885.

IN ERROR to the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court.

Mr. **John Selden,** for plaintiffs in error:

The action for money had and received lies "wherever the defendant has received money which is the property of the plaintiff and which the defendant is obliged, by natural justice and equity, to refund."

Bayne v. *U. S.* 93 U. S. 643 (Bk. 23, L. ed. 998); *U. S.* v. *State Bank*, 96 U. S. 35 (Bk. 24, L. ed. 648).

"It is an equitable action to recover back money which the defendant ought not to retain."

Nash v. *Towne*, 5 Wall. 702 (72 U. S. bk. 18, L. ed. 580).

The Messrs. Giddings contracted, with the sanction of the State, to pay the claim of the plaintiffs; and they "were entitled to retain, out of the funds recovered by them, sufficient to meet the claim."

Cowdrey v. *Galveston, etc. R. R. Co.* 93 U. S. 355 (Bk. 23, L. ed. 952).

Messrs. **A. H. Garland** and **Fletcher P. Cuppy,** for defendant in error:

The plaintiffs, in contracting with the defendant, were bound to know the extent of the authority from the State under which he acted.

State v. *Bank of Missouri*, 45 Mo. 538; *State* v. *Hays*, 52 Mo. 580; *Delafield* v. *State*, 26 Wend. 192; *Whiteside* v. *U. S.* 93 U. S. 257 (Bk. 23, L. ed. 885; *The Floyd Acceptances*, 7 Wall. 676 (74 U. S. bk. 19, L. ed. 173); *Mayor* v. *Reynolds*, 20 Md. 10.

The record shows that plaintiffs did not act upon or have any knowledge of the contract of June 2, 1874, until after their settlement with the Governor. The parties to that contract had a right to modify or rescind it; and if they did so, as shown, before plaintiffs accepted it or became privy to it, they can claim no rights under it.

Trimble v. *Strother*, 25 Ohio St. 378; *Davis* v. *Calloway*, 30 Ind. 112; *Durham* v. *Bischof*, 47 Ind. 211; *Thorp* v. *Coal Co.* 48 N. Y. 257.

Mr. Justice **Harlan** delivered the opinion of the court: [300]

This action was brought by Richard T. Merrick and Thomas J. Durant to recover damages sustained by them in consequence of the violation of an agreement alleged to have been made by the defendant in error, in reference to compensation due them for certain legal services rendered in behalf of the State of Texas. The declaration contains a special count, and also a common count for money had and received to the use of the plaintiffs. The answer put in issue the existence of the alleged agreement and every material fact averred in the declaration. Although the record contains several bills of exceptions upon plaintiffs' offer to introduce evidence, the decisive question is, whether the court erred in peremptorily instructing the jury, upon the whole case, to find for the defendant. 1 Mackey, 394.

[301] After the present writ of error was sued out, each of the plaintiffs died, and the action has been revived in the name of their respective personal representatives.

The instruction to find a verdict for the defendant must be tested by the same rules that apply in the case of a demurrer to evidence. *Parks* v. *Ross*, 11 How. 373 [52 U. S. bk. 13, L. ed. 735]; *Richardson* v. *City of Boston*, 19
[305] How. 268 [60 U. S. bk. 15, L. ed. 642]; *Schuchardt* v. *Allens*, 1 Wall. 370 [68 U. S. bk. 17, L. ed. 646]. If, therefore, the facts established and the conclusions which they reasonably justify do not disclose a valid cause of action against the defendant, the judgment must be affirmed; otherwise reversed.

[301] The bill of exceptions states that there was evidence tending to make the following case:

In the year 1867 Mr. Merrick, in conjunction with other counsel, was employed by the State to conduct and they did conduct legal proceedings for the recovery of certain bonds and coupons, of which, at the commencement of the recent civil war, she was the holder and owner, but which, pending that conflict, were transferred by a military board of the insurrectionary government of Texas for the purpose of enabling it to carry on war against the United States. These bonds had been received by the State from the United States under and in pursuance of the Act of Congress, approved September 9, 1850, entitled "An Act Proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory Claimed by Her Exterior to said Boundaries, and of all Her Claims upon the United States, and to establish a Territorial Government for New Mexico." 9 Stat. at L. ch. 49, p. 446. At the time of the employment of Mr. Merrick, some of the bonds and coupons so transferred were held, in this country, by the firm of White & Chiles, while the residue had been sent to England, and were there held, for others, by Droege & Co. and the Manchester Bank.

The suit instituted was by original bill filed in this court in the name of the State against the firm of White & Chiles and others. By the final decree therein it was adjudged that the State was entitled to recover the bonds and coupons of which White & Chiles claimed to have become owners under a contract made between them and said military board on January 12, 1865. *Texas* v. *White*, 7 Wall. 741, 742 [74 U. S. bk. 19, L. ed. 242, 243]. Subsequently, in 1873, the Governor of Texas employed Mr. Merrick and Mr. Durant to institute, and accordingly they did institute, suit in the Court of Claims for the recovery of the proceeds of such of the bonds and coupons as had been sent to England; their compensation to be 20 per centum of what might be recovered by means of that suit. It does not appear what, if anything, was realized by that proceeding.

[302] After the decree in this court in *Texas* v. *White, etc.*, establishing the invalidity, as to the lawful government of Texas, of the transfer made to White & Chiles, title was asserted by Chiles, individually, to the bonds and coupons, or their proceeds, held in England. Of this new claim, based upon a contract which Chiles pretended was made with him alone by said military board, Droege & Co. and the Manchester Bank were formally notified; and notice constituted the sole imp
way of the prompt recognition
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In this condition of affairs, th
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conducting the litigation.

On the 18th of October, 1874,
of objections made by defendan
of the contract of June 2, 1874,
agreed to its modification, as in
indorsement, as follows:

"Whereas, apprehensions
pressed by J. D. and D. C. Gi
consequence of outstanding co
fore made with other attorney
contingent fees are claimed, that
are sustained the said Giddings
liable to the State for any excess
ten or twenty per cent stipulated
contract; this indorsement is ma
pose of declaring that no such
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templated; and as, under outstan
as aforesaid, the per cent for f
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this contract, it is hereby decl
Giddings shall be paid, in that e
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Subsequently, in November
1874, Merrick and Durant were e
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f which, as just stated,

they had no knowledge, they would not have executed that receipt, or received the said $8,000 upon it.

Other facts are set out in the bills of exceptions, but as they do not materially affect the conclusion to be necessarily reached from those recited, they need not be stated.

It must be conceded that the claim of Merrick and Durant to be entitled, under their contract, to receive for their services an amount equal to 20 per cent of the bonds and coupons, and their proceeds, recovered by the defendant in England, finds strong support in the facts which the evidence, as we are informed by the bill of exceptions, tended to establish; for, not only does that recovery seem to have been the immediate result of the legal proceedings instituted and conducted by the attorneys, but the evidence justifies the conclusion that it was in the minds of all the parties, including the Governor of Texas and the defendant, that the attorneys should be deemed to have participated in any collections made in England, provided it appeared that those collections were the result of the suit last instituted in this court.

In this view of the evidence, and under all the circumstances of the case, it may be that the promise by the defendant not to part with the bonds and coupons or their proceeds, which might be recovered in England, until the fees of the attorneys were settled, was not inconsistent with the relations which he and they respectively held to the State. And it may also be that, for the violation of that promise, the defendant was responsible to them in damages. But, in our opinion, the attitude of the parties towards each other, and the whole aspect of the case, was changed when the attorneys, with information as to the amount collected by defendant, and with knowledge that their claim of 20 per cent of such collections was controverted, came to a final settlement with the State upon the basis of $8,000 as full compensation for all services rendered in and about the recovery of the bonds and coupons, or their proceeds. That settlement, we are constrained to hold, swept away the very foundation of their demand against the defendant; for, in establishing that demand, it was necessary to show that the State was actually indebted to them for legal services rendered. But how could such indebtedness be shown to exist, and how could the attorneys be said to have been damaged, within the meaning of the law, when, prior to any suit against defendant for violation of his agreement, the attorneys voluntarily submitted to a compromise, by which, in consideration of a named sum, they released the State from all further liability to them? Their suit proceeds upon the distinct ground that defendant's failure to keep his promise deprived them of the opportunity to obtain such amount as the State owed them for their services. But that breach by defendant of his promise could not be made the basis of an action for damages, after they stipulated with the State to receive and did receive a specified sum in full discharge of all claims for legal services in respect of the bonds and coupons, or their proceeds. And this view of the rights of the parties is not at all affected by the fact that the attorneys were, at the time of their settle-

[306]

ment with the State, ignorant of the existence of the contract of June 2, 1874, or of its subsequent modification. To that contract they were not parties, and it was entirely competent for the State and her agents to modify it without notice to or consultation with others. The [307] attorneys had their separate contract with the State, made at the time of their employment, under which they proceeded against Chiles in respect of his individual claim to the securities, or their proceeds, held in England. The defendant was not bound by his relations with them to disclose the terms of the contract which he and his partner had with the State. The attorneys were in possession of all the facts essential to their determination of the question whether they would stand upon their own contract or accede to the proposition made by the Governor, to pay them, in full of all demands, a specified sum. With information as to the amount actually recovered for the State, and as to the amount claimed by and allowed to the defendant and his partner for their services, the attorneys made a final settlement with her upon the basis already indicated. That settlement, we repeat, precluded them from making any further claim upon the fund which came to the hands of the defendant as agent of the State and, consequently, precludes them from recovering damages by reason of the defendant having surrendered that fund in advance of the payment of their fees, retaining only what was allowed to him and his partner for their services.

Touching the suggestion that the defendant and his partner were not justly or equitably entitled to receive more than the attorneys who conducted the litigation, it is sufficient to say that the former did not receive more than the State agreed to pay them, while the attorneys have received what they agreed to accept in full discharge of their claim against the State.

For these reasons, and without reference to other considerations pressed upon our attention, it was proper to instruct the jury to find for the defendant.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[290] CITY OF WATERVILLE, *Plff. in Err.*,

v.

BALTUS VAN SLYKE.

(See S. C., Reporter's ed., 290.)

Practice—motion to dismiss before printing the record—motion papers.

Upon a motion to dismiss before printing the record, the motion papers must so present the case as to make a reference to the transcript unnecessary.

[No. 955.]

Submitted Nov. 2, 1885. Decided Nov. 9, 1885.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

On motion to dismiss.

Mr. **S. E. Brown,** for defendant in error, in support of motion.

Messrs. **E. Stillings and W. W. Guthrie,** for plaintiff in error, *contra.*

Mr. Chief Justice **Waite** delive
ion of the court:

The judgment in this case is
$5,000, but the record contains a
division. The motion to dismis
ground that this court has no juri
such a certificate as is filed herei
ord has not been printed, and i
Ins. Co. 100 U. S. 43 [Bk. 25, L.
announced the rule that to get a
motion to dismiss before printing
papers must present the case in
will enable us to act understandi
referring to the transcript on file.
we have not been furnished either
of the certificate on which the mo
or with an agreed statement of wh
In fact, there is nothing on which
unless we go to the transcript.
consideration of the motion is
postponed until the case is for h
merits.

True copy. Test:
James H. McKenney, Clerk, Su

EDMUND H. WATTS, Libel

v.

JOHN B. CAMORS ET

JOHN B. CAMORS ET AL

v.

EDMUND H. WAT

(See S. C., Reporter's ed., 35

*Admiralty—charter-party—statem
—whether a warranty or conditi
liquidated damages—penalty—b
tract—damages.*

*1. In a charter-party which descri
name and as "of the burthen of 1,10
abouts, registered measurement,"
the owner agrees to receive on board
terer engages to provide, "a full and c
say about 11,500 quarters of wheat
statement of her registered tonnag
ranty or condition precedent; and if
rying capacity is about 11,500 quarte
charterer is bound to accept her, alth
tered measurement (unknown to bot
time of entering into the contract) i

2. The clause in a charter-party,
parties mutually bind themselves,
freight, and the merchandise to be l
"in the penal sum of estimated amou
to the performance of all and every
ments, is not a stipulation for liquid
but a penalty to secure the payment
of damage that either party may
from any breach of the contract;
treated in a court of admiralty of th
whatever may be the rule in the cou
ticular State in which the contract i
court of admiralty sits.

3. Under a charter-party which
lay days for loading, after the ship w
ceive cargo, the owner of the ship
the charterers. They immediately re
her, and thirty-six days afterwar
another cargo; but negotiations we
tween the parties for half of that
owner sustained substantial damag
amount by the failure of the charte
with their contract. The circuit cou
facts, and entered a decree against
for that amount. *Held*, no erro

*Head notes by *Mr. Justice* GRAY.

have the decree re-
33].
cided Nov. 16, 1885.

ircuit Court of the
Eastern Dis-ict of

the case appear in

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part of this contract.
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n, 311; *Haviland* v.
Mavor v. *Bush*, 16
tchum, 8 Johns. 189;
. 259: *Cox* v. *U. S.* 6
. ed. 359); *Lanusse*
6 U. S. bk 4, L. ed.
Y. 124; *Curtis* v. *Le-*
, 230; 2 Kent, Com.
§ 317, 320, 332, 349,
. Civ. Code, arts. 9,
2125, 2127, 2130.
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. Ann. 276; *Hunt* v.

Jr., for defendants.

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full and complete cargo, say about 11,500 quarters of wheat in bulk, and pay to the said party of the first part, or agent, for the use of the said vessel during the voyage aforesaid, seven shillings and sixpence per quarter of 480 pounds weight delivered in full, payable in cash on right delivery of the cargo.

It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched), commencing from the time the vessel is ready to receive or discharge cargo: Fifteen running days (Sundays excepted) for loading and discharging, lay days to commence when the captain reports the vessel is ready for cargo, and that for each and every day's detention by default of said party of the second part, or agent, fifty pounds sterling per day, day by day, shall be paid by said party of the second part, or agent, to the said party of the first part, or agent.

The cargo or cargoes to be received and delivered within the fifteen days above specified, the dangers of the sea and navigation of every nature and kind always mutually excepted.

To the true and faithful performance of all and every of the foregoing agreements we, the said parties, do hereby bind ourselves, our heirs, executors, adminisirators and assigns, and also the said vessel, freight, tackle and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of estimated amount of freight." [355]

The district court dismissed the libel, and the libelant appealed to the circuit court, which found the following facts:

The charter-party was executed at New Orleans on August 7, 1879, by the libelant, through his agents A. B. French & Co., and by the respondents. The libelant complied in all things with his contract. The Highbury arrived at the port of New Orleans on or before September 11. On that day, she being in that port and ready to receive cargo, her master notified that fact to the respondents, tendered her to them, and demanded of them a full cargo of wheat in bulk, according to the terms of the charter-party. On the next day, the respondents in writing refused to accept the ship, or to furnish the cargo, for the reason that her tonnage was greater than that expressed in the charter-party. Thereafter, during the lay days, various negotiations were pending between the parties, until September 30, when the master caused public protest to be made before a notary and witnesses of the respondents' refusal. On October 19, the master obtained at the same port a full cargo of cotton and oil cake, the freight of which exceeded in value, by $532.10, that of the cargo of wheat which the respondents had contracted to furnish.

The actual tonnage of the Highbury was 1,203 tons, registered measurement. Her actual carrying capacity for grain was about 11,500 quarters of wheat, depending upon the length of voyage between coaling stations. The estimated amount of freight, the penalty stipulated in the charter-party, was $20,872.50.

At the date of the charter-party, the Highbury was a new ship, and neither of the contracting parties in New Orleans knew her exact registered measurement or tonnage or carrying capcity. All the negotiations between them, preliminary to the contract, were

with reference to her carrying capacity, which, under the custom among merchants and shippers of grain, might run not exceeding 10 per cent over or under the cargo stipulated for.

[356] By reason of the respondents' failure to accept the ship, furnish a cargo, and comply with their contract, the libelant suffered damages to the amount of $5,693.15 (consisting of $611.15 for expenses incurred in fitting up the Highbury to receive a cargo of wheat; and $5,082 for the delay, after the expiration of the fifteen lay days; of twenty-one days, at the rate of £50 a day, in obtaining and loading another cargo), with interest from the date of the libel.

The circuit court stated, as conclusions of law, that the libel should be maintained, and that the libelant recover from the respondents the sum of $5,693.15, with interest and costs, and entered a decree accordingly; and each party appealed to this court. The opinion of the circuit court upon the merits is reported in 10 Fed. Rep. 145.

[359] In this case, as brought before us by the appeal and the cross appeal, three questions have been argued, which may naturally and conveniently be considered in the following order:

1. Is the statement of the registered tonnage of the Highbury in the charter-party a warranty or condition precedent?

2. If it is not, is the owner of the ship entitled to recover the estimated amount of freight; that is to say, the sum of $20,872.50, as liquidated damages?

3. If both these questions are answered in the negative, have the charterers shown any error in law in the amount of damages for which a decree was rendered against them in the circuit court?

1. In the charter-party, the ship is described as the "Steamship Highbury, of the burthen of 1,100 tons, or thereabouts, registered measurement"; and the owner agrees to receive on board, and the charterer engages to provide, "a full and complete cargo, say about 11,500 quarters of wheat in bulk." In fact, her registered tonnage was 1203 tons, a little more than 9 per cent above that stated in the charter; but this was not known to either party at the time of entering into the contract; and her actual carrying capacity corresponded to the cargo which the charterers engaged to furnish, and the owner agreed to receive on board.

[360] The statement in the charter-party, concerning the registered tonnage of the ship, clearly does not constitute a warranty or condition precedent that she is of 1,100 tons registered measurement. The intention and the agreement of the parties, as apparent upon the face of their written contract, were that the steamship Highbury should receive and carry a full and complete cargo of about 11,500 quarters of wheat in bulk. There being no willful or fraudulent misrepresentation, the description, "of the burthen of 1,100 tons, or thereabouts, registered measurement" (if it could under other circumstances be held a warranty), is controlled by the designation of the ship by name, and by the unequivocal stipulations regarding the cargo to be carried. *Brawley* v. *United States*, 96 U. S. 168 [Bk. 24, L. ed. 622]; *Norrington* v. *Wright*, 115 U. S. 188, 204 [*ante*, 366]; *Barker* v *Windle*, 6 E. & B. 675; *Ashburner* v. *Balchen*, 7 N. Y. 262; *Morris* v. *Levison*, 1 C. P. D. 155. The refusal of the charterers to accept her can be justified.

2. The concluding clause of the cl by which "to the true and faith ance of all and every of the fore ments" the parties bind themselves executors, administrators and assig the vessel and freight, and the me be laden on board, each to the oth penal sum of estimated amount is clearly not a stipulation for liqu ages, but a penalty to secure the the amount of damage that either actually suffer from any breach tract.

The principal object of this clau be to pledge the ship and freigh for the performance of the agreen owner, on the one hand; and the to be laden on board, as security formance of the agreements of th on the other. It is in the form o it covers alike an entire refusal to contract, and a failure to perform ticular, however slight; and for whether total or partial, a just c can be estimated in damages.

At the common law, indeed, bef ute of 8 & 9 Wm. III, ch. 11, § might have been rendered for the of the penalty. But in a case like of equity would stay proceedings payment of the damages actual *Clark* v. *Barnard*, 108 U. S. 436, L. ed. 780, 786] *et seq.*; *Sloman* v. Ch. 418; *In re Newman*, 4 Ch. D at the present day, even a court of regard such a clause in such a c penalty only, and not as liquidati ages. *Tayloe* v. *Sandiford*, 7 Whe S. bk. 5, L. ed. 384]; *Van Buren* How. 461, 477 [52 U. S. bk. 13 777]; *Higginson* v. *Weld*, 14 Gray, 1 v. *Wright*, 13 East, 343.

In Abbott on Shipping, Shee's ed § 2, speaking of charter-parties, it "it is usual for each of the parties tracts to bind himself, his heirs, e administrators, and the owner or m the ship and her freight, and the m cargo to be laden, in a pecuniary the true performance of their resp nants; this is commonly done by the end of the instrument. Suc not the absolute limit of damag side; the party may, if he thinks his action upon the other clauses c and may in such action recover dam the amount of the penalty, if in shall be found to exceed it. On the if the party sue on such a penal cl not in effect recover more than the tually sustained."

In such cases, accordingly, the United States, sitting in admiralty damages actually suffered, whether or fall short of the amount of the *Salem's Cargo*, 1 Sprague, 389; *Th* Woods, 302. In England and in a court of admiralty, within the powers, acts upon equitable pri when the facts before it, in a matt jurisdiction, are such that a cou

urt of law could not, it of admiralty to grant Dobson, 504, 521; *The* 82, 192; *The Virgin*, 8 bk. 8, L. ed. 1036, 1040]; . 443; *Hall* v. *Hurlbut*, *mond* v. *New Bedford* 5.

e Civil Code of Louisi- of her Supreme Court, e courts of that State, in of the contract by one have judgment for the nalty stipulated by the partial breach he could l damages. Louisiana s. 1945, 2117, 2124, 2125, *pson*, 5 Mart. (La.) 525, *tham*, 3 Mart. (La.) N. , 16 La. Ann. 188, 196; a. Ann. 276.

uisiana does not govern it is treated as a question contract of the parties, licial remedy.

depending upon the in- nanifested by their writ- rmance of that contract he law which they must had in view when they *v. Southard*, 10 Wheat. 1, d. 252, 264]; *Pritchard* v. 24 [Bk. 27, L. ed. 104]. lishmen entering into a nglish ship for an ocean umed to look to the gen- he two countries, and not e State in which the con-

s a question of the remedy icially administered, the jurisdiction of the courts under the national Con- uniform throughout the e limited in its extent, or rcise, by the laws of the *ted States* v. *Howland*, 4 . bk. 4, L. ed. 526]; *Liv-* t. 632 [34 U. S. bk. 9, L. *outhard*, 12 How. 139 [53 . 927]; *Neves* v. *Scott*, 13 bk. 14, L. ed. 140]; *The* 55; *The St. Lawrence*, 1 . bk. 17, L. ed. 180]; *The* . 558 [88 U. S. bk. 22, L. §§ 913, 914.

herefore, rightly held that able only for the amount of r breach of the contract o the owner of the ship. in behalf of the charterers, endered on September 11, g on the next day, it was er and the owner at once ro, and thus prevent any ollow, instead of lying idle d expired; and therefore, l down in *Warren* v. *Stod-* [Bk. 26, L. ed. 1117], no e been decreed.

urt having found, as facts, ions were pending between first refusal until September 30, and that it was by reason of the failure of the charterers to accept the ship, furnish a cargo and comply with their contract, that the owner suffered damages to the amount decreed, no error in law is shown in the decree; and it is not open to revision by this court in matters of fact. Act of February 16, 1875, chap. 77, § 1, 18 Stat. at L. 315; *The Abbotsford*, 98 U. S. 440 [Bk. 25, L. ed. 168]; *The Francis Wright*, 105 U. S. 381 [Bk. 26, L. ed. 1100]; *The Connemara*, 108 U. S. 352 [Bk. 27, L. ed. 751].

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HUMPHREY BELL ET AL., *Plffs. in Err.*, [373]
v.
FIRST NATIONAL BANK OF CHICAGO.

(See S. C., Reporter's ed., 373-383.)

Bills of exchange—protest without allowance of days of grace.

*A bill of exchange, dated March 4th, payable in London 60 days after sight, drawn in Illinois on a person in Liverpool, and accepted by him "due 21st May," without any date of acceptance, was protested for nonpayment on the 21st of May. In a suit against the drawer, on the bill, it was not shown what was the date of acceptance. *Held*, that the bill was prematurely protested, it not appearing that days of grace were allowed.

[No. 35.]

Submitted Oct. 30, 1885. Decided Nov. 16, 1885.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Mr. **O. H. Horton**, for plaintiffs in error:

The pretended protests were made on the days the drafts were due, without allowing days of grace. The protests were premature, and the drawers were thereby discharged.

Bank of Washington v. *Triplett*, 1 Pet. 31 (26 U. S. bk. 7, L. ed. 28); *Hoover* v. *Wise*, 91 U. S. 313 (Bk. 23, L. ed. 394); *National Bank* v. *City Bank*, 103 U. S. 670 (Bk. 26, L. ed. 418); *Perkins* v. *Franklin Bank*, 21 Pick. 485; *Montgomery Co. Bank* v. *Albany City Bank*, 8 Barb. 399; *S. C.* 7 N. Y. 461; *Bowen* v. *Newell*, 8 N. Y. 194; *Ivory* v. *Bank*, 36 Mo. 475; *Cook* v. *Renick*, 19 Ill. 601.

Messrs. **Charles A. Dupee** and **H. A. Gardner**, for defendant in error:

The acceptor's declaration that the bills were due May 21 and 31, was a declaration that the sixty days after sight and the three days of grace expired on those dates.

Dan. Neg. Inst. sec. 633; *Kenner* v. *Creditors*, 7 Mart. (N. S.) 540.

As the language of Turner, the acceptor, was equivalent to saying that sixty days would terminate on May 21st and 31st, and as he testified that they did mature on those days and were then dishonored, there was here no disputed fact for the consideration of the jury.

The authorities cited by plaintiff in error to this point are not inconsistent with these positions.

*Head note by *Mr. Justice* BLATCHFORD.

[374] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This suit was brought in the Circuit Court of the United States for the Northern District of Illinois, by the First National Bank of Chicago, as indorsee, against the plaintiffs in error, copartners under the name of Humphrey Bell & Co., as the drawers of three bills of exchange. One was in this form:

Canton, Ill., March 4th, 1878.

"Exchange for £850.00.

Sixty days after sight of this first of exchange (second and third unpaid), pay to the order of ourselves, in London, eight hundred and fifty pounds sterling, value received, and charge to account of Humphrey Bell & Co.

To Mr. W. D. Turner, Jr., Liverpool."

Across the face of the bill, as sued on, these words were written:

"Accepted. Payable at Messrs. Barclay & Co., bankers, London. Due 21st May.

W. D. Turner, Jr."

The foregoing description applies to each of the other two bills, and the writing across its face, except that each was for £800, and one was dated March 11, 1878, and had in the writing across its face "Due 31st May," instead of "Due 21st May."

The declaration was in *assumpsit*. Each of the defendants separately pleaded *non assumpsit*, and there were various special pleas, on which issue was joined. At the trial the court directed the jury to find a verdict for the plaintiff for $10,937.13 damages, which was done; and for that amount, with costs, a judgment was rendered for the plaintiff, to review which the defendants have brought this writ of error.

After making certain necessary proof, the plaintiff offered in evidence the three bills, and a notary public's certificate of protest accompanying each. The bill of exceptions says: "The paper introduced and read in evidence as the certificate of protest of said £850 draft states, that on the 21st day of May, 1878, at the request of the City Bank of London, the notary public exhibited the original bill of exchange, before copied, to a clerk in the bank-
[375] ing house of Messrs. Barclay and Company, bankers, London, where the said bill is accepted payable, and demanded payment of its contents, which demand was not complied with, but the said clerk thereunto answered, 'No orders,' whereupon the said notary protested the said draft against the drawers, acceptor and indorsers. The other two papers introduced as certificates of protest of the other two of said drafts are in the same form, and state the protest to be in each case the same day they are stated to be due in the acceptance thereof." When the drafts and certificates of protest were offered in evidence, the defendants objected to the admission of each of them, but the objection was overruled, and they were read in evidence, to which the defendants excepted.

The bill of exceptions purports to set forth all the evidence offered by either of the parties on the trial, but there is no evidence showing any presentation for payment of any one of the bills on any other day than that stated in the acceptance as the day it was due, nor is there any evidence showing when the acceptances were written by Turner, although his deposition taken at Liverpool, sixteen months before the trial, was read in evidence by t
All that is said on the subject in tha
is: "The last three bills for £800
£800, drawn by defendants on me s
by me, and which matured on th
and 31st May, 1878, were dishonor

At the close of the evidence on
and before the charge, the defendar
the court to instruct the jury as fol
other things: "That the bills of ex
on in this case are what are know
as foreign bills; that upon such bill
called days of grace, are allowed b
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that such a bill does not become du
in law, on the day mentioned on i
on the last day of grace; that, unle
are duly protested on the last day
on the second day, if the last day
such protest is not duly made, and
and indorsers are thereby discharg
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from the evidence and under the
of the court, that the bills of excha
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last day fell on a Sunday), then th
the jury must be for the defendants.
refused to instruct as requested as
the above points, and the defendar
to each refusal.

The court then charged the ju
plaintiff was entitled to a verdict,
them to render a verdict for the
$10,937.13 damages, which was
such ruling and direction the de
cepted. In the charge set forth i
exceptions, the views of the court
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and refused, were given in these w
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right to recover. First. That th
prematurely presented for payme
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twenty-first and the last on the th
May, 1878, and were protested f
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that, as the law allows three days
all bills of this character, they shou
been presented for payment, or p
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in the acceptance, and that, theref
tests are void and inoperative. * *
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Triplett, 1 Pet. 25, 31
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Chancellor Kent says
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time of the end of busi-
the third day of grace
r the paper falls due)

ge v. *Sherborne*, 11 M.
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payable at a fixed day.
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y days after sight, are

of rare occurrence. But no reported case has been found in England or in this country where such an acceptance has been held to have included, by mere force of its words, *ex vi termini*, the days of grace.

Some cases may here be referred to which go to support the conclusion at which we have arrived. In *Griffin* v. *Goff*, 12 Johns. 423, in 1815, a promissory note dated August 12, was made payable on the 1st of December then next; and it was held that the indorser was discharged, because payment was demanded of the maker on the 1st of December and not on the 4th.

In *Kenner* v. *Creditors*, 7 Mart. N. S. 540, in 1829, a bill drawn at 60 days' sight was accepted by an acceptance which was dated September 12, and made payable on November 14, and was protested on the latter day. It was alleged that the holders had lost recourse on the drawers, (1) because the acceptance was made for payment on the 63d day after sight instead of the 60th; and (2) because it was protested on the day of payment instead of the last of the days of grace. But the court held that the 14th of November was the peremptory day of payment, and not the day from which the days of grace were to be reckoned, because it appeared from the face of the bill that the days of grace were included between the 12th of September and the 14th of November; that the acceptance was according to the tenor of the bill; and that the protest was timely. The view taken was, that a dated acceptance is not vitiated by the express designation of a day of payment, when that day is designated according to the tenor of the bill; and that when it appears, from a comparison of the tenor of the bill, the date of the acceptance and the day designated for payment, that the latter is the third after the expiration of the days after sight, the day thus designated is the peremptory day of payment, the acceptance is according to the tenor of the bill, and the protest on the day expressly designated is timely. In *Kenner* v. *Creditors*, 8 Mart. N. S. 36, another case, decided a week after the former one, the acceptances, which were of bills drawn at 60 days' sight, were not dated, but were made payable on a day named. Proof as to the day of acceptance was admitted, and, that being proved, it was held that the case fell under the rule in the case in 7 Martin, because it clearly appeared that both the days of sight and those of grace had been computed and included between the date of acceptance and that designated as the day of payment. These views were affirmed in another case, in 1830—*Kenner* v. *Creditors*, 1 La. 120. [382]

In *McDonald* v. *Lee's Administrator*, 12 La. 435, in 1838, a note dated May 5, 1835, payable on the 5th of November, 1837, "without defalcation," was held to be payable on the 8th of November, 1837, and not before.

In *Perkins* v. *Franklin Bank*, 21 Pick. 483, in 1839, a bank post-note, dated December 7, 1836, was made payable in seven months, with interest "until due and no interest after." On the margin were written these words: "Due July 7, 1837." It was held that the bank was entitled to grace on the note; and that the memorandum on the margin was not an express stipulation in the note that it should be payable without grace, within a statute allowing grace in the absence of such a stipulation. In deliv-

ering the opinion of the court, *Chief Justice* Shaw said: "Grace is an allowance of three days to the debtor, to make payment, beyond the time at which, by the terms of the note, it becomes due and payable." In regard to the memorandum, "Due July 7, 1837," he said: "It shows when the note is to become due, and in this respect corresponds with the stipulation in the body of the note. The time it becomes due being fixed, the statute gives three days from that time for payment, under the term 'grace,' unless the contrary be expressly stipulated." A like decision was made in *Mechanics Bank* v. *Merchants Bank*, 6 Met. 13, in 1843.

In *Bowen* v. *Newell*, 8 N. Y. 190, in 1853, it was held that a negotiable draft on the cashier of a bank, dated October 5, directing him to pay a specified sum on October 12, could not be presented for payment, so as to hold the drawer and indorser, until October 15.

In *Cook* v. *Renick*, 19 Ill. 598, 602, in 1858, it was said that by the common law as adopted by the Legislature of Illinois, "A bill of exchange payable on a given day does not mature till three days after the day appointed on its face for its payment."

[383]

In *Coffin* v. *Loring*, 5 Allen, 153, in 1862, it was held that the maker of a note which is payable by installments, at future times certain, with interest, is entitled to grace on both the principal and the interest; and that the condition of a mortgage given to secure the payment of the same sums and interest, at the same times, is not broken until the expiration of the grace which is allowed upon the note. On the same principle it was decided in *Oridge* v. *Sherborne*, *ubi supra*, that the maker of a promissory note, payable by installments on days named in the note, was entitled to days of grace on the falling due of each installment.

The case of *Ivory* v. *State Bank*, 36 Mo. 475, in 1865, was like that of *Bowen* v. *Newell*, *ubi supra*. A negotiable draft on a bank dated October 12, directing it to pay a specified sum on October 22, was held to be payable on October 25, and not before.

The principle deducible from all the authorities is, that, as to every bill not payable on demand, the day on which payment is to be made to prevent dishonor is to be determined by adding three days of grace, where the bill itself does not otherwise provide, to the time of payment as fixed by the bill. This principle is formulated into a statutory provision in England, in the Bills of Exchange Act, 1882, 45, 46 Vict. chap. 61, § 14.

In the present case, the time named in the acceptance after the word "due" can be regarded only as the time of payment fixed by the bill, to which days of grace are to be added, and not as a date which includes days of grace. This view goes to the foundation of the action, and makes it unnecessary to examine any other question, and leads to the conclusion *that the judgment must be reversed, and the case be remanded to the Circuit Court, with a direction to award a new trial; and it is so ordered.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

DANA SARGENT AND MARTI
VAN, EXR., AND EMILY S.
EXRX. of DANIEL F. SULLIVA
Assignee of DANA SARGENT,

v.

JOHN A. HELTON, Sheriff
County, Alabama, JAMES
Sheriff of Escambia County, A
cessor in Office of Said JOHN
YOUNG M. RABB and McDUFF
YOUNG M. RABB and McDUFF
the Style of RABB & MAN
MORNINGSTAR, AND JAMES

(See S. C., Reporter's ed., 34

Jurisdiction—bankruptcy—convey
signee—sale by state court—in

*Where a sale of the lands of a b
has been made and confirmed by orde
ruptcy court, and the lands have bee
the assignee, the Circuit Court of the
is without jurisdiction at the suit of
to enjoin a sale of the same lands abo
upon the order of a state court.

[No. 30.]

Argued Oct. 23, 1885. Decided 1

APPEAL from the Circuit C
United States for the Southe
Alabama.

Statement of the case by *Mr. Jus*

Dana Sargent, one of the appell
sole plaintiff at the commencemen
in the circuit court. His bill was
1879. It alleged in substance as f

The Pensacola Lumber Compan
tion of the State of New York,
ruary 27, 1875, adjudicated bank
District Court of the United St
Southern District of New York, an
day of May following, a deed of a
all the property of the bankrupt
to the assignee in bankruptcy. T
so conveyed consisted in part of a
land in Escambia County, in the
bama. Under a decree of the bank
made on December 22, 1875, thes
sold at public sale on January 5,
City of New York, and were p
Dana Sargent, one of the plaintif
was confirmed by the court on Janu
and, Sargent having complied with
sale, on the 25th of the same m
signee conveyed the land to him, a
took and still retained possession
few days before the Pensacola Lum
adjudicated bankrupt, to wit: on t
and 22d of February, 1875, all o
ants respectively, except the sheriff
County, commenced actions agains
ment in the Circuit Court of Escam
Alabama, and the writs of attac
levied on the lands above mentione
sacola Lumber Co. lying in the C
cambia. More than two years
to wit: at the fall term in the year
Circuit Court of Escambia Count

*Head note by *Mr. Justice* WOODS.

against the Pensacola
achment suits, and or-
o be sold to satisfy the
e fact that the attach-
l by the adjudication
akrupt. On June 24,
uit Court of Escambia
iff an order, directing
the lands attached, in
nts condemning them
was about to execute

said order of sale had
title of Sargent to the
their value; that the
ale would still further
the title, and further
e lands, impair plain-
and inflict an injury
tain no satisfaction,
of the defendants and
eriff's bond and estate;
ting of ninety odd sec-
s, would probably, if
y persons, and thus
ed in a multiplicity of
.

l that the defendants,
re general creditors of
to the bankrupt pro-
e lands were sold and
prayer of the bill was
ts and deputies might
the lands attached.

by consent of the par-
made to the bill, by
, who was represented
ana Sargent, the pur-
made a party plaintiff.
urred to the bill on
which were that the
and the court without
t Court made a decree
was sustained and the
t decree the plaintiffs

Mayer, *Richard L.*
aham, for appellants.
for appellees.

livered the opinion of

evised Statutes of the
"that the writ of in-
anted by any court of
y proceedings in any
n cases where such in-
ed by any law relating
ptcy."

e bill in this case was
of an order of the Cir-
of Escambia, a court
; and no relief which,
e bill, this court could
without the writ of
The Circuit Court of
herefore, deprived of
quoted, to protect the
less the writ of injunc-
e law relating to pro-
Haines v. *Carpenter*,
d. 345]; *Dial* v. *Rey-*

nolds, 96 U. S. 340 [Bk. 24, L. ed. 644]. In a timely suit brought by the assignee in bankruptcy, there is no doubt that, upon a proper showing, the circuit court might have enjoined proceedings in the attachment suits in the state court. This is the express ruling in *Chapman* v. *Brewer*, 114 U. S. 158 [Bk. 29, L. ed. 83]. [351] But the plaintiff in this case is not the assignee in bankruptcy. Sullivan, the transferee of Sargent, the vendee at the bankruptcy sale, was the real plaintiff and the only party who, at the final hearing, asked for the injunction. The question therefore is, Does any law relating to proceedings in bankruptcy authorize an injunction at the instance of a purchaser of property at a bankruptcy sale or his vendee, to stay proceedings in a state court?

There is no Act of Congress expressly authorizing a Circuit Court of the United States to restrain by injunction, even at the suit of an assignee in bankruptcy, proceedings in a state court. The case of *Chapman* v. *Brewer*, *ubi supra*, was a bill in equity filed by an assignee in bankruptcy to enjoin the defendant from selling the property of the bankrupt, upon execution issued out of the state court. The jurisdiction to issue the writ in that case was placed by the court upon section 5024 of the Revised Statutes, which authorized the District Court, sitting in bankruptcy, when a petition in involuntary bankruptcy had been filed, to restrain by injunction all persons from interfering with the debtor's property; and upon section 4979, which gives the Circuit Court concurrent jurisdiction with the District Courts, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest in any property transferable to or vested in him. The court, in the case cited, said: "It must be held that Congress, in authorizing a suit in equity in a case like the present, has, in order to make the other relief granted completely effective, authorized an injunction as necessarily incidental and consequent to prevent further proceedings under the levies already made and new levies under the judgment." The case makes it clear that the injunction to stay proceedings in a state court is only allowed by the statute for the purpose of aiding the assignee in bankruptcy to discharge his duty and of protecting the property of the bankrupt estate for the equitable distribution among the creditors. But there is no Act of Congress from which can be inferred authority to a court of the United States to issue an injunction to restrain proceedings of a state court at the instance of a purchaser at a bankruptcy sale, or of his vendee. [352]

The right of the assignee in bankruptcy, by section 5057 of the Revised Statutes, to maintain any suit touching any property or rights of property transferable to or vested in him against any person claiming an adverse interest, is cut off by section 5057 of the Revised Statutes, by the lapse of two years from the time the cause of action accrued.

But the contention of the plaintiff in this case is that the Bankruptcy Act, without limitation of time, allows a purchaser at a bankruptcy sale, or his vendee, to sue out a writ of injunction from a federal court to restrain proceedings in a state court, while it denies that right

to all other persons, except the assignee in bankruptcy, and allows it to him only for two years after his cause of action has accrued.

The argument against the jurisdiction in this case is clear. The suit was not brought until long after the lands in controversy had been sold and conveyed by the assignee, and the purchaser had been put in possession. Neither the assignee nor the creditors of the bankrupt estate had any further interest in or concern with them. They had been fully administered, the purchase money had been paid to the assignee, and the lands no longer formed any part of the assets of the bankrupt estate, and no proceedings in the bankruptcy court could have any reference to them. There is, therefore, no law relating to proceedings in bankruptcy which authorizes the injunction prayed for.

The case of *Dietzsch* v. *Huidekoper*, 103 U. S. 494 [Bk. 26, L. ed. 497], cited by counsel for plaintiff, merely decided that a court of the United States could enforce its own judgment in a replevin suit removed from a state court, by enjoining the defeated party from proceeding on the replevin bond in the court from which the cause had been removed, the condition of the bond having been satisfied by the judgment of the federal court in favor of the obligor. The court further held that the bill filed for the purpose of restraining the defendant was merely ancillary to the replevin suit, its object being to secure to the defendant therein the fruits of his judgment. The authority cited does not tend to sustain the jurisdiction of the court in this case.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[321] CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC R. R. CO., *Plff. in Errr.*,

v.

COMMONWEALTH OF KENTUCKY.

LOUISVILLE AND NASHVILLE R. R. CO., *Plff. in Errr.*,

v.

SAME.

CHESAPEAKE, OHIO AND SOUTHWESTERN R. R. CO., *Plff. in Errr.*,

v.

SAME.

(See S. C., Reporter's ed., "*Ky. R. R. Tax Cases*," 321-339.)

Constitutional law—14th Amendment—"due process of law"—"equal protection of the laws"—valuation and taxation of railroad property—Act of the Legislature of Kentucky of April 3, 1878—validity of—construction

1. "Due process of law," as applied to proceedings for the levy and collection of taxes, does not imply nor require the right to such notice and hearing as are considered essential to the validity of the proceedings and judgments of judicial tribunals.

2. The mode of valuing property for taxation under the Act of the Legislature of Ken
3, 1878, is due process of law.

3. Whenever, by the laws of a St
authority, a tax, assessment, servi
burden is imposed upon property for
and provision is made for confirming
the charge thus imposed in the ordi
justice, the judgment in such proce
deprive the owner of his property
process of law.

4. Under the Constitution of Kent
nothing to forbid the classification o
purposes of taxation, and the valuati
classes by different methods.

5. Railroad property, owing to it
ture, may form a separate class, for p
uation and taxation. If the mode o
due process of law, its difference i
from the mode of valuing other de
classes of property does not operate
the equal protection of the laws.

6. The Constitution and a statute u
construed together as one law.

[Nos. 497, 498, 499.]

Argued Oct. 16, 19, 1885. Decided

IN ERROR to the Court of Ap
Commonwealth of Kentucky.

Statement by *Mr. Justice* **Mat**

The Commonwealth of Kentuc
several actions against the Railro
above named as plaintiffs in error
to recover the amounts of certai
against each of them, under the
"An Act to prescribe the mode o
the value of the property of railro
for taxation, and for taxing the sa
April 3, 1878. (Bullitt & Feland
of Ky. 1881, p. 1019.)

As the validity of this statute
question in these actions, it is he
full, as follows:

"Sec. 1. *Be it enacted, by the*
sembly of the Commonwealth of K
the president or chief officer of
company, or other corporation o
road lying in this State, shall, in
July in each year, return to th
Public Accounts of the State, u
total length of such railroad,
length thereof beyond the limits
and designating its length with
and in each county, city and inc
therein, together with the avera
mile thereof, for the purpose of b
as a carrier of freight and passeng
engines and cars and a list of the
and improvements and other
the said company, and the valu
the respective counties, cities
rated towns in which the same
That if any of said railroad co
or operates a railroad or railroa
State, but in connection with its
State, the president or chief of
company shall only be required
proportion of the entire value of
stock as the number of miles of
this State bears to the whole nu
operated by said company in a
State.

"Sec. 2. That should any railr
a line of railroad, in this State, b
or under the control of a receive
son, by order or decree of any c
any other State, it shall be the du
ceiver or other person to make, u

required by the first
ould such president
ad company, or such
l returns and valua-
t day of August in
aid auditor shall pro-
and values required
and in such manner
may deem best, and
failing to make the

or of the State, on or
gust, 1878, shall ap-
eeholders, citizens of
stitute a Board of
eet annually at the
Frankfort, on the
each year, a ma-
a quorum for the
nd at the said meet-
before them the re-
r this Act, and any
s he may have made
reof; and should the
, in the judgment of
igh or too low, they
he same by a proper
f. Said board shall
eedings, to be signed
at any meeting; and
uthorized to examine
f any railroad com-
of its property, or to
ny suitable disinter-
ed by them for that
aid board shall hold
four years, and shall
ten dollars per day
r necessary expenses
Provided, That said
onger period of time
ne year; and before
ir appointment, they
the governor of the
ully and impartially
mbers of said Board
e case of the death,
llure to act, the gov-
by another appoint-

of taxation for state
e in any year levied
his Commonwealth
ied upon the value
rd, of the railroad,
e of each company;
on for the purposes
r precinct, in which
d is located, which
evied on other real
od is hereby, levied
ate of said company
of miles of such road
value of the average
h railroad with its
l as aforesaid And
oard shall have com-
ear, the Auditor of
fy the clerk of each
t so assessed for tax-
h railroad company
sment for taxation

for state purposes and for the purposes of such county, city, town or precinct. And all existing laws in this State, authorizing the assessment and taxation of the property of railroad companies by counties, cities or incorporated towns, are hereby repealed; and no county, city or incorporated town in this State shall hereafter assess, levy or collect any taxes on the property of railroad companies of this State, except as provided by this Act.

"Sec. 5. All taxes levied under the provisions of this Act shall be paid on or before the 10th day of October in each year; and for a failure to pay the same, the officers of the said companies shall be subject to the same penalties to which they are now subject for a failure to pay the taxes now levied by law. And the taxes in behalf of the Commonwealth may be recovered by action in the Franklin Circuit Court, and those in behalf of the counties by actions [325]
in the courts of civil common-law jurisdiction in such counties, respectively.

"Sec. 6. That all laws in conflict with this Act are repealed.

"Sec. 7. This Act shall take effect from its passage."

The powers and duties conferred by this Act upon the Board of Equalization were, by a subsequent Act approved April 19, 1882, devolved upon the Board of Railroad Comissioners, appointed under an Act approved April 6, 1882.

These actions were brought in the Franklin Circuit Court in pursuance of the 5th section of the Act.

The cause of action against the Cincinnati, New Orleans and Texas Pacific Railroad Company was set out in the petition, according to the practice in Kentucky, as follows:

"The plaintiff states that the defendant is a railroad company and corporation, and is, and was during the year 1882, the owner of, by lease, and operating, a line of railway lying in the State of Kentucky known as the Cincinnati Southern Railway, and the same constructed under, and chartered and incorporated by, an Act of the General Assembly of the Commonwealth of Kentucky, entitled 'An Act to authorize the trustees of the Cincinnati Southern Railway to acquire the right of way and to extend a line of railway through certain counties in this Commonwealth,' approved February 18, 1872.

"Plaintiff states that the defendant, for the purpose of assessment and taxation for the year 1882, as required by law, reported to the Auditor of Public Accounts of the State of Kentucky the total length of said road owned and operated by it as aforesaid and the value thereof per mile, and also reported its engines, cars, depot grounds, improvements and other real estate, and the value thereof. The total valuation of said roads, including sidings and other taxable property, as reported, was —— dollars.

"Plaintiff states that after said report and valuation was made to the Auditor of Public Accounts by the defendant, the Board of Railroad Commissioners, who by law constitute a Board of Equalization to value and assess the railroad property of the State, after being sworn, as required by law, met on the first day of September, 1882, at the office of the auditor, [326]
in Frankfort, and with a majority of said board

present, constituting a quorum, the auditor placed before them the valuations, returns and report made to him by defendant.

"Plaintiff states that said Board of Equalization continued its sittings from day to day, as provided by law, of which the defendant had due notice; and plaintiff avers that defendant did appear before said board by its officers, agents, and attorneys, and presented such facts, figures and information and argument in relation to the valuation and assessment for taxation of its said property as it saw proper to.

"Plaintiff states that said board, after a full hearing of defendant, by her officers, agents, and attorneys, and a full consideration of said returns, reports, information, and arguments before them, valued and assessed for taxation for the year 1882 the defendant's line of railroad lying in this State, the same reported by defendant to the auditor, together with the rolling stock, engines, cars, depot grounds, improvements, and other real estate, at the sum of $6,027,942, and on the ——— day of September, 1882, returned and filed with the Auditor of Public Accounts the record of said assessment and valuation, signed and attested, as provided by law, a certified copy of which, marked 'A,' is filed herewith as a part hereof.

"Plaintiff states that the Auditor of Public Accounts, before the 10th day of March, 1882, duly notified defendant of the amount of its assessment for taxation, and, as required by law, opened an account with defendant, charging it with the sum of $28,632.42, the amount of tax due the State of Kentucky upon said assessment and valuation of the defendant's property for the year 1882 at 47½ cents on the one hundred dollars, which is the rate of taxation prescribed by law on such property, and all other real estate of the Commonwealth. A certified copy of said account is filed herewith as a part hereof, marked 'B.'

"Plaintiff states that the defendant is indebted to him in the sum of $28,632.42, taxes due as aforesaid for the year 1882, no part of which has been paid.

"Wherefore plaintiff prays judgment against
[327] the defendant for said debt, and interest from October 10, 1882, and for her costs and all proper relief."

In the case against the Louisville and Nashville Railroad Company, the petition is substantially the same, except the averment of the valuation of its lines of railroad, which, it is alleged, were valued and assessed at the sum of $15,521,406, on which the amount of tax, at 47½ cents to the one hundred dollars, is $72,726.69, on which there is admitted a credit of $25,000, paid January 22, 1883.

The taxable property of the other plaintiff in error, the Chesapeake, Ohio and Southwestern Railroad Company, it is averred in the petition, otherwise substantially the same as in the other cases, was valued and assessed at $2,791,994, on which the tax levied was $13,261.98, which is credited with $6,798.82, paid January 5, 1883.

An answer was filed in each case, but, so far as they raised an issue of fact, they were withdrawn, and the causes were heard on demurrers, the questions of law being such as arose upon the face of the petitions.

Judgments were rendered in favor of the

Commonwealth in all the case
firmed by the court of appeals;
the present writs of error we
have been prosecuted.

Messrs. **C. B. Simrall, Wm
Holmes Cummins,** for plain
State taxation is embrace
Amendment. *San Mateo Tax*
Eng. R. R.Cas. 11; *Poinderter*
U. S. 270, 297, 335, 336 (*ante*, 18
Corporations and corporat
within the 14th Amendment.
vate Corp. § 457, and authori
shall v. *B. & O. R. R. Co.* 16 H
bk. 14, L. ed. 959); *Sinking F*
S. 718 (Bk. 25, L. ed. 501);
Cases, 16 Wall. 36 (83 U. S. bk
Butchers Union Co. v. *Crescent*
S. 746 (Bk. 28, L. ed. 585); *L*
monwealth, 1 Duvall, 295; *L.*
Commonwealth, 1 Bush, 253.
The taxpayer is entitled, as a
to notice of any proposed char
tion of his property for taxa
Palmer, 74 N. Y. 183; *Patten*
325; *State Railroad Tax Cas*
(Bk. 23, L. ed. 663); *K. P. R.*
8 Kan. 558; *Cooper* v. *Board*
Eng. Com. Law, 180; Cooley,
As to what is constitutional
Quillan's Case, 9 Dana, 513;
8 Bush, 498; *Exchange Bank*
St. 15; *Cummings* v. *National*
158 (Bk. 25, L. ed. 905).
As to classification of railro
Applegate v. *Ernst*, 3 Bush,
R. Co. v. *Elizabethtown*, 12 Bu
& T. P. R. R. Co. v. *Commo*
492.

Messrs. **P. W. Hardin,** *At*
tucky, and **Alvin Duvall,** f
error:
The terms "due process of
the Federal Constitution, and
land" as used in the State Co
never been construed to invest
the right of hearing, notice,
plied to the taxing powe of th
Murray v. *Hoboken Land I*
276 (59 U. S. bk. 15, L. ed. 37
Anderson, 95 U. S. 37 (Bk.
Davidson v. *New Orleans*, 96 U
L. ed. 618); *High* v. *Shoemak*
Weimar v. *Bunbury*, 30 Mich.
Dogan, 48 Miss. 17; *Doe* v. *De*
Cooley, Tax. 39.
The power of the State in the
of regulating and apportionin
uniformly been held unlimited
Maryland, 4 Wheat. 428 (17 U.
606); *Providence Bank* v. *Bill*
(29 U. S. bk. 7, L. ed. 956); *St.*
Co. 11 Wall. 429 (78 U. S. bk.
State Tax on Foreign-Held Bon
(82 U. S. bk. 21, L. ed. 186); *K*
kiss, 100 U. S. 491 (Bk. 25, L.
blood v. *Sexton*, 32 Mich. 415.

Mr. Justice **Matthews** deli
ion of the court:
Two federal questions arise
in these cases, contained in the
ositions affirmed by the plainti

April 3, 1878, and the
ice of it, if enforced,
se judgments, in ef-
he defendants below
; and,
itute a denial of the
ws; in both partic-
enth Amendment to
ited States.
f these propositions,
of the plaintiffs in
ment of these judg-
ed of their property
, because the valua-
r the Act is made by
amissioners without
otice of the proceed-
l in opposition to any
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peatedly decided by
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collecting taxes are
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subject, does not im-
uch notice and hear-
essential to the va-
and judgments of
by statute is gener-
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tice Bradley, in *Da-*
J. S. 97, 107 [Bk. 24,
st be had to the cause
whether under the
of eminent domain
nt for local improve-
and if found to be
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pressive and unjust,
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ceedings for the levy
was said in *McMillen*
42 [Bk. 24, L. ed.
and never has been,
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ty to be present, in
was assessed." This
sed in the decision of
nse tax where all the
ment were declared
was intrusted to the
rs; but, in the *State*
S. 575, 610 [Bk. 23,
ascertainment of the
was the duty of a
cases, whose assess-
the reason that the
process of law," for
ring, it was said by
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time of sitting fixed
not secret. No ob-
arance of anyone be-
redress a wrong; and
taxes, this is all that

tioned in these cases,
w, notice and a hear-
ny, by its president or
law, at a specified

time, to return to the Auditor of Public Accounts, under oath, a statement showing "the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city and incorporate town therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars and a list of the depot grounds and improvements and other real estate of the said company, and the value thereof, and the respective counties, cities and incorporated towns, in which the same are located. That, if any of said railroad companies owns or operates a railroad or railroads out of this State, but in connection with its road in this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling stock as the number of miles of its railroad in this State bears to the whole number of miles [333] operated by said company in and out of this State."

This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may seem fit to insert. It is laid by the Auditor of Public Accounts before the Board of Railroad Commissioners, and constitutes the matter on which they are to act. They are required to meet for that purpose on the first day of September in each year, at the office of the auditor, at the seat of government, when these returns are to be submitted to them. The statute declares that, "should the valuation be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said board shall keep a record of their proceedings, to be signed by each member present at any meeting; and the said board is hereby authorized to examine the books and property of any railroad company, to ascertain the value of its property, or to have them examined by any suitable disinterested person, to be appointed by them for that purpose." And in the performance of these duties, their sessions are limited to a period of not longer than twenty days in any one year.

These meetings are public, and not secret. The time and place for holding them are fixed by law. The proceedings of the board are required to be made matter of record, and authenticated by the signature of the quorum present. Anyone interested has the right to be present. In reference to this point, the Court of Appeals of Kentucky, in its decision in these cases, says (81 Ky. 492, 512): "As we construe this Act, although in the nature of an original assessment, the parties had the right to be heard, and were in fact heard before the board passing on the question of valuation." It is averred, in the petitions filed in these actions, that "defendant did appear before said board by its officers, agents and attorneys, and presented such facts, figures and information, and argument in relation to the valuation and assessment for taxation of its said property, as it saw proper to"; and "that said board, after a full [334] hearing of defendant by her officers, age 1 and attorney, and a full consideration of sa

returns, reports, information and arguments before them, valued and assessed for taxation" the defendant's line of railroad, etc. These averments are not denied, but stand confessed in the record of each case.

It is said, however, in answer to this, by counsel for plaintiffs in error, in argument, that whatever was in fact this alleged hearing, it could only have beeen accorded as a matter of grace and favor, because it was not demandable, as of right, under the law; and consequently has no such legal value as attaches to a hearing to which the law gives a right, and to which it compels the attention of the officer, under an imperative obligation, with the sense of official responsibility for impartial and right decision which is imputed to the discharge of official duty.

But such is not the construction put upon the statute, as we have seen, by the Court of Appeals of the State, nor the practical construction, as we infer from the averments of the pleadings, put upon it by the officers called to act under it. And if the plaintiffs in error have the constitutional right to such hearing, for which they contend, the statute is properly to be construed so as to recognize and respect it, and not to deny it. The Constitution and the statute will be construed together as one law. This was the principle of construction applied by this court, following the decisions of the state court, in *Neal* v. *Delaware*, 103 U. S. 370 [Bk. 26, L. ed. 567], where words, denying the right, were regarded as stricken out of the State Constitution and statutes, by the controlling language of the Constitution of the United states; and in the case of *Cooper* v. *The Wandsworth Board of Works*, 14 C. B. N. S. 180, 194, in a case where a hearing was deemed essential, it was said by Willes, *J.*, "that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature."

It is still urged, however, that there is, notwithstanding what has been said, no security that the final action of the Board of Railroad Commissioners, in valuing and assessing railroad property under this statute, may not be unequal, unjust and oppressive; and that either [335] by error of judgment, through caprice, prejudice, or even from an intention to oppress, valuations may be made which are excessive, bearing no reasonable relation to what is fair and just, and fixed arbitrarily, based neither upon actual evidence nor an honest estimate. But the same suppositions may be indulged in, in opposition to all contrary presumptions, with reference to the final action of any tribunal appointed to determine the matter, however carefully constituted, and however carefully guarded in its procedure, and whether judicial or administrative. Such possibilities are but the necessary imperfections of all human institutions, and do not admit of remedy; at least no revisory power to prevent or redress them enters into the judicial system, for, by the supposition, its administration is itself subject to the same imperfections.

But whatever relief courts of justice may afford against the injuries apprehended, when, in fact, they have resulted, is secured to the plaintiffs in error by the very statute of which they complain. For the valuatio[illegible] property, under that Act, and the[illegible] the taxes thereon, are not final, in [illegible] they constitute a charge upon the [illegible] ject to the tax, or a liability fixed [illegible] poration owning it. That resul[illegible] tained, and the tax actually colle[illegible] suit, as provided in the fifth sectio[illegible] ute, either against the officers of t[illegible] for penalties incurred by a failur[illegible] taxes levied, or for the recovery [illegible] themselves, by action in the Fra[illegible] Court, or in the courts having ju[illegible] the counties, for the taxes payabl[illegible] spectively. The case is thus bro[illegible] and distinctly within the decision [illegible] v. *New Orleans*, 96 U. S. 97, 104 [illegible] ed. 616, 619], where it was held [illegible] ever by the laws of a State, or by [illegible] ity, a tax, assessment, servitude [illegible] den is imposed upon property fo[illegible] use, whether it be of the whole [illegible] some more limited portion of the [illegible] and those laws provide for a mod[illegible] ing or contesting the charge thus [illegible] the ordinary courts of justice, wit[illegible] to the person, or such proceeding[illegible] the property as is appropriate to t[illegible] the case, the judgment in such [illegible] cannot be said to deprive the owne[illegible] erty without due process of l[illegible] obnoxious it may be to other obje[illegible] this is the principle that was fol[illegible] subsequent case of *Hagar* v. *Recl[illegible]trict*, 111 U. S. 701 [Bk. 28, L. [illegible] that case, the statute of Californi[illegible] ferred the jurisdiction, authorized [illegible] going either to the validity or to t[illegible] the tax assessed, to be pleaded. [illegible] ies may be permitted in such case[illegible] is a matter that depends upon t[illegible] provisions of the law of the juri[illegible] the absence of such provisions, an[illegible] ple of general jurisprudence, it i[illegible] that any defense is admissible whi[illegible] the illegality of the proceeding, re[illegible] alleged assessment, whether be[illegible] violation of the local law which i[illegible] conferring the authority upon whi[illegible] or because it constitutes a denial [illegible] cured to the party complaining, b[illegible] tution of the United States. Th[illegible] now under review were rendered [illegible] actions, so that we cannot escape[illegible] sion that there is no ground for th[illegible] error to contend that they have b[illegible] without due process of law.

The plaintiffs in error, howev[illegible] pose a defense below, legitimate [illegible] arising under the Constitution o[illegible] States, namely: that in the proce[illegible] Board of Railroad Commissioner[illegible] the valuation and assessment, un[illegible] April 3, 1878, they were several[illegible] equal protection of the laws, co[illegible] Fourteenth Amendment to the [illegible] As this defense was overruled by [illegible] Appeals of Kentucky, another [illegible] tion is presented which we are b[illegible] examine and decide.

The discrimination against ra[illegible] nies and their property, which is [illegible] complaint as being unjust and u[illegible]

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rather than real. An examination of the statutes shows that the original valuation of the assessor, in case of ordinary real estate, is conclusive upon the taxpayer, no matter how unsatisfactory; and the appeal allowed is only from the action of the board of supervisors, in case they undertake to increase the valuation made by the assessor. But in the case of railroad property, no board has authority to increase the original assessment made by the Railroad Commissioners, and there is, therefore, no case for an appeal similar to that of the owner of ordinary real estate.

But were it otherwise, the objection would not be tenable. We have already decided that the mode of valuing railroad property for taxation under this statute is due process of law. That being so, the provision securing the equal protection of the laws does not require, in any case, an appeal, although it may be allowed in respect to other persons differently situated. This was expressly decided by this court in the case of *Missouri* v. *Lewis*, 101 U. S. 22, 30 [Bk. 25, L. ed. 989, 992]. It was there said by *Mr. Justice* Bradley, delivering the opinion of the court and speaking to this point, that "the last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts, as to subject matter, amount or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to re- [339]
sort to them for redress." The right to classify railroad property as a separate class for purposes of taxation grows out of the inherent nature of the property and the discretion vested by the Constitution of the State in its Legislature, and necessarily involves the right, on its part, to devise and carry into effect a distinct scheme, with different tribunals, in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property cannot be considered as a denial of the equal protection of the laws.

We see no error in the several judgments of the Court of Appeals of Kentucky in these cases, *and they are accordingly affirmed.*

Mr. Justice **Blatchford** did not sit in these cases, nor take any part in their decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U.S.

JAMES EACHUS, *Appt.*, [429]

v.

JOSHUA B. BROOMALL.

(See S. C., Reporter's ed., 429-439.)

Patent law—letters patent No. 142,154—reissue No. 6,315—validity of.

1. In view of the state of the art, the only invention covered by letters patent No. 142,154 consisted in the particular organization of the machine described. It could not be construed to include a process.

2. In the absence of a defective or insufficient specification, or a claim embracing too much, the error having arisen from inadvertence, accident or

mistake, a patent for a machine will not sustain a reissue for a process.

[No. 19.]

Argued October 27, 1885. Decided Nov. 16, 1885.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The history and facts of the case appear in the opinion of the court.

Messrs. **Wayne MacVeagh, Joseph C. Farley** and **George Tucker Bispham,** for appellant:

If a process is properly patentable, there is no rule of law which prohibits its claim by reissue, where the original patent had mistakenly claimed a mechanism.

Powder Co. v. *Powder Works*, 98 U. S. 126 (Bk. 25, L. ed. 77); *James* v. *Campbell*, 104 U. S. 356 (Bk. 26, L. ed. 786); *Heald* v. *Rice*, 104 U. S. 737 (Bk. 26, L. ed. 910); *Wing* v. *Anthony*, 106 U. S. 142 (Bk. 27, L. ed. 110); *Tilghman* v. *Proctor*, 102 U. S. 708 (Bk. 26, L. ed. 279).

An analysis of these decisions which, on a superficial examination, would seem to conflict with appellant's position, will show that they condemn the claiming of "processes" by reissue in only two classes of cases:

a. Where the process of the reissue is different from that of the original.

b. Where the word "process" in the reissue is only a cover for claiming a principle or abstract idea.

In the case at bar neither of these objections exists.

Mr. **Charles H. Pennypacker,** for appellee:

The original patent is for a "machine." The reissue is for a "process."

See *Heald* v. *Rice*, 104 U. S. 753 (Bk. 26, L. ed. 9;) *Mfg. Co.* v. *Corbin*, 103 U. S. 786 (Bk. 26, L. ed. 610); *Moffitt* v. *Rogers*, 106 U. S. 423 (Bk. 27, L. ed. 76); *Powder Co.* v. *Powder Works*, 98 U. S. 126 (Bk. 25, L. ed. 77); *James* v. *Campbell*, 104 U. S. 377 (Bk. 26, L. ed. 794); *Wing* v. *Anthony*, 106 U. S. 142 (Bk. 27, L. ed. 110).

Mr. Justice **Matthews** delivered the opinion of the court:

[429] The bill in equity, which was dismissed on the merits by the decree appealed from, was filed by the appellant to restrain the alleged infringement of reissued letters patent No. 6,315, dated March 2, 1875, based on the original patent, No. 142,154, dated August 26, 1873, issued to James Eachus, the complainant.

The specification forming part of the original patent, as set out in the record, is as follows;

"Be it known that I, James Eachus, of Coatesville, in the County of Chester, State of Pennsylvania, have invented a new and useful Ma-
[430] chine for Cutting Paper Boards, of which the following is a specification:

"The nature of my invention consists in combining six adjustable circular saws upon two shafts, set at any angle to each other, and a two-way carriage supported by a frame, and provided with guides so as to work easily and carry the material to be cut. The object of the invention is to trim and cut heavy paper used in the manufacture of books and boxes.

"Figure 1 is a front view of my invention. Fig. 2 a side elevation, and Fig
plan.

"In Fig. 3, E is the frame, wh
strongly constructed, and in the
B B and T T are guides on fra
two-way carriage, constructed in
as to play freely upon guides B B
and F are saw-shafts mounted up
bearings bolted to frame E. C
are circular saws, secured upon s
by adjustable collars.

"For the purpose of operating
shafts D and F are provided wit
Rotation is communicated by be
2, from a shaft G, on which are

"Upon carriage A, Fig. 3, is p
paper to be cut. The pile is c
number of large sheets, as they a
the paper-machine. The carriage
upon the guides B B, saws S
through the paper; thence at righ
first direction upon guides T T
cutting through the pile in the
the result of the operation bein
edges and cut each sheet in four

"The saws can be adjusted
and F, so as to trim and cut the
desired size.

"I make no claim to the arran
cular saws and carriages workin
for the purpose of cutting logs, b
wood of any kind, or any other m
paper; but

"I claim—

"The combination of shaft D,
S S S and C C C, carriage A, an
the purpose of cutting binders' a
paper, substantially as shown a

The drawings referred to are a
(See next page.)

The drawings accompanying
tion, which form part of the reissu
the same as the original, except
as Figure 4, which was added,
portant. The specification of th
ent is as follows:

"Be it known that I, Jam
Coatesville, in the County of
State of Pennsylvania, have in
and improved Process of Cutting
of which the following is a descri
being had to the accompanying
which—

"Fig. 1 is a front view of my
conducting my process. Fig. 2
tion of such machine. Fig. 3
and Fig. 4 is a detail of a saw in
ting.

"Similar letters of reference
sponding parts in the several fig

"The object of this invention
cut heavy paper used in the m
boxes and books; and it consists
the paper while in a wet state, as it
the paper-making machine, to th
cular cutters having serrated e
the sheets are cut evenly and eco
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"In the annexed drawings
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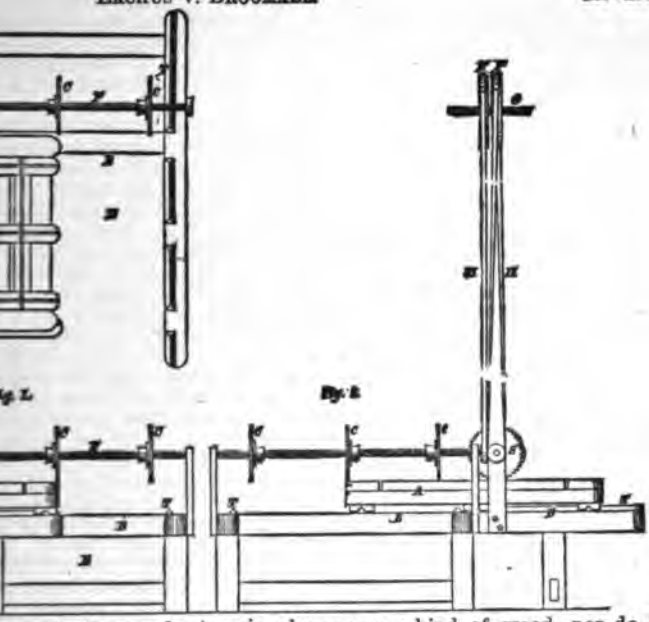

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by belts H H, Fig. 2,
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f the sheets unless the
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s for the purpose of

sawing logs or any kind of wood; nor do I broadly claim the machine herein described for sawing wood.

"I am aware that paper board has heretofore been sawed when in a dry state, and I therefore lay no claim to such invention, which leaves the edges of the paper thus sawed in a jagged condition, the action of the saw-teeth tending to separate the fibers of the paper board in the line of the kerf; whereas, when the paper board is sawed in a wet state, directly after leaving the paper machine, the edges are left smooth, the saws causing an interlocking of the fibers in its path through the paper, and the trimmings of the paper being in a condition to be returned to the vat without regrinding, which would not be the case with trimmings of paper board sawed in a dry state.

"What I claim as new, and desire to secure by letters patent, is,

"The process of sawing paper board as herein described, consisting in sawing the paper board while it is in the wet state in which it is taken from the paper-making machine, substantially as described, and for the purpose set forth."

The only defenses set up in the answer are a denial of the validity of the reissued patent and a denial of the alleged infringement. [434]

A comparison of the two patents, for the purpose of determining the question raised as to the identity of the inventions described in them, requires an interpretation of the original patent in the light of the state of the art at the date when the application for it was filed. And we have the material for ascertaining its meaning, in that view, by means of the evidence on that point contained in the record, which, although objected to on the ground that no prior use or knowledge of the invention claimed had been specifically set up in the answer as a defense, was nevertheless admissible for the purpose of defining the limits of the grant in the original patent and the scope of the invention described

in its specification. *Vance* v. *Campbell*, 1 Black, 427 [66 U. S. bk.17, L. ed. 168]; *Brown* v. *Piper*, 91 U. S. 37 [Bk. 23, L. ed. 200].

From that evidence, it appears that, at the time of the alleged invention of the appellant, and for many years prior thereto, paper boards for bookbinding or for making boxes were cut, trimmed or separated, while in a wet or moist state, as the paper in sheets came from the mill, by means of a hand saw, sometimes with teeth, and sometimes ground with a curved line to a sharp edge. This was the mode or process in universal use. Heavy paper com-
[435] ing from the machine in a dry condition was cut, for similar purposes, in one direction by means of rolling shears; that is, revolving circular discs, operated on a shaft, their edges ground to an angle of about sixty degrees, the same as a pair of scissors; and in the other direction by straight shears, acting like ordinary scissors.

It is manifest, from this state of the art, that it was not open to the appellant, at the time he applied for his patent, to claim as his invention the discovery that heavy paper intended for the use of bookbinders and boxmakers, could best be cut into proper shapes and sizes, while in wet sheets, as they came from the machine; nor that the cutting could best be performed by cutters with serrated edges; for this was matter of general knowledge and common practice.

Accordingly, in the specification to his original patent, he declared the nature of his invention to consist "in combining six adjustable circular saws upon two shafts, set at any angle to each other, and a two-way carriage supported by a frame, and provided with guides so as to work easily and carry the material to be cut." Then follows a description of the machine which contains this combination, and of the mode of operating it, so as to effect the result of cutting the large wet sheets of heavy paper, placed on the frames for that purpose, in both directions, into smaller sheets of any desired sizes. This description refers to the drawings, which show the machine with all its parts, and their relations to each other, in their combination.

But none of these parts, either in their construction or mode of operation, or general function, are novel; for saws and shafts, and frames for carrying material to be cut, had been in common use for cutting other material, and were well known. Accordingly, the appellant, in his specification, enters an express disclaimer as to all such uses, and the combinations and arrangements of well known machinery by which they had been effected. He says: "I make no claim to the arrangement of circular saws and carriages, working upon guides for the purpose of cutting logs, blocks of wood, wood of any kind, or any other material except paper." And thereupon states his claim, pre-
[436] cisely, as follows: "The combination of shaft D, shaft F, saws S S S and C C C, carriage A, and frame E, for the purpose of cutting binders' and boxmakers' paper, substantially as shown and described."

It is plain, then, that the only invention exhibited in the drawings, or described in the specifications of the original patent, consists in the particular organization of the machine described, whereby the various parts ar and adjusted, so as to fit it to acco specific result of cutting heavy pap large sheets and in a wet condition, from the paper-making machine, in sizes and other shapes, for use as boa binding and box making.

Whether the particular constructi rangement of the parts forming the c and adjustment described was, of it thing novel, requiring invention, the adaptation and application of su bination to the particular use decla invention by reason of the novelty and the new result obtained, within ple of the cases of *Stimpson* v. *Woodm* 117 [77 U. S. bk. 19, L. ed. 866]; *Spalding*, 13 Wall. 453 [80 U. S. bk. 515]; *Brown* v. *Piper*, 91 U S. 37 [ed. 200]; *Roberts* v. *Ryer*, 91 U. S. 1 L. ed. 270]; *Heald* v. *Rice*, 104 U S 26, L. ed. 916]; *Hall* v. *MacNeale*, 1 [Bk. 27, L. ed. 367]; *Atlantic Work* 107 U S. 192 [Bk. 27, L. ed. 438], *sylvania Railroad* v. *Locomotive Tru* U S. 490 [Bk. 28, L. ed. 222], are not before us. It is sufficient to say th for such an alleged invention the orig could or could not be upheld, it can strued as good for anything mor than that.

We turn now, for the purpose of c to the reissued patent. In the s thereto the patentee declares that vented, not a machine, but "a ne proved process of cutting paper b which a description follows; that th referred to are views of "my machi ducting my process;" that the inve sists "in subjecting paper, while in as it is taken from the paper-making to the action of circular cutters havi edges, whereby the sheets are cut economically, and the trimmings turned to the paper machine witho ing or other treatment;" that, in th drawings "I have represented on form of a machine for conducting but I desire to be understood as no myself to the precise construction o chine, nor to the number of serra shown." After describing the const operation of the machine, by refer drawings, the specification proceed be seen from the above description sheets of paper, while they are in a tion, directly from the paper-makin and pass the saws over them, thereb their edges and leaving them of an ness throughout and dividing them i sheets. This process of sawing ca formed successfully and without surface of the sheets, unless the sh and in the condition in which th paper-making machine."

Then follow these disclaimers:

"I make no claim to the arrange cular saws and carriages for the sawing logs or any kind of woo broadly claim the machine herein d sawing wood. I am aware that has heretofore been sawed when in and I therefore lay no claim to such

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tion intended to be claimed. The patent is plainly limited by its language to the combination, arrangement and adjustment of the particular parts of the very machine described, for the uses to which it is declared to be applicable. On the other hand, the claim of the reissued patent is broad enough to cover the process of sawing paper boards in a wet state by means of a hand saw; and if, for the purpose of saving it from the necessary consequences of such a claim, it is restrained by construction so as to include only the process described when performed by means of circular cutters having serrated edges—terms of limitation to be found in the specification—it is still broad enough to cover every arrangement, combination and adjustment in which these elements may be found; and this surely is not the same invention as that described in the original patent. [439]

The decree of the Circuit Court dismissing the bill is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EDWARD DEFFEBACK, *Appt.*, [392]

v.

ROBERT HAWKE.

(See S. C., Reporter's ed., 392-407.)

Public lands—homestead and town-site laws—mineral lands, not within—certificate of purchase of mineral land—effect of—patent of placer mining claim—color of title—improvements—authority of officers of land department.

*1. No title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the preemption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas.

2. A certificate of purchase of mineral land upon an entry of the same by a claimant at the local land office, if no adverse claim is filed with the register and receiver, and the entry is not canceled or disaffirmed by the officers of the Land Department at Washington, passes the right of the government to him; and, as against the acquisition of title by any other party, is equivalent to a patent. The land thereby ceases to be the subject of sale by the government, which thereafter holds the legal title in trust for the holder of the certificate.

3. The officers of the Land Department have no authority to insert in a patent any other terms than those of conveyance, with recitals showing a compliance with the law, and the conditions which it prescribed. The patent of a placer mining claim carries with it the title of the surface included within the lines of the mining location, as well as to the land beneath the surface.

4. There can be no color of title in an occupant of land, who does not hold under an instrument or proceeding, or law purporting to transfer the title or to give the right of possession. Nor can good faith be affirmed of a party in holding adversely, where he knows that he has no title, and that under the law, which he is presumed to know, he can acquire none. So held where, in an action of ejectment for known mineral land by the holder of a patent of the United States, the occupant set up a claim to improvements made thereon under a statute of Dakota, which provides that "in an action for the recovery of real property, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title, adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a counterclaim by such

*Head notes by *Mr. Justice* FIELD.

defendant," he not having taken any proceedings to acquire the title under the laws of Congress authorizing the sale of such lands, or to acquire the right of possession under the local customs or rules of miners of the district.

5. It would seem that there may be an entry of a town site, even though within its limits mineral lands are found, the entry and the patent being inoperative as to all lands known at the time to be valuable for its minerals, or discovered to be such before their occupation and improvement for residences or business under the town-site title.

[No. 564.]

Submitted Oct. 14, 1885. Decided Nov. 16, 1885.

APPEAL from the Supreme Court of the Territory of Dakota.

[393] Statement of the case by *Mr. Justice* **Field:**

This is an action to recover a parcel of mineral land, situated in the county of Lawrence, in the Territory of Dakota, claimed by the plaintiff under a patent of the United States bearing date on the 31st of January, 1882. The complaint alleges that on the 20th of November, 1877, the plaintiff, being in the actual, peaceable and exclusive possession of the premises, filed his application in the United States Land Office at Deadwood, in that county and Territory, to enter the land as a placer mining claim; that on the 31st of January, 1878, he entered the same aud paid the government price therefor, and that on the 31st of January, 1882, a patent of the United States, conveying a fee-simple title to the land, was executed and delivered to him, the land being described as mineral entry No. 8, and mineral lot No. 53; that while thus the owner and in possession of the premises the defendant, on or about the 1st of July, 1878, with full notice of the plaintiff's title, unlawfully and wrongfully entered upon a portion of the premises, which is particularly described, and ousted the plaintiff therefrom, and has ever since withheld the possession thereof, to his damage of five hundred dollars.

The complaint also alleges that the value of the rents and profits of the premises from the entry of the defendant has been $800; and it prays judgment for the possession of the premises, for the damages sustained, and for the rents and profits lost.

[394] To the complaint the defendant put in an answer, admitting that on the 20th of November, 1877, the plaintiff filed in the United States Land Office his application for a patent of the placer mining claim, described as mineral lot No. 53; that it includes the premises in controversy; and that, on the 31st of January, 1878, the plaintiff paid to the receiver of the Land Office the price of the land per acre, and received from the register and the receiver a certificate or receipt therefor, which payment and receipt are commonly called an entry.

The answer also contains two special pleas, by way of counterclaim, upon which affirmative relief is asked; namely, that the plaintiff be decreed to be a trustee of the premises for the defendant, and be directed to convey them, or an interest in them, to him, or to allow to him compensation for improvements thereon. In the first of these, it sets up various matters as grounds to charge the plaintiff, as trustee of the premises, for the defendant. In the second special plea, it alleges improvements made upon the premises, either by the defendant or his grantor, as a ground for con
der the statute of the Territory.

In the first special plea the ans
stantially as follows: That on th
ruary, 1877, the day on which t
Sioux Indians was ratified, by w
in Lawrence County were first
tlement and occupation, the la
mineral lot No. 53, together
amount of other land in its imm
was appropriated, set apart, an
town-site purposes; and, as such
and laid out into lots, blocks,
leys, for municipal purposes a
was then, and has ever since be
called the town of Deadwood;
then contained a population of t
habitants, and about five hun
used as residences or for busines
agriculture; that the town was
ever since been, the center of t
ness west of the Missouri River i
of Dakota, and, at the commen
action, contained a population
thousand inhabitants, and buil
provements of the value of abo
dollars; that the land in contro
of the lots originally laid out an
town-site purposes, and has alw
occupied by the defendant or hi
the buildings and improvemen
the purpose of business and trad
agriculture; that the placer mi
which the plaintiff filed his ap
patent, as alleged in the compla
cated or claimed by him or an
until after the selection, settlem
appropriation of that and adja
town-site purposes; and that,
July, 1878, the town of Deadwo
corporated, the probate judge
County entered, at the local l
said town site, paid the governm
for, and received from its office
the money and a certificate sho
and purchase by him in trust fo
benefit of the occupants, includi
ant; and that such town site em
covered by the plaintiff's patent

The answer further alleges,
that thereafter, on the 10th of A
Commissioner of the General
Washington ordered a hearing
office in Deadwood, between th
the probate judge, as trustee fo
of the town site, as to the chara
for mineral purposes; at which
not disputed that the defendant
cupants of town lots in Dead
prior appropriators of the land;
missioner refused to allow the
any other fact than the miner
the land, holding, as a propositi
cisive of and controlling the cas
of the parties, that the only q
that could be considered was
non-mineral character of the la
fact of the prior occupation and
of the land for town-site purpo
fer any rights upon the occu
register and the receiver followe
tions and decided the controve
the ground of the mineral ch

pon appeal to the
l Land Office, and
the Interior, was
the Commissioner
the land, with the
e plaintiff, and re-
any interest there-
e, or to the defend-
of the judge, and
tent mentioned in
l to the plaintiff;
ists that the patent
xception or reserva-
ation all town prop-
lings, lots, blocks,
r improvements on
he plaintiff, and all
to the occupation,
of the same; that
sioner and the Sec-
erty to the plaintiff,
or protect the prior
l other occupants of
law, and an errone-
nd that, therefore,
his patent, holds the
e buildings and im-
st for the defendant,
nveyed to him, he
portion of the legal
patent.
a the answer sets up
February, 1877, one
one of the occupants
e peaceable and law-
ises in controversy,
improvements there-
ne until his convey-
remained in the con-
f, using the same as
l trade, claiming title
inst all persons, ex-
d claiming the right
e United States as a
e said Beaman sold
s to the defendant,
ood faith, and before
y title thereto made
thereon of the value
s, and that the value
the improvements
dred dollars.
with a prayer that the
his suit, and be de-
endant the premises
and reserving to him-
extract the precious
ded, in so doing, he
, endanger, or inter-
and improvements
use and enjoyment
nt; and that, in the
ined that the plaintiff
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alue of the improve-
ally found, and the
t for the same; and
her relief as may be

pleas of the answer
general demurrer, on
state facts sufficient
to the action nor a

counterclaim in the defendant's favor against him, which was sustained, with leave to the defendant to file an amended answer. The defendant refused to amend and elected to stand on his pleadings. Judgment was therefore entered for the plaintiff. On appeal to the Supreme Court of the Territory, the judgment was affirmed, and the case is brought to this court on appeal.

Mr. **G. C. Moody,** for appellant.

Mr. **Adoniram J. Plowman,** for appellee.

Mr. Justice **Field** delivered the opinion of the court. [400]

The principal question presented by the pleadings for our consideration is, whether, upon the public domain, title to mineral land can be acquired under the laws of Congress relating to town sites. The plaintiff asserts title to mineral land under a patent of the United States founded upon an entry by him under the laws of Congress for the sale of mineral lands. The defendant, not having the legal title, claims a better right to the premises by virtue of a previous occupation of them by his grantor as a lot on a portion of the public lands appropriated and used as a town site, that is, settled upon for purposes of trade and business, and not for agriculture, and laid out into streets, lots, blocks, and alleys for that purpose.

In several Acts of Congress relating to the public lands of the United States, passed before July, 1866, lands which contained minerals were reserved from sale or other disposition. Thus, the Preemption Act of 1841 excepts from preemption and sale "lands on which are situated any known salines or mines" (5 Stat. at L. 453, chap. 16, sec. 10); and the Act of 1862, extending to California the privilege of settlement on unsurveyed lands, previously authorized in certain States and Territories, contains a clause declaring that the provisions of the Act "shall not be held to authorize preemption and settlement of mineral lands." (12 Stat. at L. 410, chap. 86, sec. 7.) Similar exceptions were made in grants to different States, and in grants to aid in the construction of railroads. Thus, in the grant to California of ten sections of land, for the purpose of erecting the public buildings of that State, there is a proviso "that none of said selections shall be made of mineral lands." (10 Stat. at L. chap. 145, sec. 13.) And in the grants to the Union Pacific Railroad, and its associated companies, to aid in the building of the trans-continental railroad and branches, there is a proviso declaring that all mineral lands, other than of coal and iron, shall be excepted from them. (12 Stat. at L. 489, chap. 120, sec. 3; 13 Stat. at L. 358, chap. 216, sec. 4.) A similar exception is made in grants for universities and schools; and, in the law allowing homesteads to be selected, it is enacted that mineral lands shall not be liable to entry and settlement for that purpose. [401]

By the Act of July 26, 1866, this policy of reserving mineral lands from sale or grant was changed. That Act declared that the mineral lands of the public domain were free and open to *exploration and occupation* by all citizens of the United States, and persons who had declared their intention to become citizens, subject to such regulations as might be prescribed

by law, and to the local customs or rules of miners in mining districts, so far as they were not in conflict with the laws of the United States. (14 Stat. at L. chap. 262, sec. 1.) It then provided for acquiring by patent the title to "veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar or copper." On the 9th of July, 1870, this Act was amended so as to make placer claims, including all forms of deposit, "excepting veins of quartz or other rock in place," subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as those provided for vein or lode claims. (16 Stat. at L. 217, chap. 235, sec. 12.) The Act of May 10, 1872, to promote the development of the mining resources of the United States, repealed several sections of the Act of 1866, and, among others, the first [402] section, but enacted in place of it a provision declaring that "all valuable mineral deposits" in lands belonging to the United States, both surveyed and unsurveyed, were "free and open to *exploration and purchase*, and the lands in which they are found to occupation and purchase," subject to the conditions named in the original Act. (17 Stat. at L. 91, chap. 152, sec. 1.) Other sections pointed out with particularity the procedure to obtain the title to veins, lodes and placer claims, and defined the extent of each claim to which title might be thus acquired. By the Act of February 18, 1873, mineral lands in the States of Michigan, Wisconsin and Minnesota were excepted from the Act of May 10, 1872, and those lands were declared to be free and open to exploration and purchase, according to legal subdivisions, in like manner as before. (17 Stat. at L. 465, chap. 159.) The provisions of the Act of 1872, with the exceptions made by the Act of 1873, were carried into the Revised Statutes, which declare the statute law of the United States upon the subjects to which they relate, as it existed on the 1st of December, 1873. (Sec. 2345.) All other provisions contained in the Acts, of which any portion is embraced in this revision, are in express language repealed. (Sec. 5596.) No reference, therefore, can be had to the original statutes to control the construction of any section of the Revised Statutes, when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given to it in the revision. *United States* v. *Bowen*, 100 U. S. 508, 513 [Bk. 25, L. ed. 631, 632].

Turning to that portion of these statutes treating of mineral lands and mining resources, which is contained in chapter 6 of title 32, we find that its first section declares that "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." (Sec. 2318.) Title, therefore, to land known at the time to be valuable for its minerals could only have been acquired after December 1, 1873, under provisions specially authorizing their sale, as found in these statutes, except in the States of Michigan, Wisconsin and Minnesota, and after May 5, 1876, in the States of Missouri and Kansas. By the Act of Congress of this latter date "de- [403] posits of coal, iron, lead or *other mineral*," in Missouri and Kansas were excluded from the operation of the Act of May 10, 1872, that is, from such provisions of that Act as were re-en-

acted in the Revised Statutes. (1
52, chap. 91.) In those portions of
Statutes which relate to preemp
homestead entries the clauses from
Acts excepting mineral lands a
(Secs. 2258 and 2302.)

If now we turn to the laws rela
sites on the public lands, and the p
thorizing the sale of lands under th
entry of town sites for the benefi
cupants, as contained in the Revi
we shall find a similar exception
entry under them of mineral lands.
the Revised Statutes contains the
public lands. Chapter 8 of that t
the reservation and sale of town
public lands. It contains provision
the President to reserve from the
town sites on the shores of harbors
tion of rivers, important portages
ural or prospective centers of popu
clares when the survey of such rese
lots may be made and the sale of
it prescribes with particularity th
whic', parties who have founded,
desire to found, a city or town
lands may proceed, and the title to
be acquired. It also provides for
the proper land office, of portions
lands occupied as a town site, suc
made by its corporate authoriti
town be unincorporated, by the
county court of the county in wh
is situated, the entry to be in tru
and benefit of the occupants, acco
respective interests. The chapter
many other clauses respecting to
with provisions against the acqui
to mineral land under them. In
declares that "where mineral v
sessed, which possession is recogn
authority, and to the extent so
recognized, the title to town lots t
shall be subject to such recognize
and the necessary use thereof," w
tion, also, that nothing in the se
construed to recognize any color
sessors for mining purposes as
United States. (Sec. 2386.) In an
near the conclusion of the chapter
all the provisions affecting the qu
us, it declares that "no title shal
under the foregoing provisions o
to any mine of gold, silver, cinnab
or to any valid mining claim or p
under existing laws." (Sec. 2392

It is plain, from this brief sta
legislation of Congress, that no ti
United States to land known at th
to be valuable for its minerals o
cinnabar or copper can be obtain
preemption or homestead laws or
laws, or in any other way than
by the laws specially authorizin
such lands, except in the States
Wisconsin, Minnesota, Missouri
We say "land *known* at the time
for its minerals," as there are v
public land in which minerals
kinds are found, but not in such
justify expenditures in the effort to
It is not to such lands that the term
the sense of the statute is applic

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be reserved from sale, ex-
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for agricultural purposes,
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reemption laws, may be
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and business, the same be-
nent or town site of Dead-
dant relies as giving him
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te judge of the county to
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r of the certificate. *With-*
Wall. 218 [71 U. S. bk. 18,

L. ed. 342]. When the patent was subsequently issued, it related back to the inception of the right of the patentee.

[406] The position that the patent to the plaintiff should have contained a reservation excluding from its operation all buildings and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed. The patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location, as well as to the land beneath the surface. The Act of Congress of May 10, 1872, contemplates the purchase of the land on which valuable mineral deposits are found; and its provisions in this respect are retained in the Revised Statutes, section 2319.

Whilst we hold that a title to known valuable mineral land cannot be acquired under the the town-site laws, and, therefore, could not be acquired to the land in controversy under the entry of the town site of Deadwood by the probate judge of the county in which that town is situated, we do not wish to be understood as expressing any opinion against the validity of the entry, so far as it affected property other than mineral lands, if there were any such at the time of the entry. The Acts of Congress relating to town sites recognize the possession of mining claims within their limits; and in *Steel v. Smelting Company*, 106 U. S. 449 [Bk. 27, L. ed. 227], we said that "land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes; its exemption is only from settlement and sale under the preemption laws of the United States. Some of the most valuable mines in the country are within the limits of incorporated cities, which have grown up on what was, at its first settlement, part of the public domain; and many of such mines were located and patented after a regular municipal government had been established. Such is the case with some of the famous mines of Virginia City, in Nevada. Indeed, the discovery of a rich mine in any quarter is usually followed by a large settlement in its immediate neighbor-
[407] hood, and the consequent organization of some form of local government for the protection of its members." It would seem, therefore, that the entry of a town site, even though within its limits mineral lands are found, would be as important to the occupants of other lands as if no mineral lands existed. Nor do we see any injury resulting therefrom, nor any departure from the policy of the government, the entry and the patent being inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation or improvement for residences or business under the town site title.

The claim of the defendant, under the second special plea, to allowance for improvements made upon the property, is as untenable as his claim to the title. It is asserted under a statute of the Territory, which provides that "in an action for the recovery of real property, upon

which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title, adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a counterclaim by such defendant." The case presented by the defendant is not covered by the provisions of this law. There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law, purporting to transfer to him the title or to give to him the right of possession. And there can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation. Here the defendant knew that the title was in the United States, that the lands were mineral, and were claimed as such by the plaintiff, and that title to them could be acquired only under the laws providing for the sale of lands of that character; and there is no pretence that he ever sought, or contemplated seeking the title to them as such lands, or claimed possession of them under any local customs or rules of miners in the district.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—115 U. S. 411, 412, 413; 117 U. S. 169.

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[408] PHILANDER E. SPARKS ET AL., *Appts.*,

v.

MOSES PIERCE ET AL.

(See S. C., Reporter's ed., 408-413.)

Public lands—occupancy and improvement of, give no vested rights—relief in equity against patent—what must appear—compensation for improvements.

*1. Mere occupancy of the public lands and making improvements thereon give no vested right therein as against the United States or any purchaser from them.

2. To entitle a party to relief in equity against a patent of the government he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent.

3. A person who makes improvements upon public land, knowing that he has no title, and that the land is open to exploration and sale for its minerals, and makes no effort to secure the title to it as such, under the laws of Congress, or a right of possession under the local customs and rules of miners, has no claim to compensation for his improvements as an adverse holder in good faith, when such sale is made to another and the title is passed to him by a patent of the United States.

[No. 563.]

Submitted Oct. 14, 1885. Decided Nov. 16, 1885.

APPEAL from the Supreme Court of the Territory of Dakota.

Statement of the case by *Mr. Justice* **Field:**

[408] This is an action to recover a parcel of mining ground, situated in Lawrence County, in the Territory of Dakota, and claimed by the plaintiffs under a patent of the United States, bearing date March 22, 1880, and issued to them upon an entry made November 30, 1877. The complaint alleges that, on the 11t ber, 1878, the plaintiffs were the c and possessed of the demanded riving their title under the said United States, founded upon the tioned; that afterwards, on the 12t cember, while they were thus sei sessed of the premises, the defend right or title, entered upon them plaintiffs therefrom and have ever fully withheld them, to the damage tiffs of $500. It also alleges that the rents and profits of the premi entry of the defendants have been month; and it prays judgment for t of the premises, for the damages s for the rents and profits lost.

The answer of the defendants ally the several allegations of th except as stated therein, and ther cially, by way of counterclaim, va which they contend constitute in defense to the action and entitle t tion, at least, of the demanded pr compensation for their improvem

The matters set forth as grounds relief are alleged upon informatio and are substantially these:

That on the 28th of February, 1 in controversy, with other land ad to, was appropriated and occupied and for town-site purposes, and laid out into lots, blocks, streets ar designated as Central City, having about one hundred inhabitants; th ber increased until, on March 22, of the plaintiffs' patent, the place b portant one, containing about tw inhabitants;

That on the said 28th of Februa grantor of the defendants was in occupation and possession of the troversy as a lot in said Central C on the 12th of December, 1878, he s lot with the improvements there uable consideration;

That after the said 28th of Fe the plaintiffs, without legal right, c ground within the town site, incl controversy, to be surveyed for a p claim, and an application for a upon that survey to be filed in the land office at Deadwood, in the Co rence;

That, within the time required inhabitants of the town, including of the defendants, filed a protest office against the issuing of the p the protest upon the ground, a things, that the land was subject rights of the town-site occupants, mineral; but that, notwithstanding the local land officers, on the 30t ber, 1877, received from the plaint of the land as a placer claim, prescribed by law, and allowed of the same; that, subsequently, o April, 1877, the Commissioner of Land Office reviewed the proceedi rected that a patent issue to the the mining claim, but with a rese the grant of all town property, rig surface, and all lots, blocks, street

*Head notes by *Mr. Justice* FIELD.

and improvements
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Commissioner sus-
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te a defense to the
defendants' favor

against them. The demurrers were sustained by the court, and the defendants declining to plead further, and electing to stand upon their special answers, the plaintiffs had judgment for the possession of the premises. On appeal to the Supreme Court of the Territory the judgment was affirmed. To review that judgment the case is brought here on appeal.

Mr. **G. C. Moody,** for appellants.

Messrs. **Van Cise & Wilson** and **J. W. Smith,** for appellees.

Mr. Justice **Field,** after stating the case, delivered the opinion of the court, as follows: [411]

This case, as seen by the pleadings stated, is in its main features similar to that of *Deffeback* v. *Hawke*, just decided [*ante*, 428]. The plaintiffs here, as in that case, rely upon a patent of the United States for the land in controversy, issued under the laws for the sale of mineral lands. It is admitted that the land was mineral [412] in its character, and the patent itself is evidence that all the requirements of the law for its sale were complied with. The defendants, as in that case, set up as ground for equitable relief against the enforcement of the rights of the plaintiffs under the patent, that their grantor occupied the land as a lot in a town site—here the town site being that of Central City; there that of Deadwood City—and made improvements thereon before the plaintiffs claimed it as mining ground, or took proceedings to procure its title; and that he sold the lot to them, with its improvements, for a valuable consideration. They, therefore, as the defendant did in the other case, deny the right of the plaintiffs to acquire the premises as a mining claim on the town site; but they also contend that if the plaintiffs had that right, the patent issued to them should have contained reservations excluding from its operation the buildings and improvements of the defendants, and whatever was necessary for their use and enjoyment. They also contend, that if this defense be not sustained, they should be allowed compensation for their improvements on the premises.

The case differs, however, in one important particular from that of *Deffeback* v. *Hawke*. There an entry had been made of the town site in the land office of the United States, by the probate judge of the county, for the benefit of the occupants of the town. The entry, it is true, was afterwards canceled by the Secretary of the Interior, so far as the premises in controversy in that case were concerned. The proceedings showed, however, a desire on the part of the occupants to secure the title of the United States, and not to rest upon their naked possession. Here it does not appear that any effort had been made, either by the authorities of the town, or by the probate judge of the county, or by anyone else on behalf of the occupants of the town, or by the defendants or their grantor, to acquire the legal title. The case presented, therefore, is that of occupants of the public lands without title, and without any attempt having been made by them, or by anyone representing them, to secure that title, resisting the enforcement of the patent of the United States, on the ground of such occu- [413] pation. Mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them.

To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that, in consequence of erroneous rulings of those officers on the facts existing, it was denied to him. *Bohall* v. *Dilla*, 114 U. S. 51 [Bk. 29, L. ed. 61].

The question as to the allowance for improvements is disposed of by the decision in *Deffeback* v. *Hawke*. A person who makes improvements upon public land, knowing that he has no title, and that the land is open to exploration and sale for its minerals, and makes no effort to secure the title to it as such land under the laws of Congress, or a right of possession under the local customs and rules of miners, has no claim to compensation for his improvements as an adverse holder in good faith when such sale is made to another and the title is passed to him by a patent of the United States.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—116 U. S. 50.

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[384] MERCHANTS EXCHANGE NATIONAL BANK OF THE CITY OF NEW YORK, *Appt.*,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BERGEN.

(See S. C., Reporter's ed., 384–392.)

Municipal bonds—special power to issue—exercise of—overissue—estoppel—genuineness of official signatures.

1. Purchasers of securities of municipalities having only a special power to issue them for a particular purpose must see that the conditions prescribed for the exercise of the power existed.

2. In the absence of recitals showing compliance with the provisions of the statutory authority, the obligor is not estopped from denying the fact of such compliance.

3. Purchasers of municipal securities must take the risk of the genuineness of official signatures.

[No. 31.]

Argued October 27 and 28, 1885. Decided November 16, 1885.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

[384] Statement of the case by *Mr. Justice* **Field:**

This is a suit in equity to compel the Merchants Exchange National Bank of the City of New York, one of the defendants below, and the appellant here, to surrender to the Board of Chosen Freeholders of the County of Bergen, New Jersey, 102 bonds of $500 each, drawn in the form of, and purporting to be, negotiable obligations of the Board, on the ground that they were never issued by its authority. The

suit was brought, not only ag
which held the bonds, but a
sheriff of the City and County
who had previously levied an a
them in an action brought by th
Benjamin C. Bogert, upon his
edness to it of $51,000.

The sheriff, having no inter
troversy between the Board a
no contest and did not appear i
decree was, therefore, only ag

The facts of the case are bri
complainant below, the Board
holders of Bergen County, is a
poration having general charg
of that county. It is composed
resentatives, one from each to
county. Its officers are a direc
elected by the Board, the form
its own members. It also ele
collector, who acts as treasurer
but is not a member or an offic
It is his duty to collect the r
county and to pay its expenses

During the late civil war, bo
by the Board of Chosen Freeho
County for money to enable it to
its quota of men under the di
troops by the government. Th
about to mature when the Legisl
passed on the 5th of April, 1876
boards of chosen freeholders
counties of the State to renew b
issued by them for any loan ma
der authority of law, which shou
come due, and for which no pro
made for their payment. The A
the new bonds should be made
thirty years from date, and be so
and one third per cent thereof
due and payable each year; th
draw interest not exceeding
should bear the seal of the
signed by the director of the
clerk, and countersigned by t
the county, and have coupons
one for the semi-annual intere
when the Board might judge it
might be registered and be
to the order of the purchaser a
out coupons. The Act declare
issued under it should be nu
register of the number, denom
issuing and name of person to
if registered, and time of payn
made by the collector in a book
by the Board for that purpose.

On the 10th of May, 1876, th
gen County passed a resoluti
its finance committee to reissu
in place of those becoming du
that year. Blanks for 800 bond
with coupons attached, were
pared by order of the committe
three books, with a margin or st
The first book contained the bl
250; the second from 251 to 50
from 501 to 800, and these
stamped on the backs of the bo
The name of the payee and t
turity were left unfilled in the
books were delivered to Benj
who was at the time collector

then director of the
ygant its clerk.
g the months of July
ree books were pro-
room of the finance
use at Hackensack,
n County, and there
were signed by Van-
d by Wygant, the
e request of Bogert,
course was advisa-
might be injured or
sued, he agreeing to
anks. The director
to have implicit con-
Bogert, and it does
s any hesitation on
his suggestion. The
this condition were
had neither the seal
nature. These were
s were issued. The
county at the time
which sum $14,000
eet the balance, 696
vith the exception of
ed for the old bonds.
roceeds applied tow-
lance. A register of
prepared, as required
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nom issued, with its
ity, and was kept by
en to inspection by

ne hundred and four
of Bogert. Two of
place of others de-
the remaining one
one were required or
was their use ever
its Board of Chosen
h of July, 1876, Bo-
them to the Mer-
s security for a loan
for thirty thousand
amount were made
May 9, 1878, it was
dollars. Soon after-
usand dollars more
d all the bonds were
our. Previously to
of March, 1876, Bo-
e same Bank forty
n as collateral two
be temporary loan
nty, each for twenty
tes of this character
been authorized by
ers to raise money
ction of taxes. The
pledged to the Bank
nt papers, never hav-
e Board. In May,
as collector of the
ook his office. After
ptember following,
s were consolidated
ve a new note for
ook up the fictitious
eir place deposited
al, seventy-eight of

these county bonds. Thus the Bank held one hundred and two of them.

Bogert died January 8, 1880, and soon afterwards the issue of these one hundred and two bonds, and their possession by the Bank, were discovered, and the present suit was brought to compel their surrender. The court below held the bonds void, and decreed that they be delivered up to the complainants. From this decree an appeal is taken to this court.

Messrs. **Stephen P. Nash, E. L. Fancher** and **Alfred J. Taylor,** for appellant:

Where bonds are issued by the proper officials, and import a compliance with the law, a purchaser is not bound to look further.

Commissioners v. *Aspinwall*, 21 How. 539 (62 U. S. bk. 16, L. ed. 268); *Town* v. *Davenport*, 94 U. S. 801 (Bk. 24, L. ed. 322). See also *Brooklyn* v. *Ins. Co.* 99 U. S. 362 (Bk. 25, L. ed. 416); *Hoff* v. *Jasper Co.* 110 U. S. 53 (Bk. 28, L. ed. 68).

A recital in a bond may furnish the basis for an estoppel, but it is not essential to an estoppel.

Hackett v. *Ottawa*, 99 U. S. 86 (Bk. 25, L. ed. 363); Bigelow, Estoppel, 466, 467; *County of Henry* v. *Nicolay*, 95 U. S. 619 (Bk. 24, L. ed. 394); *Northern Bank* v. *Porter*, 110 U. S. 608 (Bk. 28, L. ed. 258); *Dixon Co.* v. *Field*, 111 U. S. 83 (Bk. 28, L. ed. 360).

When one of two innocent persons is to suffer from the wrong or negligence of a third, it shall be the one who enabled the wrongdoer to commit the wrong.

Michigan Bank v. *Eldred*, 9 Wall. 544 (76 U. S. bk. 19, L. ed. 763); *Dair* v. *U. S.* 16 Wall. 1 (83 U. S. bk. 21, L. ed. 491).

It is not competent to show fraud or irregularity in the issuance of bonds as against a *bona fide* holder.

Co. of Macon v. *Shores*, 97 U. S. 272 (Bk. 24, L. ed. 889); *Cromwell* v. *Co. of Sac*, 96 U. S. 51 (Bk. 24, L. ed. 681).

Messrs. **Hamilton Wallis** and **J. D. Bedle,** for appellee:

The bonds having been issued without lawful authority, there can be no such thing as a *bona fide* holder.

Mayor v. *Ray*, 19 Wall. 478 (86 U. S. bk. 22, L. ed. 169); *Co. of Bates* v. *Winters*, 97 U. S. 91 (Bk. 24, L. ed. 934); *Town* v. *Perkins*, 94 U. S. 269 (Bk. 24. L. ed. 158).

The appellant is chargeable with notice of the character of the bonds.

Buchanan v. *Litchfield*, 102 U. S. 278 (Bk. 26, L. ed. 138); *McClure* v. *Township of Oxford*, 94 U. S. 432 (Bk. 24, L. ed. 129). See also *School District* v. *Stone*, 106 U. S. 184 (Bk. 27, L. ed. 90); *School District* v. *Hall*, 113 U. S. 135 (Bk. 28, L. ed. 954).

The county had no general authority to borrow money or to issue bonds or other negotiable instruments.

See the Statutes, Rev. N. J. 127, etc. See also, *Mayor* v. *Ray*, 19 Wall. 469 (86 U. S. bk. 22, L. ed. 164); *Hackettstown* v. *Swackhamer*, 37 N. J. L. 191.

Mr. Justice **Field,** after stating the case, delivered the opinion of the court: [390]

There was evidence at the hearing, of a very persuasive character, that the seventy-eight bonds deposited with the Bank on the 28th of

September, 1878, when the two loans of Bogert were consolidated, were not signed by him, and that the seal of the county was not attached until after he had ceased to be collector. Our judgment leads to that conclusion. If this be the fact, they fall within the rule in *Anthony* v. *County of Jasper*, 101 U. S. 699 [Bk. 25, L. ed. 1008], where the court said that "purchasers of municipal securities must always take the risk of the genuineness of the official signature of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it." But, in the view we take of this case, it is not material whether the bonds were signed before or after Bogert had ceased to be collector. The Board of Chosen Freeholders of the county never directed nor permitted their issue. The law under which it derived all its powers provided only for the issue of bonds to meet the indebtedness from those then about to mature. All such maturing bonds had been surrendered for the new bonds, except for a small amount, which was paid in cash. The power of the Board under the law was then exhausted. Any further issue was beyond its authority. Unless, therefore, there is something in connection with their issue to estop the Board from contesting their validity, they can in no manner bind the county. This is not a case where there existed in the Board a general power to issue negotiable securities of the [391] county, so that parties would be justified in taking them when properly executed in form by its officers. It is a case where there was no power, except as specially delegated by law for a particular purpose. All persons taking securities of municipalities having only such special power must see to it that the conditions prescribed for the exercise of the power existed. As an essential preliminary to protection as a *bona fide* holder, authority to issue them must appear. If such authority did not exist, the doctrine of protection to a *bona fide* purchaser has no application. This is the rule even with commercial paper purporting to be issued under a delegated authority. The delegation must be first established before the doctrine can come in for consideration. See case of *The Floyd Acceptances*, 7 Wall. 676 [74 U. S. bk. 19, L. ed. 178]; *Marsh* v. *Fulton*, 10 Wall. 676 [77 U. S. bk. 19, L. ed. 1040]; *Mayor* v. *Ray*, 19 Wall. 469 [86 U. S. bk. 22, L. ed. 164].

There is a class of cases where recitals in obligations are held to supply such proof of compliance with the special authority delegated as to preclude the taking of any testimony on the subject, and estop the obligor from denying the fact. These have generally arisen upon municipal bonds, authorized by statute, upon the vote of the majority of the citizens of a particular city, county, or town, and in which certain persons or officers are designated to ascertain and certify as to the result. If, in such cases, the bonds refer to the statute, and recite a compliance with its provisions, and have passed for a valuable consideration into the hands of a *bona fide* purchaser, without notice of any defect in the proceedings, the municipality has been held to be estopped from denying the truth of the recitals. The ground of the estopped is, that the officers issuing the bonds and inserting the recitals are agents of the municipality, empowered whether the statute has been follo bind the municipality by their d See, of the late cases on this po *Bank of Toledo* v. *Porter Townshi* U. S. 608 [Bk. 28, L. ed. 258] and v. *Field*, 111 U. S. 83 [Bk. 28, L.

In the bonds of Bergen County recitals. The Bank in taking the to ascertain whether or not they ized. Had it examined the registe issued to take up the matured was a public record of the county inspection, it would have learned which it received were not of the authorized. Content to rely upo ported representations of Bogert, cast upon the county the conseq own mistake. *Buchanan* v. *Lit* S. 278 [Bk. 26, L. ed. 138].

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Su

Cited—117 U. S. 665.

KNICKERBOCKER LIFE I COMPANY, *Piff. in* v. P. H. PENDLETON

(See S. C., Reporter's ed., 8

Evidence—presumption as to the p their duties by officers of a bank usage—competency—mistake in

1. It will be presumed, at least aft considerable time, that the officers performed their duties in accordi custom and course of business of th

2. Evidence of the custom and us is competent for the purpose of corroborating the conviction and cashier that a draft was duly pres ment.

[No. 4.]

Argued November 11, 1884. Dec 5, 1885. Rule to show cause 6, 1885. Judgment rescinded granted May 4, 1885. Reargue 1885. Decided November 16, 1

IN ERROR to the Circuit Court States for the Western District

The history and facts of the c the opinion of the court and in the first hearing, Bk. 28, L.ed. 86 also be found a report of the counsel and the orders of this cou the mistake in the writ of erro

Messrs. **J. A. Dennison** and **Russell,** for plaintiff in error.

Messrs. **L. W. Humes, W.** and **D. H. Poston,** for defenda

Mr. Justice **Bradley** deliver of the court:

The judgment rendered in thi 5th of January last—see opinion, [Bk. 28, L. ed. 866]—was set as day of the last term and the cause

nent at the present term.
s brought by several joint
l children of Samuel H.
gainst the Knickerbocker
ny, on a policy of insur-
Samuel, taken out by him
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come of age. The writ
was brought to reverse
udgment of reversal was
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wit: P. H. Pendleton.
al bond for costs was also
ton alone; but the bond
equently executed, was
ffs by name, and the sub-
er generally entitled in
Pendleton & als. This
efect in the writ of error,
laintiff in error to show
ent previously rendered
and the writ of error
deration of the special
ase, we allowed the writ
new citation to be issued
elow, set aside our pre-
directed the cause to be
for reargument.
been reargued, all the
ed. We do not find oc-
nder a different decision
e. The only question
d it necessary to consider
ore fully discussed by
, whether the evidence
resentment of the draft
ent was sufficient to be
The defendants in er-
ontend that it was not.
that the draft was dated
s payable three months
ce, and contained a con-
at maturity the policy
We held that if the In-
bed to avail itself of this
sent the draft for pay-
ut that protest for non-
ssary.
took place nearly ten
tions referred to, it was
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was sent from Memphis
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New Orleans, to be pre-
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nd the usage and custom
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ptance and payment, he
n: "From your exami-

nation of the endorsements upon the draft" (which was exhibited to him), "in connection with your knowledge of the course of business of the Louisiana National Bank, as stated by you, would you say whether or no said paper has been presented for acceptance and payment as other commercial paper sent to you for collection through your corresponding banks?" To which he answered: "Yes, it was presented for acceptance and for payment, as in all similar cases [of] paper sent to us for collection, which is the custom on the part of the Louisiana National Bank in giving prompt attention to all business intrusted to its care." [342]

It was not pretended that the draft was paid.

The witness being asked, on cross examination, if he knew, of his own knowledge, that said draft was presented for either acceptance or payment, answered: "Yes, for both, from the fact that the rules of the bank make it necessary, in the ordinary course of business, to present both for acceptance and payment." Being asked if he presented the bill in person, or was present, he said: "No, for the reason that, as cashier of the bank, it is not my duty to present drafts either for acceptance or payment." He also stated that it was the custom of the bank to give notice to drawees of time drafts of the maturity of the same; and that the drawees in this case, Moses Greenwood & Son, had a regular business office in the city of New Orleans. Luria further testified that the bill was entered on the books of the bank as maturing on the 14th–17th October, 1871, the three days of grace being added according to the laws of Louisiana. It further appeared that on both occasions, when the bill was sent to the Louisiana bank for presentment, and when it was sent for payment, it was with instructions not to have it protested, which accounts for the fact of there having been no regular protest of the draft. Two letters of Moses Greenwood & Son to S. H. Pendleton were produced in evidence, one dated September 29, 1871, and the other November 4, 1871. In the first they say: "Your draft for life policy (some $330) due 14th of next month, was presented this day for acceptance. Not finding any advice of it, we requested them to hold till we got an answer from you. Please write at once if you want it paid." By the letter of November 4th, they say: "Yours of 27th ult. received. Will pay that insurance note when presented, as you request. This is the first advice we have had about it." [343] This does not show that the draft had not been already presented for payment. The letters, taken together, show that Moses Greenwood & Son were not prepared to accept or pay the draft until they received Pendleton's letter of October 27th, long after the draft became due. It seems very probable from the evidence that, as well when the draft was presented for payment (if it was so presented) as when it was presented for acceptance, the drawees requested the bank to hold it until they could get instructions from the drawer. At all events, the Louisiana bank kept the draft until November 17, 1871, and then returned it to the Union and Planters' Bank of Memphis. Luria, being asked, "Why did your bank hold this paper, which matured on the 17th of October, 1871, until the 17th of November, 1871, before re-

[344]

forming it to the Union and Planters Bank, Memphis?" answered, "I cannot say positively for what reason, not having the correspondence before me; my impression, however, is that, protest being waived and the demand for its payment having been made, it is quite likely that M. Greenwood & Co. may have requested it held until they could receive advice from the parties; however, it was retained, with the expectation of collecting, until the 17th of November, 1871, when it was returned by instructions of the Union and Planters Bank of Memphis, in their letter dated November 14, 1871."

Santana, the runner of the Louisiana bank, whose duty it was to present notes and drafts, was also examined on interrogatories. Being asked to state all that he knew about the draft in question (which was exhibited to him), he answered that he had it for the purpose of presenting it for acceptance, which was refused, as per pencil memorandum on the back of it in his handwriting, namely: "No advice—refused acc't." He was not asked by either party whether he presented the draft for payment.

Greene, one of the defendants' agents at Memphis, testified that, on or about the 3d day of October, 1871, they (the said agents) wrote to Pendleton, by mail, of the nonacceptance of the draft, and on or about the 20th of November they again wrote to him of the nonpayment of it; and that, in the latter part of November or early in December, he, Pendleton, called upon said agents in Memphis, and stated that the reason he did not answer their letters was, that he expected soon to come to Memphis, and that he was much surprised that Greenwood & Co. did not pay the draft, but that they were now prepared to pay it, and exhibited their letter to him before referred to.

None of this evidence was objected to except, when the deposition of Luria was offered, the plaintiffs objected to his answers relating to the custom of the Louisiana National Bank in regard to presentment of paper for acceptance and payment, which objection was overruled.

We think that the evidence, taken together, was sufficient to go to the jury on the question, whether the draft was, or was not, presented for payment, or, which is the same thing, whether demand of payment was waived by the payees in order that they might communicate with the drawer. The evidence of the custom and usage of the bank was not objected to when taken, nor when the interrogatories were proposed, and we think it was competent even if it had been objected to. It was competent for the purpose of sustaining and corroborating the conviction and belief of Luria, the cashier, that the draft had been presented for payment. His conviction and belief were undoubtedly based on this custom and usage, and were of value only so far as such custom and usage were invariably maintained and pursued.

A bank is a quasi public institution. Its officers have regular and set duties to perform, directly affecting the financial transactions of the entire public. It is essential to the public interest that these duties should be performed with invariable certainty and exactness. The business community relies upon such performance, and at least after the lapse of a consider-

able time, it should be presumed that
have been performed and business
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they have been performed by a part
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ter of consideration for the jury.
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necessary; and, in all cases, it is t
of the jury to determine, under all
stances of the case, the weight to
the evidence. See *Rosenthal* v. *W*
S. 193 [Bk. 28, L. ed. 398], and
Whittier, 105 Mass. 391, there cited

This kind of presumptions of fa
to the consideration of a jury, is
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public responsibility. "Under this
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sent by the post, it is presumed, fro
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time, and was received by the pers
it was addressed, if living at the
usually receiving letters there."
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Mr. Taylor, in his treatise on Evi
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derived from adjudged cases in E
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to presume, *prima facie*, that they
hands. *MacGregor* v. *Keily*, 3
The fact, too, of sending a letter to
will, in general, be regarded by a
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letter, he invariably took to the p
letters that either were delivered to
deposited in a certain place for th
referring to *Skilbeck* v. *Garbett*, 7
Hetherington v. *Kemp*, 4 Camp. 1
Ld. Londesborough, 12 Com. B. 252
Thompson, 6 Irish Law R. N. S. 5
1 Taylor, Ev. § 148. We may also
case of *Dana* v. *Kemble*, 19 Pick. 1
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How. 262 [45 U.
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day when the draft matured. If it was the general custom of the New Orleans banks to allow grace upon bills of exchange even when it was waived, as the testimony of Luria would seem to imply, it is possible that such a custom made it the duty of the bank to allow it in this case. We express no opinion on the subject. We are not examining the case upon its whole merits as upon an appeal; but, being satisfied that the direction of the court was wrong as to [348] the necessity of a regular protest for nonpayment, we only examine the further question raised by the defendant in error, as to the insufficiency of the evidence adduced to show a demand of payment, for the purpose of determining as to its admissibility and competency: its weight will be for the consideration of the jury under proper instructions from the court on a future trial.

The judgment of the Circuit Court is reversed, and the cause remanded, with directions to award a new trial.

True copy. Test:
J. H. McKenney, Clerk, Sup. Court, U. S.

STATE OF ALABAMA, *Plff.*, [413]
v.
ISAAC F. BURR ET AL.

(See S. C., Reporter's ed., 413–429.)

Pleading—demurrer—sufficiency of declaration—state indorsement of railway bonds—Acts of Legislature of Alabama of February 19, 1867, and February 11, 1870—construction of.

1. Under the Acts of the Legislature of Alabama of February 19, 1867, and February 11, 1870, the State of Alabama indorsed the first mortgage bonds of the Alabama and Chattanooga Railroad Company. In an original suit at law in this court by the State against the controlling officers and stockholders of the company, it is held upon demurrer to the declaration: 1. That the liability of the defendants to the State is statutory only, and that there can be no recovery unless the facts stated in the declaration bring them within the operation of the liability clause of one or the other of the statutes. 2. That the defendants are not liable in this action for the alleged fraud in obtaining the indorsement of the State, as it was not brought to enforce the payment of the bonds thus indorsed. 3. That the other allegations of fraud in the declaration fail to show that the losses of the State resulted from such fraud. 4. That the obligation of the company to use the bonds to build and equip its road was satisfied, if the road was actually completed and equipped in accordance with the requirements of the statutes at a *bona fide* cost to the company of more than the amount of the bonds.

2. Pleadings must state facts, and not conclusions of law.

[No. 4, Orig.]
Argued and submitted Oct. 30, 1885. Decided Nov. 16, 1885.

The case is fully stated by the court.

Messrs. **B. F. Brooks, Henry G. Nichols, W. Hallett Phillips,** *John C. Coombs* and *Samuel A. Carleton*, in person, for defendants, in support of the demurrer.

Messrs: **H. C. Tompkins, Samuel F. Rice** and *E. S. Mansfield*, for plaintiff, *contra.*

Mr. Chief Justice **Waite** delivered the opin- [414]
ion of the court:

This is a suit at law brought in this court by

the State of Alabama against Isaac T. Burr, Samuel A. Carlton, John DeMerritt, citizens of Massachusetts, John C. Stanton, a citizen of New York, and Daniel N. Stanton, a citizen of New Jersey. The declaration states, in substance, that, under the operation of certain statutes of Alabama, the Governor was authorized and required to indorse, on the part of the State, the first mortgage bonds of the Alabama and Chattanooga Railroad Co., a corporation having power to construct a railroad from Meridian, in the State of Mississippi, through the States of Alabama and Georgia to Chattanooga, [415] in the State of Tennessee, a distance of 295 miles, to the extent of $16,000 per mile, on the whole length of its road, as fast as sections of twenty continuous miles each were "finished, completed and equipped." The bonds, when issued and indorsed, were to have "priority in favor of the State over any and all other liens whatever." Sections 5 and 6 of an Act of February 19, 1867, on which the liability of the defendants to a large extent depends, are as follows:

"Sec. 5. *Be it further enacted*, That the bonds before specified shall not be used by said company for any other purpose than the construction and equipment of said road; and the Governor shall not indorse the same unless on the affidavit of the president of said company, and a resolution of a majority of its directory for the time being, that said bonds shall not be used for any other purpose than the construction and equipment of said road, or sold or disposed of for a less sum than ninety cents in the dollar; nor shall said bonds be indorsed until the president and chief engineer of said company shall, upon oath, show that the conditions of this Act have been complied with in all respects.

"Sec. 6. *Be it further enacted*, That it shall be the duty of the Governor, from time to time, when there shall be reliable information given to him that any railroad company shall have fraudulently obtained the indorsement of its bonds by the Governor on the part of the State, or shall have obtained the indorsement contrary to the provisions of this Act, or shall have sold or disposed of the bonds indorsed by the Governor for a less sum than ninety cents in the dollar, he shall notify the Attorney-General of the State, whose duty it shall be forthwith to institute, in the name of the State, a suit in the Circuit or Chancery Court of the county of the place of business of the company, setting forth the facts; and when the fact shall satisfactorily appear to the court that the indorsement of any of said bonds shall have been fraudulently obtained, or obtained contrary to the true intent, meaning and provisions of this Act, or that said bonds shall have been sold or disposed of for a less sum than ninety cents in the dollar, then, and in such case, the court shall order, adjudge [416] and decree that said road lying in the State, with all the property and assets of said company, or a sufficiency thereof, shall be sold, and the proceeds thereof shall be paid into the treasury of the State; and it shall be the duty of the comptroller immediately to invest the same in state bonds, or the bonds indorsed by the Governor, under the provisions of this Act creating a sinking fund as provided for in the eleventh section of this Act; and said company shall forfeit all rights and privileges under the pro-

visions of this Act. And th
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April, 1872, its railroad

and property were sold by its assignees to the State, subject to the mortgage given the State to secure the indorsed bonds. Afterwards, the mortgage to the State was foreclosed, and the mortgaged property sold at public auction on the 22d of January, 1877, to a purchaser other than the State.

Then follows this allegation:

"The plaintiff says that in the indorsement and delivery to the said Alabama and Chattanooga Railroad Company of the said bonds of that corporation and the coupons thereunto attached as aforesaid, and in the issuance and delivery to that corporation of the said two thousand bonds of the plaintiff and the coupons thereunto attached as aforesaid, the plaintiff relied on the truthfulness of the several aforesaid false pretenses and statements of said Alabama and Chattanooga Railroad Company, as well as on all the provisions of all the said Acts of her General Assembly, and especially on all the said provisions of said Acts relating to the obligation and liability to the plaintiff of the directors, officers, incorporators and stockholders of said corporation, for any loss that should be incurred by the plaintiff by reason of the directors, officers, incorporators and stockholders of said corporation knowingly violating, or permitting the violation of, without objection, any provision of the said Act approved February 11, 1870, under and by virtue of which the said two thousand bonds of the plaintiff and the coupons thereunto attached were issued and delivered to said corporation as aforesaid, or of the said Acts under which the plaintiff indorsed and delivered to the said corporation the said bonds of the said corporation as aforesaid."

It is then averred that, in May, 1869, the company "knowingly, wrongfully, illegally and fraudulently appropriated to the defendants and their accomplices in the wrong and fraud" $160,000 of the money accruing from the sale of the indorsed bonds, and that this sum "was not used or applied in any way for the benefit of said corporation, or of plaintiff, or for the purpose of constructing or equipping its said railroad, or for any honest or lawful purpose. Also, that the company, in or about the month of May, 1869, "wrongfully, illegally, fraudulently and without any valuable consideration, appropriated and issued to the defendants and their accomplices in the fraud and wrong shares of the capital stock of the said corporation of the aggregate par value of $450,000, which the defendants thereafter pretended to sell to said corporation, and in payment therefor the said corporation fraudulently and illegally paid to the defendants, and the defendants did wrongfully, fraudulently and illegally receive: from the said corporation a large sum, to wit: the sum of $45,000, which said sum had accrued to and been received by the said corporation from the sales of a portion of said bonds, indorsed by the plaintiff and delivered to the said corporation as aforesaid, and which said sum, received by the defendants as aforesaid, they, the defendants, knowingly, wrongfully, illegally and fraudulently appropriated to their own use and benefit, and which was not used or applied in any way for the benefit of said corporation, or for the purpose of constructing or equipping its said railroad."

[420]

Also, that in the months of November and

December, 1869, the company "wrongfully, illegally, fraudulently and knowingly permitted the defendants to appropriate to their own use and to the use of their accomplices" certain sums amounting in the aggregate to $118,000, "which sums had accrued to and been received by the said corporation from sales of a portion of said bonds indorsed by the plaintiff and delivered to said corporation as aforesaid, and which were not used or applied in any way for the benefit of said corporation, or for the purpose of constructing or equipping its said road." Also, that in the months of January and February, 1870, the company "knowingly, wrongfully, illegally and fraudulently permitted the defendants to misapply, misappropriate and convert to improper uses a further large sum, to wit: $400,000, which had accrued to and been received from the sales of a portion of [421] said indorsed bonds, * * * and which was never used or applied in any way for the benefit of said * * * corporation, or for the purpose of constructing, equipping, or finishing its said railroad, or for any other purpose authorized by said Acts of the Legislature."

Also, that the company, "with the knowledge and participation of the defendants, during the years 1869 and 1870, wrongfully and illegally sold and disposed of" $812,000 of the indorsed bonds, and $771,000 of the state bonds, at less than ninety cents on the dollar; and that $580,000 of the indorsed bonds were disposed of by the company, with the knowledge and permission of the defendants, by placing them as collateral security for the debts of the company, which debts were much less than ninety per cent of the amount of the bonds.

It is then alleged that the company, with the permission of the defendants, during the years 1869 and 1870, "allowed large amounts of said indorsed bonds, to wit: $200,000, as well as large sums of the proceeds of said indorsed bonds, to wit: $150,000, to be unlawfully paid or given to various persons who were not entitled to any part of said bonds or the proceeds thereof, and were at the time of such payments or gifts known by said last-named corporation, as well as by said defendants, not to be entitled to any part of said bonds or the proceeds thereof; * * * and the indorsed bonds and proceeds of said indorsed bonds which were so unlawfully paid or given by said * * * corporation were never used or applied in any way for the benefit of that corporation, or for the construction or equipment of its said railroad, or for any honest and lawful purpose, but were lost to that corporation."

It is then alleged that the company, during the years 1869 and 1870, permitted the defendants to use 200,000 of the indorsed bonds in purchasing for themselves stock in the Roane Iron Co. and in the Vicksburg and Meridian Railroad Co. and in opening and working a coal mine, and that these bonds were wholly [422] lost to the company and to the plaintiff, and were never applied in any way to its benefit, or to the construction or equipment of its road.

As an excuse for not making the "allegations as to said wrongful, illegal and fraudulent acts of said company more full, certain or definite," it is stated that the company, with the participation and concurrence of the defendants, "fraudulently concealed tiff all knowledge or information t of the aforesaid wrongful or fraud said company and of said defenda fully kept the plaintiff ignorant o wrongful and illegal acts."

The declaration concludes as fo the plaintiff says that by reason c said wrongful, illegal and fraud the said Alabama and Chattano Company, permitted and particip defendants, who were the actual m controllers of said Alabama and Railroad Company as aforesaid, t poration last named became a ban year 1871, and was rendered whol pay its indebtedness existing on the first day of September, 1871, a the interest on said indorsed bond came due on the first days of July, A. D. 1871, and that on the which became due on the first da and September in the same year, the aggregate to $537,600, all of plaintiff was compelled to pay and the holders of said bonds, which s have been compelled to pay but fo ful, illegal and fraudulent acts of fendants and said corporation as part of which sum of $537,600 h repaid to the plaintiff; and by r aforesaid wrongful, illegal and fr of the said Alabama and Chattano Company and of the said defenda said, the said plaintiff has been fu fied and injured to the addition one million of dollars in settling created and evidenced by her afor ment of said indorsed bonds, no p which loss or damage has ever bee plaintiff. And the plaintiff says th notice, information or knowledge ful, illegal and fraudulent acts of fendants and said corporation as *til within* the twelve months no Whereby, and by force of the said General Assembly of the plainti February 19, 1867, September 2 vember 17, 1868, February 11, tively, an action hath accrued to to recover against the said defends pensation for the aforesaid respect damages to plaintiff sustained as the said defendants, although re do, have not, nor hath either or a at any time hitherto, yielded any c or made any satisfaction or am plaintiff for the said loss so by the tained as aforesaid, but to do this fendants have hitherto altogether refused, and still do refuse, to the d plaintiff, in the sum of three mill

To this declaration the defenda generally.

The demurrer presents the ques the facts stated in the declaration to support the action. The lia officers and stockholders of the co State is statutory only, and there covery unless the facts stated in th are such as to bring the defendan operation of the liability clause i other of the statutes.

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and said corporation;" and that, "by reason of the aforesaid wrongful, illegal and fraudulent acts of the said * * * company and of the defendants, the said plaintiff has been further damnified and injured to the additional extent of one million of dollars in settling her liability created and evidenced by her aforesaid indorsement of said indorsed bonds;" but this is not enough, unless the facts from which this conclusion is drawn are such as to show that the loss was both the natural and immediate consequence of the wrongful and fraudulent acts referred to. Pleadings must state facts, and not conclusions of law merely, and the allegation in this case that the loss arose from the fraud is only a conclusion of law. If the facts from which the conclusion is drawn are not sufficient to show that in law the loss was attributable to the fraud, the declaration is bad.

The facts are, that the State was to indorse certain bonds of the company upon certain security. It made the indorsement and got the security. The obligation of the company to use the bonds to build and equip the road was satisfied, if the road was actually completed and equipped in accordance with the requirements of the statute at a *bona fide* cost to the company of more than the amount of the bonds. The object of this requirement was to insure the creation of the security which the State was entitled to have. If the security was actually perfected, all claim of the State upon the indorsed bonds was satisfied. There is no pretense that the road cost less than the value of the bonds. Consequently, if the bonds were not used to build the road, other funds belonging to the company must have been, and it was proper to treat the bonds as a substitute for the other funds in the treasury of the company. This being so, it was not a fraud on the State for the company to do with the bonds as it might have done with the other funds, if they had not been used in building the road. As the State had no direct lien on the bonds for its security, a fraudulent use of the bonds was not a fraudulent diversion of the State's securities. [427]

The loss of the State is directly attributable to the deficiency in the value of its original security, and the fraudulent use of the bonds had no effect on that. The company, if the allegations are true, has wasted its property and made itself insolvent, but it has not in this way increased its obligations to, or changed its relations with, the State. Both the debt to and the security held by the State were the same after the frauds as before. The injury to innocent stockholders by the wrongful acts of the company and the defendants was direct and immediate, because their property was taken and fraudulently converted to the use of the defendants or the other wrong doers. To the State, however, the injury, if any, was both indirect and remote, because the State had no direct claim upon, or interest in, the property which was misappropriated. The law will not imply that, if the company had kept the bonds, the same loss would not have fallen on the State. There was no imperative obligation on the company to use the bonds to pay the debts for which the State was liable rather than others and, consequently, it cannot be said that, as a matter of law, if the misappropriations had not been made the State would have suffered no loss. [428]

To our minds it is clear, therefore, that, upon the facts as they are set forth in the declaration, there is no liability on the part of the defendants for the alleged frauds of the company, other than those connected with over-issues, or sales of the bonds at less than ninety cents on the dollar, and for these the suit is not brought.

2. As to the Act of 1870.

Under this Act all officers and stockholders who knowingly violate or permit without objection the violation of any of its provisions, or the provisions of the Act of 1867, are made personally liable to the State for any loss incurred thereby. There is also a prohibition against a sale of the state bonds, the issue of which to the company was authorized, at less than ninety cents on the dollar; but there is no provision for the liability of the stockholders for the payment of the bonds, in case they are so sold, as there is in the Act of 1867. The only liability under this Act, for such a violation of its provisions, is for the losses which the State sustains on that account. The declaration alleges that 771 of these bonds were sold at less than ninety cents on the dollar, but it fails entirely to show how the State was injured thereby. Stockholders are liable under this Act for violations of the Act of 1867, only when such violations occur after this Act took effect, which was February 11, 1870; and it nowhere affirmatively appears that any of the wrongs complained of were committed after that date, except in the sale of the state bonds at less than ninety cents on the dollar. It is also as much incumbent on the State to show, under this Act, that the losses for which it seeks to recover were the direct and immediate consequence of the wrongful conduct complained of, as it was under the Act of 1867. What has been said, therefore, as to the insufficiency of the allegations to charge the defendants under that Act, is equally applicable to this.

It was contended in argument that the remedy of the State to enforce the liability of the [429] defendants under the statute was exclusively in equity. This question we do not decide, as there is not entire unanimity of opinion amongst us in reference to it. There were other objections to the declaration also mentioned in the argument, but we deem it unnecessary to refer to them, as what has already been said is sufficient to dispose of the case.

Being unanimously of opinion that the facts stated in the declaration are not sufficient to constitute a cause of action against the defendants, we sustain the demurrer.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[439] WILLIAM L. GIBSON, *Plff. in Err.*,

v.

EDWARD LYON ET AL. AND BENNETT C. WILSON ET AL., Terretenants.

(See S. C., Reporter's ed., 439–453.)

Ejectment—former action as a bar—tender to mortgagee by stranger—sale under foreclosure—sale under erroneous judgment—estoppel.

1. A mortgagee is not bound to accept a tender by a stranger of the amount due on account of the mortgage, and make an assignment thereof.

2. Under the laws of Pennsylvania ejectment is not a bar to a subseque

3. The decision of the Supreme Cou though single, is entitled to peculi questions involved arising upon the State; but it is not conclusive in the United States unless it has become erty.

4. A party cannot be permitted t and against the same deed.

5. The purchaser of lands sold by Court of Philadelphia, subject to a topped from denying the authority sell such land except clear and dis liens.

6. If a judicial sale be void, the cou firmed it upon terms not authorize purchaser is without title upon wh action of ejectment; if it be erronec therefore only voidable, it cannot collaterally.

7. Under the laws of Pennsylvan under foreclosure proceedings, the j or is a party and is bound by the con a judicial decree; and the acknowl sheriff's deed cures all defects, ex power in the officer to sell, or frau An objection to the validity of th ground that more property was sold cessary, cannot be made subsequent to ledgment.

8. The fact that a judgment was might have been reversed upon a wr not destroy a sale made under the j remaining in full force and unreve

[No. 16.]

Argued Mar. 13, 16, 1885. Orde ment Apr. 20, 1885. Reargued 22, 1885. Decided Nov. 23, 18

IN ERROR to the Circuit Court States for the Eastern Distric vania.

Statement by *Mr. Justice* Mat

This was an action of ejectm possession of certain real estate in brought by the plaintiff in erro New Jersey, against the defend citizens of Pennsylvania, in whi judgment for the defendants be brought here for review by this w

The cause was submitted to th trial below, a jury being waive where judgment was rendered up ing findings of fact:

1. In 1861 George W. Roberts the premises in dispute, situate at corner of Broad and Oxford Stree in front on Broad Street 48 feet, in depth on Oxford Street 143 fe 13, 1861, the said George W. gaged the same to the Reliance In pany, of Philadelphia, to secur $5,000.

2. In 1862 George W. Roberts the 17th of December, 1863, his h a petition to the Orphans' Cour phia County for leave to sell th ises under the Act of April 18, 1 discharged of all liens in the han chaser. On January 13, 1864, t ises were sold to John Rice fo $10,500, which sale was, on Jan approved and confirmed by the C aforesaid, and security approved in the sum of $21,000. The conv said John Rice was made Januar consideration of the sum of $5,50 and subject to the payment of debt or sum of $5,000, with inter

George W. Roberts to the
rance Company, of Phil-
l 13, 1861, and recorded
. C. H., No. 9, page 71,
is made in the *habendum*
in the premises. On the
A. D. 1864, this conveyance
ged before the Orphans'

1, 1865, John Rice and
aid premises to Sarah A.
ion of $8,000," under and
nt of the said mortgage of
Reliance Insurance Com-

7, the said mortgage of
gned by the Reliance In-
oresaid to the defendants,
reclosed the same by pro-
me Court of Pennsylvania
No. 154. The action was
ge W. Roberts, and judg-
ned upon two returns of
lgment, both the said Sa-
Wagner Jermon appeared
lications to open the judg-
fused.

7, 1868, J. Wagner Jer-
, his wife, filed a bill in
ne Court for the Eastern
vania, to January Term,
ing that the defendants
Vagner Jermon, and were
mortgage for the purpose
ms against J. Wagner Jer-
ng that Sarah A. Jermon
to be made of principal,
o the defendants, and re-
cute an assignment of the
and presented to them,

ee was entered "that an
l as prayed for to restrain
e property mentioned and
, and that the said injunc-
he defendants, Lyon and
assignment of the bond
ed to in the bill, and a
ought upon the said mort-
payment of the debt and
by, together with all costs,
of which assignment and
nction shall be dissolved,
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ruary 23, 1869, and a *pro-*

the Supreme Court afore-
injunction should be dis-
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pon their said mortgage,
agner Jermon or Sarah A.
e same before the 20th of
ril 20, 1869, the time was,
of J. Wagner Jermon, ex-
9. No payment or tender
re May 10, 1869.

18, 1869, a *levari facias*
ion to foreclose the mort-
remises were described as
:

orner of Broad and Oxford
road Street by 111 feet on

Lot No. 2. South side Oxford Street, 111 feet east of Broad Street, 16 by 48 feet.

Lot No. 3. South side Oxford Street, 127 feet east of Broad Street, 16 by 48 feet.

Lot numbered 1 was purchased by the defendants at the sheriff's sale, made October 4, 1869, for the sum of $10,000; and No. 2 was purchased at the same sale, by the defendants, for the sum of $2,000. The sheriff's return to the writ of *levari facias* was *inter alia:* "and it appearing that the plaintiffs in the writ are entitled to be paid the sum of $5,748$\frac{41}{100}$, being the amount of principal and interest to day of sale of the mortgaged premises sued on in this case, I have taken their receipt for the same, and balance of purchase money I have as within commanded."

On December 4, 1869, the sheriff's deed for the premises, Nos. 1 and 2, was duly acknowledged and delivered to the said defendants. [443]
No disposition was made of lot No. 3.

7. As to lot No. 3: By virtue of certain proceedings in the District Court of Philadelphia County, of December Term, 1866, No. 1421, the premises situate on the south side of Oxford Street, 127 feet east of Broad Street, 16 feet by 48 feet, were exposed to sheriff's sale on January 3, 1870, upon a *venditioni exponas*, issued December 3, 1869, under a judgment obtained by W. A. Arnold against J. Wagner Jermon and Sarah A. Jermon, his wife. The first count of the narr. filed in this action was for materials furnished to the said premises at the request of said Sarah A. Jermon. The second count was for materials furnished at the request of J. Wagner Jermon and Sarah A. Jermon, and the judgment was confessed in open court. At the sale the premises were purchased by defendant and, on January 22, 1870, the sheriff's deed therefor was duly acknowledged and delivered to defendants.

8. On the 3d July, A. D. 1872, an ejectment was brought in the Supreme Court of Pennsylvania sitting at *nisi prius*, to July Term, 1872, No. 180, by J. Wagner Jermon and Sarah A. Jermon against these defendants, wherein a verdict was rendered for these defendants; and on March 6, 1876, this was affirmed by the Supreme Court of Pennsylvania sitting in banc.

9. On March 7, 1876, Sarah A. Jermon, wife of J. Wagner Jermon, conveyed the premises in dispute to William L. Gibson, a citizen of the State of New Jersey, for the consideration of $500. This conveyance purports to be made by Sarah A. Jermon alone. J. Wagner Jermon joined in the covenants, and both she and her husband signed and sealed the deed, and it was separately acknowledged.

Messrs. **David C. Harrington, George W. Biddle** and *F. Carroll Brewster*, for plaintiff in error.

Mr. **Wm. Henry Rawle**, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court: [444]

Before proceeding to consider this case as presented by the findings of fact, it is necessary to dispose of an assignment of error based on a ruling of the Circuit Court during the progress of the trial. It appears from a bill of exceptions that "the plaintiff offered to prove that a

tender of the money, under decree of the Supreme Court of Pennsylvania, in suit No. 60, January Term, 1868, was made about the end of May, 1869, by Charles H. Muirhead; that the assignment was returned from Lyon and Taylor executed in blank; that said C. H. Muirhead required that an assignment of said mortgage, with the blanks filled in, should be signed by said Lyon and Taylor; that A. V Parsons, Esq., representing the parties Lyon and Taylor, agreed to procure the assignment so completed, but that such an assignment was not [445] made, and the parties Lyon and Taylor absolutely refused to make the assignment and receive the money. Counsel, on being asked, say that the money was ready, but was not actually shown Lyon and Taylor, or their attorney, and avers that an actual tender was not necessary under the refusal of Lyon and Taylor to take the money and make the assignment."

It will be observed that the tender referred to in this offer was not made by the party obliged to pay the debt or entitled to do so, for the purpose of removing the incumbrance of the mortgage upon the property, nor in payment of the mortgage debt, and in satisfaction of the mortgage and the judgment rendered thereon, but was an offer made by a stranger to pay the amount due on account thereof, accompanied with a demand to execute an assignment to a named third party of the debt and securities, compliance with which was a condition of the offer of payment. If accepted, the effect would have been to transfer the debt and mortgage and judgment rendered thereon to an assignee, and not to extinguish it. This the plaintiffs were under no legal obligation to do, neither by contract nor by the terms of the decree referred to, inasmuch as the time within [which] such payment might be made for that purpose was limited by the decree to May 10, 1869. After that they were expressly left at liberty by the decree itself to proceed, at law, upon the mortgage and judgment previously rendered thereon.

This question being removed from the controversy, it is urged by counsel for defendants in error, that the judgment of the Supreme Court of Pennsylvania in the ejectment in favor of the defendants against the immediate grantors of the present plaintiff below, referred to in the eighth finding of fact, if not entitled to the force of an estoppel as *res judicata*, is at least an authoritative decision of the highest court of the State upon the law of the case, which, as it involves only questions of title to real estate within its territory dependent on its local jurisprudence, ought to furnish the obligatory rule of decision for the courts of the United States.

The former judgment in ejectment is not a bar to the present action, according to the law [446] of Pennsylvania, where the subject is regulated by statute. 1 Brightly's Purdon's Dig. 535.

By the Act of April 13, 1807, two successive verdicts and judgments in favor of the same party will defeat a third ejectment; but where there is verdict against verdict, and judgment thereon, a verdict and judgment in a third ejectment is conclusive. *Britton* v. *Thornton*, 112 U. S. 526 [Bk. 28, L. ed. 816].

As a precedent, the decision of the Supreme Court of the State, though single, is entitled to peculiar respect, because all the questions decided arise upon the local law of the State; but it cannot have conclusive force in t the United States, unless it has be of property. *Burgess* v. *Seligman*, [Bk. 27, L. ed. 359]; *Carroll Coun* 111 U. S. 556 [Bk. 28, L. ed. 517].

The plaintiff in error, being a cit Jersey, had a constitutional right, that fact, to invoke the jurisdi courts of the United States, and i their judgment upon his rights un of Pennsylvania.

The title of the plaintiff is de ived A. Jermon. Her title was vested i deed from Rice mentioned in the t of fact, and that of Rice was acq conveyance described in the second the proceedings in the Orphans' C adelphia from which it resulted. I conveyances contains a recital th under and subject to the payment gage under which the defendants

It is contended, on behalf of the error, that he is not estopped by t to deny the existence of the mort assert that, in point of law, it was by the sale ordered by the Orphans' sales being required by law to be c charged of all liens in the hands chaser, and that consequently he is insist that the subsequent sale, ma mortgage as a subsisting and va void.

It is true that the statute of Penn which the sale ordered by the Or was authorized (Act of April 18, 18 ly's Purdon's Dig. 1242, pl. 2, sec. that "by every such public sale t sold shall be discharged from lien also true that the sale prayed for in was of the premises "clear and d all liens in the hands of the purchas the sale to Rice, approved and confi court, was for the sum of $10,500, and consideration of the purchas equally true, as appears from the re deed to Rice, which was duly ac before the Orphans' Court, that of eration, as finally agreed upon betw ties, there was actually paid in cash the remainder being represented by mortgage to the Reliance Mutu Company, under and subject to wh veyance was made, approved an The proceedings and judgment of t Court must be taken as a whole, a the execution, acknowledgment an the deed. The sanction of the cou and form of the conveyance was a necessary to perfect the proceedin out the deed, the sale would not ha summated, and no title would h vested and passed. *Foster* v. *Gra* 15; *Brown's Appeal*, 68 Pa. St. 53

If the whole proceeding be void, court confirmed a sale upon term ized by law, the plaintiff below ha which to base a recovery, and th below were mortgagees in possessio protection of the decision in *Brobst* Wall. 519 [Bk. 19, L. ed. 1002]; i neous merely, and therefore only v good and stands until reversed, a questioned collaterally. If it be co

t had the necessary legal the pre-existing mortgage, at the mortgage debt was tgage security continued, ecital in the conveyance, aintiff in error claims his does not create a personal nent of the debt, enforce- haser in an action of cov- eless, a condition upon d and depends. He cer- nitted to claim both under e deed; to insist upon its enefit and repudiate a bur- as qualified it; to affirm a . The whole title of the ts upon that conveyance, istence of the mortgage as ms part of it. The deed s evidence on behalf of the ssary support of any title he proves it for that pur- isting mortgage of the de- ct. The defendant's title, t of the plaintiff's title, and t relied on to establish the nown to be its superior, for f the plaintiff to be subject ant. It is a plain case of ew is supported by the de- ne Court of Pennsylvania, ns to it, presented in argu- n fully met. *Stackpole* v. Rawle, 163; *Zeigler's Ap- Crooks* v. *Douglass*, 56 Pa. *McArthur*, 67 Pa. St. 326. *ass, ubi supra*, it was said hen, if the price of the es- mortgagee is still in the is in equity estopped from was made subject to the aving bought the estate ing that he bids so much ld hold that much in his to the excepted mortgage, mouth, at least, to say he arged of it, under the op- l rule, that a judicial sale abrances except those ex- tatute." In that case the sale rested in parol, proof hat took place, while here ls in the very deed which tiff in error the foundation

re, that the defendant in ight to proceed upon his judgment thereon was val- cution sale in pursuance t as lot No. 1 is concerned, confirmed and executed by pass the legal title, and to hat of the plaintiff in error. ns are made to the validity nder the execution, in ref- f the premises described as *ri facias* issued upon the mortgage, directed the sale emises for the satisfaction ing them as divided into 1 was purchased by the ers of the mortgage, and o, for the sum of $10,000, and lot 2, at the same sale, was also purchased by them for the sum of $2,000. The sheriff's return showed that he took from the purchasers their receipt as plaintiffs in the writ for the amount of the debt, and interest, and that he had the balance of the purchase money as commanded.

It is now contended, on behalf of the plaintiff in error, that the sale of lot No. 1, being for more than was due to the defendants herein on the mortgage debt, satisfied the judgment and exhausted the authority to proceed further under the writ, and that the sale of lot No. 2 to the plaintiffs in the execution was therefore void for want of power in the sheriff to make it.

Under the laws of Pennsylvania, the proceeding upon a mortgage was by *scire facias*, in which, judgment having been rendered for the amount of the debt, interest and costs, the mortgaged premises are directed to be seized and sold on execution by a *levari facias* for the satisfaction thereof. 1 Brightly's Purdon's Dig. 483, pl. 122.

In case there shall be a surplus of the proceeds of the execution sales after satisfaction of the judgment, the sheriff is bound to pay the same to the debtor or defendant. *Id.* 484, pl. 123. And in all cases, where there shall be disputes concerning the distribution of the money arising from sales on execution, the court from which the execution shall have issued is invested with power, upon notice to parties interested, to hear and determine the same according to law and equity. *Id.* 656, pl. 107. The sheriff makes return of the sale, with the proceeds, to the court whence it issued, and gives to the purchaser a deed for the premises so sold, but not until it has been formally acknowledged in court, as required by law. *Id.* 658, pl. 119. This acknowledgment is a public, judicial act, made in open court, and only after notice to all parties in interest. *Id.* 658, pl. 122. [450]

To this proceeding the judgment debtor is a party, and at the hearing, may make any objection to the confirmation of the sale. The action of the court has all the effect of a judicial decree. *Foster* v. *Gray*, 22 Pa. St. 1, 15.

It was said in *Shields* v. *Miltenberger*, 14 Pa. St. 77: "Most of the cases recognize the deliberative and judicial character of an acknowledgment taken in open court, founded upon the conceded right of all parties having an interest in the question, to appear and dispute the propriety or regularity of the official sale; and all of them, from *Murphy* v. *McCleary*, 3 Yeates, 405, to *Dale* v. *Medcalf*, 9 Pa. St. 108, distinguish between those objections that touch the foundation of the proceeding, by impeaching the authority of the officer or establishing the existence of fraud, and those which simply suggest irregularities in the process of sale. The absence of authority, or the presence of fraud, utterly frustrates the operation of the sale as a means of transmission of title, and avoids it from the beginning. Either may, therefore, be insisted on, even after a formal acknowledgment of the conveyance; but mere irregularities, whether of omission or commission, which do not render the officer powerless, or taint the transaction with turpitude, may be cured by the tacit acquiescence of those who ought to speak in time."

The correctness of this rule, that the acknowledgment of the sheriff's deed in consummation and confirmation of the sale cures all defects, except want of power to sell in the officer, or fraud in making it, being conceded, it is still contended that, in the present case, the power of the sheriff to proceed with the sale of lot No. 2 ceased after he had made enough by the sale of lot No. 1 to pay the judgment debt, with interest and costs; and that consequently the sale of the latter was void for want of authority to sell.

But the sheriff acted strictly within the command of his writ. That was to seize and sell the mortgaged premises. If he proceeded to sell more than was sufficient to pay the debt, it was at most but a mere irregularity, even if it [451] could be so considered. He had no judicial authority to determine questions that might arise upon the sale, or questions of distribution. The sale of lot No. 1 might, so far as he or anyone could know, be set aside, and the proceeds of lot No. 2 might prove to be necessary to satisfy the execution. His duty was merely ministerial, and so long as he pursued only the literal precept of the writ, he cannot be said to have acted without authority, and be converted thereby into a wrong doer. For aught that he might know, and for aught that we can tell from the present record, the whole proceeds of the sale of both lots may have been necessary to pay other liens upon the property, entitled to satisfaction on distribution. The presumption certainly is, in accordance with the maxim, *Omnia præsumuntur rite et solemniter esse acta*, that the surplus was either so applied, in which case, no more property was sold than was necessary; or, it was paid, as the law directs, to Mrs. Jermon, its owner; and in that event, she certainly is not in a situation to complain of the invalidity of a sale the fruits and proceeds of which she received, and has ever since continued to claim and hold as her property. She was a party to the proceeding, and had the opportunity then to present to the court the very objection now made to the validity of the sale, that more property had been sold than was in fact necessary to answer the exigency of the writ and satisfy the demands entitled to the proceeds. That was a question peculiarly for that court to determine, and that was the appropriate time for its determination. It was either then made or waived, and, in either view, the action and judgment of the court in directing the acknowledgment and delivery of the deed was conclusive. We conclude, therefore, that the objections to the title acquired by the sale of these two lots cannot be maintained

A different question arises upon the title to lot No. 3. Although part of the mortgaged premises, it was not included in the sheriff's sale under the judgment and execution for the mortgage debt. It was sold in virtue of the [452] judgment and proceedings described in the seventh finding of fact, being an action by one Arnold against Jermon and his wife to charge the wife's property. It is objected that this judgment and consequently all proceedings under it, including the sale on execution to the defendants, are void, because the declaration, one count of which was for materials furnished to the premises sold at the request of the wife, does not sufficiently allege a contract binding upon her as a married woman, and judgment was confessed, and n upon a verdict or finding of the fa

These questions, as to this very were fully considered and, as we factorily decided by the Suprem Pennsylvania in the case of *Swayn* Pa. St. 436. That was an action purchaser at this sale of the prope tion, against the defendant, who into a contract for its purchase specific performance of that agree defense which prevailed was that not marketable. The court held th the title might be good, yet, if th would be exposed to litigation to s ought not be compelled to take it. *J.*, delivering the opinion of the "Unless, then, in this case, Mrs. those claiming under her, would b concluded by the judgment unde sheriff's sale took place, which co foundation of the vendor's title, verting her liability for the debt fo judgment was confessed, in an act ment to be hereafter brought for t the purchaser will be exposed to th and peril of such litigation." T second counts of the declaratio stated, set out a contract by Mrs. J her husband at her instance and materials furnished and work an in and about the improvement, an efit of her real estate; and as a ma is liable on such a contract, it is that it may logically follow that rendered against her for it, wheth confession or verdict, will have al characteristics of a judgment agai *sui juris*. The case, therefore, turn upon the question whether or those claiming under her, in ejectment to be brought against could be permitted to show that which the judgment was confessed tracted by herself or her husban stance for the improvement of her tate. This question was answere firmative, on the ground that evi effect would not contradict the r was apparent, for the reason th count, which was the common co sold and delivered on the joint pr self and husband, showed no goo tion against her; and in a collatera she would be at liberty to prove t ery was upon this count, and not or second, which would be co the record. It was accordingly h judgment might be avoided by Mr a collateral proceeding, but only the actual recovery was upon a c as to her, that is, under the third that event it would not be supp confession, and on the other han invalidated thereby, so far as it re counts which set forth a good ca against her.

This judgment was followed by of the same court in the case of *Je* 81 Pa. St. 107, where, speaking this lot, it said: "As to the prem three, it may be conceded that t

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6 Pa. St. 447, 458.
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T AL., *Appts.*

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njunction—effect of
Rule 93.

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thority and power to make; and its exercise was a matter of discretion, with which this court will not interfere.

Wright v. *Lessee*, 1 Pet. 168 (26 U. S. bk. 7, L. ed. 98); *Dean* v. *Mason*, 20 How. 198 (61 U. S. bk. 15, L. ed. 876); *Hovey* v. *McDonald*, 109 U. S. 161 (Bk. 27, L. ed. 891).

Even regarding the final decree as an original injunction, the appellants should not be at liberty to change the *status quo* of the parties.

The effect of the *supersedeas* is to prevent all further proceedings in the subordinate court, except such as are necessary to preserve the rights of the parties.

Hovey v. *McDonald*, *supra*.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a motion for a modification of the *supersedas*, or more properly, perhaps, for a modification of the injunction contained in the decree appealed from. The bill prayed, among other things, for an injunction restraining "the defendant Leonard from cutting or removing any trees, logs or timber, or any staves manufactured from any trees or timber, from any of the lands" in controversy. In the decree the defendants were "perpetually enjoined from cutting or removing any timber from said lands." The appeal operates as a *supersedeas*, it having been taken within sixty days after the disposition of the motion, which was made during the same term, to vacate the decree, and the bond being in the form required for that purpose. The decree was rendered by the judge of the District Court of Arkansas, sitting as circuit judge. The same judge allowed the appeal, and, in doing so, directed that it should "not operate to suspend or affect so much of the decree * * * as enjoins the defendants from cutting or otherwise trespassing on the lands in controversy, * * * or removing staves or timber cut thereon." The appellant now moves this court "to vacate so much of the decree of the court below, granting an appeal and accepting appeal bond, as qualifies said appeal and prevents the same from superseding the decree rendered for the appellees, and especially so much of the said decree granting said appeal as prevents said appellant, J. W. Leonard, from removing the staves made on the land in controversy before service or entry of the decree in favor of the appellees."

[465] [466]

The injunction ordered by the final decree was not vacated by the appeal. *Slaughter-House Cases*, 10 Wall. 297 [77 U. S. bk. 19, L. ed. 922]; *Hovey* v. *McDonald*, 109 U. S. 161 [Bk. 27, L. ed. 891]. It is true that in some of the *Slaughter-House Cases* the appeal was from a decree making perpetual a preliminary injunction which had been granted at an earlier stage of the case, but the fact of the preliminary injunction had nothing to do with the decision, which was "that neither an injunction nor a decree dissolving an injunction is reversed or nullified by an appeal or writ of error before the cause is heard in this court." This doctrine, in the general language here stated, was distinctly reaffirmed in *Hovey* v. *McDonald*, and it clearly refers to the injunction contained in the decree appealed from, without reference to whether that injunction was in perpetuation of a former order to the same effect, or was then

[468]

for the first time granted. The injunction, therefore, which was granted by the final decree in this case, is in full force, notwithstanding the appeal.

Construing the injunction as granted in connection with the averments in the bill, the prayer for relief, and the findings in the decree, we think it restrains the appellees from removing the staves manufactured from timber cut on the land, as well as the timber in its unmanufactured state, and the order made by the judge when he allowed the appeal is in reality nothing more than notice to the appellant that such was the effect of his decree. It was not, and was not intended to be, an enlargement of the original scope of the injunction, but, under the circumstances, a justifiable precaution against a possible misunderstanding by the appellant of the extent and effect of the decree appealed from.

This court no doubt has the power to modify an injunction granted by a decree below in advance of a final hearing of an appeal on its merits. An application to that effect was made to us at the October Term, 1878, in the case of the *Sandusky Tool Company* v. *Comstock*, and finding that such a practice, if permitted, would oftentimes involve an examination of the whole case, and necessarily take much time, we promulgated the present Equity Rule 93, which is as follows:

"When an appeal from a final decree in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying an injunction during the pendency of the appeal, upon such terms as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party."

Here the judge who heard the case allowed the appeal, and instead of suspending or modifying the injunction, he took occasion to give special notice that it was to continue in force, and if the facts are correctly stated in his opinion, it was quite proper he should do so.

The motion is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[464] LAURA ELLEN JONES, Widow of SIDNEY A. STOCKDALE, Deceased, and Testamentary Exrx. and Natural Tutrix of her Minor Children, *Plff. in Errr.*,

v.

WATSON VAN BENTHUYSEN.

(See S. C., Reporter's ed., 464.)

Internal revenue—tax on tobacco.

Upon the sale of manufactured tobacco situated in a bonded warehouse, the broker, making such sale, cannot be taxed for the revenue stamps, required before removal, unless they were affixed at the time of the sale and entered into the value of the tobacco and formed a part of the price thereof.

[No. 68.]

Submitted Nov. 18, 1885. Decided Nov. 23, 1885.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The history and facts of the
appear in the opinion of the c
port of the case when before t
October Term, 1880, Bk. 26, 4

Mr. **John Goode,** *Solicito*
tiff in error.

Mr. **William Grant,** fo
error.

Mr. Chief Justice **Waite** de
ion of the court:

This was a suit brought by
sen, the defendant in error, a
chant engaged in the sale o
tobacco, to recover back fro
collector of internal revenue, c
under protest on the amount o
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U. S. 87 [Bk. 26, L. ed. 477]
cided that he was "not liable
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and the cause sent back for a
present writ of error was brou
of the judgment upon the sec
bill of exceptions shows that t
jury was almost in the exact
opinion of this court constru
which the rights of the parties
covered the whole case.

Affirmed.

True copy. Test:
James H. McKenney, Clerk,

SAINT LOUIS, IRON MOU
SOUTHERN RAILWAY
Plff. in Errr.

v.

HUGH McGE

(See S. C., Reporter's ed.

Public lands—grant to Missou
to aid a certain railroad—
struction of Act of July 28,

1. Lands granted by Congress t
struction of railroads do not reve
broken until a forfeiture has bee
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or by some legislative action suf
an intention by Congress to rea
sume possession.

2. The Act of July 28, 1866, ex
for earning the lands granted to
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to aid in building the Cairo and
does not declare a forfeiture and
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and Fulton Company holds under
subject to the rights of purchase
the old company.

[Bk. 23, L. ed. 608].

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Decided Nov. 23, 1885.

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A. T. Britton and
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Railroad of Missouri
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ed to the State by the Act of 1853, so far as the same were applicable to the building of the road from the northern boundary of Arkansas to the Mississippi, opposite the mouth of the Ohio. This grant by Missouri was made "for the uses and purposes, and subject to the condition, reversion and provisions set forth and contained in said Act of Congress and of this Act." Section 5 is as follows: [471]

"For the purpose of raising funds from time to time, for the construction of the said railroad, the said company may sell the said lands, in the manner provided for by said Act of Congress, and may issue their bonds in such sums as they may deem proper, at rates of interest not exceeding seven per cent per annum, payable semi-annually, and the principal of said bonds payable at such time and place as they may designate; and may secure the payment of said bonds by mortgage of said lands, or any part thereof, to be executed by said company, and may make the said bonds convertible into land or stock of the company within such periods as they may prescribe; *Provided*, That the faith of the State is in no manner pledged for the redemption of said bonds, or any part thereof; *And provided further*, That nothing in this Act contained shall be construed to authorize said company to sell, dispose of or apply the said lands, or the proceeds thereof, in any other manner, or to any other purpose, than as required and limited by the said Act of Congress." Laws of Mo. 1855, 314.

On the 3d of January, 1859, the company sold and conveyed the land sued for to M'Gee, who immediately went into possession, and has ever since occupied and improved it as his own, and paid the taxes and assessments thereon. This deed was duly recorded January 10, 1859. The land is more than forty miles from the starting point of the road on the Mississippi, and it does not appear that when it was sold a sufficient number of miles of the road had been built to authorize its sale.

On the 19th of February, 1866, the Legislature of Missouri directed the Governor of the State to sell at auction the Cairo and Fulton Railroad of Missouri, so far as the same was "constructed or projected, together with their appurtenances, rolling stock, and property of every description, and all rights and franchises thereto belonging," "in pursuance of the provisions of the several Acts creating a lien on said railroads, their appurtenances, rights and franchises, in favor of the State." Laws of Mo. 1866, 1867, 107.

On the 28th of July, 1866, Congress enacted that the original Act of February 9, 1853, granting lands to the States of Arkansas and Missouri, "with all the provisions therein made, be, and the same is hereby revived and extended for the term of ten years from the passage of this Act; and all the lands therein granted, which reverted to the United States under the provisions of said Act, be, and the same are hereby restored to the same custody, control and condition, and made subject to the uses and trusts in all respects as they were before and at the time such reversion took effect; *Provided*, That all mineral lands within the limits of this grant and the grant made in section two of this Act, are hereby reserved to the United States; *And provided further*, That all [472]

property and troops of the United States shall at all times be transported over said railroad and branches, at the cost, charge and expense of the company or corporation owning or operating said road and branches respectively, when so required by the Government of the United States."

By section 2 of the same Act an additional grant of lands was made, "subject to the same uses and trusts, and under the same custody, control and conditions, and to be held and disposed of in the same manner as if included in the original grant." It was then provided "that the lands embraced in this grant and the grant revived by section one of this Act shall be disposed of only as follows: Whenever proof shall be furnished, satisfactory to the Secretary of the Interior, that any section of ten consecutive miles of said road * * * is completed in a good, substantial, and workmanlike manner as a first class railroad, the Secretary of the Interior shall issue patents for all the lands granted as aforesaid, not exceeding ten sections per mile opposite to and within the limits of twenty miles of the section of said road and branches thus completed," and so on, as each section of ten miles was completed, until the end. It was then provided that if the road was not constructed within ten years from the time the Act went into effect, "the lands granted, or the grant of which is revived or extended by this Act, and which at the time shall be unpatented to or for the benefit of the road or company, [473] * * * shall revert to the United States." By section three, all lands "mentioned in this Act, and hereby granted, are hereby reserved from entry, preemption, or appropriation for any other purpose than herein contemplated, for the said term of ten years from the passage of this Act; *Provided*, That all lands heretofore given to the State of Missouri for the construction of the Cairo and Fulton Railroad, or for the use of said road lying in the State of Missouri, and all lands proposed to be granted by this Act for the use or in aid of the road herein named, and lying in said State of Missouri, shall be granted and patented to the said State whenever the road shall be completed through said State, which lands may be held by said State and used toward paying the State the amount of bonds heretofore issued by it to aid said company, and all interest accrued or to accrue thereon." 14 Stat. at L. 338, ch. 300.

After the passage of this Act of Congress, the railroad property was sold and conveyed by the State to certain persons, under whom the St. Louis, Iron Mountain and Southern Railway Company claims title. The conveyance upon the sale was of "the said Cairo and Fulton Railroad of Missouri, with all the franchise, privileges, rights, title and interest appertaining to said road, and all roads, road bed, rolling stock, machine shops, and all other property, both real and personal, of every description, belonging or in anywise appertaining thereto."

The railroad was completed by the purchasers, or those claiming under them, and, on the 23d of January, 1877, the lands in dispute were patented, with others of the same class, to the St. Louis, Iron Mountain and Southern Company.

The first question presented by the assignment of errors is whether the Act of July 28, 1866, was such a legislative decl
gress of a forfeiture of the gr
would devest the title of the St
lands, and defeat conveyances
railroad company before that tin
been decided that lands granted
aid in the construction of railr
vert after condition broken un
has been asserted by the Unite
through judicial proceedings i
authority of law for that purp
some legislative action legally
judgment of office found at
United States v. *Repentigny*,
268 [72 U. S. bk. 18, L. ed. 645,
berg v. *Harriman*, 21 Wall. 68
22, L. ed. 555]; *Farnsworth* v. *R.*
66 [Bk. 23, L. ed. 535]; *M'M*
States, 97 U. S. 217, 218 [Bk.
952]; *Van Wyck* v. *Knevals*, 106
27, L. ed. 201]. Legislation
must manifest an intention by
assert title and to resume posse
to take the place of a suit by th
to enforce a forfeiture, and a ju
establishing the right, it should
itive, and free from all doubt o

In the present case no such int
On the contrary, the evident p
gress was to waive a forfeiture
time for earning the lands un
Act. The language is that the p
Act of 1853 be "revived and e
term of ten years from the passa
If this had been all, no one cou
was the intention of Congress t
ties interested in the grant ju
would be if the Act of 1853 ha
1876, as the time for the comple
road. What follows does not,
manifest any different intentio
are: "and all the lands therein
reverted to the United States
vision of said Act, be, and the
stored to the same custody, co
tion, and made subject to the u
all respects as they were before
such reversion took effect." Wh
passed the property of the origin
not been sold by the State unde
ruary, 1866. There had been no
the United States to enforce a
the possession of the lands un
grant had not been changed.
far as the United States was
mained after the original limit o
ing the road had been passed,
Neither had the State done a
back its transfer of title to the
legislation looked only to a sale
ing of the franchises and prope
pany into the hands of those
forward and complete the road.
a preservation of the title of t
the lands rather than its destru
guage of the new Act is to be co
erence to these facts, and inasm
not been in law any reversion
the United States when the A
the words "reverted," "reve
stored" are to be understood a
ing more than that no advant
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the grant had been
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time originally lim-
hing in the language
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the Act of 1866
than an amendment
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Act except from the
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it, and to change the
t does not go further.
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ation of the property
States are changed.
3 is amended, and the
by the United States
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made, and the exten-
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le, we conclude that
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is now in dispute are
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subject to his rights,
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Boyce, 92 U. S. 320
t in conflict with this.
whether a purchaser
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ould be good. We held
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the facts as presented
estion arises. No title
in favor of the State
. There is no dispute
State to sell under its
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grant of 1866, the St.
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If, however, the orig-
orfeited, and the Cairo
eld under that grant

when the sale was made, the new Company took title subject to the prior right of M'Gee, and must fail in this action. As we decide that the Company held under the original title, the judgment of the Supreme Court of Missouri was right; *and it is accordingly affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited 116 U. S. 198.

ASAHEL GAGE, *Appt.*, [454]

v.

MARIA B. PUMPELLY AND ADELINE P. KIDD, Executrices and Heirs at Law, EDWARD WADE, Exr., and DELPHINE M. P. READ, Heir at Law of HARMON PUMPELLY, Deceased.

(See S. C., Reporter's ed., 454-463.)

Tax sales under Illinois statutes—validity—judgment by default—decisions of Illinois Supreme Court.

1. Where the decisions of the highest court of the State establish a rule of property, they will as a rule be followed by this court.
2. Under the decision of the Supreme Court of Illinois, a tax sale of real estate is void when a part of the tax for which it is made is illegal.
3. Under the decisions of the same court a judgment by default, in a tax sale proceeding, is not conclusive upon the taxpayer, but may be impeached collaterally.
4. This court cannot consider an objection raised by the appellee to the decree appealed from.

[No. 42.]

Submitted Nov. 2, 1885. Decided Nov. 23, 1885.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Messrs. **Augustus N. Gage** and **Albert G. Riddle**, for appellant:

The service of notice upon which the tax deed issued to appellant September 6, 1877, and the affidavits filed with the county clerk to show such service of notice, were sufficient to authorize the county clerk to issue the deed to appellant.

Garrick v. *Chamberlain*, 97 Ill. 620; *Gage* v. *Bailey*, 102 Ill. 11; *Frew* v. *Taylor*, 106 Ill. 159.

It does not appear that any of the items of the city taxes of 1875, charged by the bill to be in excess of the constitutional limits, were extended with the taxes against this property, and for which the property was sold and the deed issued to appellant February 4, 1880. The voluntary certificates of the county clerk are not evidence.

1 Greenl. Ev. sec. 498.

The judgments of the County Court of Cook County under which appellant purchased, are *res judicata* and cannot be collaterally attacked.

The county court is a court of record with general original jurisdiction in the matter of the sale of lands for delinquent taxes.

Graceland Cemetery Co. v. *People*, 92 Ill. 619.

its judgment is conclusive while it remains in operation.

Mayo v. *Ah Loy*, 82 Cal. 479; *Porter* v. *Purdy*, 29 N. Y. 106; *People* v. *Brislin*, 80 Ill. 423; *C. N. W. R. R.* v. *People*, 83 Ill. 467; *Andrews* v. *People*, 84 Ill. 28; *Graceland Cemetery Co.* v. *People*, *supra*; *Chicago Theological Seminary* v. *Gage*, 12 Fed. Rep. 398.

The action of the court in such matters is *in rem* against the property.

Rev. Stat. of Ill. 1874, ch. 120, sec. 191; *Pidgeon* v. *People*, 36 Ill. 249; *Chestnut* v. *Marsh*, 12 Ill. 173; *Spellman* v. *Curtenius*, 12 Ill. 409; *Olcott* v. *State*, 5 Gil. 431; *Brown* v. *Joliet*, 22 Ill. 123; *People* v. *Nichols*, 49 Ill. 517; *St. John* v. *E. St. Louis*, 50 Ill. 92; *Atkins* v. *Hinman*, 2 Gil. 437.

Hence the judgment is binding on all the world.

Starkie, Ev. secs. 320, 380; Wells, *Res Adjudicata*, 504, *Groudson* v. *Leonard*, 4 Cranch, 434 (8 U. S. bk. 2, L. ed. 670). See also *Gelston* v. *Hoyt*, 13 Johns. 561; 3 Wheat. 246 (16 U. S. bk. 4, L. ed. 381); *Graceland Cemetery Co.* v. *People*, 92 Ill. 619; *McCahill* v. *Ins. Co.* 26 N. J. Eq. 531, and cases cited; *Monroe* v. *Douglas*, 4 Sandf. Ch. 134; *Bradstreet* v. *Neptune Ins. Co.* 3 Sumn. 600.

It is held in Illinois that a record of a court imports verity and must be tried by itself.

Young v. *Thompson*, 14 Ill. 380.

Where the court has jurisdiction the judgment cannot be questioned collaterally.

Hobson v. *Ewan*, 62 Ill. 146; *Goudy* v. *Hall*, 36 Ill. 313; *Young* v. *Lorain*, 11 Ill. 624; *Conover* v. *Musgrave*, 68 Ill. 58; *Osgood* v. *Blackmore*, 59 Ill. 261; *Prescott* v. *Chicago*, 60 Ill. 121; *Feaster* v. *Fleming*, 56 Ill. 457.

The records of a court import absolute verity, and no evidence will be received to show the want of jurisdiction, if the records affirmatively assert jurisdiction.

Zepp v. *Hager*, 70 Ill. 223, and cases cited; *People* v. *Gray*, 72 Ill. 343; *Mulford* v. *Stalzenback*, 46 Ill. 303, and cases cited.

The valuation of property by the assessor for taxation is conclusive, and a tax based upon the assessment can be assailed only for fraud or want of jurisdiction.

Spencer v. *People*, 68 Ill. 510, and cases cited; *Republic Life Ins. Co.* v. *Pollak*, 75 Ill. 292; *People* v. *Big Muddy Iron Co.* 89 Ill. 116, and cases cited.

There is now a disposition to draw a distinction between a judgment rendered in a case where the owner of the land objected to the entry of the judgment, and a case where the judgment for the taxes was entered by default. The authority for this distinction is traced to the opinion in the *Graceland Cemetery Case*, 92 Ill. 619. See also *Belleville Nail Co.* v. *People*, 98 Ill. 399. But the cases of *Gage* v. *Busse*, 102 Ill. 592, and *Gage* v. *Parker*, 103 Ill. 528, seem to dispose of the whole question, and although the court was misled in two cases by an erroneous construction of a third, as soon as the matter was presented in its true light the court took steps immediately to correct the error.

Shortly after the determination of the case at bar in the circuit court, the learned judge before whom it was tried reviewed to some extent the questions here presented, and arrived at the conclusion now pressed.

Chicago Theological Seminary v. Rep. 398.

It does not appear by this recor jection was made to the rendition ments for the sale of the land for

Mr. **Edward G. Mason,** for

Only appellant's actual invest per cent interest should be refun

People v. *Peacock*, 98 Ill. 172 *Hill*, 11 Ill. 22; *Reed* v. *Tyler*, 56 I v. *Hutchinson*, 108 Ill. 662, 669; 102 Ill. 595.

The county court had no juris ter the two judgments upon which rest. The first judgment embrac to the county commissioners. T braced unlawful items for entert visitors and interest upon obligat of the constitutional limitation.

Law v. *People*, 87 Ill. 385; *M Thompson*, 55 Ill. 249; *Belleville N ple*, 98 Ill. 399, 403; *Gage* v. *Buss Elwell* v. *Shaw*, 1 Me. 339; *Dre* Vt. 506; *Stetson* v. *Kempton*, 1 *Kemper* v. *McClelland*, 19 Ohio, *Davis*, 4 Mich. 140; *McQuilkin* v. 581; *Noble* v. *Indianapolis*, 16 In v. *Griffin*, 51 Miss. 782; *Rhode* Iowa, 540; *Pierce* v. *Schutt*, 20 Wi *well* v. *Patterson*, 51 Cal. 637.

Mr. Justice **Harlan** delivered the court:

Appellees' testator, plaintiff the possession, and claiming to of a certain lot of ground in Chic the appellant, who was defendan deeds executed by the county County, Illinois, on the 6th of Se and 4th of February, 1880; whic based on sales made October 27, tober 3, 1877, for the non-payn These sales were in pursuance of the county court, rendered at t the treasurer of Cook County, who the collector of its revenue.

To the proceedings in the cou plaintiff did not appear, nor w thereto otherwise than by publica paper, giving notice of the applic ments, and, subsequently, of the sale of the property for non-pa taxes assessed against it.

The present suit was brought f of removing the cloud on the p arising from the before mentione deeds, and to obtain a decree re fendant to convey to the plainti and interests as he had thus acq

The plaintiff in the bill avow and willingness to pay not only t disbursements for the legal tax the judgments of the county co additional sum as to the court s

It was adjudged by the circuit plaintiff should pay the redem allowed by statute, had the j sales been only for legal taxes cent interest, in each case, from of two years after the the tax s other taxes as defendant subseque the lot in question, with interest on the amount of each payment

as ascertained to be
2. The defendant,
that sum with inter-
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0, p. 893.
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Court of the State.

His argument is, that by the Constitution and laws of the State, the County Court is a court of record, with general original jurisdiction in the matter of the sale of lands for delinquent taxes; that proceedings in such cases are *in rem* against the property assessed; and that judgment therein rendered is conclusive upon the taxpayer, so long as it remains unmodified by the court which rendered it, or until it is set aside in some direct mode for fraud or collusion, or is reversed upon appeal for error. In support of the general rule that forbids collateral attack upon the judgments or decrees of a court having jurisdiction of the subject matter and of the parties, and where the want of jurisdiction does not appear upon the record, numerous authorities are cited by appellant's counsel. But they have no application to cases like the present one, as the settled course of decision in the highest courts of the State abundantly shows. It will be well to examine a few of the cases determined in that court. [460]

In *McLaughlin* v. *Thompson*, 55 Ill. 249, which was an action of ejectment, in which the plaintiff asserted a tax title, the validity of which the defendant disputed, upon the ground that the sale was, in part, for taxes levied by a county commissioner's court, at a time other than that prescribed by the statute, the court said: "The evidence shows that this county tax entered into and formed part of the judgment, and the sum for which the land was sold. That tax being illegal, appellant, or those under whom he claims, were not required to pay it, nor did the law impose the duty of redeeming from the sale. And it has been repeatedly held that if any portion of the tax is illegal, or the judgment is too large, only to the extent of a few cents, the sale and tax deed will be void. This being so, the tax deed conveyed no title, and hence there could be no recovery under it, as the plaintiff in ejectment must, as in other cases, establish his right to recover."

A case much relied upon by counsel for appellant is *Graceland Cemetery Co.* v. *The People, etc.* 92 Ill. 619. That was an appeal from a judgment rendered by a county court against certain lands belonging to the Cemetery Company for the taxes of 1871 to 1874 inclusive. It appeared that, in 1873, application was made to the county court for judgment against the lands for the taxes of 1871. The company resisted judgment upon the ground that the lands were exempted by law from taxation. After trial the defense was sustained. A similar application was made for judgment for the taxes of 1872, 1873 and 1874. It was again resisted, and the exemption again sustained. No appeal or writ of error was prosecuted from either of those judgments. Nevertheless, in 1879, another application was made for judgment against the same lands for the taxes for 1871 to 1874 inclusive, and judgment was then rendered by the county court against the company. [461] The Supreme Court of Illinois reversed the latter judgment upon the ground that the former judgments in favor of the company, in respect of its claim of exemption from taxation, having been rendered after a trial on the merits—the court having jurisdiction of the parties and the subject matter—were, even if erroneous, conclusive so long as they were not reversed or modified in some legal proceeding in-

stituted for that purpose. The court observed in that case, that it was "clear, upon principle and authority, there is no difference between a judgment rendered in a proceeding to collect taxes and any other judgment, so far as being binding on the parties is concerned."

That case is cited by counsel in support of the proposition that the judgment of the county court, in respect of the premises here in question, is conclusive against the owner, although he did not appear and resist the application for judgment. But that the court did not intend so to decide is clear from its language in *Belleville Nail Co.* v. *People, etc.* 98 Ill. 483, where it was said: "In *Graceland Cemetery Co.* v. *People*, 92 Ill. 619, we held, where the owner of the land appeared in such a proceeding, filed objections and contested the liability of his land for the tax claimed, that the judgment against the land for the tax was conclusive against him of the liability of the land for the tax, in a collateral proceeding. But it is only in the case of such appearance and defense that we regard the judgment as conclusive." It was further observed in the same case, that the declaration of the statute that the tax deed made upon a sale under a judgment for taxes shall be *prima facie* evidence of certain enumerated things requisite to a correct judgment, "shows the intention of the statute that the judgment was not to have the same effect of conclusiveness which is given, collaterally, to ordinary judgments rendered by default, where personal service has been had. There is in these cases no personal service, but only publication of notice in a newspaper that application will be made for judgment." These principles were reaffirmed in *Gage* v. *Bailey*, 102 Ill. 11, which was a suit in equity to set aside the sale and conveyance of lands for taxes upon several grounds, which, as the owner did not appear in the county court and contest the application for judgment for the tax assessed against his property, were fully considered and passed upon.

[462]

But the latest adjudication by the state court of the question under consideration was *Riverside Co.* v. *Howell*, 118 Ill. 259. That was ejectment for the recovery of land, the defendant claiming title under a tax deed based upon a judgment of the county court. The validity of the sale was questioned upon the ground, among others, that a part of the taxes, for the non-payment of which the sale was ordered, were illegal and void. The argument was made there, as in this case, that the judgment of the county court was conclusive as to all matters that could or ought to have been passed upon in rendering it; and, if it included too much taxes, or illegal taxes, it was only error to be remedied by appeal. But the court, finding that certain taxes included in the judgment were invalid, held that no title passed by the sale observing that "the authorities are to the effect, that when a part of the tax for which a sale of real estate is made is illegal, the sale is void," citing *McLaughlin* v. *Thompson*, 55 Ill. 249; *Kemper* v. *McClelland's Lessee*, 19 Ohio, 308; *Gamble* v. *Witty*, 55 Miss. 26; Cooley, Taxation, 295, 296; *Hardenburg* v. *Kidd*, 10 Cal. 402. In the same case the court reaffirmed the doctrine laid down in *Belleville Nail Co.* v. *People*, 98 Ill. 399; *Gage* v. *Bailey*, 102 Id. 12, and other cases, to the effect that a judgment

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These decisions establish a ru
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These grounds of objection to
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v. *Hutchinson*, 108 Id. 668; *Pea*
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the owner of the lot.

We perceive no error in the
affirmed.

True copy. Test:
James H. McKenney, Clerk, S

ND EDMUND WEBB,
in Err.,
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L AND GEORGE S.
s. of MOSES H. GRIN-
Collector of the PORT

ter's ed., 477-481.)

-Act of June 30, 1864.

Act of June 30, 1864, chap.
posing a duty of 60 per cent
ty of 50 per cent on "all
of which silk is the compo-
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Decided Nov. 23, 1885.

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ties BLATCHFORD.
S., BOOK 29.

testified that the merchandise in question was a manufacture made partly of silk and partly of cotton; that the ground of the fabric was silk and the spot upon it was cotton, but the fabric was made substantially of silk, and the article was universally bought and sold under the name of 'spot or dotted net,' and never by the name of 'silk lace,' and that there was in 1864, and has been ever since that time, a well known class of goods imported into this country, which was made wholly of silk, and other and different from the merchandise in question in this action, which was bought and sold under the name of 'silk lace.' Plaintiffs offered testimony tending to show that the fabrics commercially regarded as 'silk laces' were finished on one side in figures in the form of a scollop, as a rule, and having finished edges, and that lace edgings were known as 'silk laces;' that, among laces known as 'silk laces,' are Spanish laces, Pushee laces, blond laces; that all laces which are known in commerce as 'silk laces' are made on a machine; that there were minor classes of laces included in the general class of 'silk laces,' and each class is composed of several kinds of laces, which go by distinguishing names, so that, if a person should come into a store and ask for 'silk laces' it would not be possible to tell what particular silk lace he wanted until he should specify by its particular name the particular variety wanted; that there were different names for different kinds of nets, and if a person should simply ask for net goods, it could not be ascertained what particular article he required until he mentioned its specific distinguishing name; and that there were curtain nets, bobbinets, Brussels nets, Mechlin nets, zephyr nets, mohair nets, illusion nets, and a variety of others. But plaintiffs' witnesses, upon cross examination, testified that the term 'silk laces' was not a commercial term used to designate a particular article in trade, but was a general term, and that each particular silk lace had a specific trade name, such as Valenciennes, Bretonne, and a variety of other names. Plaintiffs counsel having rested their case, the defendants' counsel called witnesses who testified in behalf of the defendants, that they were and had been for twenty years, wholesale dealers in, and importers of, silk laces, and were also wholesale dealers and importers of goods like the goods which were the subject of controversy in this action; that the term 'silk laces' was not generally regarded, in trade and commerce, in the United States, among wholesale dealers in and importers of laces, as a commercial term, used to designate any particular article of trade, but was generally understood to include all laces which were made wholly or substantially of silk; that each particular lace had a particular trade name; that the goods which were the subject of controversy in this suit were a particular kind of silk lace, called 'spotted or dotted net;' that they were made upon lace machines; that, in trade and commerce generally, in the United States, laces were understood to be delicate, thin ornamental net work, the meshes of which were formed by plaiting together threads of silk, cotton, or other material; and that the goods which were the subject of controversy in this suit corresponded with that definition."

[479]

Both parties having rested, the plaintiffs re-

quested the court to direct a verdict for them. This was refused and they excepted.

They then requested the court to charge the jury as follows: "1. That, if the jury find that goods such as those in question were not generally known among wholesale dealers in, and importers of, the articles, in buying and selling, at and prior to June 30, 1864, in our markets, under the commercial name of 'silk lace,' then the plaintiffs are entitled to recover. 2. That, if the jury find that goods such as those in [480] question were generally known among wholesale dealers in, and importers of, the article, in buying and selling, at and prior to June 30, 1864, in our markets, under the name of 'nets,' or 'spot nets,' or 'dotted nets,' or 'silk and cotton spot nets,' and not as 'silk laces,' then the plaintiffs are entitled to a verdict. 3. That, testimony having been given and not contradicted, that the goods in suit were manufactures of silk and cotton, in which silk was the component material of chief value, the plaintiffs are entitled to recover, unless the goods were known in trade and commerce, in this country, by importers, as 'silk laces.' 4. That, if the jury find that the goods were not commercially known, among wholesale dealers, in this country, as 'silk laces,' at the time of the passage of the Act of June 30, 1864, plaintiffs are entitled to recover. 5. That it is immaterial whether goods like plaintiffs' importations were or were not known as 'laces,' if they were not known commercially as 'silk laces.' 6. That, plaintiffs having shown, without contradiction, that the articles in controversy were composed of silk and cotton, the presumption, in the absence of proof, would be, that the laces were not silk laces." The court, as to each proposition, refused so to charge, and the plaintiffs excepted to each refusal.

The court then instructed the jury "that, if the plaintiffs' importation was not a silk lace within the meaning of the Act of June 30, 1864, the plaintiffs were entitled to recover; that it was a silk lace within the meaning of the Act, if it was a lace of which silk was the component material of chief value, unless, at the time the Act was passed, it was commercially known, by importers and dealers in such articles in this country, as a different article; that, if it was commercially known as 'spot net' or 'dotted net' instead of 'lace,' it would fall under the clause relating to manufactures of silk, not otherwise provided for; but, if it was called by such name only to distinguish it from other varieties of silk lace, all silk laces being known by some particular name which distinguished one variety from the others, it was, nevertheless, a 'silk lace,' within the meaning of the Act." There was no exception taken to any [481] part of those instructions.

The jury, having retired, came into court for further instructions, and the court charged them that the first clause of the 8th section imposed a duty of 60 per cent "upon articles which were made all of silk, or which were made of silk and cotton, in which silk was the controlling element, if they were known among merchants as silk goods." To this charge the plaintiffs excepted.

We think the case was, in view of the evidence, fairly and properly presented to the jury by the court. The jury were, in substance, told: (1) that the plaintiffs were entitled to
article was not a silk lace; (2) the
lace, if it was a lace of which sil
ponent material of chief value,
time the Act was passed it was
known here as a different article
was commercially known as "spo
ted net," it would fall under th
clause; but if it was so called as
rieties of silk lace, each of which
lar distinguishing name, it was,
silk lace within the meaning of t

The instructions asked for we
roneous view that an article coul
lace, within the Act, unless it w
sold by the commercial name o
This was the substance of all th
asked. Although the article wa
silk and cotton, yet, if silk was t
material of chief value, and it w
was known among merchants a
clearly fell within the 60 per c
though a lace wholly of silk also
clause, as a silk lace. The evi
sides was to the effect that the ter
was not a commercial term for a
ticle, but included all laces made
stantially of silk, each particula
particular trade name, and the
tion being a particular kind of s
"spotted or dotted net."

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, S

P. R. BOHLEN, *Plf.*
v.
RICHARD ARTHURS, Assig
BAUM and JOHN CARRIER,
M. McCLURE *et al.*

(See S. C., Reporter's ed.,

*Replevin—parties—right of poss
in common—right to cut timb
nia Statute.*

*1. A tenant in common cannot m
against a cotenant, because they
equally a right of possession; this r
in Pennsylvania.

2. Where under an agreement fo
of an undivided interest in land, to
the purchaser on his paying for it,
right to cut timber on the land wit
of the owners of the remaining in
tenants in common with him of the
such timber, and removes it, and it
sion of by such owners of the remai
has no such right of possession in it
an action of replevin by him again

3. The Pennsylvania Act of May
sec. 6, which provides as follows: "
replevin, now pending or hereafter
cover timber, lumber, coal or othe
ered from realty, the plaintiff shal
recover, notwithstanding the fact
the land from which said proper
may be in dispute; *Provided*, Said
title in himself at the time of the
no operation as between tenants in

[No. 59.]

Submitted Nov. 12, 1885. Decide

IN ERROR to the Circuit Cou
States for the Western Distri
vania.

* Head notes by *Mr. Justice* BLAT

d facts of the case appear in
e court.

rt Arthurs and **George**
r plaintiff in error.

Dalzell and **Miller & Mc-**
ndants in error.

atchford delivered the opin-

on of replevin brought in the
f the United States for the
of Pennsylvania, to recover
are white pine timber logs, in
al the court directed a verdict
ts, and, after a judgment ac-
laintiff has brought this writ
efendants who pleaded, setting
hemselves, were one Arthurs,
ruptcy of Baum and Carrier,
re. Each party, plaintiff and
med title to the timber un-
Carrier and one Osborne, who
e December 18, 1872, to the
h the timber was taken. On
, Carrier and Osborne made a
nt with one Phillips, to the ef-
ould convey to him, his heirs
warranty deed, in fee simple,
one half of certain specified
unties of Clearfield and Jeffer-
e of Pennsylvania, on his pay-
ation, and performing the cove-
ed in the agreement. These
ould pay them $125 per acre
vided one half, amounting to
nent thereof to be made out of
said lands, when and as soon
be realized from the sale of
lands, or from the sale of tim-
coal or other minerals therein
mber manufactured upon said
ills thereon to be erected, as
ntioned and provided for."
pay no interest, and to have the
y time the consideration money
r any part of the lands and re-
Phillips agreed "to advance and
of such amounts of money as
y to construct and erect a first
r sawmills, and such fixtures
appurtenant thereto, and such
tional improvements," as he,
"from time to time, consider
o be advantageous and neces-
ditable and full development"
Then followed these clauses:
awmills, machinery, and other
hall be located on such parts of
y be mutually agreed upon by
of the first and second parts
olding as tenants in common,
ers. And it is hereby express-
d agreed, that the said Wm.
f the second part named in this
have the right and power to
vements made or to be made
, and to direct and manage the
the lands herein described and
ties hereto as tenants in com-
partners."
nd his administrators, in June,
the plaintiff and one Whitney
Phillips under the agreement

of December, 1872, and in and to the lands described therein. At the same time, the heirs at law of Phillips quitclaimed to the plaintiff and Whitney the undivided one half of the said lands, so agreed to be conveyed to Phillips. The timber in question was cut and taken from those lands. Under a contract between the plaintiff and Whitney, and one McCracken, made in September, 1876, the latter agreed to [484] cut from the lands a specified quantity of square pine timber, for a stipulated price, and deliver it to the plaintiff and Whitney at Pittsburgh. In April, 1877, Whitney assigned to the plaintiff all his interest in that timber. McCracken, in pursuance of this contract, cut from the lands the timber in question. It was taken by the marshal under the writ in this suit, in April, 1877, and was bonded by the defendants and delivered to them.

The foregoing facts being proved at the trial, the court instructed the jury that the plaintiff had failed to show sufficient property in the timber to sustain replevin, and directed a verdict for the defendants, to which direction the plaintiff excepted.

It is contended, for the plaintiff, that Phillips acquired a right to the possession of the lands as a tenant in common, and a right to cut [485] and market the timber, with a view to paying the consideration for the purchase; that such rights had passed to the plaintiff; and that a verdict for the plaintiff should have been directed or else the case should have been left to the jury under proper instructions.

The most that was shown by the evidence was, that the plaintiff claimed title to the timber as being a tenant in common with the defendants of the lands from which it was cut (it being stated in the bill of exceptions that both plaintiff and defendants claimed under Baum, Carrier and Osborne); and that the suit was against the defendants, being such tenants in common with the plaintiff, and in possession of the timber.

It is a well settled principle, that, to maintain an action of replevin, a person must have not only some right of property but the right of possession. Hence, a tenant in common cannot maintain replevin against a cotenant, because they have each and equally a right of possession. This rule is recognized in Pennsylvania. In *Wilson* v. *Gray*, 8 Watts, 25, 35, it is said: "The defendant may plead property in the plaintiff and himself, and, if true, it must not only defeat the plaintiff in his writ, but entitle the defendant to a return of the property; because the latter, having had the possession of it, coupled with an interest, which [486] makes his case the stronger, until improperly deprived thereof by the sheriff, under the plaintiff's writ, which he had no right to use for such purpose, has a right to be placed *in statu quo*, that is, restored to the possession of the property as the joint owner thereof."

The terms of the agreement with Phillips did not give him any title to, or right of possession in, any timber which might be cut from the premises. He was to have a deed of an undivided half of the lands when he should pay the consideration and perform the covenants. The purchase money could be paid out of the proceeds of the sale of the lands, or out of the sale of timber, coal or minerals, or lumber

manufactured on the premises in mills to be erected thereon, as provided for in the agreement. But no land or timber could be sold unless the owners of the other undivided half of the lands should join with Phillips in a sale, and then one half of the purchase money would belong absolutely to the former, and only the other half to Phillips, to be applied on his purchase. There was nothing in the agreement which gave Phillips any right to cut timber on the premises without the consent of the other parties, and their consent that McCracken or the plaintiff might cut and remove the timber is not shown.

The plaintiff cites the Pennsylvania Statute of May 15, 1871, No. 249 (Sess. Laws, 1871, p. 268; 2 Purdon's Digest, p. 1266, sec. 6), which provides as follows: "In all actions of replevin, now pending or hereafter brought, to recover timber, lumber, coal or other property severed from realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed may be in dispute; *Provided*, Said plaintiff shows title in himself at the time of the severance." This statute has no operation as between tenants in common, but applies only to actions against third persons; and its object is only to prevent a defendant in a replevin suit of the character mentioned from setting up a dispute as to the title to the land, between the plaintiff and a person other than the defendant, if the plaintiff shows a title to the [487] land, as against the defendant, at the time of the severance. Besides, the plaintiff here showed no title at all to the land, in himself.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[505] ALEXANDER R. SHEPHERD, *Plff. in Err.*,

v.

JOHN FREDERICK MAY.

(See S. C., Reporter's ed. 505-512.)

Purchase subject to incumbrance—personal liability—principal and surety—estoppel.

1. An agreement merely to take land subject to a specified incumbrance, is not an agreement to assume and pay the incumbrance. There must be words importing a promise to pay the debt to render the grantee personally liable.

2. In the absence of the mutual agreement of the grantor, grantee and holder of the incumbrance to that effect, the relation of principal and surety does not exist between the grantee and grantor; and the latter is not discharged from his liability by an agreement between the other parties to extend the time of payment.

3. A clause in a trust deed, prescribing that the terms of sale should be the amount due on the note, and the expenses of sale in cash, does not estop the holder from denying payment in full, he having purchased at the sale for a less sum than the amount due.

[No. 50.]

Argued Nov. 11, 1885. Decided Nov. 23, 1885.

IN ERROR to the Supreme Court of the District of Columbia.

Statement by *Mr. Justice* **Woods:**

This was an action at law brought by Jo Frederick May, the defendant in error, again Alexander R. Shepherd, the plaintiff in erro to recover a balance due on a promissory not

The facts disclosed by the bill of exceptio were, in substance, as follows: On April 2 1875, May lent Shepherd $10,000, whereup Shepherd made and delivered to May a note that date and amount, payable to his order t years after date, with interest at 10 per ce per annum, payable quarter yearly until pa To secure the payment of the note, Shephe on the same day conveyed to two trustees, w power to sell, in default of the payment of t note, a certain improved lot in the City Washington of which he was the owner, a which May at that time believed to be go security for the money lent. This deed of tr provided that if default was made in the p ment of the note or the interest, the trust should sell the property thereby conveyed public sale, on the following terms: "T amount of indebtedness secured by said deed trust unpaid, with the expenses of sale, in ca and the balance at twelve and eighteen mont for which the notes of the purchaser, bear interest from the day of sale, * * * shall taken."

Before the maturity of the note, Shepherd s the lot to Gilbert C. Walker, and by deed da August 1, 1876, for the consideration, as sta in the deed, of $30,000, the receipt of wh was acknowledged, conveyed the same to h The deed to Walker was made "subject t certain deed of trust dated the twenty-sixth of April, A. D. 1875, * * * for the sum of thousand dollars," being the same deed of t executed by Shepherd to secure his note May. The deed contained a covenant by Sh herd to defend the premises conveyed, aga the claim of all persons claiming under grantor, "save and except the aforesaid dee trust." Shepherd paid the interest on his n to May as it accrued up to the time of his to Walker, and after that time Walker paid interest until the maturity of the note. W the note fell due, Walker came to May and him that "he had the note to pay," and as May to extend the time of payment for year; and thereupon May extended the note one year, Walker agreeing to pay inte thereon at the rate specified in the note. Wa paid the interest upon the note for the year, at the end of that time asked a further exten for another year. May agreed to extend the of payment for nine months at the same ra interest, which Walker agreed to pay, bu paid no interest for this period. There wa evidence that Shepherd consented to thes tensions of time for the payment of his n

At the end of the nine months allowe May to Walker for the payment of the n upon default made, the property covered by deed of trust was advertised and sold by trustees. It was purchased by May for the of $8,500, to whom it was conveyed by trustees by deed dated May 19, 1879. crediting the note with the net proceeds of May brought suit against Shepherd to rec the balance which he claimed to be due the The jury returned a verdict for May $3,163.28, on which the court rendered ment. Shepherd, by the present writ of e

tness of that judgment.

attingly and **Andrew** intiff in error:

ances of the case Walker debtor, and Shepherd the t of the note; and the ex- ime for a valid considera- d s consent, released him e note.

2; *Millerd* v. *Thorn*, 56 v. *Tallman*, 67 N. Y. 96; 10 Bligh, N. R. 548, 580, Mich. 478; *Calvo* v. *Da- eorge* v. *Andrews*, 60 Md.

not be used to show that tgaged premises assumed ortgage. The assumption by circumstances, and a se is sufficient.

2; *Moore's Appeal*, 88 Pa. Zab. 680; *Drury* v. *Tre- n*, 168; *Brewer* v. *Dyer*, 7

his assumed relations to ame liable upon it to suit

ush. 337; *Barker* v. *Buck- ence* v. *Fox*, 20 N. Y. 268; Y. 178; *Ross* v. *Kennison*, *ugh* v. *Kugler*, 3 Ohio St. *ompson*, 4 Ohio St. 333.

er cent interest until paid, e same rate of interest, for fficient consideration, and

ls'n v. *Helmrick*, 57 Mo. s, 69 Mo. 539; *McComb* v. 48; *Wood* v. *Newkirk*, 15 v. *Freshwater*, 31 Ohio St. 3 Wis. 286.

rescribed that the terms of unt of the note and expen- d the plaintiff is estopped not paid.

17 Johns. 161, 166; *Free-* Y. 50; *Dundas* v. *Hitch-* U. S. bk. 13, L. ed. 978). property and say that the

3, 504, *et seq.*; *Breeding* v. 175; *Phillips* v. *Rogers*, 12 *Davis*, 26 N. Y. 495.

Duvall, for defendant in

ls delivered the opinion

of the plaintiff in error the transactions stated in Walker became the prin- and Shepherd became his pon a valid contract with time for the payment of consent of Shepherd, the charged.

or sought upon the trial contention by asking the ry to render a verdict in having refused to do this, igned for error.

is assignment of error to e mere conveyance of the premises in question to Walker by Shepherd, subject to the incumbrance created by the deed of trust, Walker became bound to May as principal debtor, and Shepherd became his surety. We are of opinion that the conveyance of the premises to Walker did not subject him to any liability to May whatever. To raise such a liability as is contended for by Shepherd there must be words in the deed of conveyance from which, by fair import, an agreement to pay the debt can be inferred. This was expressly held in *Elliott* v. *Sackett*, 108 U. S. 132 [Bk. 27, L. ed. 678], where *Mr. Justice* Blatchford, in delivering the judgment of this court, said: "An agreement merely to take land, subject to a specified incumbrance, is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment, does not bind himself personally to pay the debt. There must be words importing that he will pay the debt to make him personally liable." To the same effect see *Belmont* v. *Coman*, 22 N. Y. 438; *Fisk* v. *Tolman*, 124 Mass. 254; *Hay* v. *Brownshall*, 4 C. E. Green, 78; *Fowler* v. *Fay*, 62 Ill. 375. There are no such words in the deed made by the plaintiff in error to Walker.

Neither is there any other sufficient evidence of any agreement between Walker and Shepherd, whereby the former undertook to pay the debt of the latter to May. The remark made by Walker to May, when he asked to have the time for the payment of the note extended, that "he had it to pay," falls far short of showing any such agreement. As he had bought the property, subject to the incumbrance of the deed of trust, for the consideration of $30,000, which, as appears by the deed to him, he had paid to Shepherd, he might well say that he had the incumbrance to pay without admitting or meaning that he had become personally liable to Shepherd to pay it. His words may be fairly construed to mean that he had the incumbrance to pay or would have to lose the property on which he had already paid $30,000 of the purchase money. But, even if Walker had said to May that he was liable for the debt, his admission would not have been binding on May so as to establish the fact without other proof. And if Walker had expressly promised May to pay the debt, that would not, without the assent of May, have converted Shepherd from a principal debtor into a surety merely. *Cucullu* v. *Hernandez*, 103 U. S. 105 [Bk. 26, L. ed. 322]; *Rey* v. *Simpson*, 22 How. 341 [63 U. S. bk. 16, L. ed. 260]. The only way in which Walker could become the principal debtor of May, and Shepherd, the surety, was by the mutual agreement of all three. There is no proof of any such agreement. It follows that, as the relation of principal and surety did not exist between Walker and Shepherd, the latter was not discharged from his liability to May by the contract of May with Walker to extend the time for the payment of the money due on Shepherd's note. But even if it had been shown that Shepherd had become the surety of Walker, it was incumbent on the former to show as a part of his defense that the indulgence given by May to Walker was without his assent. *Spriggs* v. *Bank of Mount Pleasant*, 14 Pet. 201 [39 U. S. bk. 10, L. ed. 419]; *Bangs* v. *Strong*, 7 Hill, 250;

[511]

S. C. 42 Am. Dec. 64; *Cox* v. *Mobile, etc. R. R. Co.* 37 Ala. 323. There was no proof of want of assent. The defense therefore failed.

It is next contended by the plaintiff in error that May is estopped to deny that the note sued on is not paid in full, because the deed of conveyance made to him by the trustees recites that the property was sold to him in accordance with the terms of the deed of trust, and the deed of trust declared that the terms of sale should be the amount due on the note of Shepherd, and the expenses of sale in cash, and the balance on a credit of twelve and eighteen months. This contention is based on the theory that the clause of the deed of trust executed by Shepherd, prescribing the terms of sale, and which merely showed his expectation that the property would bring, at least, the amount of the note and expenses of sale, estopped May from denying that the property would, and actually did, bring that amount. There is no estoppel. The proposition amounts to this, that when a mortgagor represents to his mortgagee that the property mortgaged is sufficient security for the debt, and the mortgagee, relying upon the representation, accepts the security, and it turns out that the proceeds of the mortgaged property are insufficient to pay the debt, he is estopped to deny that his debt is paid. The statement of the proposition is its answer. The authorities referred to upon this contention* by counsel for Shepherd are cited to sustain the proposition, that a person who accepts a deed of conveyance is estopped to deny recitals therein contained. But as there is no recital in the deed that May had agreed that the property should bring a sum sufficient to pay his note, he is not estopped to deny that the note is paid.

[512]

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

*Fitch v. Baldwin, 17 Johns. 161; Freeman v. Auld, 44 N. Y. 50; Dundas v. Hitchcock, 12 How. 256 ([53 U. S. bk. 13 L. ed. 978.]

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[487]

STEPHEN KURTZ, *Plff. in Err.*,

v.

JOHN MOFFITT ET AL.

JOHN MOFFITT ET AL., *Plffs. in Err.*,

v.

STEPHEN KURTZ.

(See S. C., Reporter's ed., 487-505.)

Removal of causes—Act of 1875—writ of habeas corpus—*arrest of deserter from Army of the United States.*

*1. A writ of *habeas corpus* is not removable from a State Court into a Circuit Court of the United States under the Act of March 3, 1875, ch. 137, sec. 2.

2. A police officer of a State, or a private citizen, has no authority as such, without any warrant or military order, to arrest and detain a deserter from the Army of the United States.

[Nos. 860, 871.]

Submitted Oct. 14, 1885. Decided Nov. 23, 1885.

IN ERROR to the Superior Court of the City and County of San Francisco and State of California; and to the Circuit Co United States for the District of Cal

The history and facts appear in t of the court.

Messrs. **H. G. Siebert** and **R. M** for Kurtz, the petitioner.

Messrs. **Alfred Clarke and S. derson,** for respondents.

Mr. Justice **Gray** delivered the the court:

A writ of *habeas corpus* was issue 8, 1885, by and returnable before the Superior Court of the City and San Francisco in the State of Cali dressed to John Moffitt and T. W. zens of that State, upon the petition Kurtz, a citizen of Pennsylvania, al he was by them unlawfully impriso strained of his liberty, inasmuch a arrested him as a deserter from th the United States, and had no war thority to arrest him, and were not the United States.

Moffitt and Fields, at the time their appearance in that court, file to remove the case into the Circuit C United States, because the parties w of different States, and because the su a question arising under the Consti laws of the United States, to wit: t whether a person who is not an of United States has authority to arres from the Army of the United States. ordered the case to be so removed.

Moffitt and Fields thereupon signe in the circuit court the following re

"Now come the respondents and their return to the writ of *habeas cor* and show that respondent J. Moffitt police officer of the City and Cou Francisco, and respondent T. W. special police officer of said city a and being such officers as aforesai rested the petitioner, Stephen Ku City and County of San Francis authority of the United States, wit: that said Stephen Kurtz, name of Stephen Noll, on the 2 May, 1876, at Cleveland in the Sta enlisted in the Army of the United the term of five years, and on th of March, 1879, he being a soldier Co. D of the 21st Regiment of Infa Army of the United States, station couver Barracks, in the Territory o ton, deserted from the Army of States; and your respondents hold s er for the purpose of delivering him tary authorities of the United State according to the laws of the United

The circuit court, upon motion a made an order remanding the case perior Court of San Francisco; and Fields sued out a writ of error fro to reverse that order.

After the case had been so reman filed in the Superior Court of San suggestion that the return was insu that he was entitled to be discharg following reasons:

"First. It appears by said retu defendants were not officers of the U

*Head notes by *Mr. Justice* GRAY.

cers of the municipality of
l as such they have no au-
detain the plaintiff, and as
ave been and are prohibited
detaining the plaintiff as a
nited States Army by a rule
tment which was in force at
est of the plaintiff, and still
rule was and is as follows:
e prohibited from arresting
United States Army or Navy
'

ertion set up in the return
t the United States, and not
f California, of which Com-
efendants are officers, and
, incompetent to arrest or
.

rtion set up in the return is
6 of section 1342 of the Re-
e United States."

rt, upon a hearing, ordered
corpus to be dismissed and
custody, and entered judg-
and he sued out a writ of
rt to reverse that judgment,
e highest court of the State
n on the merits of the case
e *Robb's Case*, 64 Cal. 431,
24, 627 [Bk. 28, L. ed. 542,
anolly, 113 U. S. 27 [Bk. 28,

n to be considered is whether
tly remanded to the state
ve been retained and decided
rt of the United States into
en removed on a petition
of March 3, 1875, ch. 137,

y the removal of a case from
be circuit court under this
gh that it arises under the
ws of the United States, or
citizens of different States,
uit of a civil nature, at law
e the matter in dispute ex-
costs, the sum or value of
s." 18 Stat. at L. 470.

corpus, sued out by one ar-
a civil suit or proceeding,
assert the civil right of per-
nst those who are holding
a criminal. *Ex parte Tom*
[Bk. 27, L. ed. 826]. To
g whether it is, within the
of 1875, a "suit at law or
e matter in dispute exceeds
f five hundred dollars," it
to refer to the use and the
e words in earlier Acts de-
on of the national courts.

t of September 24, 1789, ch.
ized "final judgments and
ons and suits in equity in a
the matter in dispute ex-
ne of two thousand dollars,
to be revised by this court
appeal. 1 Stat. at L. 84.
2, 1816, ch. 39, sec. 1, pro-
should be brought to this
writ of error from the Cir-
District of Columbia, "un-
dispute in such cause shall
be of the value of one thousand dollars or upwards, exclusive of costs." 3 Stat. at L. 261.

In *Lee* v. *Lee*, 8 Pet. 44 [33 U. S. bk. 8, L. ed. 860], decided in 1834, a petition to the Circuit Court for the District of Columbia set forth that the petitioners were entitled to their freedom, and were held in slavery by the defendant; he pleaded that they were not entitled to their freedom as they had alleged; upon that plea issue was joined, and a verdict and judgment rendered for the defendant; and the petitioners sued out a writ of error. A preliminary objection to the jurisdiction of this court was overruled, and the judgment below considered on the merits and reversed. The ground of the decision upon the question of jurisdiction appears to have been that the single matter in dispute between the parties was the freedom or slavery of the petitioners—to the petitioners, the value of their freedom, not to be estimated in money; to the defendant, claiming to be their owner, the pecuniary value of the slaves as property, which, if he had been the plaintiff in error, might have been ascertained by affidavits. 8 Pet. 48 [33 U. S. bk. 8, L. ed. 862].

In *Barry* v. *Mercein*, 5 How. 103 [46 U. S. bk. 12, L. ed. 70], decided in 1847, this court dismissed for want of jurisdiction a writ of error to reverse a judgment of the Circuit Court for the Southern District of New York, refusing to grant to a father a writ of *habeas corpus* to take his child out of the custody of his wife who was living apart from him. *Chief Justice* Taney, in delivering the opinion, after quoting the 22d section of the Judiciary Act of 1789, said: "In order, therefore, to give us appellate power under this section, the matter in dispute must be money, or some right, the value of which in money can be estimated and ascertained." "The words of the Act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of a business transaction. There are no words in the law which by any just interpretation can be held to extend the appellate jurisdiction beyond those limits, and authorize us to take cognizance of cases to which no test of money value can be applied. Nor indeed is this limitation upon the appellate power of this court confined to cases like the one before us. It is the same in judgments in criminal cases, although the liberty or life of the party may depend on the decision of the circuit court. And since this court can exercise no appellate power unless it is conferred by Act of Congress, the writ of error in this case must be dismissed." 5 How. 120, 121 [46 U. S. bk. 12, L. ed. 77, 78]. [496]

In *Pratt* v. *Fitzhugh*, 1 Black, 271 [66 U. S. bk. 17, L. ed. 206], decided in 1861, this court dismissed for want of jurisdiction a writ of error to reverse a judgment of the Circuit Court for the Northern District of New York, discharging on *habeas corpus* persons imprisoned upon an execution issued by that court directing the marshal to levy the amount of a decree for $21,581.28 out of their goods and chattels, and, for want thereof, to arrest and keep them until the moneys were paid. *Mr. Justice* Nelson, in delivering the opinion, said that the

22d section of the Judiciary Act had always been held to mean a property value; and he distinguished the case of *Holmes* v. *Jennison*, 14 Pet. 540 [39 U. S. bk. 10, L. ed. 579] which was a writ of error to reverse a judgment of the Supreme Court of Vermont on *habeas corpus*, remanding to custody a prisoner under a warrant of extradition from the Governor of that State, upon the ground that it was brought up from a state court under the 25th section of the Judiciary Act, in which case no value was required.

In *DeKrafft* v. *Barney*, 2 Black, 704 [67 U. S. bk. 17, L. ed. 350], decided in 1862, an appeal was taken from a decree of the Circuit Court for the District of Columbia, awarding the custody of a child to the father as against the divorced mother; and *Lee* v. *Lee*, above cited, was referred to as supporting the right of appeal. But this court dismissed the appeal for want of jurisdiction, *Chief Justice* Taney saying that the case was not distinguishable from *Barry* v. *Mercein*, above cited, and that in that case it was held "that in order to give this court jurisdiction under the 22d section of the Judiciary Act of 1789, the matter in dispute must be [497] money, or some right, the value of which could be calculated and ascertained in money."

The Act of February 5, 1867, ch. 28, sec. 1, conferring power upon the judges of the national courts to issue writs of *habeas corpus* in cases of persons restrained of their liberty in violation of the Constitution, or of any treaty or law of the United States, expressly gave an appeal to this court from the judgment of a circuit court in such cases. 14 Stat. at L. 385. Shortly after the passage of that Act, *Mr. Justice* Nelson refused to allow an appeal from a judgment of the Circuit Court for the Southern District of New York upon a writ of *habeas corpus* issued under the 14th section of the Judiciary Act of 1789, because no appeal was provided by law in the case of a *habeas corpus* issued under that Act, and the appeal given by the Act of 1867 was confined to cases begun under it. *In re Heinrich*, 5 Blatchf. C. C. 414, 427. And within two years afterwards it was determined by this court that, independently of the Act of 1867 (which was repealed by the Act of March 27, 1868, ch. 34, 15 Stat. at L. 44), this court (except in a small class of cases of commitments for acts done or omitted under alleged authority of a foreign government, as to which provision was made by the Act of August 29, 1842, ch. 257, 5 Stat. at L. 539) had no jurisdiction by direct appeal to revise the judgments of inferior courts in cases of *habeas corpus*, but could only do so by itself issuing writs of *habeas corpus* and *certiorari* under the general powers conferred by the Judiciary Act of 1789. *Ex parte McCardle*, 6 Wall. 318 [73 U. S. bk. 18, L. ed. 816], and 7 Wall. 506 [74 U. S. bk. 19, L. ed. 264]; *Ex parte Yerger*, 8 Wall. 85 [75 U. S. bk. 19, L. ed. 332]. See also, *Ex parte Royall*, 112 U. S. 181 [Bk. 28, L. ed. 690]; *Wales* v. *Whitney*, 114 U. S. 564 [*ante*, 277].

Section 1909 of the Revised Statutes, substantially re-enacting provisions of earlier Acts, and providing that writs of error and appeals from the final decisions of the Supreme Courts of certain Territories shall be allowed to this court in the same manner and under the same regulations as from the Circuit Courts of the United States, "where the value
erty or the amount in controversy
thousand dollars, except that a wr
appeal shall be allowed" to this c
decisions of the courts or judges
tory "upon writs of *habeas corp*
the question of personal freedom,
plies that writs of *habeas corpus* v
included if not specially mentione
Potts v. *Chumasero*, 92 U. S. 358 [
499]; *Elgin* v. *Marshall*, 106 U.
[Bk. 27, L. ed. 249]; Curtis, U. S.
From this review of the statut
sions, the conclusion is inevitable
diction, conferred by Congress up
of the United States, of suits at lav
in which the matter in dispute exc
or value of a certain number of dol
no case in which the right of neit
capable of being valued in money
fore that writs of *habeas corpus* ar
able from a state court into a Cir
the United States under the Act
1875, ch. 137, § 2; and this case
remanded to the state court.

We are then brought to a con
the merits of the case, as presente
of error sued out by the prisoner t
judgment of the state court, rema
custody.

The case, as shown by the reco
this: Kurtz, a deserter from the
United States, was, without any w
press authority, arrested by Moffit
police officers of the City of San F
citizens of the State of Californi
United States, and held by them
pose of being delivered to the mili
ties of the United States to be tri
to the laws of the United States; a
immunity from being arrested fo
crime by persons not military of
United States, and having no expr
from the United States or from su
arrest him.

If a police officer or a private ci
right, without warrant or express
arrest a military deserter, the righ
rived either from some rule of the
land which has become part of our
the legislation of Congress.

By the common law of Englan
civil officer nor a private citizen h
without a warrant to make an
crime not committed in his presen
the case of felony, and then only
pose of bringing the offender b
magistrate. 1 Hale, P. C. 587-59
C. 76-81; 4 Bl. Com. 292, 293, 29
Court, 6 D. & R. 623; *S. C.* 4 B
No crime was considered a felon
not occasion a total forfeiture of t
lands, or goods, or both. 4 Bl.
Ex parte Wilson, 114 U. S. 417, 42
ed. 89, 91]. And such a forfeiture
low upon conviction by a court-
crime not punishable by the court
law. Co. Lit. 391 *a*; 1 Clode, Mi
of the Crown, 176.

By some early English statutes, w
to have been in force down to the
of 1688, desertion was made felony
in the civil courts. 3 Inst. 86, 87;

eal, 3 Mod. 124; *S.*
2 Shower, 511; 12
note; 4 Bl. Com.
Allen, 480, 487–490.
disuse after Parlia-
beginning with the
, and re-enacted al-
he first time author-
to be punished at
ial in time of peace.
Hist. 458; 1 Clode,
wn, 19, 55, 56, 143,

Mutiny Acts have
nly, contained pro-
easonably suspected
apprehended by a
re a justice of the
desertion established
eir surrender to the
7 Anne, ch. 4, sec.
c. 42; 9 Statutes of
Military Law, 93,
, 3d ed. 200. By
s made for their ap-
icer or soldier, if a
ately met with; and
ion whether a man
auses to be appre-
delivered to an offi-
aving him brought
may not maintain
who causes his ar-
e the officer of the
he latter under the
nd hold all prison-
a military officer.
48, 81; *Wolton* v.

e ever been the law
cer or a private cit-
ithout any warrant
magistrate or from
arrest a deserter for
im to the military
t-martial.
line between civil
s always been main-
of Amendment of
clares that "no per-
for a capital or oth-
nless on a present-
nd jury," expressly
the land or naval
ases subject to the
regulation of those
section of the First
Congress is empow-
ial form no part of
United States, and
the limits of their
rolled or revised by
Hoover, 20 How. 65
]; *Ex parte Mason*,
ed, 1213]; *Wales*
[*ante*, 277]. Con-
upon civil officers
citizens any power
only in a military
e Revised Statutes,
any crime or offense
e offender may, by
United States," or

commissioner of a circuit court, or by any judge, mayor, justice of the peace or magistrate of any State where he may be found, "and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense," and that "copies of the process shall be returned as speedily as may be into the clerk's office of such court," manifestly applies to proceedings before the civil courts only. [501]

From the very year of the Declaration of Independence, Congress has dealt with desertion as exclusively a military crime, triable and punishable, in time of peace, as well as in time of war, by court-martial only, and not by the civil tribunals; the only qualification being that since 1830 the punishment of death cannot be awarded in time of peace. Articles of War of September 20, 1776, sec. 6, art. 1, 2 Journals of Congress, 347, continued in force by the Act of September 29, 1789, ch. 25, sec. 4, 1 Stat. at L. 96; Acts of March 16, 1802, ch. 9, sec. 18; April 10, 1806, ch. 20, art. 20; January 11, 1812, ch. 14, sec. 16; January 29, 1813, ch. 16, sec. 12; 2 Stat. at L. 136, 362, 673, 796; May 29, 1830, ch. 183; 4 Stat. at L. 418; Rev. Stat. sec. 1342, arts. 47, 48.

The provisions of the Revised Statutes concerning the trial and punishment of deserters are as follows: By section 1342, "The Armies of the United States shall be governed by the following rules and articles;" "and the convictions mentioned therein shall be understood to be convictions by court-martial." By article 47, any officer or soldier who deserts the service of the United States "shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct;" and by article 48, every soldier who deserts "shall be tried by a court-martial and punished, although the time of his enlistment may have elapsed previous to his being apprehended and tried." The provisions of sections 1996 and 1998, which re-enact the Act of March 3, 1865, ch. 79, sec. 21, 13 Stat. at L. 490, and subject every person deserting the military service of the United States to additional penalties, namely: forfeiture of all rights of citizenship, and disqualification to hold any office of trust or profit, can only take effect upon conviction by a court-martial, as was clearly shown by *Mr. Justice* Strong, when a judge of the Supreme Court of Pennsylvania, in *Huber* v. *Reily*, 53 Pa. St. 112, and has been uniformly held by the civil courts as well as by the military authorities. *State* v. *Symonds*, 57 Maine, 148; *Severance* v. *Healey*, 50 N. H. 448; [502]
Goetcheus v. *Matthewson*, 61 N. Y. 420; Winthrop's Digest of Judge Advocate General's Opinions, 225.

The Articles of War have likewise always provided that any officer or soldier who advises or persuades any other officer or soldier to desert the service shall be punished by court-martial. Articles of War of September 20, 1776, sec. 6, art. 4; Act of April 10, 1806, ch. 20, art. 23; Rev. Stat. at L., sec. 1342, art. 51. Section 5455 of the Revised Statutes, which re-enacts the Act of March 3, 1863, ch. 75, sec. 24, 12 Stat. at L.

735, embracing the provisions of earlier statutes, and by which every person who entices or procures a soldier to desert the military service of the United States, or who aids a soldier in deserting, or knowingly harbors a soldier who has deserted, "or who refuses to give up and deliver such soldier at the demand of any officer authorized to receive him," is to be punished by fine and imprisonment, merely provides for the punishment of civilians, not subject to the Articles of War, who are accessories to the crime of desertion by a soldier, or who do any of the acts specified tending to promote his commission of that crime. It has no application to the crime of the soldier himself, and no tendency to show that he may be arrested by a private citizen without authority from a military officer. Indeed, the last clause above quoted has rather the opposite tendency.

The respondents contend that their authority to make this arrest is to be implied from the usage of offering rewards for the apprehension of deserters, which has existed from a very early date.

On May 31, 1786, the Congress of the Confederation passed the following resolve: "*Resolved*, That the commanding officer of any of the forces in the service of the United States shall, upon report made to him of any desertions in the troops under his orders, cause the most immediate and vigorous search to be made after the deserter or deserters, which may be conducted by a commissioned or non-commissioned officer, as the case shall require. That, if such search should prove ineffectual, the officer commanding the regiment or corps to which the deserter or de-
[503] serters belonged shall insert in the nearest gazette or newspaper an advertisement, descriptive of the deserter or deserters, and offering a reward, not exceeding ten dollars, for each deserter who shall be apprehended and secured in any of the gaols of the neighboring States. That the charges of advertising deserters, the reasonable extra expenses incurred by the person conducting the pursuit, and the reward, shall be paid by the Secretary of War, on the certificate of the commanding officer of the troops." 11 Journals of Congress, 81.

Since the adoption of the Constitution, Congress has never passed any similar resolve or statute; and the only legislation upon the subject, that has come to our notice, is in the provision made in the annual Army Appropriation Acts from 1844 to 1876, "for the apprehension of deserters, and the expenses incidental to their pursuit," and from 1877 to the present time, "for the apprehension, securing and delivery of deserters, and the expense incident to their pursuit." Acts of June 17, 1844, ch. 106, 5 Stat. at L. 697; July 24, 1876, ch. 226, 19 Stat. at L. 98; November 21, 1877, ch. 1, 20 Stat. at L. 2; 1885, ch. 339, 23 Stat. at L. 359. These Acts clearly confer no authority upon anyone, not otherwise lawfully authorized, to arrest a deserter.

For many years, the Army Regulations promulgated by the Secretary of War under authority of the President, have generally provided, as in those of 1821 and 1841, that a certain pecuniary reward "shall be paid to any person who may apprehend and deliver a deserter" to an officer of the Army; or, as in the later regulations, that a like reward "will be paid for the apprehension and
serter to an officer of the Army
venient post or recruiting statio
ulations of 1821, art. 69, sec. 1
sec. 123; 1857, art. 18, sec. 1
sec. 156; 1863, art. 18, sec. 156
48; 1881, art. 22, sec. 214.

The Army Regulations derive
the power of the President as
Chief, and are binding upon all
of his legal and constitutional a
States v. *Eliason*, 16 Pet. 291
L. ed. 968]; *United States* v.
556 [44 U. S. bk. 11, L. ed.
they could, in time of peace,
assent of Congress, confer aut
officers or private citizens to e
tary law need not be consider
regulations in question cannot
undertaking to confer such a
do not command or authorize
arrest or detain deserters, but
payment of a reward for every
brought in, and justify the mi
paying the reward and receiv
the deserter.

The President's Proclamatio
March 10, 1863, 13 Stat. at L.
ing all soldiers absent without
to their regiments, on pain of
and punished as deserters, and
good citizens "to aid in restori
ments all soldiers absent witho
now in force. It was issued in
a temporary purpose, under s
Act of March 3, 1863, ch. 75, 12
which has been repealed by s
5596 of the Revised Statutes.

The rule of the common l
officer or a private citizen ma
without a warrant, has been g
the courts of the several States
cases of felony punishable by
nals. *Wakely* v. *Hart*, 6 Bin
v. *Mix*, 3 Wend. 350; *Rohan* v.
281; *Brockway* v. *Crawford*, 3
433; *Reuck* v. *McGregor*, 3 Vro
Erben, 40 N. Y. 463; *State* v.
377. But that rule has never,
informed, been judicially e
case of an offender against t
punishable exclusively by co
Hutchings v. *Van Bokkelen*, 3
which it was held that an offic
might lawfully arrest a deserte
for trial by court-martial, wit
and that proof of the person m
was *de facto* such an officer
was not even suggested that th
supported without any evidenc
authority. And in *Trask* v.
569, it was decided that a civil
citizen could not lawfully arrest
out express order or warrant.

Sections 836, 837, 849, of th
California of 1872, affirming th
peace officer, without a warra
person, to make an arrest "for
committed or attempted in h
well as in cases of felony, an
person arrested to be taken for
magistrate, evidently have in vi
only, and if they could be cons

3. The mode in which fines and penalties shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are matters of legislative discretion.

[No. 593.]

After the opening of the argument, November 12, 1885, the court declined to hear further argument. Decided, November 23, 1885.

IN ERROR to the Supreme Court of the State of Missouri.

Statement of the case by *Mr. Justice* **Field:**

This case comes from the Supreme Court of Missouri. It is an action against the Missouri Pacific Railway Company, a corporation created under the laws of that State, to recover in double its value damages for killing a mule, the property of the plaintiff below, of the value of $135. It was brought in the Circuit Court of St. Louis under a statute of the State which provides that "Every railroad corporation formed or to be formed in this State, and every corporation formed or to be formed under this chapter, or any railroad corporation running or operating any railroad in this State, shall erect and maintain lawful fences on the sides of the road where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands, with openings and gates therein to be hung, and have latches or hooks, that they may be easily opened and shut at all necessary farm crossings of the road, for the use of the proprietors or owners of the lands adjoining such railroad, and also to construct and maintain cattle guards, where fences are required, sufficient to prevent horses, cattle, mules, and all other animals from getting on the railroad; and until fences, openings, gates, and farm crossings, and cattle guards as aforesaid, shall be made and maintained, such corporation shall be liable in double the amount of all damages which shall be done by its agents, engines, or cars to horses, cattle, mules, or other animals on said road, or by reason of any horses, cattle, mules, or other animals escaping from or coming upon said lands, fields, or inclosures, occasioned in either case by the failure to construct or maintain such fences or cattle guards. After such fences, gates, farm crossings, and cattle guards shall be duly made and maintained, said corporation shall not be liable for any such damages, unless negligently or wilfully done." (Session Laws of 1875, p. 131.) [513] [514]

The petition avers the incorporation of the defendant below, the plaintiff in error here; its ownership of a railroad running into and through the City of St. Louis; the ownership of the mule by the plaintiff below on the first of August, 1877, and its value; the failure of the Company to construct and maintain the fences, gates and cattle guards required by the above statute, at the point on the line of the road in the city where it passes through, along and adjoining cultivated fields, and that the mule was on that day run over and killed by the agents, engines and cars of the Company on the road; that the killing was occasioned by the failure of the Company to construct and maintain such fences, cattle guards and gates, and that the plaintiff was damaged thereby in the sum of $135. He therefore prays judgment for $270 and costs.

[illegible] the petition, deny-
[illegible] allegations, and
[illegible] that such in-
[illegible] were assumed by the
[illegible] to be true unless, neg-
[illegible] directly controlling

[illegible] assumed the aver-
[illegible]
[illegible] without a
[illegible] The allega-
[illegible] established, and the
[illegible] of the plaintiff,
[illegible] $300. Thereupon,
[illegible] were doubled, and
[illegible] in his favor for $270

[illegible] were taken by the
[illegible] of evidence on the
[illegible] in various stages
[illegible] of the action,
[illegible] against the Com-
[illegible] the statute upon which
[illegible] in violation of and in

[illegible] of the Constitution
[illegible] that it is depriving the
[illegible] property, so far as it exceeds
[illegible] killed or injured, with-
[illegible] law, and in that it denies to
[illegible] equal protection of the laws.
[illegible] article 2, of the Constitution
[illegible] Missouri, in that it is taking the
[illegible] the defendant against its con-
[illegible] use and benefit of the plain-
[illegible] the amount claimed by plaintiff
[illegible] the stock killed or injured,
[illegible] taking and appropriating, without
[illegible] law, the property of the defend-
[illegible] use of the plaintiff, which use is pri-
[illegible] the meaning of said provision.
[illegible] 10, article 2, of the Constitution
[illegible] State of Missouri, in that, so far as plain-
[illegible] recover in excess of the value of the
[illegible] killed or injured, it is depriving the de-
[illegible] of its property without due process of
[illegible] against the law of the land.

[illegible] 33, article 4, of the Constitu-
[illegible] the State of Missouri, in that it is grant-
[illegible] a class of persons, of which plaintiff is
[illegible] a special and exclusive right, privilege,
[illegible]

[illegible] 7, article 11, of the Constitution
[illegible] State of Missouri, in that it is giving the
[illegible] proceeds of the penalty, to wit: the
[illegible] over and above the value of the stock
[illegible] killed or injured, to the plaintiff, and not to the
[illegible] fund, as provided by said section, and
[illegible] the Legislature has provided no remedy,
[illegible] plaintiff, for the recovery of such pen-
[illegible] of said school fund.

But the court overruled the objections in
[illegible] instance, as they were made, and the de-
[illegible] below excepted to the rulings. A mo-
[illegible] for a new trial, and also in arrest of judg-
[illegible] was made on similar grounds, and was
[illegible] of in the same way against the excep-
[illegible] of the defendant.

The case being taken to the Court of Appeals
of St. Louis, the judgment was there affirmed
[illegible] without prejudice to either party in
the appellate court, both parties waiving any
error in such affirmance. The case was then
carried to the Supreme Cour
where the judgment of the lov
firmed after full consideration
and thereupon this writ of er

Messrs. **A. B. Browne, A.**
Thos. J. Portis, for plaintif
Railroad corporations are "
the meaning of the term as use
tution, who cannot "be depriv
ty, or property without due p
and who are entitled to "the eq
the laws."

R. R. Tax Case, 8 Saw. 263
v. *Deveaux*, 5 Cranch, 86 (9 U.
44); *Society, etc.* v. *New Haven*
(21 U. S. bk. 5, L. ed. 662); *Ma*
O. R. R. Co. 16 How. 314 (57 U.
953); *Sinking Fund Cases*, 99 U
L. ed. 501).

This "double damage" Act
Missouri requires the railroad
tion to individuals.

It deprives this Corporation
without due process of law, an
equal protection of the laws.

Cole v. *La Grange*, 113 U. S.
898); *St. Louis Co. Ct.* v. *Gris*

The statute is not a penal
which stand upon the police po
are not necessarily penal.

Cooley, Const. Lim. 596. S
Dwarris, 74; *Reed* v. *Northfield*

Mr. **T. K. Skinker,** for def
The Fourteenth Amendment
tion to this case, since no quest
nation against the negro race is

Slaughter House Cases, 16 W
bk. 21, L. ed. 394); *Strauder* v
100 U. S. 303 (Bk. 25, L. ed. 664
ware, 103 U. S. 370, 386 (Bk. 26,

The statute in question does
plaintiff in error the equal protec

Tredway v. *R. R. Co.* 43 Iow
v. *R. R. Co.* 29 Minn. 425; *F*
Trust Co. 77 Mo. 475; *State* v. *M*
529; *Soon Hing* v. *Crowley*, 113
28, L. ed. 1145); *Barbier* v. *Con*
27 (Bk. 28, L. ed. 923); *R. R. C*
96 U. S. 521 (Bk. 24, L. ed. 734
v. *Dubarry*, 33 La. An. 481; *S.*
273; *Cincinnati, etc. R.R. Co.* v.
91 Ky. 492.

It does not deprive the plai
his property without due proce

Walker v. *Sauvinet*, 92 U. S.
ed. 678); *Davidson* v. *New Orle*
(Bk. 24, L. ed. 616).

The statute in question is a p
Its object is, by compelling rail
to fence their lines, to keep liv
the way of trains, and thus af
curity to the traveling public,
transit and to the stock itself.

State v. *Matthews*, 44 Mo. 52
v. *R. R. Co.* 73 Mo. 143; *Revelle*
Mo. 438, 441.

In the exercise of the police
islature may impose upon a w
bility, recoverable in a civil ac
of the party injured, beyond th
merely to the amount of the
done.

to determine whether
d in this way or in
h crime is ordinarily

v. *Harry*, 18 Am. &
v. *R. R. Co.* 49 Mo.
v. *Duggan*, 109 Ill.
29 Minn. 425.
ll be found to sustain
r legislation:
. *Warrington*, 92 Ill.
v. *Peoples*, 92 Ill. 97;
owa, 527; *Jones* v. *R.*
Rock, etc. R. Co. v.
ria, etc. R. R. Co. v.
nsas Pacific R R. Co.

3 N. H. 513, and in
New Eng. Rep. 58, a
ry of double damages
o be penal, and, for
tutional.
Co. v. *Haley*, 25 Kan.
rd, 44 Wis. 282, 287;
28 Am. Rep. 582; *Le*
ss. 110.
dment does not inter-
r of the States.
3 U. S. 27, 31 (Bk. 28,
yer v. *Iowa*, 18 Wall.
21, L. ed. 929, 932);
. *R. Co.* 17 Fed. Rep.

police power over all
been strongly asserted

01 U. S. 814 (Bk. 25,
Co. v. *Hyde Park*, 97
036); *Beer Co.* v. *Mas-*
2 (Bk. 24, L. ed. 989,
. v. *Crescent City Co.*
ed. 585).

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pressed that it is wiser to ascertain their intent and application by the "gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." 96 U. S. 97–104 [Bk. 24, L. ed. 616–620].

In England the requirement of due process of law, in cases where life, liberty and property were affected, was originally designed to secure the subject against the arbitrary action of the Crown, and to place him under the protection of the law. The words were held to be the equivalent of "law of the land." And a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property. But, from the number of instances in which these words are invoked to set aside the legislation of the States, there is abundant evidence, as observed by *Mr. Justice* Miller in the case referred to, "that there exists some strange misconception of the scope of this provision, as found in the XIVth Amendment." [520] It seems, as he states, to be looked upon "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court, of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." This language was used in 1877, and now, after the lapse of eight years, it may be repeated with an expression of increased surprise at the continued misconception of the purpose of the provision.

If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law. Within the present century, the punishment of death or long imprisonment was inflicted in England for many offenses which are not now visited with any severer penalty than a fine or a short confinement, yet no one has ever pretended that life or liberty was taken thereby without due process of law. And it often happens that heavy and oppressive burdens are imposed by statute upon residents of cities and counties, not merely to meet the necessary expenses of government, but for buildings and improvements of doubtful advantage, which sometimes, as in changing the grade of streets, seriously depreciate the value of property. Yet if no rule of justice is violated in the provisions for the enforcement of such a statute, its operation, in lessening the value of the property affected, does not bring it under the objection of depriving a person of property without due process of law. It is hardly necessary to say that the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from State Legislatures. Our jurisdiction cannot be invoked unless some right claimed under the Constitution,

laws, or treaties of the United States is invaded.
[521] This court is not a harbor where refuge can be found from every act of ill advised and oppressive state legislation.

It is the duty of every State to provide, in the administration of justice, for the redress of private wrongs; yet the damages which should be awarded to the injured party are not always readily ascertainable. They are in many cases a matter of conjectural estimate, in relation to which there may be great differences of opinion. The general rule undoubtedly is that they should be precisely commensurate with the injury. Yet, in England and in this country, they have been allowed in excess of compensation, whenever malice, gross neglect, or oppression has caused or accompanied the commission of the injury complained of. "The law," says Sedgwick in his excellent treatise on Damages, "permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages, not only to recompense the sufferer but to punish the offender." The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice. "We are aware," said *Mr. Justice* Grier, in *Day* v. *Woodworth*, speaking for this court, "that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured." 13 How. 371 [54 U. S. bk. 14, L. ed. 185]. See also *Milwaukee and St. Paul Railway Co.* v. *Arms*, 91 U S. 489 [Bk. 23, L. ed. 374].

For injuries resulting from a neglect of duties, in the discharge of which the public is interested, juries are also permitted to assess exemplary damages. These may perhaps be considered as falling under the head of cases of gross negligence, for any neglect of duties imposed for the protection of life or property is culpable, and deserves punishment.

The law of Missouri, in requiring railroad
[522] corporations to erect fences where their roads pass through, along or adjoining inclosed or cultivated fields or uninclosed lands, with openings or gates at farm crossings, and to construct and maintain cattle guards, where fences are required, sufficient to keep horses, cattle and other animals from going on the roads, imposes a duty in the performance of which the public is largely interested. Authority for exacting it is found in the general police power of the State to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations. Under this power the State, or the municipality exercising a delegated authority, prescribes the manner in which buildings in cities shall be constructed, and the thickness and height of their walls; excludes the use of all inflammable materials; forbids the storage

therein of powder, nitro-glycerin
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AL., *Plffs. in Err.*,

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Mr. Justice **Woods:**
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203, *note*. See also Mc-
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8 U. S. (7 How.), 819, bk.
Townsend v. Jemison,
194, *note*.

Court of Linn County Iowa, against John W Traer and others, to recover the value of fifty shares, of $1,000 each, of capital stock in the Cedar Rapids Northwestern Construction Company, and the dividends which had been declared thereon. The stock had been originally subscribed and owned by Clews. The construction company was organized in 1870. The dividends sued for were declared $10,000 in December, 1873, and $500 in January, 1874, and were in the treasury of the company ready to be paid out to the holder of the stock. On November 28, 1874, Clews was adjudicated a bankrupt, and his stock in the construction company, with the dividends which had been declared thereon, passed to J. Nelson Tappan, trustee of his bankrupt estate. In February, 1875, the construction company went into voluntary dissolution and liquidation, and John [529] W. Traer, John F. Ely and William Green were appointed trustees to settle up its affairs and divide its assets among its stockholders, according to their interest therein. Traer, knowing that the dividends above mentioned had been declared, and the same being unknown to Clews and Tappan, his trustee in bankruptcy, on March 4, 1876, for the consideration of $1,200, through the intervention of one Armstrong, who did not disclose his agency, purchased of Tappan, the trustee, the fifty shares of stock above mentioned. Traer alleged, and it appeared, that the purchase was made by him for his wife, Mrs. Ella D. Traer.

Afterwards, on December 6, 1877, Tappan, the trustee in bankruptcy, assuming, as it may be supposed, that the sale of the stock made at the instance of Armstrong was void for fraud, sold all his claims and demands on account of the stock to Clews, who, on January 17, 1878, brought this suit. John W. Traer and others, who had been officers and trustees of the construction company, were made defendants to the original petition. The defendants demurred to the petition on the ground that it did not state facts sufficient to entitle the plaintiff to the relief demanded. The court overruled the demurrer. Afterwards, the plaintiff having discovered that, on March 4, 1876, the stock in the construction company had been assigned to Ella D. Traer, on October 28, 1879, amended his petition by making her a party defendant to his suit. Upon final hearing in the Circuit Court for Linn County, the suit was dismissed as to all the defendants except John W. Traer and Ella D. Traer, and judgment was rendered against them for $15,000. Traer and his wife appealed from this judgment to the Supreme Court of Iowa, which affirmed the judgment of the Circuit Court. By the present writ of error, Traer and wife ask a review of the judgment of the Supreme Court of Iowa.

Messrs. **Charles A. Clark** and **N. M. Hubbard**, for plaintiffs in error:

The decisions fully sustain the jurisdiction of this court.

New Orleans R. Co. v. *Delamore*, 114 U. S. 501 (Bk. 29, L. ed. 244); *Factors, etc. Ins. Co.* v. *Murphy*, 111 U. S. 741 (Bk. 28, L. ed. 583); *Ray* v. *Norseworthy*, 23 Wall. 128 (90 U. S. bk. 23, L. ed. 116); see also *Orapo* v. *Kelly*, 16 Wall. 611 (83 U. S. bk. 21, L. ed. 430); *Green* v. *Van Buskirk*, 5 Wall. 314 (72 U. S. bk. 18, L. ed

601); *Sharpe* v. *Doyle*, 102 U. S. 688 (Bk. 26, L. ed. 278).

The bar was complete as to Mrs. Traer when the suit against her was commenced.

Bailey v. *Glover*, 21 Wall. 346 (88 U. S. bk. 22, L. ed. 638); *Gifford* v. *Helms*, 98 U. S. 248 (Bk. 25, L. ed. 57).

Where fraud and concealment are relied upon to take a case out of the Statute of Limitations, this court lays down the rule as follows:

"The plaintiff is held to stringent rules of pleading and evidence, and especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether by ordinary diligence the discovery may not have been made before."

Wood v. *Carpenter*, 101 U. S. 135 (Bk. 25, L. ed. 807).

The Statute of Limitations continued to run until the new cause of action was pleaded.

Holmes v. *Trout*, 7 Pet. 213 (32 U. S. bk. 8, L. ed. 662); *Gorman* v. *Circuit Judge*, 27 Mich. 139; *People* v. *Judge Cir. Ct.* 35 Mich. 229; *I. C. R. R. Co.* v. *Cobb*, 64 Ill. 140; *Comrs. etc*, v. *Andrews*, 18 Ohio St. 49; *Skowhegan Bank* v. *Cutler*, 49 Me. 315; *Woodward* v. *Ware*, 37 Me. 564; *Woodbridge* v. *Hathaway*, 45 Texas, 380; *Lanford* v *Scott*, 51 Ala. 557; *Marble* v. *Hinds*, 67 Me. 203; *Hawthorn* v. *State*, 57 Ind. 286; *Selma R. R. Co.* v. *Lacey*, 49 Ga. 106.

Does the instrument under which Clews claims give him any right to set aside the assignment under which Mrs. Traer claims, for fraud in its procurement?

"Where an equitable interest has been assigned in order to give the assignee a *locus standi judicio* in a court of equity, the party assigning such rights must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument, to maintain a suit."

Brace v. *Reid*, 3 G. Greene, 423.

This decision has never been denied or overruled by the Supreme Court of Iowa.

Sustaining the same view in New York are: *French* v. *Shotwell*, 5 Johns. Ch. 566; *Same Case* affirmed, 20 Johns. 668; *Shufelt* v. *Shufelt*, 9 Paige, Ch. 144, 148.

The English cases are the same way.

In *De Hoghton* v. *Money*, L. R. 2 Ch. App. 169, it was said: "The right to complain of fraud is not a marketable commodity."

White v. *Hill*, L. R. 4 Eq. Cas. 265; *Prosser* v. *Edmonds*, 1 Y. & C. (Ex. Eq.) 481; see also *Brush* v. *Sweet*, 38 Mich. 578; *Dickinson* v. *Seaver*, 44 Mich. 631; *Crocker* v. *Bellanges*, 6 Wis. 642; *M. & M. R. Co.* v. *R. Co.* 20 Wis. 174.

This rule has been upheld in this court upon a full review of the authorities.

Graham v. *R. Co.* 102 U. S. 148 (Bk. 26, L. ed. 106).

That the assignment of the stock and dividends in blank passed title to Mrs. Traer does not admit of question.

Johnston v. *Laflin*, 103 U. S. 800 (Bk. 26, L. ed. 532); *Nat. Bank* v. *Watsontown Bank*, 105 U. S. 217 (Bk. 26, L. ed. 1039); *Courtright* v. *Deeds*, 37 Iowa, 510.

The court below declared the assignment to Mrs. Traer of the stock and dividends void. At most it was voidable.

Twin Lick Oil Co. v. *Marbury*, 9
23, L. ed. 328); *Thomas* v. *Bro*
R. Co. 109 U. S. 524 (Bk. 27, L.
dell v. *R. R. Co.* 103 U. S. 651
509); *Pneumatic Gas Co.* v. *B*
327 (Bk. 28, L. ed. 1005).

"When a party desires to
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Grimes v. *Sanders*, 93 U. S.
ed. 802), and many authorities

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Masson v. *Bovet*, 1 Denio, 74

"If he be silent and continue
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Grymes v. *Sanders*, 93 U. S.
ed. 802); see also *Coolidge* v.
547; *Perley* v. *Balch*, 23 Pick.
Turner, 8 Met. 552; *Bowen* v.
195; *Ayres* v. *Hewitt*, 19 Me. 2
Horney, 12 Ill. 338; *Cooley* v.
456; *Moore* v. *Bare*, 11 Iowa, 2
v. *Gibbs*, 40 Iowa, 656; *Rynea*
Greene (Iowa), 315; *Baker* v.
138; *Bisbee* v. *Ham*, 47 Me. 54
mouth Ins. Co. 63 Me. 442.

Messrs. **Frank G. Clark**
Deane, for defendant in erro

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Iddings v. *Bruen*, 4 Sandf. C
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hon v. *Allen*, 35 N. Y. 403.

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Zogbaum v. *Parker*, 66 Barb
Vasse, 1 Pet. 209 (26 U. S. bk.
Gray v. *McCallister*, 50 Iow
Haight v. *Hayt*, 19 N. Y. 464
v. *Allen*, 35 N. Y. 403; *Stewa*
10 Kan. 131; *Lazard* v. *Wheel*
Couillard v. *Johnson*, 24 Wis
McGuineas, 25 Wis. 656; *Fi*
Mich. 318.

"It is the settled doctrine of
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7 Wait, Act. & Def. 243 and
win v. *Tuttle*, 23 Iowa, 66.

Mr. Justice **Woods** deliver
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111 U. S. 738 [Bk. 28,
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as to her by the provisions of the Act of Congress in that behalf, and was so barred before she was made a party defendant herein."

This plea sets up the bar prescribed by the second section of the Bankrupt Act, now forming section 5057 of the Revised Statutes, which declares: "No suit, either at law or in equity, shall be maintained in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time the cause of action accrued for or against such assignee."

The suit was brought against John D. Traer within two years after the fraudulent purchase and transfer of the stock and dividends, but Mrs. Traer was not made a party to the suit until after the lapse of three years and a half from the time of the purchase and transfer. The question is presented by one of the assignments of error whether, upon the circumstances of this case, the suit was barred as to Mrs. Traer.

The amended petition filed in the case on October 28, 1879, the day after Mrs. Traer had been made a defendant, averred that John W. Traer, while holding the office of trustee of the construction company, falsely represented to Tappan that there were no dividends due the estate of Clews from the stock held by him in the construction company, and falsely and fraudulently concealed from him the true condition of the company with the intent of undervaluing the stock and dividends declared thereon; that Traer and his wife employed one Armstrong to purchase for Mrs. Traer the said stock and dividends; that Armstrong took from Tappan an assignment of the certificate of stock to Mrs. Traer; that he forwarded the certificate to one Howard, whom Traer and his wife had previously employed, and Howard, following the instructions of Traer and his wife, carried the certificate to the headquarters of the construction company at Cedar Rapids, and demanded of Traer, as trustee, the dividends and interest thereon; whereupon Traer paid over to Howard, his own and his wife's attorney, the sum of $11,913.75 on account of said dividends and interest, and Howard, while pretending to act for Armstrong, "carefully concealed, from those who might inform the said plaintiff's trustee in bankruptcy, and from the papers and receipts, that he was acting as the attorney for John W. Traer and Ella D. Traer, his wife," and that after receiving said sum of money and receipting the vouchers prepared by Traer, as trustee, he paid back the money to Traer and his wife, less the amount of his own share as co-conspirator and attorney. Afterwards, it was alleged, Traer transferred the stock to his wife upon the books of the company.

These averments show not only a fraudulent concealment of the value of the stock and dividends from Tappan by Traer, acting as agent for his wife, but a carefully devised plan by which the payment of the dividends to Mrs. Traer was concealed from Tappan, and no trace of such payment left upon the books and vouchers of the Construction Company. Subsequently, and before the trial of the case, the following amendment was made to the petition:

[536]

"That as to the matters and things herein set forth as a cause of action against the said Ella D. Traer, the said fraudulent transactions with which she was connected and her part therein were studiously concealed from the plaintiff and his assignor, and he had no means of discovering the same, nor had his assignor any means of discovering the same until the same were disclosed upon the examination of John W. Traer, as witness in this action, on the 24th day of September, 1879; that the plaintiff and his assignor did not know of the said fraud and the fraudulent acts of the defendant, Ella D. Traer, until the same were made known on the said examination." No issue was taken on this amendment.

The state court having entered a general finding and judgment against the defendants, [537] John W. Traer and Ella D. Traer, his wife, the facts set out in the pleadings of the plaintiff, so far as they are necessary to support the judgment, must be taken as established by the evidence. The question is, therefore, do the facts alleged constitute a good reply to the plea of the two years' limitation filed by Mrs. Traer. We think they do. The fraud by which Mrs. Traer succeeded in purchasing from Tappan for $1,200 property to which he had the title worth $15,000 must necessarily have been a fraud carried on by concealment from Tappan of the true value of the property purchased. Such is the averment of the plaintiff's pleadings. But not only was fraudulent concealment in accomplishing the fraudulent purpose averred, but also a studious concealment from the plaintiff Clews, and Tappan, the trustee, of the connection of Mrs. Traer with the fraud, and their want of means to discover the fraud, until it was revealed by the examination of John W. Traer on September 24, 1879. The case is substantially the same, so far as the question now in hand is concerned, as that of *Bailey* v. *Glover*, 21 Wall. 342 [88 U. S. bk. 22, L. ed. 636]. The averment of fraudulent concealment in that case was, as shown by the report, as follows: "The bill alleged that the defendants kept secret their said fraudulent acts, and endeavored to conceal them from the knowledge, both of the assignees and of the said Winston & Co., creditors of the bankrupt, whereby both were prevented from obtaining any sufficient knowledge or information thereof until within the last two years, and that, even up to the present time, they have not been able to obtain full and particular information as to the fraudulent disposition made by the bankrupt of a large part of his property."

The court in that case, upon demurrer, held in effect that these averments were sufficient to take the case from the operation of the same limitation which is set up in the present case. In delivering the judgment of the court, *Mr. Justice* Miller said. "We hold that where there has been no negligence or laches on the part of the plaintiff in coming to a knowledge [538] of the fraud, which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud has been discovered or becomes known to the party suing or those in privity with him."

So in the case of *Rosenthal* v. *Walker*, 111 U. S. 185 [Bk. 28, L. ed. 395], the plaintiff averred

that "both the said Carney and kept concealed from him, the sai fact of the said payment and t aggregate sum of $30,000, * * of the sale, transfer and conveya goods, * * * and, that he, the did not obtain knowledge and i said matter until the 29th day 1879, and then, for the first time ters were disclosed to him, and knowledge." These averments ficient on exception to the petiti case out of the bar prescribed b of the Revised Statutes. The v. *Glover* has never been overr or modified by this court. On in *Rosenthal* v. *Walker* it w and was distinguished from *Wood* v. *Carpenter*, 101 U. S. 135 807], relied on by the appellants. ities cited are in point and full conclusion that, upon the plea dence, the suit of the plaintiff by the limitation prescribed by the Revised Statutes.

The next contention of the ap the transfer executed by Tappa not a sale to him of a right of stock of the construction comp dividends, but merely a transfe sue Traer and his wife for a fr therefore, void. The assignme lows:

"In consideration of the sum paid by Henry Clews, the rece hereby acknowledged, and for valuable considerations, I here transfer, and set over unto t Clews any and all claims and ery name, nature and descripti now have or be entitled to on fifty shares of the capital stock Rapids & Northwestern Constr ny, which was subscribed f Clews."

This paper will not, in our o construction put upon it by Treating the transfer to Mrs. T evident purpose is to assign to property and rights were incide ership of the stock.

When this paper was execute tion known as the construction been dissolved and its affairs we of liquidation. The ownership simply entitled the holder to a interest in the unpaid divide been declared before the dissolut pany, and to a *pro rata* share of the company's assets, and in its sole value. The language of t by which Tappan undertook Clews all claims and demands then had or might be entitled to the fifty shares of stock in the c had been subscribed by Henry ly chosen to convey the divide been declared, and an interest of the company in proportion to of stock. It did not transfer a sue Traer and his wife. That ri an incident to the transfer of tangible property.

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It is next insisted by the plaintiffs in error, that Clews acquired no title to the dividends and other property which Tappan attempted to transfer to him, because (1) he had not been discharged as a bankrupt at the time of the transfer, and (2) because Tappan had no authority to sell the stock and its dividends for a bond or obligation to pay, as the evidence shows was the case, but only for cash.

Whether Clews had been discharged at the date of the transfer to him is immaterial. After his adjudication as a bankrupt, and the surrender of his property to be administered in bankruptcy, he was just as much at liberty to purchase, if he had the means, any of the property so surrendered, as any other person. The policy of the Bankrupt Act was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities, and enable him to take a fresh start. His subsequent earnings were his own. A bankrupt might often desire, out of the proceeds of his exempted property, or out of his means earned since his bankruptcy, to purchase property which he has surrendered to the assignee. This he might do, and there is nothing in the letter or policy of the Bankrupt Act which forbids his doing so until after his discharge. For, having complied with the law, as it must be presumed he has, he is, after the lapse of six months, entitled, as a matter of course, to his discharge. His right to purchase property surrendered cannot, therefore, depend on his actual discharge; and, in this respect, he stands upon the same footing as any other person.

As to the second ground, upon which the validity of the title of Clews is questioned, it is sufficient to say that, by the bankrupt law, section 5062 Revised Statutes, it is provided: "The assignee shall sell all such unincumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors."

If, therefore, the plaintiffs in error occupied the position of guardians for the creditors of the bankrupt estate, and had the right, in this [542] suit, to question the administration of the trustee, the section referred to would be a sufficient answer to the exception taken to the sale by Tappan to Clews of the property which is the subject of this controversy. We think, therefore, that no ground is shown on which the title of Clews can be successfully assailed.

Other points have been raised and argued by counsel, but as these do not present any federal question, it is not our province or duty to pass upon them. *Murdock* v. *City of Memphis*, 20 Wall. 590 [87 U. S. bk. 22, L. ed. 429]. All the federal questions presented by the record were, in our judgment, rightly decided by the Supreme Court of Iowa.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

T. W. THOMPSON, *Appt.*, v. ALLEN COUNTY *et al.*

(See S. C., Reporter's ed., [illegible])

Jurisdiction—equity has no authority to collect taxes or appoint a collector—inadequacy of remedy at law—mandamus.

*1. The proposition that the levy and collection of taxes, though they are to be raised for the satisfaction of judgments against counties or towns, is not within the jurisdiction of a court of equity, reviewed and reaffirmed.

2. The fact that the remedy at law by mandamus has proved ineffectual and that no officers can be found to perform the duty of levying and collecting taxes, is no sufficient ground of equity jurisdiction.

3. The principle is the same where the proper officers of the county or town have levied the tax and no one can be found to accept the office of collector of taxes. This gives no jurisdiction to a court of equity to fill that office or to appoint a receiver to perform its functions.

4. The inadequacy of the remedy at law, which sometimes justifies the interference of a court of equity, does not consist merely in its failure to produce the money, a misfortune often attendant upon all remedies, but that in its nature or character it is not fitted or adapted to the end in view; for, in this sense, the remedy at law is adequate, as much so, at least, as any remedy which chancery can give.

[No. 60.]

Argued Nov. 13, 1885. Decided Nov. 23, 1885.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The history and facts of the case appear in the opinion of the court.

Messrs. **Charles Eginton** and **W. O. Dodd**, for appellant:

The question plainly presented by this record is, whether a tax levied under judicial directions for the payment of judgments of this court can be collected by the process of the court, either through a receiver or otherwise, where there is no public officer charged with authority to collect the same.

This question was left open by the supreme court in *Meriwether* v. *Garrett*, 102 U. S. 472 (Bk. 26, L. ed. 197).

The moneys to be raised here to meet the principal and interest on bonds are in no sense public revenue. The object and purpose of the tax, as well as the powers authorizing it, are private.

Claxton v. *R. R. Co.* 13 Bush, 638; *San Francisco Gas Co.* v. *San Francisco*, 9 Cal. 453; *Board of Park Comrs.* v. *Detroit*, 28 Mich. 338; *Western Sav.-Fund Soc.* v. *Philadelphia*, 31 Pa. St. 183; *Bailey* v. *New York*, 3 Hill, 531; *Oliver* v. *Worcester*, 102 Mass. 489· Cooley, Tax. 482.

The tax has been levied. Its collection is purely a ministerial act.

These taxes are set apart for a specific purpose and cannot be used for any other. The order directing the levy specified to whom the taxes should be paid when collected. A trust was therefore created. The cou[illegible] tee, and complainant is *cestui que* [illegible]

Von Hoffman v. *Quincy*, 4 W[illegible] S. bk. 18, L. ed. 403).

If the trust or power can by a[illegible] be exercised by the court, the no[illegible] the party intrusted shall not preju[illegible] beneficially interested, or the *cest*[illegible]

Brown v. *Higgs*, 5 Ves. 505; [illegible] sec. 349; *Batesville Inst.* v *Kauf*[illegible] 154 (85 U. S. bk. 21, L. ed. 776).

It is a well recognized principl[illegible] a contract cannot be impaired, th[illegible] is any fund to which the credit[illegible] to resort for the enforcement or p[illegible] contract, it will be followed b[illegible] equity.

Beckwith v. *Racine*, 7 Biss. 146 [illegible] *ras* v. *Arkansas*, 15 How. 304 (5[illegible] L. ed. 705); *Montpelier* v. *East* [illegible] Vt. 12.

A tax is not a debt, and taxes [illegible] covered by an action at law or in [illegible]

Johnston v. *Louisville*, 11 Bush[illegible]

The taxes here levied are by [illegible] the property against which they [illegible] They are made so by express pro[illegible] ute. It is the peculiar province [illegible] equity to enforce liens where no [illegible] enforcing them exists. We do [illegible] such a lien exists until the levy i[illegible] distinguishes this case from *Rees* [illegible] 19 Wall. 107 (86 U. S. bk 22, L[illegible] *Heine* v. *Levee Comrs.* 19 Wall. [illegible] bk. 22, L. ed. 223).

Messrs. **John Mason Brow**[illegible] *P. Humphrey* and *George M. Da*[illegible] lees.

Mr. Justice **Miller** delivered [illegible] the court:

This is an appeal from a decree [illegible] Court of the United States for t[illegible] Kentucky, dismissing the bill of [illegible] who was plaintiff in that court.

The case was tried on bill, a[illegible] tions to the answer, and a stipul[illegible] facts.

The substance of the bill is, tha[illegible] obtained against Allen County, [illegible] two judgments at law, amou[illegible] $27,000, on coupons for interest o[illegible] by the county to pay for subsc[illegible] stock of the Cumberland and [illegible] Company. That, after executi[illegible] judgments had been duly return[illegible] erty found," the court, at the in[illegible] plaintiff, issued writs of *mandam*[illegible] tices of the Allen County Court [illegible] they levied a tax of $2.08 on e[illegible] dollars' worth of taxable property [illegible] to pay said judgments. That, at t[illegible] they elected one J. T. Stork collec[illegible] levy, and made an order that he g[illegible] good security as such collector, a[illegible] collect the levy and pay it over [illegible] of the judgments. That Stork r[illegible] bond as required, and refused [illegible] qualify as such collector; and th[illegible] of the hostility of the citizens a[illegible] of Allen County, no one can be [illegible] county who will perform the dut[illegible]

The bill then gives the names o[illegible]

*Head notes by *Mr. Justice* MILLER.

NOTE.—Mandamus *to compel the levy or collection of taxes to satisfy judgments against municipalities.* In addition to the authorities cited by the court and counsel in the above case of Thompson v. Allen Co., see Mayor v. United States, (9 Wall.) 76 U. S., bk. 19, 704, *note.*

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A decree was rendered in accordance with the view of Presiding *Justice* Matthews, whose opinion is found in the record, by which the bill was dismissed.

The questions on which the judges of the circuit court divided are not new in this court, for, while the subject, in the precise form presented in the first and second questions, may not have been decided, the whole subject has been often before us, and the principles which govern it have been well considered.

The cases in which it has been held that a court of equity cannot enforce the levy and collection of taxes to pay the debts of municipal corporations began with *Walkley* v. *City of Muscatine*, 6 Wall. 481 [78 U. S. bk. 18, L. ed. 930].

In that case, the complainant Walkley had procured judgments against the City of Muscatine for interest on bonds of the city, executions had been returned "*nulla bona*," the mayor and aldermen had refused to levy a tax for the payment of the judgments, and had used the annual tax for other purposes and paid nothing to plaintiff.

Walkley then filed his bill in equity praying a decree that the mayor and aldermen be compelled to levy a tax and appropriate so much of its proceeds as might be necessary to pay his judgments.

This court said, by *Mr. Justice* Nelson, that the remedy was by *mandamus* at law, and "We have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of *mandamus*;" and he adds, that "a court of equity is invoked as auxiliary to a court of law in the enforcement of its judgment only where the latter is inadequate to afford the proper remedy."

By inadequacy of the remedy at law is here meant, not that it fails to produce the money [554]
(that is a very usual result in the use of all remedies) but that in its nature or character it is not fitted or adapted to the end in view. This is clearly stated in the next case in this court on the same subject, namely: *Rees* v. *Watertown*, 19 Wall. 107 [86 U. S. bk. 22, L. ed. 72].

In that case, as in this, execution on a judgment against the City of Watertown had been returned "no property found." Writs of *mandamus* had been issued requiring the levy of a tax to pay the judgment. These writs had failed by reason of resignations of the officers of the city to whom they were directed, and this had occurred more than once. The court was pressed with the doctrine that the writ of *mandamus* having proved inadequate, a court of equity should provide some other remedy. To this it replied: "We apprehend that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit a question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of *mandamus* is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that by means of the aid afforded by the Legislature, and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy

is in law and in theory adequate. The difficulty is in its execution only. The want of a remedy, and the inability to obtain the fruits of a remedy, are quite distinct, and yet they are confounded in the present proceeding. To illustrate: the writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate and complete remedy. Not many years since there existed in central New York confederations of settlers and tenants disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could gain possession [555] of his land. There was a perfect remedy at law, but through fraud, violence or crime its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedy was temporarily suspended by means of illegal violence, but the remedy remained as before. It was the case of a miniature revolution. The courts of law lost no power; the court of chancery gained none. The present case stands upon the same principle. The legal remedy is adequate and complete, and time and the law must perfect its execution."

The language here used is not only applicable to the case under consideration, but in regard to the facts they are the same.

In that case the court said: "The plaintiff further invokes the aid of the principle that, all legal remedies having failed, the court of chancery must give him a remedy, and that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of the general principle. * * * Generally its jurisdiction (chancery) is as well defined and limited as is that of a court of law. * * * *Lord* Talbot says there are cases, indeed, in which a court of equity gives remedy where the law gives none; but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court (chancery) to take it up where the law leaves it, and extend it further than the law allows." "Generally its jurisdiction depends on legal obligations, and its decrees can only enforce remedies to the extent and in the mode established by law. A court of equity cannot, by averring there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels."

The court also said the power to direct a tax to be levied is the highest attribute of sovereignty, and is exercised by legislative authority only. It is a power that has not been extended to the judiciary. "Especially," says the opinion, "is it beyond the power of the federal ju- [556] diciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

These propositions are reasserted in a later case of the same term of the court—*Heine* v. *The Levee Commissioners*, 19 Wall. 655 [86 U. S. bk. 22, L. ed. 223].

It was, like the present, a bill in chancery to enforce collection of taxes where ficers could be found whose duty co enforced by *mandamus*. "There doe said the court, "appear to be any aut founded on recognized principles, of of equity on which the bill can be sustain sustained at all, it must be on the broad that, because the plaintiff finds himself to collect his debt by proceedings at la the duty of a court of equity to devis mode by which it can be done. It is, ho the experience of every day and of that debts are created which are neve though the creditor has exhausted all sources of the law. It is a misfortune in the imperfection of human nature, ad no redress. The holder of a corporatio must, in common with other men, sul this calamity when the law affords no

The court added that the exercise power of taxation belonged to the ture and not to the judiciary, and case it had delegated the power to th commissioners. "If that body has ce exist, the remedy is in the Legislature to assess the tax by special statute, or the power in some other tribunal. It c is not invested as in the exercise of an jurisdiction in any federal court." "I only not one of the inherent powers of t to levy and collect taxes, but it is an i by the judiciary of the Federal Govern the legislative functions of the State ment." And it cites *Walkley* v. *Muscati Rees* v. *Watertown* as in point.

Mr. Justice Bradley, who decided this the circuit, had there elaborately discus whole subject. See *Heine* v. *Levee sioners*, 1 Woods, 246. This languag peated and approved in *State Railro Case*, 92 U. S. 615 [Bk. 23, L. ed. 674.]

The same principles are laid down in v. *Levee Commissioners*, 93 U. S. 258 L. ed. 893], in which the whole subjec viewed. It is said there that the power pel, by *mandamus*, municipal officers form the ministerial duty of levying taxes is a distinct power from the levy lection of taxes by a court of chancery, a truth is, that a party situated like p (where there were no such officers) is f rely on the public faith of the Legisl supply him a proper remedy. The remedy having failed by lapse of time operation of unavoidable contingencies be presumed that the Legislature will is equitable and just, and, in this case, tive action seems to be absolutely requi

In the case of *Meriwether* v. *Garrett* S. 501 [Bk. 26, L. ed. 200], the Legisl Tennessee had repealed the charter of of Memphis and abolished the city o tion, at a time when there were taxes and uncollected amounting to several of dollars, and debts of the city to a muc amount. Some of these taxes had bee under compulsion of writs of *mandam* the Circuit Court of the United States in chancery was filed in that court by these creditors praying the appointm receiver, who should take charge of a sets of the City of Memphis, collect th and pay them over to the creditors, an

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exercised by a court of chancery. The appointment of its own officer to collect taxes levied by order of a common-law court is as much without authority as to appoint the same officer to levy and collect the tax. They are parts of the same proceeding, and relate to the same matter. If the common-law court can compel the assessment of a tax, it is quite as competent to enforce its collection as a court of chancery. Having jurisdiction to compel the assessment, there is no reason why it should stop short, if any further judicial power exists under the law, and turn the case over to a court of equity. Its sheriff or marshal is as well qualified to collect the tax as a receiver appointed by the court of chancery.

The difficulty is that no power exists in either court to fill the vacancy in the office of tax collector; and the case of *Lee County* v. *Rogers*, 7 Wall. 175 [74 U. S. bk. 19, L. ed. 162], where the laws of the State of Iowa expressly authorize the court to enforce its writ of *mandamus* by making such appointment, the only case in which it has ever been done, shows that without such legislative authority it cannot be done.

It is the duty of the marshals of the federal courts and the sheriffs of state courts to levy executions issuing from these courts on the property of defendants, and sell it, to raise money to pay their judgments. Let us suppose that, for some reason or other, the office of marshal or sheriff became vacant for a while. Would that authorize the court of equity of the Federal or State Government to appoint a sheriff or marshal? or to appoint a receiver to levy the execution? or, if it had been levied, to sell the property, collect the purchase money and pay it to plaintiff? If this cannot be done, if it never has been done, why can it do a much more unjudicial act, by appointing a collector to collect the taxes, or what is still less appropriate, appointing a receiver and endowing him with that power?

To appoint a marshal or a sheriff to execute the process of a court to enforce the judgment of that court is not such a wide departure from the judicial function as to appoint a receiver to collect taxes; but no case has been cited of the exercise of even the former power by the court, much less the appointment, by a court of chancery, of an officer to execute the processes of a court of law. The appointment of special masters or commissioners, to make sales under decrees in chancery, is the ordinary mode of that court to enforce its decrees in cases where the court has jurisdiction of the subject matter of the suit. [560]

Not only are the decisions here reviewed of our own court clearly opposed to the exercise of this power by the court of equity, but the decisions of the highest court of the State of Kentucky are equally emphatic. It is the powers derived from the statute law of that State under which alone this tax can be collected. The issue of the bonds on which the judgment was obtained was by virtue of a special statute, and that statute prescribed the mode of levying and collecting this tax.

It enacted that its collection should not be by the sheriff who collected the ordinary taxes for the State and county, but that a special tax collector should be appointed for that purpose

by the justices of the county court who levied the tax. The court of appeals, construing this statute, which was in existence when the bonds were issued, holds that no other officers but these can collect the taxes, and has decided, both in reference to this law and the Constitution of the State, that a court of chancery cannot appoint such an officer or exercise this function of tax collector. *McLean County Precinct* v. *Deposit Bank*, 81 Ky. 254.

This decision, if not conclusive, is entitled to great weight as construing the statute under which alone this tax can be levied and collected.

These considerations require that the answer to each of the three questions certified to us by the judges of the circuit court be in the negative, and that the decree of that court dismissing the bill be affirmed; and *it is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan**, dissenting:

[561] The present case presents a question not heretofore decided by this court.

The appellant has judgments against the County of Allen, in the Commonwealth of Kentucky, which was rendered in the Circuit Court of the United States for the Kentucky District, for the amount of unpaid interest on bonds issued by that County in payment of its subscription to the capital stock of a railroad company, the subscription having been made and the bonds issued under express legislative authority. The county court refused to levy a tax to satisfy such judgments, although it was authorized and required by the Act, in virtue of which the bonds were issued, to levy "as listed and taxed under the revenue laws of the State, a sum sufficient to pay the interest on such bonds as it accrues, together with the costs of collecting the same." It was further provided, by the same Act, that the county court "may appoint collectors for said tax," or may require the sheriff to collect the tax.

In 1876 the General Assembly of Kentucky passed a special Act releasing the sheriff of Allen County from the duty of giving bond for the collection of any railroad tax, and providing that the "county court shall, at the instance or motion of any person, or by request, appoint a special collector to collect all taxes or levies on said county for railroad purposes; and shall require bonds, with security, to be approved by the court, for the faithful discharge of all duties incumbent on him."

Execution upon Thompson's judgments having been returned "no property," and the county court having refused to levy a tax to pay them, the circuit court, upon Thompson's application, issued a *mandamus* against the judge and justices constituting the county court, commanding them to perform the duty, enjoined by statute, of levying and causing to be collected, from the taxable property of the county, a sum sufficient to satisfy the before mentioned judgments, and the cost of collecting the same. Subsequently, on May 28, 1881, the county court, in conformity with the foregoing order, made a levy upon the taxable property of the taxpayers of the county "to pay the judgments in favor of T. W. Thompson against said [562] county." It was further ordered by the county court "that J. T. Stork be, and is hereby appointed collector of said levy, upon his executing bond, with approved secu
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essary for the satisfac-
In other words, the
a levy of taxes. And
ssioners, 19 Wall. 655
228], it appears that
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law having been re-
r any attempt made to
suit in a common-law
equity, and prayed
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nd Tax Cases, 92 U. S.
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mmissioners, 93 U. S.
the court was asked
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the foregoing cases.
court to usurp the func-
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unal authorized to do
urt of Allen County.
done, except to collect
sums of money which

they are under legal obligation to pay. The collection of these sums will not interfere with any discretion with which the Allen County Court is invested by law; for, by its own order, [565] made in conformity with the law of the State, and by the judgment in the *mandamus* proceedings, the sums due from the individual defendants, and from other taxpayers, have been set apart for the payment of Thompson's judgments. Those sums, when collected, cannot be otherwise used. As the county court cannot find anyone who will accept the office of special collector, and as the parties agree that there is no mode of collecting the sums set apart in the hands of the individual defendants and other taxpayers, for the payment of Thompson, I am unable to perceive why the circuit court, sitting in equity, may not cause these sums to be applied in satisfaction of its judgments at law. The plaintiff has no remedy at law; for, the common-law court in rendering judgment has all that it can do, and the local tribunal, by levying the required tax and seeking the aid of a special collector to collect it, has done all that it can do. There is no suggestion, or even pretense, that the taxpayers who are sued dispute the regularity of the assessment made against them by the county court. Admitting their legal liability for the specific amounts assessed against them, and conceding that what they owe must, when paid, go in satisfaction of Thompson's judgments, they dispute the authority of any judicial tribunal to compel them to pay it over. With money in their hands, equitably belonging to the judgment creditor, they walk out of the court whose judgments remain unsatisfied, announcing, in effect, that they will hold negotiations only with a "special collector," who has no existence.

That the court below, sitting in equity—after it has given a judgment at law for money, and after a return of *nulla bona* against the debtor—may not lay hold of moneys, set apart, *by the act of the debtor*, in the hands of individuals *exclusively for the payment of that judgment*, and which money, the parties agree, cannot be otherwise reached than by being brought into that court, under its orders, is a confession of helplessness on the part of the courts of the United States that I am unwilling to make. I, therefore, dissent from the opinion and judgment in this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NORTHERN PACIFIC R. R. CO., *Appt.*, [600]

v.

IVER L. ROCKNE, County Treasurer of Traill County.

(See S. C., "*Northern Pac. R. R. Co.* v. *Traill Co.*" Reporter's ed., 600-611.)

Public lands—grant to Northern Pacific Railroad Company—right of Territory to tax.

1. The lands granted to the Northern Pacific Railroad Company are not subject to taxation by the local authorities while the legal title remains in the United States as security for the payment of the cost of surveying them.

2. The Act of 1870 requiring the payment of

these costs by the Company, is valid, though the original grant imposed no such condition.

[No. 690.]

Submitted, Nov. 17, 1885. Decided Dec. 7, 1885.

APPEAL from the Supreme Court of the Territory of Dakota.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **W. P. Clough,** for appellant:

The lands taxed had not become part of the taxable property within the Territory when the taxes in dispute were levied, and the court below erred in not so deciding, and reversing the decree of the district court.

Kan. Pac. R. Co. v. *Prescott*, 16 Wall. 603 (83 U. S. bk. 21, L. ed. 373); *U. P. R. Co.* v. *McShane*, 22 Wall. 444 (89 U. S. bk. 22, L. ed. 747).

A legislative Act tending to violate a contract can only be objected to by the injured party to the contract.

Hagar v. *Rec. Dist.* 111 U. S. 701 [Bk. 28, L. ed. 569].

Since every statute must be presumed to have been constitutionally enacted, until the contrary has been clearly shown, the presumption of legislative power to pass a given statute includes the presumption of assent by all parties to be affected thereby, whenever such assent is requisite to the existence of such power.

Ames v. *L. S. & M. R. Co.* 21 Minn. 241.

So long as the legal title to lands is actually retained by the government, in pursuance of an Act of Congress especially requiring it to be done, as security for a payment of money to the government, such lands remain outside the body of property liable to taxation by a State or Territory.

Messrs. **M. S. Wilkinson** and **Miller & Greene,** for appellee:

The appellant derives its interest in and title to the lands in question solely through an Act of Congress, approved July 2, A. D. 1864.

The words "that there be and hereby is granted" are words of absolute donation, and import a grant *in præsenti*.

Leavenworth, etc. R. R. Co. v. *U. S.* 92 U. S. 741 (Bk. 23, L. ed. 637); *H. & St. J. R. R. Co.* v. *Smith*, 9 Wall. 95 (76 U. S. bk. 19, L. ed. 599); *Schulenberg* v. *Harriman*, 21 Wall. 60 (88 U. S. bk. 22, L. ed. 554); 1 Lester, 513–8, opinion 257.

Such words vest a present title in the grantee, though a survey of the lands and a location of the roads are necessary to give precision to it, and attach it to any particular tract.

Leavenworth, etc. R. R. Co. v. *U. S.* 92 U. S. 741 (Bk. 23, L. ed. 637); *Lessieur* v. *Price*, 12 How. 72 (53 U. S. bk. 13, L. ed. 898); *Blair T. L. & Land Co.* v. *Kitteringham*, 43 Ia. 462; *Lee* v. *Summers*, 2 Oreg. 260. See also *Northern Pacific R. R. Co.* v. *Peronto*, 14 N. W. Rep. 103.

Again, the title of the United States may pass as well by an Act of Congress in the words of a present grant, as by patent.

Wilcox v. *Jackson*, 13 Pet. 499 (38 U. S. bk. 10, L. ed. 264); *Stoddard* v. *Chambers*, 2 How. 285 (43 U. S. bk. 11, L. ed. 270).

And the position that the grant in question conveyed a present existing title to the N. P. R. R. Co. of all the lands granted is supported by the clear weight of authority.

Schulenberg v. *Harriman*, 21 Wall. 60 (88 U. S. bk. 22, L. ed. 554); *Cent. Pac. R.* *Dyer*, 1 Sawy. 641; *Ballance* v. *For* How. 18 (54 U. S. bk. 14, L. ed. 32); *M* *Boyle*, 19 How. 132. 145 (60 U S. bk. 1 577); *R. R. Co.* v. *Smith*, 9 Wall. 95 (bk. 19, L. ed. 599).

But even if the grant in question di vest the appellant with the legal tit lands, still such lands may be taxed b government has parted with the le when the right to the title is complet

Carroll v. *Safford*, 3 How. 441 (44 11, L. ed. 671); *Kan. Pac. R. Co.* v. *Pr* Wall. 603 (83 U. S. bk. 21 L. ed. 373); *Co.* v. *McShane* 22 Wall. 444 (89 U. S. ed. 747).

The Company owned these lands of a present grant, six years before th of the Act of 1870.

What is this Act for which this Co now, for the first time in all these yea some degree of respect?

It is a fair and rational constructio Act to say that the law-making tended thereby, not to devest the Co persons interested in these lands, of given by the original grant, but simp clare that neither the Company no claiming under it should receive United States the evidences of their p acquired title to particular tracts of the costs of the survey should be pa

If, however, this construction be rect, then the Act of 1870 must be either as one by which the governme to reinvest itself with the title to lan ceased to own, an Act of forfeiture o tion, and therefore absolutely void, impairing the obligation of the origi and therefore void not only as to th tion not assenting thereto, but as t sons interested in asserting its validi

See *Wilkinson* v. *Leland*, 2 Pet. 65 bk. 7, L. ed. 553); *Ham* v. *McClaws*, Cooley, Const. Lim. 155, 166; Potte ris, Stat. & Const. 46.

The appellant in this case founds upon no statute, but upon the viol statute whose aid it invokes. It c this forum as into a court of equity, hinting at the validity of the statu protection it claims, it bases its righ table relief upon its refusal to compl requirements of that statute. It does into court with clean hands. Forge equity it asks equity. Refusing to General Government what, for the p argument, it admits to be due, it at time refuses to pay the assessments o government, and alleges its default in as a justification for its default in the

It is now too late for this Corpora sert the validity of the Act of 187 presumed acquiescence in its provisi

Cass Co. v. *Morrison*, 28 Minn. 257; *Pacific R. R. Co.* v. *Peronto*, 14 N. 103.

Mr. Justice **Miller** delivered the the court:

This is an appeal from a decree preme Court of the Territory of Dak

A suit was brought by the appella

ll County, for the pur-
ıthorities of that coun-
collection of taxes as-
ompany, on the ground
cts of Congress to be
ey were not subject to
court made a finding
on which it declared
fendant, and dismissed
the supreme court of
was twice argued, and,
ip of that court was
tion of two new judges
between the two hear-
each instance, equally
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t of two judges out of
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83 U. S. bk. 21, L. ed.
Shane, 22 Wall. 444 [89

evied on lands granted
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Pacific Ocean, by an
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grant was made for
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er it. In the year 1864
an amendatory Act,
to the companies, and
the charter or original
nd in section 21, reads

d granted by this Act
said company or party
here shall first be paid
United States the cost
, and conveying the
or party in interest, as
red by said company."

o. v. *Prescott*, which
the Supreme Court of
these lands could not
taxes under state laws
ying them was paid to
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s decided in 1872.
the *R. Co.* v. *McShane*,
ng the same question,
ved some other points
escott, which the court
uled, it necessarily re-
, the result of which

was to reaffim the proposition that, until the United States was reimbursed for the expenses of the survey of those lands, they were not subject to state taxation.

By an Act approved also July 2, 1864 (13 Stat. at L. 365), Congress passed a law chartering the Northern Pacific Railroad Company to construct a road from Lake Superior to Puget's Sound, on the Pacific Coast, by the northern route, and made a munificent grant of the public lands to aid in this construction. The terms of the grant and its conditions were much the same as the original grant of 1862 to the Union Pacific Company and its branches. It contained the following provision: [608]

"Sec. 20 And be it further enacted, That the better to accomplish the object of this Act, namely: to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this Act."

And in 1870, when making the appropriation for the survey of these lands within the limit of the grant to the Northern Pacific Railroad Company, Congress added this proviso: "That before any land granted to said Company by the United States shall be conveyed to any party entitled thereto under any of the Acts incorporating or relating to said Company, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the company or party in interest." 16 Stat. at L., p. 305. It will be seen that this language is almost identical with section 21 of the Act of 1864 concerning the lands granted to the Union Pacific Company which was construed in *R. Co.* v. *Prescott* and in *R. Co.* v. *McShane*. As the principle of the exemption of these lands from taxation until the costs of surveying them was paid received the full consideration of the court in two cases argued and decided two years apart, and as it received the unanimous approval of the court, it must govern the present case, unless a distinction can be shown.

Such distinction is relied on, and has received the support of a decision of the Supreme Court of Minnesota in the case of *Cass Co.* v. *Morrison*, 28 Minn. 257. It is there held that the company, having built its road and earned the lands, had thereby acquired a complete equitable title, with right to demand a patent, though the costs of survey had not been paid, and this equitable title was subject to taxation. [609]

It was also held that because the requirement to pay these costs was made in 1870, six years after the original grant, it was void as an unconstitutional exercise of power by Congress.

But we think that the clause authorizing Congress to add to, alter, amend, or repeal the Act of 1864, clearly conferred this power on Congress, especially when exercised, as in this instance, before the Company had built a mile of road, or earned an acre of land, or in any other manner secured an equitable right to the lands. *Sinking Fund Cases*, 99 U. S. 719 [Bk. 25, L. ed. 501].

But this very question, in a little different form, was raised and decided in *R. Co.* v. *Prescott*, 16 Wall. 608 [83 U. S. bk. 21, L. ed. 374]. In that case the original grant, made in 1862, contained no provision about the payment of the costs of survey. The Act of 1864, which did contain this provision, added very largely to the area of the land granted by the Act of 1862, and the opening sentences of the opinion state the proposition whether the requirement that the costs of surveying must be paid before the patent shall issue, covers all of both grants or only that of 1864, and it is held that it covers both. We think this governs the present case. Independently of the clause of the Act of 1864 authorizing amendments, additions and repeals, we think that, until the lands were earned, and other acts that the law demanded that the Company should do had been done, it had no such right in the lands as would prevent Congress from passing a remedial provision so eminently just as the one under consideration.

Again, it is said that, since the road was built before this tax was levied and the Company had earned the land, its equitable title was complete, and according to the decisions of this court, it was subject to taxation.

The same point was urged in *R. Co.* v. *Prescott*. But the court said that "this doctrine was only applicable to cases where the right to the patent is complete, the equitable title fully vested, without anything more to be paid or [61C] any act to be done going to the foundation of the right." But it added, in that case, that two important acts remained to be done, the failure to do which might wholly defeat the company's title. One of these was payment of the costs of surveying.

It may be well to restate the grounds on which this decision rests.

The United States made a magnificent grant to this Company, of lands equal in quantity to forty or fifty thousand square miles, an area as large as an average State of the Union. It thought proper to require of the grantee the payment of the costs of making the surveys necessary to the location and ascertainment of these lands. To secure the payment of those expenses, it decided to retain the legal title in its own hands until they were paid. The government was, as to these costs, in the condition of a trustee in a conveyance to secure payment of money. But, if the land was liable to be sold for taxes due to state, territorial or county organizations, this security would be easily lost.

No sale of land for taxes, no taxes can be assessed on any property, but by virtue of the sovereign authority in whose jurisdiction it is done. If not assessed by direct Act of the Legislature itself, it must, to be valid, be done under authority of a law enacted by such Legislature. A valid sale, therefore, for taxes, being the highest exercise of sovereign power of the State, must carry the title to the property sold, and if it does not do this, it is because the assessment is void.

It follows that if the assessment of these taxes is valid and the proceedings well conducted, the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the costs of surveying these lands. If, on the other hand, the sale would not confer such a title, it is because th
thority to make it.

At all events, the holder of t
to these lands has a right to
which would have the effect
United States in the assertion
them until these costs are paid

We are aware of the use bei
principle by the companies, wh
the lands, neglect to pay these
prevent taxation. The remed
gress and is of easy applicatio
will take steps to enforce its li
of survey, by sale of the lands
of title, the Treasury of the Uni
soon be reimbursed for its exp
the surveys, and the States an
which the lands lie, be remit
propriate rights of taxation.
do no more than declare the la

The decree of the Supreme Co
tory of Dakota is reversed a
manded, with directions to ca
entered perpetually enjoining
Traill County from any furt
collect the taxes in the bill ment

True copy. Test:
James H. McKenney, Clerk.

Cited—117 U. S. 160.

DAVIS SEWING MACHIN
OF WATERTOWN, N. Y

v.

ALMARIN C. RICHARDS
ANDREW ROTHWELL, Dec
MARIN C. RICHARDS.

(See S. C., Reporter's ed.

Guaranty—when acceptance

1. A guaranty, signed by the g
any previous request of the othe
absence, for no consideration mov
except future advances to be ma
debtor, is in legal effect an offer
part of the guarantor, which re
ance to complete the contract.

The rules stated in Davis v. V
bk. 26, 686, applied.

[No. 49.]

Argued Nov. 10, 11, 1885. Deci

IN ERROR to the Supreme
trict of Columbia.

The history and facts of the
opinion of the court.

NOTE.—*Guaranty; notice of*
necessary to render guarantor li
Wells, Fargo & Co., 104 U. S., 159,
the subject is fully considered. Se
v. Drake, 30 U. S. (5 Pet.), 624

Some of the recent cases in th
King v. Batterson, 13 R. I., 117;
ver, 78 Ky., 193; Taylor v. Shouse
ter v. Green, 26 Kan., 252; Wilcox
138; Crittenden v. Fiske, 46 Mich.,
ler, 13 S. C., 94; Milroy v. Quinn,
v. Raymond, 70 Ind., 271; Newbur
60 N. H., 100.

Continuing guaranties, what
mond v. Prestman, 25 U. S. (12 Wh
note.

"If one proposes to lend his c
for the benefit of another, and wi
liability to a particular transacti

ae, for plaintiff in er-

otance of the guaranty

Wend. 82; *Smith* v. *n Bank* v. *Coster*, 8 N. *Prestman*, 12 Wheat. 712); *Mitchell* v. *Mo-lon* v. *Shaw*, 2 Har. & 17 Md. 288; *Cass* v. *Carman* v. *Elledge*, 40 *urch*, 15 Conn. 406; see *ne Co.* v. *Jones*, 61 Mo. s, 8 Grattan, 174–178; Sm. & M. 595; *Sand-*04.

ice of the guaranty is guaranty expresses a

S. 165 (Bk. 26, L. ed.

o the extent or charac-ideration. One merely

t, 2 How. 426–452 (43 26–336); *Dutchman* v. 7.

and C. C. Cole, for

livered the opinion of

ought in the Supreme Columbia, upon a guar-by one John W. Poler , dated December 17, the plaintiff Corpora-reed that all sales of ch the Corporation ould be upon certain e principal of which e all reasonable efforts sell the machines of ess than its regular re-he District of Colum-f Prince George and te of Maryland, and ness by account, note, e, which should arise ion under the contract, the sale of sewing ma-ufacture; and that the continuance of the chines to him at a cer-e payment therefor in at either party might pleasure.

The guaranty was upon the same paper with the above contract, and was as follows:

"For value received, we hereby guarantee to the Davis Sewing Machine Company of Watertown, N. Y., the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness, by account, note, indorsement of notes (including renewals and extensions) or otherwise, to the said Davis Sewing Machine Company, for property sold to said John W. Poler, under this contract, to the amount of three thousand ($3,000) dollars.

"Dated Washington, D. C., this 17th day of December, 1872. "A. Rothwell.

"A. C. Richards."

Under the guaranty were these words: "I consider the above sureties entirely responsible. Washington, December 19, 1872. J. T. Stevens."

At the trial the above papers, signed by the parties, were given in evidence by the plaintiff, and there was proof of the following facts: on December 17, 1872, at Washington, the contract was executed by Poler, and the guaranty was signed by the defendants, and the contract and guaranty, after being so signed, were delivered by the defendants to Poler, and by Poler to Stevens, the plaintiff's attorney, and by Stevens afterwards forwarded, with his recommendation of the sureties, to the plaintiff at Watertown in the State of New York, and the contract there executed by the plaintiff. The plaintiff afterwards delivered goods to Poler under the contract, and he did not pay for them. The defendants had no notice of the plaintiff's execution of the contract or acceptance of the guaranty, and no notice or knowledge that the plaintiff had furnished any goods to Poler under the contract or upon the faith of the guaranty, until January, 1875, when payment therefor was demanded by the plaintiff of the defendants, and refused. At the time of the signing of the guaranty, the plaintiff had furnished no goods to Poler, and the negotiations then pending between the plaintiff and Poler related to prospective transactions between them. [526]

The court instructed the jury as follows: "It appearing that, at the time the defendant signed the guaranty on the back of the contract between the plaintiff and Poler, the plaintiff had not executed the contract or assented thereto, and that the contract and guaranty related to prospective dealings between the plaintiff and Poler, and that subsequently to the signing thereof by the defendants the attorney for the

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istinctly in his proposi-y. What form of words guaranty' is a question xpressions as 'We hold he payment of any sum y receive of you' or a liabilities to said bank y hereafter arise, to the e the guarantors agreed any time not exceeding to pay 'unconditionally ss of B to the extent and f $10,000 for any over hereafter shall be made,' uing guaranties; but 'I r the amount of $2,500,' at. Sec., p. 186, § 269, citing v. Phelps, 16 Hun, 158; Rindge v. Judson, 24 N. Y., 64; Clark v. Burdett, 2 Hall, 197; Mayer v. Isaac, 6 M. & W., 605; Coles v. Pack, L. R., 5 C. P., 65; Merle v. Wells, 2 Campb., 413; Lazear v. Union Bank, 52 Md., 78; Reynolds v. Douglass, 37 U. S. (12 Pet.), 497, bk. 9, 1171; Davis v. Wells, Gerson v. Hamilton, 30 La. Ann., pt. 1, 737.

See also Cutler v. Ballou, 136 Mass., 337; Pratt v. Matthews, 24 Hun, 386; Young v. Brown, 53 Wis., 339; Crittenden v. Fiske, 46 Mich., 70; Tootle v. Elgutter, 14 Neb., 158; Morgan v. Boyer, 39 Ohio St., 324.

Notice of default; when guarantor entitled to. See Louisville Mfg. Co. v. Welch, 51 U. S. (10 How.), 461, bk. 13, 497; Mauran v. Bullus, 41 U. S. 16 Pet.), 528, bk. 10, 1056 *note*; Davis v. Wells, Fargo & Co., *supra*; Dearborn v. Sawyer, 59 N. H., 95; Davis S. M. Co. v. Mills, 55 Ia., 543; Singer Mfg. Co. v. Littler, 56 Ia., 601; Kline v. Raymond, *supra*; Milroy v. Quinn, *supra*.

plaintiff approved the responsibility of the guarantors and sent the contract to Watertown, N. Y., to the plaintiff, which subsequently signed it, and no notice having been given by the plaintiff to the defendants of the acceptance of such contract and guaranty, and that it intended to furnish goods thereon and hold the defendants responsible, the plaintiff cannot recover, and the jury should find for the defendants."

A verdict was returned for the defendants, and judgment rendered thereon, which on exceptions by the plaintiff was affirmed at the general term, and the plaintiff sued out this writ of error, pending which one of the defendants died and his executor was summoned in.

[527] The decision of this case depends upon the application of the rules of law stated in the opinion in the recent case of *Davis* v. *Wells*, 104 U. S. 159 [Bk. 26, L. ed. 686], in which the earlier decisions of this court upon the subject are reviewed.

Those rules may be summed up as follows: A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

The case at bar belongs to the latter class. There is no evidence of any request from the plaintiff Corporation to the guarantors, or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of the guaranty, "value received," without stating from whom, are quite as consistent with a consideration received by the guarantors from the principal debtor only. The certificate of the sufficiency of the guarantors, written by the plaintiff's attorney under the guaranty, bears date two days later than the guaranty itself. The plaintiff's original contract with the principal debtor was not executed by the plaintiff until after that. The guarantors had no notice that their sufficiency had been approved, or that their guaranty had been accepted, or even that the original contract had been executed or assented to by the plaintiff, until long afterwards, when payment was demanded of them for goods supplied by the plaintiff to the principal debtor.

Judgment affirmed.

True copy. Test:

James H. M[illegible]enney, Clerk, Sup. Court, U. S.

CLAY COUNTY, IOWA, *v.*

UNITED STATES, *ex rel.* H[illegible]EER, SR., AND HUGH Mc[illegible]

Admrs. of MICHAEL MCALEER

(See S. C., "*Clay Co.* v. *McAleer*" [illegible] 616-612.)

Mandamus *to compel tax levy—[illegible]rent expenses of county—[illegible]*

Upon a petition for a *mandamu[illegible]* levy of a tax for the payment [illegible] against a county, the answer stat[illegible] ceeds of the maximum levy allow[illegible] insufficient to meet the ordinary c[illegible] of the county government. It is he[illegible] demurrer to the answer, that the pe[illegible] entitled to the writ.

[No. 66.]

Argued Nov. 18, 1885. Decide[illegible]

IN ERROR to the Circuit Cou[illegible] States for the District of Iow[illegible]

The history and facts of the c[illegible] appear in the opinion of the cou[illegible]

Mr. **George G. Wright,** [illegible] error.

Mr. **John Mitchell,** for def[illegible]

Mr. Chief Justice **Waite** del[illegible] ion of the court:

This record shows that Mich[illegible] covered a judgment on the 2[illegible] 1864, in the Circuit Court of th[illegible] for the District of Iowa, agains[illegible] for $9,172.50. Upon this ju[illegible] payments have been made, bu[illegible] mains due more than $5,000. [illegible] in judgment was contracted, th[illegible] county to levy a tax for ordin[illegible] enue was limited to four mills [illegible] dollar of the assessed value of ta[illegible] afterwards this was increase[illegible] which is the authorized rate n[illegible] of May, 1881, the administrato[illegible] ment creditor, he being dead [illegible] circuit court for a *mandamu[illegible]* county "to set apart of the funds [illegible] and of the revenues collected an[illegible] for and during the year 1881, [illegible] the same in an amount sufficien[illegible] judgment, interest and costs, an[illegible] shall not be sufficient, that then [illegible] be compelled to levy for the [illegible] amount sufficient to pay the sai[illegible] interest and costs, and for such [illegible] may be proper in the premises [illegible] states that the full amount of [illegible] by law for the ordinary revenu[illegible] was levied for the years 1880 [illegible] that these levies were all requ[illegible] too, for the proper maintenance [illegible] government. It is also stated [illegible] the revenues for these years c[illegible] devoted to the payment of the ju[illegible] out seriously impairing the ef[illegible] government." The answer co[illegible] lows: "That the maximum le[illegible] pose for the year 1882 will not be [illegible] the ordinary current expenses [illegible] and that no part thereof can be [illegible] payment of said judgment wi[illegible] impairing the efficiency of said [illegible]

the relators demurred, ie court ordered "that *mandamus* issue com- pervisors * * * forth- e mill on the dollar of f the property of said 882, and to be collected rent year, 1882, and to judgment of relator, collect, and pay over a llar each year until re- st and costs are fully judgment the present it.

he court cannot order to levy a tax in excess by statute in a case like tion." Such was the f this court in *United* U. S. 582 [Bk. 25, L. f Iowa have uniformly *offin* v. *Davenport*, 26 *ett*, 37 Iowa, 34; *Iowa ty of Sac*, 39 Iowa, 134. that the court might of the six-mills tax au- ied separately from the ially for the payment as said in *Beaulieu* v. y, 554, that this might levy was not required enses chargeable upon und, and such is the *yons*, 17 Iowa, 1. But affirmatively that the y of 1882 will not be inary current expenses ort was made to have and certain, so as to ount of the tax would as to be expended, but to go to a hearing upon he answer as it stood. ume the fact to be that evied to pay the judg- ing the County in the rent affairs.

Louis v. *United States*, L. ed. 162], decided this case below, that penditures are proper unicipal administration lded by law to the mu- court has the right to much less to usurp or in a single year, would he details of every esti- based upon an inquiry municipal service; to s, and in advance, will every contingency and contingency that may he public necessities." of the present contro- was a case in which a payment out of the after the special tax au- ied for his benefit had balance due him was n the ordinary revenue no other provision in s v. *Clark Co.* 96 U. S. 8]. In *Coy* v. *City of Lyons*, *supra*, the municipal authorities had levied a tax of five mills only, when by the charter they could have levied ten mills. In this way they showed that the full tax was not needed for current purposes, and the court was therefore free to require them to proceed with the execution of the power which had been conferred by law until the judgment creditor was paid. But in *Coffin* v. *Davenport*, 26 Iowa, 515, the same court held that "when the ordinary expenses of carrying on the government of a municipal corporation require all the proceeds arising from a tax, which is the full limit the corporation is authorized to levy, it cannot be compelled to apply a part of such fund to the payment of a judgment held by a creditor against it." The case of *Beaulieu* v. *Pleasant Hill*, *supra*, is to the same effect, for there the order was to levy the special tax for the payment of the judgment, unless it should be made to appear upon a further return that the power had been already exhausted, and that the fund raised had been properly appropriated.

It follows that the judgment of the court below ordering the levy of a tax of one mill for the benefit of the relators, upon the facts stated in the answer and admitted by the demurrer, was erroneous, and that it must be reversed.

The judgment is consequently reversed, and the cause remanded for further proceedings according to law.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MOINA CAMPBELL, Admrx., and J. B. CAMPBELL, Admr. of the Estate of JOHN STAMPS, Deceased, *Plffs. in Err.*, [620]

v.

JAMES H. HOLT.

(See S. C., Reporter's ed., 620-634.)

Constitutional law—"due process of law"—Statute of Limitations—extension after defense has accrued.

1. The repeal of a statute of limitations does not deprive a debtor in whose favor it had become a defense, of his property without due process of law, in violation of the provisions of the Fourteenth Amendment.

2. There is a distinction between the effect of statutes of limitation in vesting rights to real and personal property and their operation as a defense to contracts.

[No. 27.]

Submitted Apr. 17, 1885. Decided Dec. 7, 1885.

IN ERROR to the Supreme Court of the State of Texas.

The history and facts of the case appear in the opinion of the court.

Mr. **W. W. Boyce**, for plaintiffs in error:

When the period prescribed by the Statute of Limitations has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as

NOTE.—*Statute of Limitations.* See, in connection with the above case of Campbell v. Holt, Townsend v. Jemison 50 U. S., (9 How.), 407, bk. 13, 194, note.

vested in the possessor, who is entitled to the same protection in that respect as the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect so as to disturb this title.

Cooley, Const. Lim. 5th ed. 449, and numerous authorities cited.

A claim of a pecuniary character, after the statute has run, cannot be treated otherwise than a claim of title to property adversely possessed.

Rockport v. *Walden*, 54 N. H. 167; *McMerty* v. *Morrison*, 62 Mo. 140; *Goodman* v. *Munks*, 8 Porter (Ala.), 84; *Harrison* v. *Stacy*, 6 Rob. (La.) 15; *Baker* v. *Stonebraker*, 36 Mo. 338; *Shelby* v. *Guy*, 11 Wheat. 361 (24 U. S. bk. 6, L. ed. 495).

A right, to have become a vested right, must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.

Cooley, Const. Lim. 448; see further *Weidenger* v. *Spruance*, 101 Ill., 278; *Wanser* v. *Atkinson*, 43 N. J. 571.

[620] *Messrs.* **F. Charles Hume, Seth Shepard** and **Sayles & Bassett,** for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Texas.

The action was brought in the District Court of Washington County, Texas, May 16, 1874, by Holt, the defendant in error, against the present plaintiffs in error. Holt sued as devisee and legatee of his wife, Malvina, who was the daughter of John Stamps, deceased, of whose estate Moina and J. B. Campbell are administrators.

The action was founded in the allegation that Malvina Stamps, afterwards Holt, inherited from her mother, Henrietta Stamps, the wife of John Stamps, an interest in lands and negroes which her mother owned at the time of her death. That the land was sold by her father, John Stamps, who received the money and converted it to his own use, and that he also received the hire and profits of the negroes so long as they remained slaves under the laws of Texas.

The defendants set up several defenses, among others the Statute of Limitations of the State of Texas, but, on a trial by jury, Holt recovered a judgment for $8,692.93. From this [621] judgment an appeal was taken to the supreme court of the State, and referred, by consent of parties, to the commissioners of appeal, by whom it was confirmed, and this affirmance was made the judgment of the supreme court.

There were several assignments of error in the hearing before the commissioners of appeal, but the only one which we can consider is that growing out of the plea of the Statute of Limitations.

The cause of action in this case accrued before the outbreak of the war, the mother having died in 1857, and Malvina Stamps was a minor during all the time preceding the insurrection. It seems that the Legislature of Texas had passed several Acts suspending the operation of the Statutes of Limitations
the war. But in 1866 a law was passed
enacted that these statutes, which had b
pended during this time, should agai
mence running on the 2d day of Septe
that year. At this time Malvina Stam
of age and unmarried, and the statute
gan to run against her in this case, and
become a bar in two years. This time
without any suit brought on the claim.
therefore, as the commissioners of ap
mit, then barred by the statute. But
the State of Texas, which had not yet
instated and accepted by the two Houses
gress as in her old relations, made a n
stitution which, it was declared in t
nance submitting it to the vote of the
should take effect when it was accepted
gress, which was afterwards done.

Article 12, section 43, of this Consti
in these words: "The Statutes of Lim
of civil suits were suspended by the s
Act of Secession of the 28th of Januar
and shall be considered as suspended
this State, until the acceptance of this
tution by the United States Congress."

The District Court of Washington
and the commissioners of appeal, fo
many previous decisions of the supre
of the State, held that this provision
the bar of the Statute of Limitations,
before its taking effect the time had
necessary to make the bar complete in t

The defendants, both by plea and by
for instruction to the jury, and in argu
fore the commissioners of appeal,
that the bar of the statute, being comp
perfect, could not, as a defense, be tak
by this constitutional provision, and th
so would violate that part of the Fo
Amendment to the Constitution of the
States which declares that no State sh
prive any person of life, liberty or
without due process of law."

This writ of error to the state court
ed on that proposition, and we must inq
its soundness.

The action is based on contract.
hire of the negroes used by the father,
the money received for the land of hi
ter, sold by him. The allegation is of
edness on this account, and the plea is
action is barred by the Statute of Lim
It is not a suit to recover possession o
personal property, but to recover for
lation of an implied contract to pay
The distinction is clear, and, in the
take of the case, important.

By the long and undisturbed posse
tangible property, real or personal,
acquire a title to it, or ownership, sup
law to that of another, who may be
prove an antecedent and, at one tim
mount title. This superior or anteced
has been lost by the laches of the pers
ing it, in failing within a reasonable
assert it effectively; as, by resuming th
sion to which he was entitled, or asse
right by suit in the proper court. W
primary owner has lost by his laches,
party has gained by continued possessi
out question of his right. This is the
tion of the doctrine of prescription, a

aw, is mainly applied
ents, but which in the
es founded on it, is ap-
kinds.
on Limitations of Ac-
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which is prescribed by
during which a title
perty by virtue of a
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maintained;" and in
d *præscriptio*.
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servitude of judicial
tations, §§ 1, 2.
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or creating title.
rican statutes of limit-
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cquired a good title—
the latter, whose neg-
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ine has been repeatedly
Leffingwell v. *Warren*,
17, L. ed. 261]; *Croxall*
72 U. S. bk. 18, L. ed.
ee, 100 U. S. 583 [Bk.
v. *Comstock*, 113 U. S.
It is the doctrine of
has been often asserted
of the States of the

y well be held that in
or personal property,
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him of his property
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tations enables a debtor
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ground.
ng this difference in the
limitations is found in
364 (*Smart* v. *Baugh*),
as delivered by *Chief*
reputation as a jurist
highest consideration.
for a slave, and the
his undisturbed pos-

session of the slave for a period of time which would bar the action, but having failed to plead the Statute of Limitations, the question was whether he could avail himself of the lapse of time. "The plea (said the court) is *non detinet* in the present tense, and under this plea anything which will show a better right in the defendant than in the plaintiff may be admitted as competent evidence. The plea puts in issue the plaintiff's right. Five years' uninterrupted adverse possession of a slave not only bars the remedy of the claimant out of possession, but vests the absolute legal right in the possessor. Therefore, proof of such possession may show that the claimant has no right to the slave and cannot recover. Consequently, it would seem to result, from the reason of the case, that the adverse possession may be proved under the general issue." Answering the objection that in assumpsit and other actions the statute to be available must be pleaded, and by analogy should be pleaded in that case, he says: "The same reason does not apply to assumpsit, because the Statute of Limitations does not destroy the right *in foro conscientiæ* to the benefit of assumpsit, but only bars the remedy if the defendant chooses to rely on the bar. Time does not pay the debt, but time may vest the right of property." Again he says: "This is perfectly true in detinue for a slave, because, in such a case, the lapse of time has devested the plaintiff of his right of property, and vested it in the defendant. * * * But it is not so in debt, because the Statute of Limitations does not destroy nor pay the debt." "This (he says) has been abundantly established by authority. * * * A debt barred by time is a sufficient consideration for a new assumpsit. The Statute of Limitations only disqualifies the plaintiff to recover a debt by suit if the defendant rely on time in his plea. It is a personal privilege, accorded by law for reasons of public expediency; and the privilege can only be asserted by plea." [625]

The distinction between the effect of statutes of limitation in vesting rights to real and personal property, and its operation as a defense to contracts, is well stated in *Jones* v. *Jones*, 18 Alabama, 248. See also Langdell's Equity Pleadings, §§ 118, *et sequitur*.

We are aware that there are to be found, in the opinions of courts of the States of the Union, expressions of the idea that the lapse of time required to bar the action extinguishes the right, and that this is the principle on which the statutes of limitation of actions rest.

But it will be found that many of these are in cases where the suits are for the recovery of specific real or personal property, and where the proposition was true, because the right of the plaintiff in the property was extinguished and had become vested in the defendant. In others, the Constitution of the State forbids retrospective legislation. That the proposition is sound, that, in regard to debt or assumpsit on contract, the remedy alone is gone and not the obligation, is obvious from a class of cases which have never been disputed.

1. It is uniformly conceded that the debt is a sufficient consideration for a new promise to pay, made after the bar has become perfect.

2. It has been held, in all the English courts, that, though the right of action may be barred in the country where the defendant resides or

has resided, and where the contract was made, so that the bar in that jurisdiction is complete, it is no defense, if he can be found, to a suit in another country.

In the case of *Williams* v. *Jones*, 18 East, 439, the contract sued on was made in India, and by the law of limitations of that jurisdiction the right of action was barred. But the recovery on it was allowed in England on the ground that the bar did not exist in England, and the right itself had not been lost. *Lord* Ellenborough said: "Here there is only an extinction of the remedy in the foreign court, [626] according to the law stated to be received there, but no extinction of the right." Bayley, *Justice*, said: "The Statute of Limitations only bars the plaintiff's remedy and not the debt, and the extent of the defendant's argument is only to show that the remedy is barred in India, but that does not show it to be barred here."

The decisions are numerous to the same effect in the American courts. In the case of *Le Roy* v. *Crowninshield*, 2 Mason, 151, *Judge* Story had conceded that the authorities were that way, but intimated that, if the question were *res nova*, sound principle might require a different decision. But in the case of *Townsend* v. *Jemison*, 9 How. 407 [50 U. S. bk. 13, L. ed. 194], *Mr. Justice* Wayne says that, in the previous case of *McElmoyle* v. *Cohen*, 13 Pet. 312 [38 U. S. bk. 10, L. ed. 177], in which *Judge* Story participated, he concurred in the doctrine that, on principle as well as authority, the bar of the statute in one State cannot be pleaded as a defense in the courts of another State, though the contract be made in the former.

In this case of *Townsend* v. *Jemison* the opinion of the court contains an elaborate examination of the whole question. It explains the difference between statutes whose effect is to vest title to property by adverse possession, and those which merely affect the remedy, as in case of contract. The result of it is summed up in a single sentence: "The rule in the courts of the United States, in respect to pleas of the Statute of Limitations, has always been that they strictly affect the remedy and not the merits." Again: "The rule is that the Statute of Limitations of the country in which the suit is brought, may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the limitation of the *lex loci contractus* cannot be." And it is said that in the cases decided in England on this subject there has been no fluctuation.

The case before the court was an action brought in Alabama against a citizen of Mississippi, on a contract made in the latter State, and which, by the laws of that State, was barred by the lapse of time. In the case of *McElmoyle* v. *Cohen*, the question was "whether the Statute of Limitations of the State of Georgia can be pleaded to an action in that [627] State upon a judgment rendered in the State of South Carolina.

The court, in its opinion, says: "This will be determined by settling what is the nature of a plea of the Statute of Limitations. Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists on this point, v settled to be a plea to the rem quently, that the *lex fori* mu well is this doctrine establis States of the Union have made statute of limitations, that, v is barred by the law of a Sta fendants had resided, it shall a action in those States.

There are numerous cases v incapable of enforcement for w or because there is some ob remedy, can be so aided by leg come the proper ground of a in the case of a physician, pr license, who was forbidden to for his service by suit. Th repealed which made this pr covered in the court a judgme of his services on the ground t ute only affected the remedy. *cox*, 1 Metcalf, Mass. 154. O is the effect of a repeal of usury, in enabling parties to tracts in which the law forbad before the repeal. *Wood* v. *E* 68; *Welch* v. *Wadsworth*, 30 C v. *Palmer*, 1 Hill, 324; *Hamp wealth*, 7 Harris, 329; *Baugher* 304.

In all this class of cases the that there exists a contract, b no remedy having been provid ment, or the remedy ordinari that class having, for reasons been forbidden or withheld, th providing a remedy where no moving the statutory obstructi the remedy, enables the party contract, otherwise unobjectio

Such is the precise case befo plied obligation of defendants his child for the use of her p It was a valid contract, implie fore the statute began to run i ture and character were not lapse of two years, though t that a valid defense to a suit defense, a purely arbitrary cre fell with the repeal of the law pended.

It is much insisted that this is a vested right, and a right o is protected by the provisions o Amendment.

It is to be observed that th right" is nowhere used in t neither in the original instrum the amendments to it.

We understand very well w a vested right to real estate, t erty, or to incorporeal hereditar we get beyond this, although v exist, they are better describe exact term, as the phrase itself in the language of the Constit

We certainly do not unders to defeat a just debt by the St tions is a vested right, so as to lative power in a proper case. limitation, as often asserted, a this court, are founded in p public policy—are arbitrary e

Tioga R. R. Co. v. *Blossll.* 150 [87 U. S. bk. 22, ther statutes, shortening it longer, which is necessave always been held to ve power until the bar is does not enter into or betract. No man promises y view to being released y lapse of time. It viherefore, when the Legis- be no bar, though such contract was made. The cited, especially in this ght is destroyed when the which had been lost.

e on this subject is that *e Essex Bank*, 16 Mass. the bank being about to islature of Massachusetts ning the existence of all pace of three years after charters, for the purpose fending suits, and enabl close their concerns and ock. To a suit brought its charter had expired, ears allowed by this statt the Statute of 1819 was pective in its operation, vested rights. The court iscover any principle by d that this statute is void. interfere with any of the the charter, unless it be to be secured from payerformance of contracts, privilege which, we imagvas not intended to proislature which, in its Acts zed by the Constitution, ing mistakes, and provid- furtherance of justice, h violating its duty or ex-

e how a man can be said e bar of the statute as a e to pay. In the most e use of the word propon, to incorporeal rights, fense of lapse of time to money, property. It is s the creation of conven-

l a right to enforce the debt. The Constitution l pass any law impairing we do not understand the ligation by a protracted an see no right which the w which permits him to stead of payment, which islature from repealing fect is to make him fulfill

rt of the State of Texas , within two years after new Constitution, in the *ausford*, 33 Texas, 745, l provision repealing all formerly in existence was was well considered, and er since.

Among the cases, on the subject referred to in the opinion of the Commissioners of Appeal in the present case, are *Rivers* v. *Washington*, 34 Texas, 267; *Dwight* v. *Overton*, 35 Texas, 390; *Mosely* v. *Lee*, 37 Texas, 479; *Bentinck* v. *Franklin*, 38 Texas, 458; *Wood* v. *Wilder*, 42 Texas, 396; and *Lewis* v. *Davidson*, 52 Texas, 257.

The judgment of the Supreme Court of Texas is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Bradley** dissenting:

I feel obliged to dissent from the opinion of the court in this case. I think that when the Statute of Limitations gives a man a defense to an action, and that defense has absolutely accrued, he has a right which is protected by the Fourteenth Amendment to the Constitution from legislative aggression. That clause of the amendment which declares that "no State shall deprive any person of life, liberty or property without due process of law," was intended to protect every valuable right which a man has. The words life, liberty and property are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdivisions of all civil right. The term "property," in this clause, embraces all valuable interests which a man may possess outside of himself, that is to say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right. In my judgment, it would be a very narrow and technical construction to hold otherwise. In an advanced civilization like ours, a very large proportion of the property of individuals is not visible and tangible, but consists in rights and claims against others, or against the government itself.

Now, an exemption from a demand, or an immunity from prosecution in a suit, is as valuable to the one party as the right to the demand or to prosecute the suit is to the other. The two things are correlative, and to say that the one is protected by constitutional guaranties and that the other is not, seems to me almost an absurdity. One right is as valuable as the other. My property is as much imperiled by an action against me for money as it is by an action against me for my land or my goods. It may involve and sweep away all that I have in the world. Is not a right of defense to such an action of the greatest value to me? If it is not property in the sense of the Constitution, then we need another amendment to that instrument. But it seems to me that there can hardly be a doubt that it is property. [631]

The immunity from suit which arises by operation of the Statute of Limitations is as valuable a right as the right to bring the suit itself. It is a right founded upon a wise and just policy. Statutes of limitation are not only calculated for the repose and peace of society, but to provide against the evils that arise from loss of evidence and the failing memory of witnesses. It is true that a man may plead the statute when he justly owes the debt for which he is sued; and this has led the courts to adopt strict rules of pleading and proof to be observed when the defense of the statutes is interposed. But it is, nevertheless, a right given

by a just and politic law, and, when vested, is as much to be protected as any other right that a man has.

The fact that this defense pertains to the remedy does not alter the case. Remedies are the life of rights, and are equally protected by the Constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away. This court has frequently held that to deprive a man of a remedy for enforcing a contract is itself a mode of impairing the validity of the contract. And, as before said, the right of defense is just as valuable as the right of action. It is the defendant's remedy. There is really no difference between the one right and the other in this respect.

It is said that the statutory defense acquired and perfected in one State or country is not, or
[632] may not be, a good defense in another. This, if it were true, proves nothing to the purpose. It is a vested right in the place where it has accrued, and is an absolute bar to the action there. This is a valuable right, although it may be ineffective elsewhere.

Again, it is said that a debt barred by the statute is a good consideration for a promise to pay it; which shows that the statute does not extinguish the debt. This is no answer to the position that the statutory defense is a valuable and an absolute right. A new promise is an implied admission that the debt has not been paid, and amounts to a voluntary waiver of the statute.

I am unable to yield assent to any of the specious arguments advanced to show that the defense of the statute, when it has once vested, is an imperfect right which the Legislature may, at its mere will, abrogate and take away. I think it is then a vested right, and that vested rights are a species of property which the Fourteenth Amendment of the Constitution was intended to protect from adverse state legislation. The suggestion that the words "vested rights" are not to be found in the Constitution does not prove that there are no such rights. The name of the Supreme Being does not occur in the Constitution; yet our national being is founded on a tacit recognition of His justice and goodness, and the eternal obligation of His laws.

A few of the authorities sustaining the views which I entertain on this subject will be referred to.

On the purpose and object of statutes of limitation, *Chief Justice* Marshall, in *Clementson* v. *Williams*, 8 Cranch, 74 [12 U. S. bk. 3, L. ed. 492], says: "The Statute of Limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of which has been lost."

In the following cases the general principle is laid down, that, if the time limited by statute for commencing a suit expires whilst the statute is in force, and before the suit is brought, the right to bring the suit is barred, and no subsequent statute can renew the right: *McKinney* v. *Springer*, 8 Blackf. 506; *Pratt* v. *Vattier*, 1 McLean, 146; *Stipp* v. *Brown*, 2 Ind. 647; *Davis* v. *Minor*, 2 Miss (1 How.) 183; *Bradford* v. *Brooks*, 2 Aik. [illegible] *Talmie*, 1 Oreg. 176; *Girdne*[illegible] Heisk. 280; *Bigelow* v. *Bem*[illegible] *Ryder* v. *Wilson*, 41 N. J. L[illegible] *P*[illegible]*utice* v. *Dehon*, 10 Allen, [illegible] *Wyeth*, 99 Mass. 339.

In *Bigelow* v. *Bemis*, 2 Alle[illegible] an action on contract, the S[illegible] Court of Massachusetts, spe[illegible] Bigelow, says: "It is well [illegible] competent for the Legislatur[illegible] utes prescribing a limitation [illegible] that the one in force at the tim[illegible] is applicable to the cause of a[illegible] restriction on the exercise o[illegible] that the Legislature cannot [illegible] limitation which has alread[illegible] plete, and that no new limitati[illegible] to affect existing claims wit[illegible] reasonable time for parties to [illegible] fore their claims are absolutel[illegible] enactment." In *Ryder* v. *Wil*[illegible] J. L. 11), which was a suit on [illegible] the Supreme Court of New Jer[illegible] *Chief Justice* Beasley, says: "[illegible] the courts, so far as my resear[illegible] are wholly in accord on th[illegible] with one voice, they declare t[illegible] of action has become barre[illegible] laws, the right to rely upon t[illegible] fense is a vested right that can[illegible] or disturbed by subsequent [illegible] *Davis* v. *Minor*, 2 Miss. (1 How[illegible] an action on contract, *Chief* [illegible] says: "A bar created by the [illegible] itations is as effectual as pay[illegible] fendant cannot be deprived [illegible] such payment, nor of the evid[illegible] it; and, having provided hims[illegible] sufficient and legal at the time [illegible] law can change the nature, or [illegible] ciency, of the evidence." *J*[illegible] cussing this subject, says: "[illegible] circumstances under which a [illegible] to have a vested right to a d[illegible] demand made by another, it is [illegible] cult to lay down a comprehe[illegible] the authorities will justify. [illegible] he who has satisfied a demand [illegible] revived against him, and he [illegible] released from a demand by the [illegible] Statute of Limitations is eq[illegible] In both cases the demand is [illegible] store it would be to create a [illegible] the parties—a thing quite beyo[illegible] the Legislature." Cooley's Co[illegible] 429 (460).

In my opinion the judgment [illegible] *Court of Texas should be reverse*[illegible]

I am authorized to say that [illegible] lan concurs in this opinion.

True copy. Test:

James H. McKenney, Clerk

CO., *Plff. in Err.*,
v.
STON, JR., Collector of
ISTRICT OF DETROIT.

STON, JR., Collector of
DISTRICT OF DETROIT,
v.
RRY & CO.

rter's ed., 542-550.)

n seeds are subject to 20
alorem, or free.

ots by the court below, cer-
eds are held to be "garden
duty of 20 per cent *ad val-*
gel-wurzel and turnip seeds
duty.
875, 876.]
Decided Dec. 7, 1885.

rcuit Court of the United
ern District of Michigan.
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of the court.
r, for D. M. Ferry & Co.,

, *Solicitor-Gen.*, for de-

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ved in this suit is as to
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, certain mangel-wurzel,
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valorem, or are free.
tutes, as enacted in 1874
, Schedule M, p. 480, 2d
ollowing provision as to
, shade, lawn and orna-
plants, and flower seeds,
d for; garden seeds, and
cultural and horticultural
se provided for, twenty
s." In "The Free List,"
d ed.), exempt from duty,
'Seeds: cardamom, cara-
reek, fennel, cummin and
wise provided for. Seeds:
ry, chia, sesamum, sugar-
est trees."
Act of March 3d, 1883,
t L. 489), new sections,
to 2513, both inclusive,
nd after July 1st, 1883,
evised Statutes, thus re-
to 2516, both inclusive, of
In section 2502, Sched-
883, is the following pro-
): "Garden seeds, except
t, twenty per centum *ad*
Free List," section 2503,
e the following: "Plants,
s of all kinds, not other-
d seeds of all kinds, ex-
ot specially enumerated
Act." (p. 520). "Seed
. 521). In section 2502,

Schedule A, (p. 495), a duty of 10 per centum *ad valorem* is imposed on "seeds (aromatic, not garden seeds), and seeds of morbid growth * * * which are not edible, but which have been advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially enumerated or provided for in this Act." In "The Free List," section 2503, exempt from duty, are the following (p. 517): "Seeds aromatic, and seeds of morbid growth * * * which are not edible and are in a crude state, and not advanced in value or condition by refining or grinding, or by any other process of manufacture, and not specially enumerated or provided for in this Act." [544]

The question involved depends upon the meaning of the words "garden seeds;" and, with a view to determine whether that designation in the statute includes the seeds covered by this suit, it will be useful to see what was the course of decisions by the Treasury Department, under the Act of 1883, prior to the importation in this case, which was in December, 1884.

On November 2, 1883 (29 Int. Rev. Rec. 410), the Department decided that flower seeds were not to be regarded as "garden seeds," but were free, on the view that the term "garden seeds" was to be "generally confined to those seeds which are produced from edible plants, and does not extend to flower seeds."

Subsequently, a collector exacted a duty of 20 per cent on pease imported as seeds, and not for consumption as vegetables, and, the question being presented whether they were "garden seeds," the Department, on November 27, 1883 (29 Int. Rev. Rec. 419), made this ruling: "The general and not the exceptional use must determine the classification of the article. As a rule, pease, beans and many other vegetable products are more largely sown in the field or farm than in the garden, although some varieties may be specially adapted for garden planting. It is held by the Department that all pease and beans imported for seeds are entitled to free admission under the provision in the free list * * * for seeds of all kinds not specially enumerated or provided for in that Act. * * * I may add, for your further information, that the Department regards seeds such as barley, beans, beets, carrots, cabbage, clover, corn, cane, grass, mangel-wurzel, oats, onions, potatoes, pumpkins, rye, tobacco, turnip, wheat and other like products, as belonging to the category of agricultural seeds which are not garden seeds; and that seeds of the artichoke, asparagus, borecole, Brussels sprouts, cauliflower, celery, cucumber, egg-plant, lettuce, leek, okra, parsley, pepper, rhubarb, radish, salsify, and tomato belong to the category of garden seeds. It is impossible to enumerate all the seeds which belong to either of these divisions in detail, and the above is given for information as to the principle upon which collectors of customs must act." [545]

It is thus seen that these instructions classified beet, cabbage, mangel-wurzel, and turnip seeds, as free, because not garden seeds; and as not garden seeds, because they were agricultural seeds, and were more largely sown in the field or farm than in the garden, and because the general use and not the exceptional use must determine the classification.

On December 28, 1883, a collector having exacted a duty on cabbage seeds and beet seeds as garden seeds, the Department (30 Int. Rev. Rec. 24), referring to its decision of November 27, 1883, held that the seeds were free, and directed the duty to be refunded.

On March 8, 1884, the Department (30 Int. Rev. Rec. 77), held that lettuce seeds and spinach seeds were dutiable as "garden seeds;" and, on March 18, 1884 (*Id.* 95), it held that nasturtium seeds, being generally planted in gardens, and producing not only flowers, but seeds or berries which, when green, are largely used for cooking purposes, and in the manufacture of sauces were dutiable as "garden seeds."

Afterwards, a collector exacted a duty of 2 per cent on certain beans, as "garden seeds." On the view that they were the seeds of the bean plant, and were intended for food or for planting or sowing, the Department, on March 28, 1884 (30 Int. Rev. Rec. 109), reconsidered to some extent its rulings of November 27, 1883. It held that the beans, being edible, were not within the specific provisions as to beans, which made beans not edible free of duty; and that they were not vegetables, but were the seeds of a vegetable. On the question of whether they were "garden seeds," it said: "In common speech, 'garden seeds' are seeds used either for planting or sowing in the gardens adjacent to dwelling-houses, small spaces of land, and in the large spaces of land called market gardens, lying about cities or other large places of numerous and condensed population. The common notion of garden seeds is this, that they are those from which are raised, in the growing season of the year, the vegetable products which, before complete maturity, are used upon the table as part of the customary food of mankind, and in distinction from those seeds which, sowed or planted on a broader scale in the fields, produce the vegetables which are stored for winter use as food. Yet it is to be taken note of, that, by extended field culture, there is produced much of the seed which finds its way to market and to sale as 'garden seeds,' in the common notion thereof above stated. It is not easy, therefore, to say of any importation, on general principles, that it is of garden seeds or of field seeds, nor to frame a rule, on general principles and general knowledge, which will always exactly apply. We are constrained, therefore, to see if we can, by interpretation, get at the purpose of Congress, and if it did not intend to charge the phrase 'garden seeds,' in paragraph 465, with an arbitrary meaning. It has made an exception of the seed of one vegetable from the general expression 'garden seeds.' It must have been thought by Congress that there was need of that exception, or that else the seed excepted would properly and necessarily be treated by the administrative officers of the Government as 'garden seeds.' It follows, then, that Congress thought that seeds like the seed of the sugar beet were 'garden seeds.' We have, then, an idea of what kind of seeds Congress meant when it spoke the phrase 'garden seeds.' Now, the sugar beet is not a plant or a vegetable exclusively, nor mostly, of the growth of gardens. It is, on the contrary, mostly the growth of the field or of the market garden. If the sugar beet is, in the view of Congress, a garden plant or vegetable, as well as, or in contrast with, a
and its seed garden seed as well a
trast with, field seed, surely the
legislative contemplation, a gard
vegetable, and the bean of the ma
is the seed of the bean plant, is a
as well as, or rather than, a fiel
know that, in fact, the bean, as
bean plant or vegetable, is planted i
and is largely planted in the field
former case, generally, to be eaten
pod, as a green esculent, though s
with lima beans, in the form of
the plant; in the latter case, for th
of seed for subsequent planting,
in the form of the matured seed.
noticed, too, that elsewhere in the
'garden seeds' are mentioned, the
contrast or opposition to seeds whi
the character of beans or other se
sowing or planting both in field
As, in paragraph 94, where the ph
(aromatic, not garden seeds),' a
morbid growth;' and so, in paragr
seeds put in the free list are 'see
and seeds of morbid growth.'
are garden seeds in some of the u
and as it is to be got, by interpr
Congress meant to include such
of the bean in the phrase 'garde
paragraph 465, the conclusion mu
article under consideration is prope
under paragraph 465. This ru
equally to pease, and the duty o
ad valorem will, therefore, be exac
on entries of such merchandise."

[546] On November 8, 1884, the De
Int. Rev. Rec. 357), ruled that beet
bage, onion and turnip seeds were
20 per cent *ad valorem*, as "garden

This reversed the prior rulings o
27, 1883, and, under the new rulin
20 per cent was imposed by Willi
ton, Jr., Collector of Customs at De
gan, on importations, by D. M. I
a Corporation, of mangel-wurzel,
and cabbage seeds, entered at the c
at Detroit, in December, 1884. T
claiming that all the seeds were e
duty, brought a suit, in the Circu
the United States for the East
of Michigan, against Livingston
$560.40, which had been paid as th
case was tried before the court wit
and on special findings of fact, th
that the mangel-wurzel and turni
duty exacted on which amounted
were exempt from duty; and that
and beet seeds, the duty exacte
amounted to 227.80, were subject t
A judgment having been entered
ingston for $332, he and Ferry & C
brought a writ of error.

The facts found by the court, s
need be recited, were these: "That
sugar beets, are almost altogether
seeds of the kind in the declaratio
in gardens, for the table, although
raised in fields, for cattle, to a lim
That mangel-wurzels are cultivate
fields, from seeds of the kind in the
mentioned, and not in gardens;
not used as food for man, but for c

raised from seed of the kind nentioned, in fields, for cat- vely small quantities are also for the table, the proportion nty to one. Most of those table are raised in fields. cultivated from seeds of the ration mentioned, in fields dens. They are used to a od for cattle, but to a much ood for man. That turnip and cabbage seeds generally n catalogued, by prominent rica, England and Germany, nd agricultural seeds." Un rcuit court found, as conclu- that the turnip and mangel- not garden seeds, and were y duty; (2) that the cabbage re garden seeds, and subject d.

, on the part of Ferry & Co. ds which are cultivated in the ltivated in the field, they are s," within the statute, but, be- e free, as being seeds not oth- or, that is, not provided for as and that, otherwise, seeds ated in both garden and field e time be subject to duty and view, it is claimed by Ferry & circuit court has found that seeds are cultivated in fields s, they are exempt from duty. le to concur in this view. In itle 33 of the Revised Statutes, cent was imposed on flower seeds, and all other seeds for l horticultural purposes, not led for," while the free list in- eds "not otherwise provided ct of 1883, the duty of 20 per n seeds, except seed of the s left, while the exemption from ed to cover "seeds of all kinds, l seeds not specially enumerated in this Act." From this change cannot be inferred that seeds for agricultural purposes are om duty because of such use, used for garden purposes. The l rather be that, if they are used purposes, they are subject to y, although they are also used purposes.

of opinion that the conclusion he circuit court, based on the was correct. Beets, other than ing almost altogether raised in gh raised to a limited extent in ds are "garden seeds." Mangel- cultivated wholly in fields, and , their seeds are not "garden ps being largely raised in fields, ely small quantities being also ms, their seeds are not "garden the cabbage seeds, it is found from the seeds in question are oth gardens and fields; and, while which is the larger in proportion, t cabbages are used to a small for cattle, but to a much larger for man; and, in the absence of any finding that the seed in question belongs to a variety which is not intended to raise cabbages to be consumed by man, it must be regarded as a "garden seed."

We are unable to concur in the view that the free list in the Act of 1883 is to be read as including seeds of all kinds, with the exception of medicinal seeds which are not specially enumerated or provided for in the Act. The proper reading is that it includes seeds of all kinds (other than medicinal seeds) which are not specially enumerated or provided for in the Act. Garden seeds are specially provided for. [550]

As this case rests for decision on the facts found, it is not possible for this court to lay down any general rule which will apply to cases differing in their facts from this case.

The judgment of the Circuit Court is affirmed, the plaintiff in error in each case to pay the clerk's costs taxed therein, and the plaintiff in error in No. 875 to recover one half of the expense of printing the record, paid by it.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

BERNHARD ARNSON ET AL., *Plffs. in Err.*, [579]

v.

THOMAS MURPHY, Late Collector of the PORT of NEW YORK.

(See S. C., Reporter's ed., 579–586.)

Duties—illegal exaction of—remedy of importer—sections 2931 and 3011 R. S.—limitation of actions—evidence.

1. Under sections 2931 and 3011, R. S., the importer must show, in order to recover duties alleged to have been illegally exacted, that he has fully complied with the statutory conditions which attach to the statutory action provided for.

2. The conditions imposed by statute cannot, any of them, be regarded as matters a failure to comply with which must be pleaded by the defendant as a statute of limitations.

3. The plaintiffs having failed to show not only due protests and appeals, but that the action was brought within the time required by the statute, it was proper for the court below to direct a verdict for the defendant.

4. It seems that the statute does not require any communication of the decisions on the appeals to the claimant; and that they may be introduced in evidence by the defendant although not thus communicated.

[No. 887.]

Argued Nov. 19, 1885. Decided Dec. 7, 1885.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court. See also the report of the opinion of this court on a former writ of error, Bk. 27, 920.

Messrs. **Lewis Sanders** and *George N. Sanders*, for plaintiffs in error.

Mr. **John Goode**, *Solicitor-Gen.* for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court: [580]

This suit was commenced in May, 1879, in a State Court of New York, by Bernhard Arn-

son and Ellis Wilzinski, against Thomas Murphy, and removed into the Circuit Court of the United States for the Southern District of New York, to recover moneys paid to the defendant, as Collector of the Port of New York, between April 25, 1871, and November 30, 1871, as duties on several importations of nitro-benzole. The defendant set up, in his answer, that the moneys received were for lawful duties, and also pleaded the six years' limitation of the New York Statute. The suit was tried, resulting in a verdict for the defendant, by direction of the court, followed by a judgment, to review which the plaintiff sued out a writ of error. which came before this court at October Term, 1883, and the decision on which is reported in 109 U. S. 238 [Bk. 27, L. ed. 920]. It is there stated that there had been due protests and appeals to the Secretary of the Treasury, but that no decision had been rendered by him thereon prior to the commencement of this action, and that it was not brought until after ninety days had elapsed from the date of the latest appeal, and not until after the lapse of more than six years from the expiration of that period. The circuit court having sustained the bar by the New York Statute, this court reversed that ruling.

The cause of action arose while section 14 of the Act of June 30, 1864, chap. 171 (13 Stat. at L. 214), now embodied in section 2931 of the Revised Statutes, was in force, providing as follows: "On the entry of any vessel, or of any goods, wares, or merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel, or on such goods, wares, or merchandise, and the dutiable cost and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on goods, wares, or merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond, as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury, whose decision on such appeal shall be final and conclusive; and such vessel, goods, wares, or merchandise, or costs and charges, shall be liable to duty accordingly, any Act of Congress to the contrary notwithstanding, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such goods, wares, or merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. And no suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treas-

[581]

ury shall have been first had
unless the decision of the Secre
layed more than ninety days f
such appeal in case of an entry
of the Rocky Mountains, or
months in case of an entry wes
tains." Section 2931 was in
suit was brought.

Section 3011 of the Revis
amended by section 1 of the A
27, 1877, chap. 69 (19 Stat. at
in force when this suit was bro
follows: "Any person who s
payment under protest, and in
possession of merchandise imp
any collector, or person acting
any money as duties, when s
duties was not, or was not wh
by law, may maintain an actio
of an action at law, which sha
jury, to ascertain the validity o
and payment of duties, and t
any excess so paid. But no re
allowed in such action unless a
peal shall have been taken as p
tion 2931."

In view of these provisions,
this court, in this case, that a
collector was barred unless
ninety days after an adverse
Secretary of the Treasury on
that, while a suit might be br
expiration of ninety days from
case there had not been a dec
peal, the claimant was not ob
suit until after such decision
It was further held, that the effe
tion cited had been to convert th
law action into one based wh
tory liability, and regulated, a
dents, by express statutory p
among them, "the conditi
the time when the suit m
prescribe the period at the
the right to sue shall cease;"
legislation of Congress on th
exclusive of state laws. As,
peared that this suit had been
under the Act of Congress, bec
that no decision had been mad
before this suit was brought,
than seven years had elapsed,
court had applied the New Y
bar, this court reversed the
awarded a new trial. That tri
resulting in a verdict for th
direction of the court, and
cordingly, to review which the
brought this writ of error.

The plaintiffs proved necess
matters and due protests and
Secretary of the Treasury. T
appeals was taken November
plaintiffs rested their case
given any evidence as to wheth
had not been any decision on
peals. The defendant then off
decisions made by the Secretary
one on July 12, 1871, and the
1872, affirming the decisions o
The evidence consisted of certi
the Treasury Department, of let
dates from that department

'ork, which letters were ment. It was conceded nose letters were the de- on the appeals in ques- was objected to by them that the defense was not arising under a statute object being to show that t within ninety days after als; (2) that it did not ons had been commu- s. The court, without dmissibility of the evi- plaintiffs, in addition to and appeal, must, as a recovery, show either brought within ninety decision on the appeal, or such decision, and the after the expiration of appeal. The plaintiffs g, and then called as a ntiffs, and asked him if otice, before the suit was ons of the Secretary on jection by the defendant immaterial, it was ex- iffs excepted. The de- ered the decisions in evi- ntiffs objected on the d. The objection was iffs excepted, and the idence. The court then the defendant, on the n being a statutory one, complied with the stat- the plaintiffs excepted. the decision of the col- sive as to the rate and ss there is a specific pro- tor within ten days after appeal taken to the Sec- within thirty days after cision of the Secretary on l and conclusive unless n ninety days after such duties paid before the nety days after the pay- ter the decision; and no fore a decision on the ap- n is delayed for the time

nat it is incumbent upon in order to recover, that with the statutory condi- he statutory action pro- how not only due protest ecision on the appeal, and within the time limited by cision, or else that there nd the prescribed time af- sed. The decision on the a matter of record in the , and, as is shown in the municated to the collec- the letter itself being the s a matter of record in Inquiry there or at the would always elicit in- ject; and the importer, ppeal was taken, can al- y bringing his suit after ime named after the appeal, although he has not heard of a decision, being thus certain that he will have brought it within the time prescribed after a possible decision.

The conditions imposed by the statute cannot, any of them, be regarded as matters a failure to comply with which must be pleaded by the defendant as a statute of limitation. The right of action does not exist independently of the statute, but is conferred by it. There is no right of action on showing merely the payment of the money as duties, and that the payment was more than the law allowed, leaving any statute of limitation to be set up in defense, as in an ordinary suit. But the statute sets out with declaring that the decision of the collector shall be final and conclusive against all persons interested unless certain things are done. The mere exaction of the duties is, necessarily, the decision of the collector; and, on this being shown in any suit, it stands as conclusive till the plaintiff shows the proper steps to avoid it. These steps include not only protest and appeal, but the bringing of a suit within the time prescribed. They are all successively grouped together in one section, not only in section 14 of the Act of 1864, but in section 2931 of the Revised Statutes; and the "suit" spoken of in those sections is the "action" given in section 3011 of the Revised Statutes. [585]

The question involved is analogous to the one presented in *Cheatham* v. *United States*, 92 U. S. 85 [Bk. 23, L. ed. 561], which arose under section 19 of the Act of July 13, 1866, chap. 184 (14 Stat. at L. 152), in regard to internal revenue taxes. That section provided that no suit should be maintained in any court for the recovery of any tax, until after an appeal to the Commissioner of Internal Revenue and his decision thereon, unless the suit should be brought within six months from the decision, provided that, if the decision should be delayed more than six months from the date of the appeal, the suit might be brought within twelve months from the date of the appeal. In that case there was an assessment of a tax, a proper appeal, a setting aside of the assessment on appeal, a second assessment, less in amount, a payment of the second assessment, and a suit to recover back the money paid. But the suit was not brought within six months from the appeal taken, and there was no appeal from the second assessment. The court below having instructed the jury that the statute imposed a condition without which the plaintiffs could not recover, and was not merely a statute of limitation, and that the plaintiffs had no right of action, this court affirmed that ruling. It was urged that the requirement of bringing a suit within six months from the decision was a statute of limitation, and that the time under it could not begin to run till the cause of action accrued, which was not till the money was paid, and that time was, as to a larger part of the money, within six months before the suit was brought; and that the first appeal was the only one necessary to a right of action because the modified assessment was paid under protest. But this court, while holding that an appeal from the second assessment was necessary to warrant a suit, also held, the opinion of the court being delivered by *Mr. Justice* Miller, that, if the appeal taken could be regarded as

sufficient, the suit could not be maintained, because it was not brought within six months after the decision on that appeal. The view taken was, that the government had, by statute, as to both the customs and the internal revenue departments, prescribed the conditions [586] on which it would subject itself to the judgments of the courts in the collection of its revenues; and that the prescription of a time within which a suit must be brought for the purpose, is a condition on which alone the government consents to litigate the lawfulness of the original tax.

We are, therefore, of opinion that the circuit court properly held that it was incumbent on the plaintiffs, as a condition precedent to their recovery, to show not only due protests and appeals, but that the action was brought within the time required by the statute. This they failed to show, and it was proper to direct a verdict for the defendant.

In regard to the point taken, that, when the defendant introduced in evidence the decisions on the appeals, he did not show that they had been communicated to the plaintiffs, although this case is disposed of on the failure of the plaintiffs to make the proof necessary to recover, it is proper to say, as the question has been argued, that we see nothing in the statute which requires that the decision on the appeal shall be communicated to the claimant by any action of the officers of the government. All that the statute requires is that the Secretary shall make the decision. It is to be made in the usual way in which decisions of the department are made. If, in any case, it should appear that, on due inquiry of the proper officers, a party had been misled to his prejudice, in regard to a decision on an appeal, a different question would be presented from any now before us.

We find no error in the record and the judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited: 116 U. S. 547.

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[577] CHARLES C. HARRISON ET AL., *Plfs. in Err.*,

v.

EDWIN A. MERRITT, Collector of the PORT OF NEW YORK.

(See S. C., Reporter's ed., 577-579.)

Duties—"Bone-Black"—evidence.

1. A certain article of merchandise, used to decolorize sugar, and manufactured from bones, is held to be "bone-black," subject to a duty of 25 per centum *ad valorem* under section 2504 R. S. and not within the free list under section 2505 R. S.

2. Evidence to show differences in value between an imported article and similar articles, is admissible to show the character of the article in question.

[No. 913.]

Submitted Nov. 18, 1885. Decided Dec. 7, 1885.

IN ERROR to the Circuit Court of the United States for the District of New York.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **Henry E. Davies** and **Charles C. Suydam**, for plaintiffs in error.

Mr. **A. H. Garland**, *Atty-*
fendant in error.

Mr. Justice **Blatchford** deliv
ion of the court:

This is an action brought in No
by the members of the firm of H
meyer & Co., against Edwin A. M
tor of the Port of New York, in
State of New York, and removed
cuit Court of the United States fo
District of New York, to recove
exacted, in May and June, 1881,
25 per cent. *ad valorem*, on impo
dise, some of which was invoic
charcoal," some as "calcined bon
as "burnt bones." The duty was e
view that the article fell under the
of bone, or ivory drop black: 2
ad valorem," in Schedule M of se
the Revised Statutes (p. 473, 2d e
fendants contended that it fell
Free List" in section 2505, and
from duty (p. 483, 2d ed.), as "bo
not manufactured; burned; calc
or steamed." Schedule M of se
474, 2d ed.) imposed a duty of 3
ad valorem on "manufactures o
ivory, or vegetable ivory;" and
List," section 2505 (p. 482, 2d e
from duty "bone dust and bone
facture of phosphates and fertili
trial, before a jury, the evidence
the article in question, which w
to be used to decolorize sugar, in
manufacturing it; that it was
jecting bones, after they were
cleaned, to destructive distillati
close vessels, until everything bu
matter was expelled, and then
residuum, and assorting the piec
sizes; and that calcined or burn
prepared by subjecting them, in
to the direct action of fire, and t
them friable, so that they beca
which was not black. On these
held that the article was not burn
bones and free, but had been
into bone-black. A refusal by t
rect a verdict for the plaintiffs w
and it directed a verdict for t
which was also excepted to. A
dict and a judgment for the d
plaintiffs have brought a writ of

We are of opinion that the a
free, nor liable to a duty of 35
manufacture of bones, but that
black, it was liable, as "black of
duty imposed on it; and that it
direct a verdict for the defendar

Objection was made to the ad
dence to show the difference in
bone-black and crude bone; and
bone-black and white calcined
that between bone-black before i
refiners and after it was spent.
objection to the evidence. It we
character of the article in questi

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, S

GER, *Plf. in Err.*,

Trustee of ALLAN C.
AN.

ter's ed. 566-576.)

standard of value—en-
made with reference to—
of contracts—Statute of
28, 1867.

e insurgent States, during
residents of those States,
rate notes as a standard
d to aid the insurrection-
enforced in the national
the contracts is to be de-
the confederate notes in
ed States at the time when
tracts were made.
, of February, 1867, after
ion or suit or other pro-
ent of any contract, ex-
etween the first day of
of April, 1865, it shall be
show, by parol or other
t was the understanding
arties, either express or
kind of currency in which
med, or with reference to
lue, it was made, provides
ction grows out of a sale
property, whether real or
when it is a jury case, the
ll the circumstances, the
sold, or the fair rent or
ost just measure of recov-
f these principles may be
the recovery instead of
ontract." *Held*, that the
anctions the impairment
, under the Federal Con-
etency of the Legislature
y, in a suit to enforce a
money of real estate sold
a note was given payable
ave been made with refer-
a decision that the plain-
r the value of the land at
d of the value of confed-
as erroneous.
47.]
5. *Decided Dec. 7, 188*

preme Court of Appeals
nia.

by *Mr. Justice* **Field:**
the Supreme Court of
t was brought in one of
hat State to enforce a
by James Kenney, the
lant in error here, as
Bryan, for the unpaid
e money of certain real
Effinger, the defendant
rror here. The mate-
re these: on the 7th of
, Bryan and wife con-
real and personal, to
t for the benefit of the
ryan. The real estate
ham County, Virginia,
isting of about one hun-
as the "Home Farm"
of March, 1863, Ken-

ice FIELD.

le in confederate notes;
on v. Smith, 75 U. S., bk.

ney, the trustee, sold this farm at public auction to the highest bidder, pursuant to the deed of trust; and at that sale Effinger became the purchaser, at $210 per acre, one third to be paid in cash and the balance in one and two years from the date of sale, with the privilege of paying in cash the first of these deferred payments. Effinger made the cash payment and the first of the deferred payments, and executed to the trustee his promissory note, or bond, as it is termed in the record, for the second deferred payment, amounting to $7,067.72, payable on the 30th of March, 1865, with interest from date, stating in the instrument that the amount was the deferred payment on the "Home Farm" of Bryan. The trustee and the purchaser were at the time residents and citizens of Virginia. The first and second payments were made in treasury notes of the Confederate States, but after the maturity of the bond the third payment in such notes was refused by the trustee, and no payment in any other currency being made the present suit was brought. The circuit court was of opinion that the sale was made with reference to notes of the Confederate States as a standard of value; that the fair value of the property on the day of sale "was the most just measure of recovery;" and that such value was $80 an acre in lawful currency of the United States. This conclusion as to value was drawn from the fact that the land was assessed for taxation at that sum before the civil war, and that during the continuance of the war its value had not materially depreciated, the court observing that "whilst the war had a tendency to impair the value of all kinds of property, yet, as to lands, that tendency was counteracted by the fact that they were not liable to be destroyed, and therefore afforded a safer means of investment than any other kind of property." It accordingly awarded judgment for one third the value of the land at the time of sale, estimating it to have been then worth $80 an acre in lawful currency, with interest on the sum thus adjudged to be due, and decreed a sale of the property to pay the amount unless the same was paid within a time designated. [568]

In adopting the rule stated to arrive at what it deemed the "most just measure of recovery," the court acted in conformity with a Statute of Virginia, passed on the 28th of February, 1867, amending and re-enacting sections of an Act of the previous year "providing for the adjustment of liabilities arising under contracts or wills made between the first day of January, 1862, and the tenth day of April, 1865. This Act of 1867 provides:

Sec. 1. That in any action or suit, or other proceedings for the enforcement of any contract, express or implied, made or entered into between the first day of January, 1862, and the tenth day of April, 1865, it shall be lawful for either party to show, by parol or other relevant testimony, what was the true understanding and agreement of the parties thereto, either express or to be implied, in respect to the kind of currency in which the same was to be fulfilled or performed, or with reference to which as a standard of value it was made or entered into; and in any action at law or suit in equity it shall not be necessary to plead the agreement specially in order to admit such evidence; *Provided*,

That when the cause of action grows out of a sale or renting or hiring of property, whether real or personal, if the court (or when it is a jury case, the jury) think that, under all the circumstances, the fair value of the property sold, or the fair rent or hire of it, would be the most just measure of recovery in the action, either of these principles may be adopted as the measure of the recovery instead of the express terms of the contract.

Sec. 2. Whenever it shall appear that any such contract was, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value, the same shall be liquidated and settled by reducing the nominal amount due or payable under such [569] contract in Confederate States treasury notes to its true value at the time they were respectively made or entered into, or at such other time as may to the court, or if it be a jury case, to the jury, seem right in the particular case.

The judgment of the circuit court was affirmed by the supreme court of appeals of the State, and to review the judgment of the latter court this writ of error was brought.

Mr. **Jacob P. Effinger**, in person, and **W. A. Maury**, for plaintiff in error.

Mr. **W. B. Compton**, for defendant in error.

[569] *Mr. Justice* **Field**, after stating the case, delivered the opinion of the court, as follows:

The contract of sale, which is the subject of consideration in this case, was made in Virginia, between citizens of that State, pending the late civil war, and with reference to notes of the Confederate States as the standard of value. These notes had, at that time, almost entirely superseded the use of coin, and they constituted the principal currency within those States. Not only the ordinary purchases of the necessaries of life, but contracts of every description, which were to be performed there, were made with reference to them. Such contracts were not invalid between the parties because payable in those notes, when not made in aid of the insurrectionary government. It was so held by this court in *Thorington* v. *Smith*, where it was declared that they must be regarded as a currency imposed on the community by irresistible force; and that this currency must therefore be considered, in the courts of law, in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States. "Contracts stipulating for payments in this currency," said *Mr. Chief Justice* Chase, speaking for the entire court, "cannot be regarded, for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. [570] They have no necessary relation to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation [75 U. S. bk. 19, L. ed. 361-
like the present, was a suit t
or's lien for the unpaid pu
real estate. The property wa
bama and was sold during t
$45,000, of which sum all bu
the execution of the deed, pa
treasury notes. For the re
sory note of the purchaser
parties were both residents a
State. The plaintiff sought t
for the full amount in lawf
United States. The defendan
the time of sale, treasury not
erate States constituted the
ordinary use in Alabama, an
exceptions, all business trans
ducted in them; that the land
only $3,000, in lawful mon
contract price of $45,000 wa
to be paid in those notes. W
to this court the question wa
the admissibility of evidence
promise, for the payment o
qualifying words, was in fa
payment of other than lawf
United States. The court h
dence was admissible, observ
is clear that a contract to pay
tween citizens of any State o
taining its constitutional re
National Government, is a co
ful money of the United Stat
be modified or explained by
"it is equally clear, if in an
coins or notes denominated
authorized of different value
notes which are current here
that, in a suit upon a contra
made in that country, eviden
mitted to prove what kind of
tended, and, if it should turn
dollars were meant, to prove
value in lawful money of the
that such evidence does not m
contract, but simply explain
which, under the general r
may be removed by parol evi
court added that the people
States under the Confederate G
in legal contemplation, sub
same situation as inhabitants
country occupied and control
ing belligerent; that contrac
must be interpreted and enfo
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acts of the ruling power, a
light it was hardly less than a
the dollars used in the insurg
be considered identical in kin
the dollars constituting th
United States.

It being thus held that a co
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federate notes, is not for the
and that parol evidence is ad
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words in a contract of tha
made, those notes were inte
important to ascertain and la
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of such a contract is
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ldon R. R. Co. v. King,
ed. 186], the contract
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e notes. In an action
court below refused to
e plaintiff was entitled
e of the currency stip-
d, but stated that he was
value of the wood with-
alue of that currency.
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they could put a differ-
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nforced with anything
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or their breach, would
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parties and to make for
contracts." In refer-
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e their own judgment
ontract, and did not re-
value stipulated by the
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constituting the jury a
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ing parties, might in
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would be intolerable.
, to say that the Con-
States interposes an im-
new innovation in the
e, and with its conserva-
es contracts, not illegal
enforced as made by
any State interference
he judgment was ac-

, 94 U. S. 434 [Bk. 24,
eld that the amount in
d by a promissory note,
in the insurgent States,
treasury notes, was to
value of those notes in
f the United States at
place where the prom-

U. S. 793 [Bk. 26, L. ed.
ed in the decisions men-

tioned were referred to as settled, although *Thorington* v. *Smith*, was alone cited for them. [573] The *Chief Justice*, after observing that it had long been settled in this court that transactions in confederate money during the late civil war between the inhabitants of the Confederate States, within the confederate lines, not intended to promote the ends of the Confederate Government, could be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation, said: "It is equally well settled that, if a contract entered into under such circumstances, payable in dollars, was, according to the understanding of the parties, to be paid in confederate dollars, upon proof of that fact, the party entitled to the payment can only recover the value of confederate dollars in the lawful money of the United States."

In *Rives* v. *Duke*, 105 U. S. 132 [Bk. 26, L. ed. 1031], the same doctrines were stated and followed. *Mr. Justice* Gray, in delivering the opinion of the court, said: "It is settled by the decisions of this court that a contract, made within the so-called Confederate States during the war of the rebellion, to pay a certain sum in dollars, without specifying the kind of currency in which it was to be paid, may be shown, by the nature of the transaction and the attendant circumstances, as well as by the language of the contract itself, to have contemplated payment in confederate currency; and, if that fact is shown, in an action upon the contract, no more can be recovered than the value of that currency in lawful money of the United States;" citing the cases of *Thorington* v. *Smith*, *supra*; *The Confederate Note Case*, 19 Wall. 548 [86 U. S. bk. 22, L. ed. 196], and *Wilmington & Weldon R. R. Co.* v. *King*, *supra*. In the *Confederate Note Case*, the doctrines of the previous decisions were also stated and approved, but the bonds there in suit were distinguished from obligations payable in confederate notes.

The several decisions mentioned, with one exception, were rendered by the court with the concurrence of all its members. In the excepted case only one judge dissented. It would seem, therefore, to be no longer open to question, that where contracts were made in the insurgent States during the war between residents [574] of those States, with reference to confederate notes as a standard of value, and were not designed to aid the insurrectionary government, they may be enforced in our courts; and that the value of the contracts is to be determined by the value of the confederate notes in lawful money of the United States.

The measure of valuation adopted by the court below was not in conformity with this rule. It allowed a recovery for the value of the land instead of treasury notes, which was nothing less than substituting for the contract of the parties a new and different one. The statute of the State which permitted this estimate, whenever the court might think that the fair value of the property would be "the most just measure of recovery," and pursuant to which the court acted, sanctions the impairment of contracts, which is not, under the Federal Constitution, within the competency of the State Legislature. It follows that the judgment must be reversed and the case remanded for a new trial, in which the plaintiff will be permitted to re-

cover the value of the confederate notes in lawful money of the United States, and not the value of the land at the time of sale.

There is, however, a further question for consideration which is not free from difficulty. The bond of the defendant, dated March 30, 1863, is payable two years thereafter, that is on the 30th of March, 1865. At these respective dates the value of the confederate notes was materially different. At the date of the bond their purchasing power was in Virginia at least one third less than that of lawful money of the United States of the same nominal amount. At the maturity of the bond it was greatly less, not more than one twentieth of that of lawful money. The Confederacy was then in the throes of dissolution; a few days afterwards it ceased to be an organized power, and the notes lost all appreciable value. The condition upon which their payment was promised—"after the ratification of a treaty of peace between the Confederate States and the United States of America"—had become impossible. It is evident, therefore, that if their value in lawful money is to be estimated at the maturity of the bond, a nominal sum, not more than one twentieth of its amount [575] in confederate currency, can be recovered. In the case of contracts maturing after the overthrow of the Confederacy, no value whatever can be given to that currency.

In some of the cases decided by this court, to which we have referred, it is said that the value of the confederate notes was to be estimated at the date and in the locality of the contract. Such is the language used in *Thorington* v. *Smith*, *Wilmington & Weldon R. R. Co.* v. *King*, and *Stewart* v. *Salamon*. In the first case, the note was payable one day after date. In the second case, it does not appear that the time of payment was fixed. But in the third case, the note was payable one year after date, and the court is careful to state that the value of the confederate currency was to be estimated in lawful money of the United States at the time when and the place where the note was made. And this rule was prescribed in estimating the value of the confederate currency for the balance due on the note after its maturity.

Where a contract is for the delivery of specific articles, the rule undoubtedly is that the damages recoverable for its breach are to be determined by the value of the articles at the time and place of their delivery. Where a contract is payable in a specified currency, the rule is also clear that such currency is demandable and receivable at the maturity of the contract, whatever change in its value by increase or depreciation may have taken place in the meantime. The damages recoverable for a breach of the contract are to be measured by the value of the currency at its maturity. But in these rules it is assumed that the articles to be delivered are lawful property, and that the currency to be paid is a lawful currency, and that, therefore, in the creation and exchange of both no public duty is violated. The treasury notes of the Confederate States constituted, under the laws of the United States, neither lawful property nor lawful currency. They were the promises of an insurgent and revolutionary organization, payable only when its success should be established by a treaty of peace with the United States. Of the value of such promises the national courts will make no inquiry, except as they were rece tracts not designed to further the They were receivable in such con imposed as a currency upon the irresistible force. Their intrin nothing, but their exchangeable son of their enforced circulation mate of them at the time in law the United States. The relation and coin and other lawful mo known in the community, as it coin or other lawful money as value that commerce was cond the insurgents and persons outsi federacy. Persons then parting goods for confederate notes, or f of them, attached to them this value, and expected to receive i wards. They did not intend to suppose they were surrendering, without any consideration, if th should fail, and its notes lose able value. They expected an any event. Therefore, as having given to them at the time and p ceipt, or the promise of them, the will treat them, but not as ha any other time or place. Any o involve considerations of inextri and would be inconsistent with termining the value of contracts where they matured near the c overthrow of the Confederacy.

It follows, therefore, that on the plaintiff will be allowed to exchangeable value of confed which the bond was payable, time and place of its execution i of the United States.

Decree reversed and cause rema proceedings.

True copy. Test:
James H. McKenney, Clerk,

JAMES KENNEY, Trustee
BRYAN, *Plf. in E*
v.
JACOB P. EFFING

(See S. C., Reporter's ed.,

Jurisdiction—federal q

The question whether a bond w reference to confederate notes i the state court, and not a federal for this court.

[No. 216.]

Argued November 10, 11, 1885.
ber 7, 1885.

IN ERROR to the Supreme C of the State of Virginia.

Mr. **W. B. Compton**, for p
Mr. **Jacob P. Effinger**,
Wm. A. Maury, for defendant

Mr. Justice **Field** delivered the court:

The writ of error brought raises no federal question whi

ond of Effinger was or
reference to confederate
act for the state court,
this court.

y, Clerk, Sup. Court, U. S.

JE CAR COMPANY,
pt.,
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C RAILWAY COM-
ET AL.

ter's ed., 587-598.)

n—obligation of new com-
e of former companies—
one company by another
l—pleading—equity ju-

Pacific Railway Company
s of Missouri by the disso-
panies, including the for-
way Company, and the es-
mpany to take their place
liabilities.
the former Missouri Pa-
nan's Palace Car Company
"its own line of road, and
ontrols, or may hereafter
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iting on the new company
d or controlled by the old
he consolidation.
Mountain and Southern
controlled by the Missouri
r within the meaning of
e controlling interest in
company is owned by the

can grant no relief to the
on the nature of its busi-
to the St. Louis Company.
ll facts well pleaded, but
ents of conclusions of law.
24.]
1885. Decided Decem-
1885.

rcuit Court of the United
rn District of Missouri.
of the case fully ap-
he court.
aam, for appellant:
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'otherwise," is the aver-
bill.
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3 Watts, 46; *Evarts* v.

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power, whether the usual mode be actually or only colorably followed.

This is the precise status presented by the bill. The ostensible officers of the Iron Mountain are mere agents and employees of the Missouri Pacific. The ostensible independence of the Iron Mountain road is merely colorable. Its separate organization is a mere disguise. All administrative authority is actually exercised by the Missouri Pacific. These are the practical facts to be dealt with on this record.

Messrs. **John F. Dillon, Walter H. Smith** and *A. T. Britton*, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit in equity brought by Pullman's Palace Car Company to injoin the Missouri [587] Pacific Railway Company and the St. Louis, Iron Mountain and Southern Railway Company from discontinuing the use of the drawing-room cars and sleeping cars of the Pullman Company on the line of the St. Louis, Iron Mountain and Southern Company; from refusing to haul such cars on passenger trains running on such line; and from contracting with any other persons for supplying like cars for that use. The court below dismissed the bill on demurrer, and from a decree to that effect this appeal was taken.

The case made by the bill is in substance this:

On the 8th of March, 1877, the Missouri Pacific Railway Company was a Missouri corporation owning and operating a railroad between St. Louis and Kansas City, and Pullman's Palace Car Company, an Illinois corporation, engaged in the business of manufacturing drawing-room cars and sleeping cars, and hiring them to, or otherwise arranging with, railway companies for their use upon railroads under written contracts for a term of years. By a writ- [588] ten contract entered into on that day the Pullman Company agreed to furnish the Missouri Pacific Company, for fifteen years, upon certain specified terms, with drawing-room and sleeping cars sufficient to meet all the requirements of travel, and the Missouri Pacific Company agreed "to haul the same on the passenger trains on its own line of road, and on all roads which it now controls, or may hereafter control, by ownership, lease, or otherwise." The Railway Company also agreed that the Pullman Company "shall have the exclusive right, for a term of fifteen years from the date, * * * to furnish for the use of the Railway Company drawing-room or parlor and sleeping cars on all the passenger trains of the Railway Company, and over its entire line of railway, and on all roads which it controls, or may hereafter control, by ownership, lease, or otherwise, * * * and that it will not contract with any other party to run said class of cars on and over said lines of road during said period of fifteen years."

Sometime during the summer or autumn of 1820, and as early as October 7, the Missouri Pacific Company "consolidated with itself certain other companies, under the laws of Missouri, retaining its former name; and * * * said consolidated company assumed all the obligations of the separate consolidating companies, and continued to use and operate the for-

mer road, together with other consolidated lines."

The St. Louis, Iron Mountain and Southern Railway Company is, and for many years has been, a corporation owning and operating a railroad from St. Louis, in a southwesterly direction, to Texarkana. On the 20th of November, 1871, that Company entered into a contract with the Pullman Company, similar to the one with the Missouri Pacific Company, for the hauling of the Pullman cars on its line until November 20, 1881.

In or about the month of December, 1880, the Missouri Pacific Company "acquired and became the owner of more than a majority of the stock of said St. Louis, Iron Mountain and Southern Railway Company," and this, as the [589] bill alleges, was done "with the intent and purpose of controlling the management and administration of the said St. Louis, Iron Mountain and Southern Railway Company, and for the purpose of subordinating, in effect, the said St. Louis, Iron Mountain and Southern Railway Company and the Missouri Pacific Railway Company to the same management and control, and of running and operating said roads as one line, and in the interest of the Missouri Pacific Railway Company."

Since that time the Missouri Pacific Company has acquired all but about 1,795 of the 220,682 shares of the capital stock of the St. Louis, Iron Mountain and Southern Company. Five of the directors of the Missouri Pacific are also directors in the St. Louis, Iron Mountain and Southern Company, and the two roads are operated under the same general management. The general offices of the two Companies are kept together, and both roads are managed substantially by the same persons. All this was brought about and done, as is alleged, in pursuance of an arrangement between the Missouri Pacific Company and persons who were at the time the holders of nearly all the stock of the St. Louis, Iron Mountain and Southern Company "for the transfer of the ownership and control of the franchises, property and business of said last named corporation to the said Missouri Pacific Railway Company," it being part of the arrangement that the "stockholders of the said St. Louis, Iron Mountain and Southern Railway Company should not devest themselves altogether of their interest in the franchises, property and business thereof, but that they should place the same under the control and management of the said Missouri Pacific Railway Company, by the method of the transfer of their stock in said St. Louis, Iron Mountain and Southern Railway Company to the said Missouri Pacific Railway Company, and retain their interest therein by receiving in exchange therefor the stock of the said Missouri Pacific Railway Company, in the proportion of three shares of the stock of the Missouri Pacific to four shares of said St. Louis, Iron Mountain and Southern; and it was understood that, as a part of said arrangement, the stock of said Missouri Pacific Railway Company received in exchange for said stock of said St. Louis, Iron Mountain [590] and Southern would represent in the hands of its holders a combined interest in the properties of both of said corporations; and that the stock of said St. Louis, Iron Mountain and Southern which was by the arrangement aforesaid acquired by the said Missouri P
Company should be retained, he
it to control the franchises, pro
ness of the said St. Louis, Iron
Southern Railway Company, in
execution of the purpose aforesa
authority of the board of direct
souri Pacific Railway Company
terest of all persons so holding as
of the Missouri Pacific Railway

And this, it is further allege
pursuance "of a general purp
affairs aforesaid of said St. Lou
tain and Southern Railway Com
control of the said Missouri P
Company, that they might be op
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a mode adopted to that end in
others methods and modes propo
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otherwise, as being least subje
based upon considerations of
gality."

At the expiration of the contr
Pullman Company and the
Mountain and Southern Comp
ident of the last named Compa
Pullman Company that the furt
Company to have its cars haul
of the St. Louis, Iron Mountai
road was denied, and that the Rai
would cease to operate its road
the Pullman Company.

As a ground of equitable reli
tains the following allegations:

"Your orator further shows
to operate your orator's cars upo
Iron Mountain and Southern R
denial of your orator's right a
plain and palpable violation o
of the contract between your
Missouri Pacific Railway Comp
contract cannot be violated with
and most irreparable damage
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your orator's business are of a
that your orator has invested a
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charter, and for which it is inc
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character herein set forth with
nies engaged in the business of
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tracts it can run through cars
points and over distances far
length of the separate lines of r
convenience of the public; and
ing and enforcement of such co
importance and relation to the
corporate franchises of your or
public convenience; that if sai
be violated as is threatened in t
inbefore stated, the facilities of
aforesaid will be broken up, a
and estate of your orator, to th
many thousands of dollars, whi
and inheres in such contracts, v
in value, and the corporate fra
orator practically destroyed; th
the magnitude of the investme
and the cost of operating such c

rn, unless it can have
said business, as pro-
ith the several compa-
operates; and that the
l for, and obtained by
acts, as in the contract
is not only reasonable
for the success of your
it which your orator
contracts, and would
ent with the said Mis-
Company hereinbefore

shows that in making
e set forth with said
in making the pro-
, for the extension of
rator's cars upon such
in their control, it has
growth and develop-
ch, in the performance
years past, it has been
ping in the region of
e said lines of railway
run; that said business
and developed by the
y of your orator; that,
of its future develop-
rne the burden of sus-
when the business was
unremunerative; and
ustice and inequity to
panies, by violation of
remove at the present
or from the line of the
ountain and Southern
discontinue operating
stitute the cars of any

volved in the merits of
the contract between
Pullman Companies,
dation, binds the con-
ul the Pullman cars
Louis, Iron Mountain
if that road is con-
d Company within the
; and, 2, whether it is
olidated Company.
Pacific Company is a
n that which contract-
mpany. The original
erated a railroad be-
sas City. This Com-
hat road and others be-
oration created by the
ones, and the estab-
ir place. It has new
nd new stockholders.
1 Wall. 42 [68 U. S.
ts v. *Ohio*, 95 U. S.
Railroad Co. v. *Maine*,
ed. 839]; *Railroad Co.*
[Bk. 25, L. ed. 187];
R. R. Co. v. *Palmes*,
. ed. 925]. The bill
Missouri Pacific Com-
itself certain other
ing its former name,"
der the laws of Mis-
solidation depends on
lroad Co. v. *Georgia*,
ed. 760]. They pro-

vide that "any two or more railroad companies in this State, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form, in the whole or in the [595] main, one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities and subject to all the obligations and liabilities to the State, or otherwise, which belonged to or rested upon either of the companies making such consolidation." In order to accomplish such consolidation an agreement to that effect must be entered into by the companies interested. "A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the Secretary of State when the consolidation shall be considered duly consummated, and a certified copy from the office of the Secretary of State shall be deemed conclusive evidence thereof." "The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company under such corporate name as may have been adopted." Rev. Stat. Mo. 1879, sec. 789. This clearly contemplates the actual dissolution of the old corporations and the creation of a new one to take their place.

The new Company assumed on the consolidation all the obligations of the old Missouri Pacific. This requires it to haul the Pullman cars, under the contract, on all roads owned or controlled by the old company at the time of the consolidation, but it does not extend the operation of the contract to other roads which the new company may afterwards acquire. The power of the old company to get the control of other roads ceased when its corporate existence came to an end, and the new Company into which its capital stock was merged by the consolidation undertook only to assume its obligations as they then stood. It did not bind itself to run the cars of the Pullman Company on all the roads it might from time to time itself control, but only on such as were controlled by the old Missouri Pacific. Contracts thereafter made to get the control of other roads would be the contracts of the new consolidated Com- [596] pany, and not of those on the dissolution of which that Company came into existence. It follows that the present Missouri Pacific Company is not required, by the contract of the old company, to haul the Pullman cars on the road of the St. Louis, Iron Mountain and Southern Company, even if it does now control that road, within the meaning of the contract.

We are also of opinion that the railroad of the St. Louis, Iron Mountain and Southern Company is not controlled by the present Missouri Pacific Company in such a way as to require that Company to haul the Pullman cars over it, if the contract is binding on the new Company to the same extent it would be on the old were that company still in existence and standing in the place of the new. Confessedly the St. Louis, Iron Mountain and Southern Company keeps up its own corporate organiza

tion. It operates its own road. It has its own officers and makes its own bargains. The Missouri Pacific owns all, or nearly all, its stock, and in that way can determine who shall constitute its board of directors; but there the power of that Company over the management stops. The board when elected has controlling authority, and for its doings is not necessarily answerable to the Missouri Pacific Company. The two roads are substantially owned by the same persons and operated in the same interest, but that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific.

It is true the bill avers in many places and in many ways that the purchase of the stock of the St. Louis, Iron Mountain and Southern Company was made by the Missouri Pacific Company for the purpose and with the intent of getting the control of the road of the St. Louis, Iron Mountain and Southern, and that the case is before us on demurrer to the bill. A demurrer admits all facts stated in the bill which are well pleaded, but not necessarily all statements of conclusions of law. What was actually done is stated clearly and distinctly. The effect of what was done is a question of law, not of fact. It is a matter of no importance what the purpose of the parties was if what they did was not sufficient in law to accomplish what they wanted. When there is doubt, the purpose and intention of the parties may sometimes aid in explaining what was done, but here [597] there is no need of explanation. The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the Company, but the Company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property.

Something was intimated in argument about the duty of the Railway Company to haul the cars of the Pullman Company, because of the nature of the business in which the latter company was engaged, which consisted "of hiring or otherwise arranging with railway companies to use its cars," "under written contracts, for a term of years." The bill al "by reason of the magnitude of "and the cost of operating such man Company "cannot receiv unless it can have the exclusi said business, as provided in sai the several companies over wh rates." It may be, as is also all "become indispensable, in the business of a railroad company senger trains sleeping and drav with the conveniences usually cars for night travel," but it b lows that the railway is, in law range with the Pullman Comp commodations. According to two such car companies can carry on a competing business o and the custom has been for th pany, if possible, to contract f right. The business is always cial written contracts. These necessarily vary, according to cumstances of each particular it cannot be claimed that a co is competent to require these c ter into such a contract, for the hauling of Pullman cars, as the reasonable. A mere statement tion is sufficient to show that i

An objection was raised to of a court of equity to grant asked. This we do not consid agreed that the demurrer was pr upon the other grounds.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk

Cited—117 U. S., 29.

GEORGE A. BOWMAN ET
Err.,
v.
CHICAGO & NORTH WE
WAY COMPAN

(See S. C., Reporter's ed.,

Jurisdiction—value of matter tion 699, R. S.—application

1. The jurisdiction of this court, a money demand, is governed b actual matter in dispute, as sho record, and not by the damage prayer for judgment alone.

2. An action against a common damages for a refusal to transp State of Ohio, on the ground that tion is forbidden by a statute of an action brought on account of of a right, privilege or immunit Constitution within the meaning which gives the court jurisdictio to the sum or value in dispute.

3. In the Revised Statutes, se separate from the other parts of t Acts, and is to be construed acco reference to the general rules of i plicable to the revision.

[No. 1168.]

Submitted Nov. 17, 1885. Deci

IN ERROR to the Circuit Cou States for the Northern Dist

ts of the case appear in
t.
a, for plaintiffs in error.
r defendant in error.
Atty-Gen. of Iowa, also
: of the position of the

aite delivered the opin-

ght by George A. Bow-
ska, and Fred. W. Bow-
, against the Chicago &
y Company, an Illinois
iness as a common car-
etween Chicago, Illinois,
wa, to recover damages
ompany to receive and
gs of beer from Chicago
on the line of its road,
There are two counts in
same cause of action,
that the damages sus-
00. The suit was begun
the declaration was filed
were filed by the Com-
ing up as an excuse for
ring the goods, a statute
a penal offense for any
nowingly bring within
ting liquors for a person
roper certificate author-
articles, and that the
certificate, and the beer
transportation was an
hin the meaning of the
May the plaintiffs de-
and on the 11th of the
heir declaration, by leave
ncrease the damages de-
he demurrer to the pleas
ame day, and on the 23d
ulation was filed in the

ted and agreed by and
parties hereto that, in
of this cause to be trans-
e Court of the United
s court shall only trans-
cord the amended decla-
(*quod*) *damnum* to be
of the defendant to said
ith the demurrer thereto,
ourt thereon."
the 13th of July, judg-
favor of the defendant.
nt this writ of error was
here October 21. At a
he cause was submitted
ed briefs.
is record it is apparent
matter in dispute is not
isdiction. It is now well
ction in an action upon
overned by the value of
lispute in this court, as
record, and not by the
e prayer for judgment
1 Wall. 337 [68 U. S.
hacker v. *Hartford Fire*
U. S. 241 [Bk. 23, L.
kard, 97 U. S. 564 [Bk.

24, L. ed. 1108]; *Tintsman* v. *National Bank*, 100 U. S. 6 [Bk. 25, L. ed. 530]; *Banking Association* v. *Insurance Association*, 102 U. S. 121 [Bk. 26, L ed. 45]; *Hilton* v. *Dickinson*, 108 U. S. 174 [Bk. 27, L. ed. 691]; *The Jesse Williamson, Jr.* Id. 309 [Bk. 27, L. ed. 731]; *Jenness* v. *Citizens' National Bank of Rome*, 110 U. S. 52 [Bk. 28, L. ed. 67]; *Webster* v. *Buffalo Insurance Company*, Id. 388 [Bk. 28, L. ed. 173]; *Bradstreet Co.* v. *Higgins*, 112 U. S. 227 [Bk. 28, L. ed. 715]. As was said in *Hilton* v. *Dickinson*, "It is undoubtedly true that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail." Here the suit is to recover damages for not transporting from Chicago to Marshalltown one thousand kegs of beer. There are no allegations of special damage or malicious conduct. In the original declaration the claim was for only $1,200, and it was not until the case was actually decided, or about to be decided on its merits, that application was made for leave to increase the amount of the demand. Then it was manifestly done, not in the expectation of recovering more than was originally claimed, but to give color to the jurisdiction of this court. As it stands, the case is not materially different in principle from that of *Lee* v. *Watson*, *supra*, where, after a demurrer was sustained, the demand for damages was increased, by leave of the court, so as to be in excess of our jurisdictional limit, although it was apparent from the whole record that in no event could there be a recovery except for a much less sum. Under these circumstances, the court did not hesitate to dismiss the cause, for the reason that it was clear the amendment was made for the sole purpose of giving color of jurisdiction. Here the stipulation which was put on file, taken in connection with the time it was made, shows unmistakably the purpose of the amendment was to make a case for our jurisdiction. In *Smith* v. *Greenhow*, 109 U. S. 669 [Bk. 27, L. ed. 1080], the action begun in a state court was trespass for taking and carrying away personal property of the value of $100, but the damages were laid at $6,000. On the removal of the case to the Circuit Court of the United States it was remanded, on the ground that the case was not one arising under the Constitution or laws of the United States. This we decided was error, and, therefore, reversed the order to remand, but, in doing so, remarked, that, "if the circuit court had found, as a matter of fact, that the amount of the damages stated in the declaration was colorable, and had been laid beyond the amount of reasonable expectation of recovery, for the purpose of creating a case removable under the Act of Congress, * * * the order remanding it to the state court could have been sustained." This was said in reference to the requirement of the Removal Act of 1875, which limits the jurisdiction of the circuit courts, under such circumstances, to cases "where the matter in dispute exceeds * * * the sum of $500," but it is equally applicable to appeals and writs of error to this court where our jurisdiction de-

[614]

pends on the money value of the matter in dispute.

It is suggested, however, that the case falls within the fourth subdivision of section 699 of the Revised Statutes, which gives this court jurisdiction, "without regard to the sum or value in dispute," for the review of "any final judgment at law or final decree in equity of any circuit court, or of any district court acting [615] as a circuit court, in any case brought on account of the deprivation of any right, privilege or immunity secured by the Constitution of the United States, or any right or privilege of a citizen of the United States."

The authority for making this a part of the Revised Statutes is found in what are known as the "Civil Rights" Acts of April 9, 1866, 14 Stat. 27, chap. 31, secs. 1, 3, 10; May 31, 1870, 16 Stat. 144, chap. 114, secs. 16, 18, and April 20, 1871, 17 Stat. 13, chap. 22, secs. 1, 2. In the original statutes this provision was applicable only to the particular rights, privileges and immunities therein mentioned. In the Revised Statutes it stands separate from the other parts of the old Acts, and is to be construed accordingly, but with reference to the general rules of interpretation applicable to the revision. We deem it unnecessary to consider now whether it has, in its present form, a more extended meaning than it had originally, because, in our opinion, this is not a case to which it can, in any event, be applied. The alleged right of which these plaintiffs have been deprived is one secured to them, if secured at all, not by the Constitution, but by that principle of general law which requires a common carrier of goods for hire to carry, whenever he is asked to do so, within the general scope of his professed business, and for a reasonable reward. It grows out of the duty which in law a common carrier owes to the public at large, and is no more secured by the Constitution than are any other of the ordinary transactions of business. Whether the Railway Company is excused from the performance of that duty by the statute on which it relies may depend on the Constitution. If the statute is constitutional, the plaintiffs are deprived of the right which they would otherwise have had in law, but if not, the Railway Company must carry for them. This, not because the Constitution requires it, but because the statute does not furnish a sufficient excuse for not carrying. The question is not, therefore, whether the plaintiffs have been deprived of a right which the Constitution has secured to them, but whether a right existing without the Constitution has been lawfully taken away. The case may be one arising under the Constitution, within the meaning of that term, as used in [616] other statutes, but it is not one brought on account of the deprivation of a right, privilege or immunity secured by the Constitution, within the meaning of this provision.

The writ of error is dismissed for want of jurisdiction.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—116 U. S., 561.

WILLIAM HASSALL, T

v.

A. W. WILCOX

(See S. C., Reporter's ed.

Jurisdiction—separate judgmen
$5,000 each.

1. In a controversy between the
road mortgage and certain credi
perior liens, it is held that the dem
itor is separate and distinct, and
tion of this court does not extend
whose several decrees do not exce
2. The trustee represents all of
This appeal is therefore their ap
treated as such.

[No. 1008.]

Submitted Nov. 23, 1885. Decid

APPEAL from the Circuit Co
ed States for the Western D
On motion to dismiss.
The case is sufficiently state
Mr. **W. Hallett Phillips,**
support of motion.
Messrs. **George Biddle**
Wilkinson, for appellant, *con*

Mr. Chief Justice **Waite** de
ion of the court:
The grounds of the motion t
1. That the appeal is impropo
name of Hassall, trustee, as it
has no interest in the decree;
2. That the amounts involv
ficient to give this court jurisdi
The controversy is between
tee in a railroad mortgage, wh
a suit brought by one of the bo
foreclosure, and certain credit
road company claiming superi
mortgaged property. The tru
the suit by agreement, and, wi
court, "as a party complainant."
as trustee, he represents all th
there being no conflicting interes
The demand of each creditor
distinct from all the others.
pends on its own facts, and a
does not necessarily involve a
other. The decree is in favor
separately. The total amount
coveries is $19,043.45, or thereal
the appellee, A. W. Wilcox,
gets more than $5,000. The m
erty has been sold, and the quest
the distribution of the proceeds
claimants are each severally d
ment of their respective claims,
is resisting them all. If the clai
the trustee gets less for the bo
they are defeated, or either of
amount going to the bondholde
respondingly increased.
It is clear that, as to all the c
several decrees do not exceed $
cannot be distinguished from
and Trust Co. v. *Waterman*, 106
27, L. ed. 115], and that, so far
itors are concerned, the motion
be granted. With Wilcox it is

han $5,000. In *Water-*
was between the several
rchasers who bought at
ubject to their liens. It
were a part of the bond-
ntroversy then before us
chasers and not as bond-
t for distribution to the
e proceeds of the sale
hether the creditors suc-
r not. In this case, how-
etween the creditors and
ondholders. If the cred-
ount realized from the
ndingly reduced for the
ion to the bondholders.
place of the bondholders
e it is his duty to do for
they would do for them-
arties instead of himself.
re, their appeal, and is to

to all the parties except
dismiss the appeal must
s to him it must be denied.
ng on the appeal from the
lcox are not such as ought
a motion to affirm. The
s denied.

the appellees except Wilcox.

ey, Clerk, Sup. Court, U. S.

LTZER ET AL., *Appts.*,
v.
AUGUSTA AIR LINE
COMPANY ET AL.

orter's ed., 634–649.)

-contracts—reformation of
ion of—evidence.

hn F. Pickrell, having made
railroad company to con-
rnish the iron therefor, and
ds in payment, made a con-
inants for the iron, payment
nds, the contract providing
be deposited subject to the
the president of the com-
separate contract whereby
ch order when the complain-
d to the bonds by the terms
rith Pickrell. Upon a bill
ption that the railroad com-
e contract through Pickrell
: that Pickrell was not the
; that the contracts should
her; that, to entitle the com-
first contract reformed by
of the company in place of
ow that it was omitted by
that upon the facts the com-
led to the relief sought.
e understanding of the par-
act is inadmissible to vary or
r to affect persons not parties

No. 64.]

85. *Decided, Dec. 7, 1885.*

Circuit Court of the United
Western District of North

facts of the case fully ap-
of the court.

Messrs. **A. H. Garland** and **John N. Staples**, for appellants.

Messrs. **Edmund Randolph Robinson** and *Thomas C. Fuller*, for appellees.

Mr. Justice **Woods** delivered the opinion of the court: [634]

The bill was filed October 18, 1878, by Herman R. Baltzer and William G. Taaks, the appellants, against the Raleigh and Augusta Air Line Railroad Company, a corporation of the State of North Carolina, and others, for a decree against the Railroad Company for $93,615.62, with interest thereon from November 2, 1868, that sum being the balance due them, as the plaintiffs alleged, for iron furnished the Chatham Railroad Company, whose name, on December 1, 1871, was changed by an Act of the Legislature of North Carolina to the name under which the Company is sued in this case. The Chatham Railroad Company was authorized to build a railroad from Raleigh to the South Carolina state line. To help the company to construct its road, the State of North Carolina, by an ordinance of its convention passed on March 11, 1868, authorized its public treasurer to issue to the company bonds of the State for $1,200,000; and by an Act of its General Assembly, passed August 15 of the same year, authorized the same officer to issue to the company other bonds of the State for the additional sum of $2,000,000. The bonds of both issues were for $1,000 each; were payable in thirty years, and were secured by a like amount of bonds of the company deposited with the public treasurer, and were also secured by statutory liens and by mortgages on the franchises and property of the company. [635]

On September 1, 1868, the company had received the $1,200,000 authorized by the convention, and on October 19, 1868, the company having complied with the conditions prescribed by the Act of the General Assembly, the $2,000,000 in bonds of the State authorized by the General Assembly were delivered to it.

On September 1, 1868, the defendant, John F. Pickrell, who was a resident of the City of New York, doing business in Wall Street as a banker and broker, and being in good credit, made an offer in writing in which he represented himself and John D. Whitford, of North Carolina, to W. J. Hawkins, the president of the Chatham Railroad Company, to do the entire work on the Chatham Railroad, such as grading, superstructure and masonry, and furnish all material for the same, including the iron rails, and to take the state bonds in payment. This proposition was accepted by resolution adopted by the board of directors of the railroad company on September 4, 1868. The firm of Greenleaf, Norris & Co. and Charles Gould, of New York, were interested with Pickrell and Whitford in the performance and profits of the contract.

Having thus bound themselves to build the railroad and furnish the iron, Pickrell and Whitford began negotiations for the purchase of the iron with Schepeler & Co., a firm engaged in the iron trade in New York. This latter firm asked Baltzer & Taaks, the plaintiffs, to join them in a contract to sell the iron, which they agreed to do. [636]

The parties, Pickrell and Whitford on one

side, and Schepeler & Co. and Baltzer & Taaks on the other, met at the office of the counsel of Baltzer & Taaks, in New York, and, in the presence of and with the concurrence of the counsel, a draft of the intended contract for the purchase and sale of the iron was made. In the draft the names of Pickrell and Whitford both appeared as parties of the second part. This paper was taken by Pickrell and Whitford, who said, so the plaintiffs alleged, that they must send it to W. J. Hawkins, president of the Chatham Railroad Company. Afterwards the paper was returned to Baltzer & Taaks, with various changes, among which was the dropping of the name of Whitford, because he declined to sign the contract as a party. From this paper the final agreement between the parties, dated September 11, 1868, was drawn up by the counsel of Baltzer & Taaks, and was dated and executed September 11, 1868.

The introduction to this contract was as follows:

"This agreement, made this eleventh day of September, one thousand eight hundred and sixty-eight, by and between Messieurs Schepeler & Company and Messieurs Baltzer & Taaks, of the City of New York, parties of the first part, and John F. Pickrell, also of the City of New York, party of the second part, witnesseth."

By it the parties of the first part agreed to sell and deliver to the party of the second part, and the party of the second part agreed to purchase and receive of the parties of the first part, ten thousand tons of English or Welsh iron rails, at the price of $79.36 per ton. The contract then proceeded thus:

"The iron is to be paid for as follows: The party of the second part is to deposit with the Continental National Bank, on or before the execution of this agreement, such an amount of the bonds of the State of North Carolina as will, at the market price on the day of deposit, be equal to the whole purchase money for the [637] said ten thousand tons of iron, and 15 per cent in addition thereto, which margin of 15 per cent is to be kept good until the full performance of this contract. The said bonds are to be held by said bank, subject to the joint order of the parties of the first and second parts and William J. Hawkins, or his attorney, or the survivors of said parties respectively. On the presentation of a warehouse receipt or ship's delivery order for any lot of said iron, the party of the second part and said William J. Hawkins, or the survivor of them, are to join with the parties of the first part in drawing an order on said bank, in favor of the parties of the first part, for so many of the said bonds as will, at the market price thereof on the day of drawing, equal the sum payable for such lot of iron at the price of seventy-nine dollars and thirty-six cents per ton as aforesaid, or pay that amount in money.

"Upon presentation of a bill of lading for any lot of such iron placed on shipboard for transportation to the port of New York or Norfolk, Virginia, the party of the second part and the said Hawkins, or the survivor of them, shall join with the parties of the first part in drawing an order on the said bank, in favor of the said parties of the first part, for so many of said bonds as v
market price thereof on the day
equal the sum due for the iron
in the bill of lading at forty-nine
forty-six cents per ton, the balance
such iron, namely: twenty-nine dolls
ty cents per ton, shall be paid in
on the arrival of the vessel containi
at the port of New York or the p
folk. Notice shall be given to the
second part, or his personal represe
the arrival of any ship containing i
or they are to be ready to receive the
ever ship is ready to discharge."

The contract further provided th
event of the death of said party of
part and no appointment of a pers
sentative at the time notice is requ
given," notice might be given to Ha
"if at any time the party of the s
or his personal representative," o
Hawkins or his attorney, or the s
them, should refuse to join in drawi
for the amount due for iron, the pa
first part might retain the warehouse
sell the iron for which payment ha
fused "for and on account of the p
second part, or his personal repres
who should be liable to reimburse th
the first part any loss from such resa
tice of intention to sell should be
depositing the same in the general po
the City of New York, addressed to
of the second part, or his personal
tives, or the said William J. Hawk
event of the death of the said party
ond part, and the non-appointment o
sonal representative, in the City of N

The contract also contained the
stipulation:

"It is understood that the said
deposited as a fund out of which
said iron, and that the parties of the
are to have a lien on the same, for th
performance of this contract, on the
party of the second part, but it is
stood that the parties of the first p
look solely to the said bonds for pay
if for any reason they should at any
to constitute a fund for payment, the
the first part are nevertheless to be
iron at the same rates and times as her
provided.

"The party of the second part res
right to sell any or all of the bonds
with said bank, and, in case of sale, t
realized for the same, or a sufficient s
cover the price of all said iron, an
cent in addition thereto, shall be pl
said bank on the same terms, and rep
said bonds for all the purposes of this

"The said bank shall deliver the b
on the presentation and delivery of s
order as aforesaid. The parties of
part shall have their election to draw
ment for iron, bonds, or money, the
of bonds, if any shall have been subs
the place of bonds sold."

The contract concluded, and was si
witnessed, as follows:

"In testimony whereof the said
these presents have hereunto subscr

r first hereinbefore writ-
peler & Co.,
By John T. Schepeler.
er & Taaks,
By H. R. Baltzer.
F. Pickrell.
rge H. Sturr."
after its execution, ac-
y of New York, on Sep-
parties who signed it,
rr, a notary public of

on the same day, W. J.
paper bearing the same
bove mentioned, which
ving recital: "Whereas
. and Baltzer & Taaks
have entered into an
te herewith, by which
er & Co. and Baltzer &
deliver, on certain terms
thousand tons of iron
. Pickrell."
act Hawkins stipulated
rteen hundred bonds of
rolina, each for $1,000,
o 3,000 inclusive, which
he Continental Bank of
subject to my order as
am Railroad Company
ll remain on deposit in
the joint order of the
e said contract, as there-
contract is being per-
e of providing for the
and as security for the
ontract as therein pro-
nite in drawing the or-
or at the times and in the
th; provided, however,
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y delivery of said bonds
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said contract, I am to
ght to pay in money the
d contract for the iron,
h delivery of bonds is
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being made by me, I
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nd Baltzer & Taaks as
ertained."
gned "W. J. Hawkins,
lroad Company."
were designated in the
"A" and "B."
there were delivered to
hepeler & Co. and Baltzer & Taaks, under this contract with him, 630 tons of iron rails, and on November 2 following, in three lots, 2,104 tons. The 630 tons delivered October 12, 1868, were paid for before any North Carolina bonds were issued or received in New York, by the check of Greenleaf, Norris & Co. for $63,593.46. This more than paid for the iron, and left a balance due Pickrell of $11,794.27, which was settled with him afterwards. The three deliveries made on November 2, the price of which was $167,098.73, were paid for in part by the check of Greenleaf, Norris & Co. for $75,000, which was cashed, leaving a balance of $92,098.73. For this balance Baltzer & Taaks received from Pickrell, between November 2 and November 20, one hundred and fifty North Carolina State bonds of $1,000 each.

The validity of the bonds of the State of North Carolina, issued by authority of the ordinance of the Convention of March 11, 1868, and the Act of the General Assembly of August 15, 1868, having been questioned in the latter part of the year 1868, they became discredited, and both the railroad company and Pickrell were embarrassed thereby. The contract between Pickrell and the Railroad Company was changed, and the length of the road to be built by Pickrell was, by contract dated March 6, 1869, reduced. Under the contract as amended he built the railroad from Raleigh to Haw River, a distance of thirty miles, furnishing therefor the iron rails. The Company paid him in full for the rails and for constructing the road. [641]

In consequence of the embarrassment resulting to Pickrell from the discrediting of the North Carolina bonds, no iron was received by him after November 2, 1868, from Baltzer & Taaks on the contract of September 11, 1868; and on August 11, 1869, Baltzer and Taaks, by a letter of that date addressed to Pickrell, released him, as far as they were concerned, "from obligations of receiving any more iron under contract dated 11th September, 1868, and," they added, "we consider the same as closed." The balance sued for was, therefore, for iron delivered on November 2, 1868.

The bill in this case was based on the assumption and averment that the Chatham Railroad Company was a party to the contract of September 11, 1868, designated "A," and that all the stipulations therein made by Pickrell were made by him for the Railroad Company, acting by its authority and in its behalf, and that the Chatham Railroad Company was the party of the second part to the contract, and not Pickrell; that the contract was to be construed together with and as a part of the agreement of the same date, signed by W. J. Hawkins, President Chatham Railroad Company, and designated "B;" and that, under the terms of these contracts, the Railroad Company had purchased, and received from plaintiffs, and used twenty-seven hundred and thirty-four tons of iron rails, on which there remained unpaid and due to the plaintiffs the sum of $93,615.57, with interest from November 2, 1868.

The bill prayed that the contract "A" might be reformed and corrected by the substitution of the name of the Raleigh and Augusta Air Line Railroad Company, formerly called the Chatham Railroad Company, for the name of

John F. Pickrell, who, it was alleged, as the
[642] agent of said Company, nominally signed such agreement, at its procurement and request, and for its benefit and advantage, and that said agreement, when so reformed, might be enforced as the agreement and undertaking of the Railroad Company, the same as if its name had been signed thereto and its corporate seal affixed.

The bill further prayed for a decree against the Raleigh and Augusta Air Line Railroad Company for the said sum of $93,615.57, and interest thereon for November 2, 1868, with the right to enforce a first lien therefor on all the franchises, estate and property of the Railroad Company. The answers of the defendants, under oath, were called for.

The Railroad Company answered under its corporate seal, and Hawkins and Whitford under oath. Pickrell failed to answer, and a decree pro confesso was taken against him. The Railroad Company averred in its answer that it was not a party to the contract of September 11, 1868, designated "A;" that Pickrell was not its agent and had no power or authority to enter into said contract, or any other contract for it; that the contract "B" was signed by the defendant Hawkins to enable Pickrell to carry out the contract "A," which he had previously made with the plaintiffs, by which he expected to procure the iron for the defendant Company's road, and with no purpose to become a party to the contract "A" or to bind the Railroad Company thereby.

The answer of the Railroad Company further averred that Pickrell had paid the plaintiffs for all iron delivered by them under their contract "A," and that the Company had paid Pickrell for all work done and materials furnished by him, including iron, under his construction contract with the Company, and pleaded the North Carolina Statute of Limitation of three years in bar of the plaintiffs' suit.

Whitford answered that when the contract "A" was made and executed he was not the agent of the defendant Company to make or execute the same, or for any purpose, and did not represent himself to be so to the plaintiff; and that he was not a party to said contract or interested therein.

Hawkins, in his answer, denied that Pickrell was the agent of the defendant Company, or that he had any authority to make any contract
[642] in behalf of the Company for the purchase of iron, and averred that Pickrell made the contract for himself to procure iron to perform his own contract with the Railroad Company. He denied that the contract "B," signed by himself, as president of the Chatham Railroad Company, was a part of the contract "A," but averred that it was a separate and independent contract, made by him to enable Pickrell to pay for the iron which he had purchased from Baltzer & Tsaks and Schepeler & Co., and that the two contracts were not, at the time of their execution, regarded by any of the parties thereto as forming parts of the same contract, but as distinct, each binding upon the party or parties signing the same, and upon him or them alone, and that he had fully performed every part of the agreement "B" signed by him.

To these answers replications were filed by the plaintiffs. Upon final hearing the circuit court dismissed the bill, and
pealed.

It is plain that the relief pra
tiffs in their bill of complaint
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have not been paid for.

The agreements set out in
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lina, and Hawkins, as agent
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only parties, and Exhibit "B"
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read that Pickrell, who, acco
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In the light of the surro
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. 66 [54 U. S. bk. 14, L.
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ly shown. If the proofs
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ntirely plain, equity will
elburne v. *Inchiquin*, 1
v. *Royal Assurance Co.*
v. *Moon*, 2 Johns. Ch.
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contract were drawn under the supervision of counsel for the plaintiffs, and the latter was signed by the parties on September 11, 1868, and nearly two weeks later was acknowledged by them before a notary public. The record shows that the plaintiffs, so far as the contract was carried out, performed it precisely as its terms required. The iron delivered was delivered to Pickrell, the payments made were made by Pickrell and receipted for to him, the accounts in reference to the business were kept in his name on the books of the plaintiffs, an overpayment made on the iron delivered was returned to him, and a final settlement and adjustment of the business, and a statement of the account of the plaintiffs with him arising out of the contract, was made nearly a year after the last delivery of iron.

It is necessary, in order to sustain their contention that the name of Pickrell was inserted in the contract when that of the Railroad Company should have been, for the plaintiffs to show that Pickrell was the agent of the Railroad Company, authorized by it to make the contract, and that he used his own name in the contract instead of the name of his principal. There is no proof in the record to show that the defendant Company ever authorized Pickrell to act as its agent in any matter whatever; on the contrary, it is established beyond question that Pickrell was not the agent of the Railroad Company. The Company denies it in its answer; Hawkins, the president of the Company, denies it; Whitford, the associate of Pickrell, denies it; and Pickrell himself does not assert the contrary, and he swears he did not, in purchasing the iron of the plaintiffs, represent himself or Whitford to be the agent of the Railroad Company. There is no proof [647] in the record which tends to rebut this evidence; on the contrary, all the dealings of the plaintiffs with Pickrell, the letters, accounts, payments, and settlements relating to the contract "A," show that Pickrell was acting for himself, and the plaintiffs so understood it, and that the contract was what it purports on its face and in all its provisions to be, namely: the contract of Pickrell, and not of the Railroad Company.

If John F. Pickrell, party of the second part in contract "A," means the Chatham Railroad Company, then the execution of contract "B" was a vain and futile act. It is only on the theory that Pickrell, and not the Railroad Company, was the party of the second part in contract "A" that the necessity for contract "B" becomes apparent. For the Railroad Company having, according to the contention of plaintiffs, consented to the method for the withdrawal of the bonds provided in contract "A," it was bound and protected thereby, and there was no necessity for the preparation and execution of another contract, whereby the Railroad Company bound itself to substantially the same thing.

It is also apparent upon the most cursory reading of contract "A" that the substitution of the name of the Railroad Company for that of Pickrell would render several of its provisions nugatory and impossible of execution, and the paper generally incongruous and absurd.

But if anything further were needed to show how baseless is the contention of the plaintiffs

that the name of Pickrell was inserted in the contract "A" in place of that of the Railroad Company by mistake or fraud, it is found in the deposition of Baltzer, one of the plaintiffs, who testifies that contract "A" was prepared by the counsel of the plaintiffs, and that the contracts "A" and "B" express in exact words the final agreement of the parties with reference to the matters embraced therein.

As, therefore, the contract expressed the agreement of the parties, no court has power to change it. Courts of equity may compel parties to execute their agreements, but have [648] no power to make agreements for them. *Hunt* v. *Rousmaniere*, 1 Pet. 1 [26 U. S. bk. 7, L. ed. 27].

The evidence which was offered of the understanding between Baltzer and Pickrell that the covenants of Pickrell were the covenants of the Railroad Company was inadmissible, first, because it is a general rule that when a contract has been reduced to the form of a document or series of documents, no evidence can be given of the terms of such contract, except the document itself; and, second, the Railroad Company could not be bound by the understanding of other persons to which it was not a party. The only covenant of the Railroad Company appearing upon the face of the papers was that contained in contract "B," and that covenant Baltzer, one of the plaintiffs, and Hawkins, who signed it as president of the Railroad Company, both testified had been fully performed.

The plaintiffs, therefore, fail in the first step necessary to entitle them to the relief prayed by their bill; they show no contract between themselves and the Railroad Company.

But their case must fail for another reason. The evidence in the record shows conclusively that the plaintiffs were paid by Pickrell, in accordance with the terms of their contract with him, for all the iron bought by Pickrell and used by him in the construction of the road of the defendant Company.

It is not disputed that for the balance now sued for Baltzer & Taaks received from Pickrell, between November 2 and November 20, 1868, one hundred and fifty North Carolina bonds of $1,000 each. On November 20, they reported in writing to Pickrell that they had sold one hundred of the bonds at 64 cents on the dollar, amounting to $62,493.40, and on November 21, that they had sold the remaining fifty bonds for 63¼ cents on the dollar, amounting to $30,996.82, "producing to" his "credit," $93,490.22. The proceeds of the bonds, with the overpayment made by Pickrell on the first lot of iron delivered, more than paid the amount due on the lots delivered November 2, 1868. On November 23, 1868, Baltzer & Taaks stated their account with [649] Pickrell, which showed there was due to him on account of overpayment for the iron delivered $937.44, and this sum they paid him on December 28, 1868. By a final balance sheet, made out by themselves in September, 1869, more than ten months after the bonds were received by them, and nine months after the North Carolina bonds had, according to the averments of their bill, become discredited and of little value, they credited Pickrell with the amounts for which, on November 20 and 21, 1868, they reported that the bo sold by them, and such balance that they had been paid in full f furnished by them. There is in the bill that the plaintiffs did r hundred and fifty bonds as they rep rell they had done, or that they s in their possession, and there is turn them either to Pickrell or Company. These facts, consider tion with the further fact that th the sale of the iron provided therefor should be made in N State bonds, leave no ground fo tion that there is anything due from anyone for the iron furnish tract "A."

Therefore, without considering the plaintiffs have never, either at any time, tendered back the and fifty bonds of the State of N which they admit they received of the iron furnished, or the fac eler & Company, who were part tract on which the suit is based, parties plaintiff, and without co Statute of Limitations of No which is pleaded by the Railroad are of opinion that the plaintif to maintain their suit, and their b e ly dismissed.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Su

LOUISVILLE GAS COMPA

Err.,

v.

CITIZENS GAS LIGHT C

(See S. C., Reporter's ed., 6

Constitutional law—obligation of c pairment—exclusive privileges Gas Company—construction of junction.

*1. The grant by the Legislature o 1869, to the Louisville Gas Company of twenty years, of "the exclusiv erecting and establishing gas works Louisville, and of vending coal gas plying the city and citizens with ga public works," that is, by means of p streets and public ways of that city, contract, within the meaning of the stitution, and was not forbidden by the Bill of Rights of Kentucky whic "all freemen, when they form a socie equal, and that no man or set of men exclusive, separate public emolum leges from the community, but in co public services." Within the meanin the services which the Company und form were public services, affectin and rights of the public generally.

2. By a general statute of Kentucky it was declared that "all charters an

*Head notes by *Mr. Justice* HARLA

NOTE.—*Constitutional law; obligati impairment of.* See Fletcher v. Pe Cranch), 87, bk. 3, 162, *note.*

Same; legislative grant of exclusive lidity of. See the two following c Cooley, Const. Lim., 5th ed., 339–345.

mendments thereof, shall be
or repeal at the will of the
ontrary intent be plainly ex-
at whilst privileges and fran-
be changed or repealed, no
shall impair other rights pre-
that the provisions of that
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nted hereafter." By an Act
latory of the charter of the
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efore mentioned, it was pro-
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principles announced in N. O.
siana Light and Heat Produc-
ng Company, the Citizens Gas
rporated in 1872, and endowed
manufacturing and distribut-
Louisville, by means of pipes
streets and public ways, is not
tion restraining the Louisville
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nted by its charter.

No. 489.]

885. Decided Dec. 7, 1885.

Court of Appeals of the State

facts of the case appear in
court.

**arlisle, John K. Good-
. Harris** and **Alex. P.**
plaintiff in error:

he Louisville Gas Company,
cts of January 30, 1867, and
is a contract between the
said Company, and the City
ch is under the protection of
of the United States and also
entucky, both of which de-
impairing the obligation of
made.

reight Co. 105 U. S. 20 (Bk. 26,
. Wisconsin, 94 U. S. 181, 183
3, 103); *Farrington* v. *Tennes-*
Bk. 24, L. ed. 558); *Wilming-*
13 Wall. 266 (80 U. S. bk.
Gordon v. *Appeal, Tax Ct.* 3
S. bk. 11, L. ed. 529); *New*
U. S. 113 (Bk. 24, L. ed. 354);
18 How. 331 (59 U. S. bk. 15,
e Bk. v. *Knoop*, 16 How. 369
ed. 977); Cooley, Const. Lim.
ge Proprietors v. *Hoboken Co.*
. S. bk. 17, L. ed. 571); *Bank*
Edwards, 5 Ired. 516; *Union*
Yerg. (Tenn.) 490; *Boston, etc.*
etc., R. R. Co. 2 Gray, 1; *John-*
alth, 7 Dana, 342; *Hamilton*
458; *Louisville* v. *University*
3. Mon. 642.

he *State of Wisconsin* v. *Mil-*
. 29 Wis. 454, it was held that
f that State might confer upon
ation the exclusive right to
to sell gas, and to erect works
erefor, within the limits of a
ation.

ard v. *Milwaukee Gas Co.* 6
. Cincinnati Gas Co. 18 Ohio
. Carondelet, 22 Mo. 110; *Cres.*
V. Orleans Gas Co. 27 La. Ann.
138; *Gas Light Co.* v. *Colliday*, 25 Md. 1; *People* v. *Manhattan Gas Co.* 45 Barb. 136.

The undertaking of the Company to furnish gas to all the citizens who should apply therefor was a valuable and sufficient consideration for the grant of the exclusive privilege of making and vending gas to the City and citizens of Louisville.

Gas Light Co. v. *Colliday*, 25 Md. 1; *People* v. *Manhattan Gas Co.* 45 Barb. 136; *Shepard* v. *Milwaukee Gas Co.* 6 Wis. 546; *Weymouth* v. *Penobscot Driving Co.* 71 Me. 29, 38.

Messrs. **John Mason Brown, George M. Davie** and **Wm. Lindsay,** for defendant in error:

To prohibit all but one favored individual from engaging in a business which is lawful is, unless under legitimate exercise of the police power, a "denying to others of equal privileges," and a "depriving of them of their rights of property," and of their "liberty," in the meaning of the American Constitution.

Cooley, Const. Lim. 5th ed. 343-5, 486, 745; *Re Jacobs*, 40 N. Y. Sup. Ct. (33 Hun), 378; *S. C.* 98 N. Y. 98; *People* v. *Marx*, 99 N. Y. 377; *Commonwealth* v. *Bacon*, 13 Bush, 212; *Norwich Gas Co.* v. *Norwich City Gas Co.* 25 Conn. 19; *Smith* v. *Burlingame*, 4 McLean, 121; *Bertholf* v. *O'Reilly*, 74 N. Y. 509; *Butchers Union Co.* v. *Crescent City Co.* 111 U. S. 746 (Bk. 28, L. ed. 585).

Some courts have held that the making and selling of gas is not an unwholesome and dangerous occupation, and an exclusive privilege to make it cannot be sustained, even under the police power.

Norwich Gas Light Co. v. *Norwich City Gas Co.* 25 Conn. 37; *St. Louis Gas Co.* case 19, Central Law Journal, 201; *Paterson Gas Co.* v. *Brady* (27 N. J. L.), 3 Dutch, 248; *Jersey City Gas Co.* v. *Dwight*, 29 N. J. Eq. 248.

The grant of an easement, franchise or privilege, with respect to the use of streets or other highways, will be construed strictly and will not be treated as exclusive, unless words of exclusion are explicit and "unequivocal."

Charles River Bridge v. *Warren Bridge*, 11 Pet. 420 (36 U. S. bk. 9, L. ed. 773); High, Injunctions, sec. 901; *Lehigh Water Co's Appeal*, 102 Pa. St. 527; *Holyoke Co.* v. *Lyman*, 15 Wall. 512 (82 U. S. bk. 26, L. ed. 137); *Fertilizer Co.* v. *Hyde Park*, 97 U. S. 666 (Bk. 24, L. ed. 1038); *Wright* v. *Nagle*, 101 U. S. 796 (Bk. 25, L. ed. 923); *State* v. *Cincinnati Gas Co.* 18 Ohio St. 290; *Norwich Gas Co.* v. *Norwich City Gas Co.* 25 Conn. 19.

The "exclusive privilege," if valid, could be, and was, *pro tanto*, repealed, under the right reserved to the Legislature, by the Kentucky Act of 1856, to amend, alter or repeal all legislative grants and franchises.

Griffin v. *Kentucky Ins. Co.* 3 Bush, 592; *Cumberland & Ohio R. R.* v. *Barren Co.* 10 Bush, (Ky.) 608, 609; *Greenwood* v. *Freight Co.* 105 U. S. 20 (Bk. 26, L. ed. 964); see also *Newton* v. *Comrs.* 100 U. S. 561 (Bk. 25, L. ed. 712); *Wright* v. *Nagle*, 101 U. S. 796 (Bk. 25, L. ed. 923).

The grant of the exclusive privilege herein, if a contract at all, was without any consideration, and, therefore, could be repealed at any time.

Johnson v. *Crow*, 87 Pa. St. 184; *Philadelphia R. R. Co's Appeal*, 102 Pa. St. 129; *Norwich*

Gas Light Co. v. *City Gas Co.* 25 Conn. 36; *Tucker* v. *Ferguson*, 22 Wall. 574 (89 U. S. bk. 22, L. ed. 816).

Mr. Justice **Harlan** delivered the opinion of the court:

[684] This is a writ of error to the highest court of Kentucky. The general question to be determined is whether certain legislation of that Commonwealth is in conflict with the clause of the National Constitution which forbids a State to pass any law impairing the obligation of contracts. The appellant, the Louisville Gas Company, contends that its charter, granting certain exclusive rights and privileges, constituted, within the meaning of that Constitution, a contract, the obligation of which has been impaired by the charter subsequently granted to the appellee, the Citizens Gas Light Company. The Court of Appeals of Kentucky sustained as constitutional the legislation under the authority of which the latter Company is exercising the rights, privileges and franchises conferred by its charter.

By an Act of the General Assembly of Kentucky, approved February 15, 1838 (Sess. Acts, 1837-8, p. 206), the Louisville Gas and Water Company was created a corporation to continue for the term of thirty years from January 1, 1839. It was made its duty, within three years after its organization, to establish in Louisville a gas manufactory of sufficient extent and capacity to supply that city and its people with such public and private lights as might, from time to time, be required; and, within five years after the establishment of its gas works, to erect and establish water works sufficient to supply the city with water for the extinguishment of fires, for the cleansing and sprinkling of streets and alleys, and for all manufacturing and do-
[685] mestic purposes; to which end, it might lay down and extend pipes through any of the streets and alleys of the city, the Company being responsible to the city for any damages resulting therefrom. The Act imposed a limit upon the price to be charged for gas lights used by the city; and gave the latter the right to subscribe for four thousand shares in the Company, payment for one half of which could be made in city coupon bonds for $200,000, redeemable at any time within three years after the expiration of the Company's charter. It was made a fundamental condition that, upon the termination of the Company's charter, the city at its election could take the gas and water works at a fair estimate of what they would cost and be worth at that time, to be ascertained by the judgment of competent engineers, selected by the parties, or, in case they disagreed, by the Louisville Chancery Court.

Under this charter the Company proceeded at once to erect gas works, including suitable buildings and machinery. It supplied itself with all necessary apparatus, laid down mains and pipes, and erected lamp-posts, for the purpose of lighting the streets. It supplied gas for the public buildings, and for street lights, as well as for domestic purposes. And it continued so to do during the term of its original charter.

By an Act passed in 1842, the authority to erect water works was withdrawn by the Legislature.

By an Act, entitled "An Act to Extend the Charter of the Louisville Gas Company," approved January 30, 1867, a n
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Gas Company, on the 31st of
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On the 22d of January, 18
passed amending that of Janua
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streets. The court of original jurisdiction dismissed the suit. Upon appeal to the Court of Appeals, the decree was reversed, with directions to issue a perpetual injunction restraining the Louisville Gas Company from claiming and exercising the exclusive right of manufacturing and supplying gas to the City of Louisville and its inhabitants. This writ of error was sued out to review that judgment.

Two of the judges of the state court held that the clause of the Bill of Rights of Kentucky, which declares that "all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services" (Const. Ky. 1799, art. 10, § 1; 1850, art. 13, § 1), forbade the General Assembly of that Commonwealth to grant to a private corporation the exclusive privilege of manufacturing and distributing gas, for public and private use, in the City of Louisville, by means of pipes and mains laid under the streets and other public ways of that municipality. The other judges were of opinion that that clause did not prohibit a grant by the State to a private corporation, whereby certain privileges were conferred upon the latter in consideration of its discharging a public duty, or of rendering a public service; that the municipality of Louisville being a part of the State Government, there was a public necessity for gas lights upon its streets and in its public buildings, almost as urgent as the establishment of the streets themselves; that the services thus to be performed by the corporation were, in the judgment of the legislative department, an adequate consideration for the grant to it of exclusive privileges; and, consequently, that the grant was a contract, the rights of the parties under it to be determined by the rules applicable to contracts between individuals. [691] [692]

While the judgment below, in view of the equal division in opinion of the judges of the state court, does not rest upon any final determination of this question by that tribunal, it cannot be ignored by us; for, at the threshold of all cases of this kind, this court must ascertain whether there is any such agreement on the part of the State as constitutes a contract, within the meaning of the Constitution of the United States. If the services which the Gas Company undertook to perform, in consideration of the exclusive privileges granted to it, were public services, within the meaning of the Bill of Rights of Kentucky, then the grant of such privileges was not forbidden by the State Constitution. In *N. O. Gas Light Co.* v. *Louisiana Heat and Light Producing and Manufacturing Co.* [*post*, 516], just decided, it was held that the supplying of gas to a city and its inhabitants, by means of pipes and mains laid under its public ways, was a franchise belonging to the State, and that the services performed, as the consideration for the grant of such a franchise, are of a public nature. Such a business is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas lights. The former articles may be supplied by individual effort, and with their supply the government has no such concern that it can grant an exclusive right to engage in their manufacture and [693]

sale. But as the distribution of gas in thickly populated districts is, for the reasons stated in the other case, a matter of which the public may assume control, services rendered in supplying it for public and private use constitute, in our opinion, such public services as, under the Constitution of Kentucky, authorized the Legislature to grant to the defendant the exclusive privileges in question. This conclusion is justified, we think, by the decisions of the Court of Appeals of that State. In *O'Hara* v. *Lexington & Ohio Railroad Co.* 1 Dana, 232, the point was made, that an inquisition for the assessment of damages for the taking of land by a railroad corporation was void upon certain grounds, one of which was that the company's charter granted exclusive privileges, without any consideration of public services. *Chief Justice* Robertson, speaking for the court, said that in the true sense of the Constitution, no exclusive privileges were granted to the corporation, observing that "if the charter be on that ground unconstitutional, it would be difficult to maintain the validity of any statute for incorporating any bridge company, or any bank, or even for granting a ferry franchise."

But the principles announced in *Gordon* v. *Winchester, etc., Asso.* 12 Bush, 114, seem mor directly applicable to the present case. *Judge* Cofer, speaking for the whole court, after observing that there were unquestionably cases in which the State may, without violating the Constitution, grant privileges to specified individuals, which, from the nature of the case, could not be enjoyed by all, and in respect of which the State could designate the grantee, said: "But in all such cases the person, whether natural or artificial, to whom the privilege is granted, is bound, upon accepting it, to render to the public that service, the performance of which was the inducement to the grant; and it is because of such obligation to render service to the public that the Legislature has power to make the grant." In illustration of this principle he proceeds to say: "Permission to keep a tavern or a ferry, to erect a toll-bridge over a stream where it is crossed by a public highway, to [694] build a mill-dam across a navigable stream, and the like, are special privileges, and, being matters in which the public have an interest, may be granted by the Legislature to individuals or corporations; but the grantee, upon accepting the grant, at once becomes bound to render that service, to secure which the grant was made; and such obligation, on the part of the grantee, is just as necessary to the validity of a legislative grant of an exclusive privilege, as a consideration, either good or valuable, is to the validity of an ordinary contract. Whenever, by accepting such privilege, the grantee becomes bound, by an express or implied undertaking, to render service to the public, such undertaking will uphold the grant, no matter how inadequate it may be; for, the Legislature being vested with power to make grants of that character, when the public convenience demands it, the legislative judgment is conclusive, both as to the necessity for making the grant and the amount of service to be rendered; and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant may appear to them to be. But when they can see that the grantee of an exclusive privilege has

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the question was as to the con
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Its validity was attempted to b
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other things, saying: "Ferrie
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the Bill of Rights, Pryor, *J.*
Lewis concurring), said: "Thi
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The precise question here p
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Citizens' Gas Light Com-
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any corporation shall ex-
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within the protection of the Constitution of the United States. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436 [66 U. S. bk. 17, L. ed. 73]; *Wright* v. *Nagle*, 101 U. S. 794 [Bk. 25, L. ed. 922]; *R. R. Co.* v. *Palmes*, 109 Id. 257 [Bk. 27, L. ed. 926]. After carefully considering the grounds upon which the state court rests its conclusion, we have felt constrained to reach a different result. We are of opinion that the Act of 1869 plainly expresses the intention that the Company should enjoy the rights, privileges and franchises conferred by the Act of 1867, as modified and extended by that of 1869, without its charter being subject to amendment or repeal at the will of the Legislature. In ascertaining the legislative intent, we attach no consequence to the negotiations between the Louisville Gas Company and the city council of Louisville as to the provisions to be embodied in an amended charter giving the Company exclusive privileges after January 1, 1869; for, the words of the Act of 1869 being, in our opinion, clear and unambiguous, effect must be given to them according to their ordinary signification. The clause in that Act declaring that "no alteration or amendment to the charter of the Gas Company shall be made without the concurrence of the city council and the directors of the Gas Company," plainly expresses, as we think, the intention that the Company's charter should not be amended or repealed "at the will of the [698] Legislature." When the Legislature declared that there shall be no alteration or amendment without the concurrence of the city council and the directors of the Company, it must have intended to waive, with respect to that Company, her absolute power reserved by the Act of 1856, of amending or repealing charters of incorporations thereafter granted. The language used is wholly inconsistent with any other purpose than to withdraw its charter from the operation of that Act, so far as to make the right of amendment or repeal subject, not to the mere will of the Legislature, but in the first instance to the concurrence of the city council and the directors of the Gas Company. If there can be no amendment or repeal without the concurrence of the city council and the directors of the Company, then it cannot be said that such amendment or repeal depends entirely upon the will of the Legislature, as declared in the Act of 1856. It was as if the Legislature had said: "As the municipal government of Louisville and the Company are agreed, the latter may enjoy the rights, privileges and franchises granted by its charter for the whole term of twenty years, unless before the expiration of that period the city council and its directors concur in asking alterations or amendments, which will be made if, in the judgment of the General Assembly, the public interests will be thereby promoted."

3. But it is argued that, as the defendant's charter of 1867 conferred upon it no exclusive privileges, the granting of such privileges in the Act of 1869 was without consideration, and is to be deemed a mere gratuity. To this it is sufficient to answer that, apart from the public services to be performed, the obligations of the Company were enlarged by the Act of 1869, and its rights under that of 1867 materially lessened and burdened in the following particulars: The amended charter limited the profits

of the Company to 12 per cent per annum on the par value of its stock, 2 per cent of [699] which was required to be used for extensions and not to be capitalized, except at the end of each five years, while, under the original charter, the only limitation upon the prices to be charged private consumers was that they should not exceed the average charges in Philadelphia, Baltimore, Cincinnati, Chicago and St. Louis; the amended charter limited the amount to be annually charged the city per lamp to $35, no matter what its actual cost was, while, under the original charter, the Company was entitled to charge the city for the actual cost of supplying, lighting and extinguishing lamps, not, however, exceeding the average charges in the before mentioned cities; and, by the amended charter, the Company was required to extend its mains when its income from lights would amount to 7 per cent on such extensions, while under the original charter such extensions were not required unless its income therefrom would pay 8 per cent. These concessions upon the part of the Company seem to be of a substantial character, and constituted a sufficient consideration to uphold the grant of exclusive privileges. If the consideration appears now to be inadequate, upon a money basis, that was a matter for legislative determination, behind which the courts should not attempt to go.

4. These preliminary matters being disposed of, and without referring to some matters discussed by counsel but not fairly arising on the pleadings, or in any evidence in the cause, it is clear that, upon the main issue, this case is determined by the principles announced in *New Orleans Gas Light Company* v. *The Louisiana Light and Heat Producing and Manufacturing Company* [*post*], just decided. For the reasons there stated, and which need not be repeated here, we are of opinion that the grant to the Louisville Gas Company, by the Act of January 22, 1869, amendatory of the Act of January 30, 1867, of the exclusive privilege of erecting and establishing gas works in the city of Louisville during the continuance of its charter, and of vending coal gas lights, and supplying that municipality and its people with gas by means of public works, that is, by means of pipes, mains and conduits placed in and under its streets and public ways, constitutes a contract between the State and that Company the obligation of which was impaired by the charter of the Citizens' Gas Light Company. The charter of the latter Company is, therefore, inoperative, in respect of these matters, until, at least, the exclusive privileges granted the [700] Louisville Gas Company cease, according to the provisions of its charter. As the object of the plaintiff's suit was to obtain a decree enjoining the defendant from claiming and exercising the exclusive privileges so granted to it, the judgment of the Louisville Chancery Court dismissing the bill should have been affirmed by the Court of Appeals.

The judgment of the latter court, reversing that of the court of original jurisdiction, is itself reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NEW ORLEANS GAS LI
PANY, *Appt.*,
v.
LOUISIANA LIGHT AND
DUCING AND MANUFACT
PANY ET AL.

(See S. C., Reporter's ed.,

Constitutional law—obligation o
pairment of — the New Orl
Company—exclusive privileges
—Constitution of Louisiana
monopoly features of existin
consolidation of corporations.

*1. The New Orleans Gas Light
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corporation of the same name w
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exclusive privilege of supplying g
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and conduits laid, at its own cost,
other public ways of that city.

2. Before the adoption of the pre
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5. The constitutional prohibition
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6. The provision in the present
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[No. 18.]

Argued Mar. 27, 30, 1885. Deci

APPEAL from the Circuit Co
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*Head notes by *Mr. Justice* HA

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Same; legislative grant of exclus
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Caleb, for appellee:
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Crescent City Co. 111
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97 U. S. 697 (Bk. 24,
Georgia, 98 U. S. 359
v. *R. R. Co.* 99 U. S.
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the consolidation of other corporations. The plaintiff claims to be entitled, for the term of fifty years from April 1, 1875, to the sole and exclusive privilege of manufacturing and distributing gas in that city by means of pipes, mains, and conduits laid in its streets, to such persons or corporate bodies as may choose to contract for the same. The relief asked is a decree perpetually enjoining defendant from digging up the streets, and other public ways or places of the city for the purpose of laying pipes, conduits, or mains for supplying illuminating gas, and from asserting any right to do so until after the lapse of fifty years from the latter date.

An application for an injunction having been denied, the suit was thereafter removed by the plaintiff into the Circuit Court of the United States, upon the ground that it was one arising under the Constitution of the United States. In the latter court a bill was filed, so as to conform to the general rules of equity practice.

A statement of the history of the corporations concerned in the before mentioned consolidation is necessary to a clear understanding as well of the grounds upon which the court below proceeded, as of the questions argued in this court.

By an Act of the Legislature of Louisiana, passed April 1, 1835, the New Orleans Gas Light and Banking Company was incorporated and was given "the sole and exclusive privilege of vending gas lights in the City of New Orleans and its faubourgs and the City of Lafayette, to such persons or bodies corporate who may voluntarily choose to contract for the same;" to which end it was authorized to lay pipes or conduits at its own expense in any of the public ways or streets of those localities, having due regard to the public convenience. The right was reserved to the city, after the expiration of forty years, to buy such gas works as the company constructed, and pay for the same in city bonds. If the city declined to purchase, then its bonds which the company had received in payment of its subscription of stock were to be renewed for twenty years. [652]

By amendments of its charter made in 1845 and 1854, the company's right to engage in banking was, by its consent, withdrawn, and the remaining rights granted by the original Act were continued to the corporation under the name of the New Orleans Gas Light Company, to be enjoyed until April 1, 1875, when its corporate privileges were to expire. This change was made subject to the condition that the Company should assume all the debts and engagements of the original company, release its claims against the Charity Hospital, and, during the continuance of its charter, furnish that institution with necessary gas and fixtures free of charge. By amendments made in 1860 its charter was extended to April 1, 1895, the exclusive privileges granted by the original charter not, however, to exist beyond the time fixed in the Act of incorporation.

By an Act approved April 20, 1870, another company, under the name of the Crescent City Gas Light Company, was incorporated. The charter provided that that company, its successors and assigns, should, for fifty years from the expiration of the charter of the New Orleans Gas Light Company

have the sole and exclusive privilege of making and supplying gas lights in the City of New Orleans, by means of pipes or conduits laid in the streets, to such persons or bodies corporate as might voluntarily choose to contract for it. By a subsequent enactment, in 1873, it was given authority to issue bonds to an amount not exceeding $1,000,000, secured by mortgage of its works and property; and it [653] was declared that the charter of the New Orleans Gas Light Company should expire on April 1, 1875, from which latter date, and for the term fixed in the Act of 1870, the franchise and privileges granted to the Crescent City Gas Light Company were confirmed.

By a judgment rendered February 1, 1875, in a suit brought by the Crescent City Gas Light Company against the New Orleans Gas Light Company, and which involved their respective rights to manufacture and sell gas in New Orleans, the Supreme Court of the State held that the former company "has the sole and exclusive privilege to make and sell illuminating gas in the City of New Orleans for fifty years from 1st April, 1875;" also, that the Act of March 1, 1860, extending the charter of the New Orleans Gas Light Company from April 1, 1875, until April 1, 1895, "is unconstitutional and void," as having a title that did not declare the object of the Act. The latter Company was also enjoined from conducting business after April 1, 1875, while the other company was confirmed in its exclusive right, after that date, to manufacture and distribute gas in New Orleans. *Crescent City Gas Light Co.* v. *New Orleans Gas Light Co.* 27 La. Ann. 188.

The bill sets out the foregoing facts, and alleges that during February and March, 1875, the directors of the two Companies, by means of conferences with each other and with their respective stockholders, concluded to consolidate the two corporations under the name of the New Orleans Gas Light Company, which should hold and enjoy the rights, privileges, franchises and property of each; that they determined the amount of its capital, the number of directors, and the persons to compose a board before an election; that the two boards made an agreement, in writing, to which the owners of all the stock of either company have assented; that there has been no contestation by any stockholder of either of the two corporations of the consolidation or consolidation agreement; that "there was a formal vote, comprising more than three fifths of all owners of stock, ratifying and confirming the articles, and the agreement and certificate of consolida- [654] tion have been filed and recorded in the office of the Secretary of State;" that "the Corporation thus organized and conducting business, from the 29th of March, 1875, has manufactured and sold gas throughout New Orleans without question or opposition," supplying the city, its officers, the officers of the State, and the public generally, and collecting its monthly bills; that there has been no suit by the State or the city questioning its capacity as a corporation, or its title to all the franchises, privileges, rights, or property in its possession; that its possession of "the sole and exclusive right aforesaid has existed from the agreement of the 29th of March, 1875;" that the State regularly assessed the property of the corporation and its franchise for taxation, it by suit to pay such taxe amounting to $3,750,000, of chise is charged to be worth that the City of New Orlean ner, assessed the consolidated C quired from it the performanc tions of its charter in supplyi out the city and on the publi public buildings ever since tioned consolidation.

The defendants filed a demu the bill. The case was deter demurrer, which was sustained missed, without any mention the plea.

The circuit court was of o consolidation was entirely wi thority, and consequently tha no such Corporation as the one this suit. Upon that ground a dismissed.

The effect of the consolidati 1875, is the first question to be

By an Act of the General Ass ana of December 12, 1874, e to Authorize the Consolidation Manufacturing Corporations it is provided: "That any tw manufacturing corporations or existing under general or spe objects and business are in same nature, may amalgamate, solidate said corporations or form one consolidated compa enjoying all the rights, priv franchises and property belo and under such corporate na adopt or agree upon. Such co be made by agreement in writi the authority of the board of di assent of the owners of at lea the capital stock of each of said companies, and a certificate of consolidation, with the name o ed company, shall be filed and office of the Secretary of Stat such consolidation shall in an or impair the right of any c of said companies. In the ag solidation the number of direc solidated company shall be s capital stock may be any amou by the companies or corporatio in the articles of consolidation.

It will be observed that a co pany formed under this Act rights, privileges and franchis its constituent companies.

It is contended—and such taken by the circuit court—th nal New Orleans Gas Light Co til April 1, 1875, the exclusive facture and distribute gas in N as the like exclusive right of t Gas Light Company did not ence until that day, the latte not, when the Act of 1874 was isting" business or manufactu entitled to the privilege of co another company.

In this interpretation of the concur. The original and ame

ight Company invested mportant character, ca- ly exerted prior to the tatute of 1874. By the it was authorized, after s or conduits in any of he City of New Orleans. , it was entitled to ac- ty for all the objects of ct works, purchase ma- erials, and make such quired to put it in readi- sive privilege of supply- nhabitants with gas on . After its incorpora- ade contracts, obtained ey upon bonds secured ks and property then or At the passage of the as entitled to exert the rter, except that it could 75, encroach upon the anted to the other Com- t of the latter Company, hat date have manufact- e city and to its inhabit- in the Civil Code of n all cases in which it pliedly prohibited, they nce what the law has es- , when the renunciation ts of others, and is not good." Without such ity Gas Light Company zation have engaged in stribution of gas in those w Orleans not included d company. *Pontchar- yette & P. R. R. Co.* 10 ese reasons, we are of ssage of the Act of 1874, le interpretation of its City Gas Light Company siness or manufacturing o "amalgamate, unite, ny like corporation hav- s in general of the same , it is not perceived that considerations of public upposed to have prompt- the legislation relating

ct to the decision of the State in *Fee* v. *The New pany*, 35 La. Ann. 418, after the decree in the n passed. One of the e's rights in the consoli- tue of his ownership of ty Gas Light Company. shows that the articles efore the court, and that nsidered with reference Act of 1874. *Mr. Jus- or* the court, said: "On , the New Orleans Gas the Crescent City Gas rporations chartered un- te, amalgamated, united selves into one consoli- uance of the provisions al Assembly, No. 157 of t to Authorize the Con- solidation of Business or Manufacturing Corporations or Companies.' * * * All requirements of the Act were fully complied with. * * * The articles of consolidation, and the legislative Act by the authority of which they were executed, evidently present a case of complete and perfect amalgamation, the effect of which was, under American authorities, to terminate the existence of the original corporations, to create a new corporation, to transmute the members of the former into members of the latter and to operate a transfer of the property, rights, and liability of each old company to the new one. * * * These authorities, and the reason of the matter, satisfy us that plaintiff can and must look to the defendant company for the satisfaction of whatever rights he had against the Crescent City Gas Light Company, in the mode and on the terms provided in the articles of consolidation." Again: "The law conferred upon three fifths of his fellow stockholders the power to effect a consolidation without his consent, and even against his will; and he is bound by that consolidation, and by the legal effects thereof, which we have heretofore stated." If the view taken by the circuit court be correct, then the consolidation between these [658] companies could not, as adjudged by the Supreme Court of Louisiana, have affected Fee's rights, and compelled him to look to the consolidated Company for the satisfaction of his claims as a stockholder in the Crescent City Gas Light Company.

This brings us to the consideration of questions more difficult. It is contended that the right granted to the Crescent City Gas Light Company, of manufacturing and distributing illuminating gas, and now enjoyed by the consolidated Company, was abrogated to the extent that it was made exclusive by that article of the Constitution of Louisiana of 1879 which, while preserving rights, claims and contracts then existing, provided that "the monopoly features in the charter of any corporation now existing in this State, save such as may be contained in the charter of railroad companies, are hereby abolished;" and that such article is not in violation of the provision of the Constitution of the United States, which forbids a State to pass a law impairing the obligation of contracts.

These propositions have received the careful consideration which their importance demands.

It is true, as suggested in argument, that the manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character. Under proper management the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public, through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime. An English historian, contrasting the London of his day with the London of the time when its streets, supplied only with oil lamps, were scenes of nightly robberies, says that "the adventurers in gas lights did more for the prevention of crime than the government had done since the days of Alfred."

Knight, vol. 7, chap. 21, Macaulay, chap. 8. Municipal corporations constitute a part of the civil government of the State, and their streets are highways which it is the province of government by appropriate means to render safe. To that end the lighting of streets is a matter
[659] of which the public may assume control. For these reasons, and the necessity of uniform regulations for the manufacture and distribution of gas for use by the community, we are of opinion that the supplying of it to the City of New Orleans, and to its inhabitants, by the means designated in the legislation of Louisiana, was an object for which the State could rightfully make provision. Authority for the position that the supplying of gas to a city and its people may become a public purpose is found in *New Orleans* v. *Clark*, 95 U. S. 652 [Bk. 24, L. ed. 522]. That case involved the liability of a municipal corporation upon coupon bonds issued to the company which had undertaken, for a valuable consideration, to light its streets with gas. *Mr. Justice* Field, delivering the opinion of the court, said: "A private corporation, as well as individuals, may be employed by a city in the construction of works needed for the health, comfort, and convenience of its citizens; and though such works may be used by the corporation for its own gain, yet, as they advance the public good, the corporation may be properly aided in their construction by the city; and for that purpose its obligations may be issued, unless some constitutional or legislative provision stands in the way." Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business open as of common right to all, upon terms of equality; for, the right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the State, or by the municipal government of that city acting under legislative authority. Dillon's Municipal Corp. 3d ed. § 691; *State* v. *Cincinnati Gas Co.* 18 Ohio St. 262. See also *Boston* v. *Richardson*, 13 Allen, 146.

To the same effect is the decision of the Supreme Court of Louisiana, in *Crescent City Gas Light Co.* v. *N. O. Gas Light Co.* 27 La. Ann. 147, in which it was said: "The right to operate gas works, and to illuminate a city, is not an ancient or usual occupation of citizens generally.
[660] No one has the right to dig up the streets, and lay down gas pipes, erect lamp-posts, and carry on the business of lighting the streets and the houses of the City of New Orleans, without special authority from the sovereign. It is a franchise belonging to the State, and, in the exercise of the police power, the State could carry on the business itself or select one or several agents to do so."

It will therefore be assumed, in the further consideration of this case, that the charter of the Crescent City Gas Light Company—to whose rights and franchises the present plaintiff has succeeded—so far as it created a corporation with authority to manufacture gas and to distribute the same by means of pipes, mains and conduits, laid in the streets and other public ways of New Orleans, constituted, to use

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S. 113 [Bk. 24, L. ed. 354].

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Illustrations of interference
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cases where enactments uction of foreign paupers, l persons, were held to be conflicting, by their necesffect, with the paramount ss to regulate commerce , and among the several *etc.* v. *Mayor of New York*, 3, L. ed. 543], the court, *ice* Miller, while declining the absence of action by an, or how far they may, lation protect themselves rs, vagrants, criminals and iving from foreign counnition of the police power, r its use can authorize a regard to a subject matter ded exclusively to the disy the Constitution." *City* U. S. 276 [Bk. 23, L. ed. *ad Co.* v. *Husen*, 95 U. S. 1], *Mr. Justice* Strong, decf the court, said that "the te cannot obstruct foreign ate commerce beyond the rcise; and, under color of n its scope cannot be seof the protection afforded itution."

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lors v. *The Hoboken Co.*, 1 bk. 17, L. ed. 571], it was of New Jersey empowerners to contract for the ver the Hackensack River, ly that the "said contract he parties contracting as of New Jersey," but that ul "for any person or perect any other bridge over er for ninety-nine years," obligation could not be f the State. *Mr. Justice* opinion of the court (after rties who built the bridge ctment of the Legislature hich authorized the con- no other bridge should be ohibition against the erecvas the necessary and only them the benefit of their t this they would not have in building the bridges, h needed, and which could ithout some such security sufficient return for the On the faith of this enact- e money necessary to erect acts and promises on the er are wanting in no elestitute a contract."

Bridge, 3 Wall. 51 [70 U. the question was, whether a company authorizing it a bridge across a river in New York for the accommodation of the public in consideration for which it was given a right to take certain tolls, and providing that it should be unlawful for anyone to erect a bridge, or establish a ferry, within a distance of two miles on that river, either above or below that bridge, constituted a contract within the meaning of the Constitution Under authority of a subsequent statute, another company erected a bridge across the same river, within a few rods above the old one, to the injury of the business of the latter. The argument was strenuously pressed that while the Legislature could dispose of all matters properly the subject of bargain, it had no authority to dispose of the right of passing a great river for four miles. The court held that the first company's charter was a contract between it and the State, within the protection of the Constitution of the United States, and that the charter to the last company was, therefore, null and void. *Mr. Justice* Davis, delivering the opinion of the court, said that if anything was settled by an unbroken chain of decisions in the federal courts, it was, that an Act of incorporation was a contract between the State and the stockholders, "a departure from which now would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government." It was also observed, in language applicable to the present case, in some respects: "The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an Act of incorporation. The wants of the public are often so imperative that a duty is imposed on the government to provide for them; and, as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The Legislature, therefore, says to public spirited citizens: 'If you will embark, with your time, money and skill, in an enterprise which will accommodate the public necessities, we will grant to you for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations; and justice and good policy alike require that the protection of the law should be assured to it." See also *West River Bridge Co.* v. *Dix*, 6 How. 531 [47 U. S. bk. 12, L. ed. 544]. [664]

The same principle was declared by the Supreme Court of Louisiana in *Pontchartrain R. R. Co.* v. *Orleans Navigation Co.* 15 La. 413, where *Chief Justice* Martin said: "In the same manner as Congress may reward the discoverer of a new invention or mode of constructing roads, by an exclusive privilege, the Legislature may reward those who employ their capital and industry in doubtful enterprises, for the construction of a railway between two points, which may be of great utility to the public, though the success of the enterprise may be precarious." See also *Pontchartrain R. R. Co.* v. *N. O., etc., R. Co.* 11 La. Ann. 253; *Pontchartrain R. R.*

Co. v. *Lafayette & P. R.R. Co. ubi supra.* And in *Crescent City Gas Light Co.* v. *N. O. Gas Light Co.* the court said: "As the Legislature had the right in 1835 to grant the sole and exclusive privilege to the defendant company to make and vend gas in New Orleans for forty years, the Legislature of 1870 had the same power to confer on the plaintiff the same privilege for fifty years from the termination of the grant to defendant. We, therefore, conclude that the grant of the monopoly complained of does not violate the Constitution and is valid."

Numerous other cases could be cited as establishing the doctrine that the State may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from [665] taxation, for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution. *Asylum* v. *New Orleans*, 105 U. S. 368 [Bk. 26, L. ed. 1130]; *Home of the Friendless*, 8 Wall. 430 [75 U. S. bk. 19, L. ed. 495]; *New Jersey* v. *Wilson*, 7 Cranch, 166 [11 U. S. bk. 3, L. ed. 303]; *Bank of Ohio* v. *Knoop*, 16 How. 376 [57 U. S. bk. 14, L. ed. 980]; *Gordon* v. *Appeal Tax Court*, 3 How. 133 [44 U. S. bk. 11, L. ed. 529]; *Wilmington R. R.* v. *Reid*, 13 Wall. 266 [80 U. S. bk. 20, L. ed. 569]; *Humphrey* v. *Pegues*, 16 Wall. 248, 249 [83 U. S. bk. 21, L. ed. 327]; *Farrington* v. *Tennessee*, 95 U. S. 689 [Bk. 24, L. ed. 561].

If the State can, by contract, restrict the exercise of her power to construct and maintain highways, bridges and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations, it is difficult to perceive upon what ground we can deny her authority—when not forbidden by her own organic law—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the State might undertake to perform either herself or by subordinate municipal agencies.

The former adjudications of this court, upon which counsel mainly rely, do not declare any different doctrine, or justify the conclusion for which the defendant contends.

In *Beer Co.* v. *Massachusetts*, 97 U. S. 32 [Bk. 24, L. ed. 991], one of the questions considered was, whether the charter of a private corporation, authorizing it to engage in the manufacture of malt liquors, and, as incidental thereto, to dispose of the product, constituted a contract protected against subsequent legislation prohibiting the manufacture of liquors within the State. The beer company claimed the right, under its charter, to manufacture and sell beer without limit as to time, and without reference to any exigencies in the health or morals of the community requiring such manufacture to cease. [666] It was decided that while the company acquired by its charter the capacity, as a corporation, to engage in the manuf
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The case of *Fertilizing Co.* v.
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U. S. 746 [Bk. 28, L. ed.
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members of this court, while assenting to the doctrine that the State cannot limit the exercise of her powers to the prejudice of the public health and the public morals, concurred in the judgment, upon the general ground, among others, that the Act of 1869, giving exclusive privileges to the company, the validity of whose charter in that respect was the matter determined in the *Slaughter House Cases*, was not, [669] in any just or legal sense, an exercise of the police power for the preservation of the public health, but under the pretense simply of exerting that power, was an invasion of the right of citizens, other than those interested in that particular company, to engage in an ordinary business, open to everyone upon terms of perfect equality, although, at all times, it was subject to such regulations in respect of the locality and the mode in which it should be conducted as the State might establish.

The principle upon which the decisions in *Beer Co.* v. *Massachusetts*, *Fertilizing Co.* v. *Hyde Park*, *Stone* v. *Mississippi*, and *Butchers' Union Co.* v. *Crescent City Live-Stock Landing Co.* rest is that one Legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases that statutory authority given by the State, to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others.

The present case involves no such considerations. We have seen, the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which everyone may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the State may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important [670] agencies of civilization for the promotion of the public convenience and the public safety.

It is to be presumed that the Legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation invested with the power, and charged with the duty, of supplying gas of the requisite quality and in such quantity as the public needs demanded. In order to accomplish what, in its judgment, the public welfare required, the Legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, that work. That inducement was fur-

nished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be protected against competition from corporations or companies engaged in like business. Without that grant it was inevitable, either that the cost of supplying the city and its people would have been made, in some form, a charge upon the public, or that the public would have been deprived of the security in person, property and business which comes from well-lighted streets.

It is not our province to declare that the Legislature unwisely exercised the discretion with which it was invested. Nor are we prepared to hold that the State was incapable—her authority in the premises not being, at the time, limited by her own organic law—of providing for supplying gas to one of her municipalities and its inhabitants, by means of a valid contract with a private corporation of her own creation. We may repeat here what was said by *Chief Justice* Taney in *Ohio Life Insurance and Trust Co.* v. *Debolt*, 16 How. 428 [57 U. S. bk. 14, L. ed. 1002], in reference to the authority of a State to limit the exercise of its power of taxation: "But whether such contract should be made or not is exclusively for the consideration of the State. It is the exercise of an undoubted power of sovereignty which has not been surrendered by the adoption of the Constitution of the United States, and over which this court has no control. For it can never be maintained in any tribunal in this country that the people of a State, in the exercise of the powers of sovereignty, can be restrained within narrower limits than that fixed by the Constitution of the United States, upon the ground that they make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest is the foundation of our political institutions. It is equally clear, upon the same principle, that [671] the people of a State may, by the form of government they adopt, confer on their public servants and representatives all the power and rights of sovereignty which they themselves possess; or may restrict them within such limits as they deem best and safest for the public interest." After observing that the power of the State to make contracts may be indiscreetly and, for the public, injuriously exercised, he proceeds: "Yet if the contract was within the scope of the authority conferred by the Constitution of the State, it is, like any other contract made by competent authority, binding upon the parties. Nor can the people or their representatives, by any act of theirs afterwards, impair its obligation. When the contract is made the Constitution of the United States acts upon it and declares that it shall not be impaired, and makes it the duty of this court to carry it into execution. That duty must be performed."

With reference to the contract in this case, it may be said that it is not, in any legal sense, to the prejudice of the public health or the public safety. It is none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges to the plaintiff does not restrict the power of the State, or of t ipal government of New Orleans ac authority for that purpose, to establi force regulations which are not in with the essential rights granted by charter, which may be necessary fo tection of the public against injur arising from the want of due care i duct of its business, or from an im of the streets in laying gas pipes, o failure of the grantee to furnish gas quired quality and amount. The con prohibition upon state laws impairi ligation of contracts does not restrict of the State to protect the public public morals, or the public safety, or the other may be involved in the of such contracts. Rights and priv ing from contracts with a State are regulations for the protection of t health, the public morals and the pul in the same sense, and to the same ex all contracts and all property, whetl by natural persons or corporations.

Whatever therefore in the manu distribution of gas in the City of Ne proves to be injurious to the public public comfort, or the public safety, withstanding the exclusive grant to be prohibited by legislation, or by ordinance passed under legislative It cannot be said with propriety that that grant is to obstruct the State in cise of her power to provide for the tection, health and safety. The art State Constitution of 1879 in relati nopolies is not, in any legal sense, of the police power for the preserva public health, or the promotion of safety; for, the exclusiveness of a gr relation whatever to the public healt public safety. These consideratio upon the nature of the business which the grant relates, and not at al inquiry whether a franchise is exerci rather than by many. The monop only evinces a purpose to reverse previously pursued of granting to p porations franchises accompanied by privileges, as a means of accomplish objects. That change of policy, manifested by constitutional enact not affect contracts which, when en were within the power of the Stat and which, consequently, were against impairment, in respect of th tion, by the Constitution of the Uni A State can no more impair the oblig contract by her organic laws than by enactment; for her Constitution is a the meaning of the contract clause tional Constitution. *Railroad Co.* v 10 Wall. 511 [77 U. S. bk. 19, L. ed. *Life Ins. & T. Co.* v. *Debolt*, 16 Ho U. S. bk. 14, L. ed. 1002]; Sedgw & Const. Law, 637. And the obliga contracts is as fully protected by that i against impairment by legislation a tracts between individuals exclusiv *Jersey* v. *Wilson*, 7 Cranch, 164 [11 U L. ed. 302]; *Providence Bank* v. *Billi* 514 [29 U. S. bk. 7, L. ed. 939]; *Green* 8 Wheat. 1 [21 U. S. bk. 5, L. ed. 5

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note.
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ro preceding cases. See, also,
th ed., 339-345.

isiana abrogating the monopoly features of existing corporations, other than railroad corporations, is inoperative in respect of the charter of this Company, which was granted before the adoption of that instrument.

3. An ordinance of the city council of New Orleans authorizing the lessee of the St. Charles Hotel in that city, distant many blocks from the Mississippi River, to supply that hotel with water by means of pipes and mains laid in the streets of that city, is a violation of the Company's contract with the State, and therefore void.

4. The principles announced in New Orleans Gas Light Company v. Louisiana Light and Heat Producing and Manufacturing Company (*ante*), held to govern this case.

[No. 539.]

Submitted Nov. 20, 1885. Decided Dec. 7, 1885.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The history and facts of the case appear in the opinion of the court.

Mr. **J. R. Beckwith,** for appellant.

Mr. **G. L. Hall,** for appellee.

Mr. A. Goldthwaite, counsel for the appellee in the case of the *New Orleans Water Works Company* v. *Louisiana Sugar Refining Company,* leave having been granted, also filed a brief in support of the position of the appellee.

[674]

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was commenced by bill in equity filed by the New Orleans Water Works Company, a corporation of Louisiana, against Robert C. Rivers, a citizen of the same State. A demurrer having been interposed and sustained, the bill was dismissed. The present appeal raises the question whether the plaintiff is entitled, under the allegations of its bill, to the relief asked.

The general object of the suit is to obtain a decree perpetually enjoining the defendant from laying pipes, mains or conduits in the streets or public ways of New Orleans, for the purpose of supplying the St. Charles Hotel in that city, distant six or seven blocks from the Mississippi River, with water from that stream. The plaintiff rests its claim to relief upon the ground that it had, by valid contract with the State and city, the exclusive right, for the full term of fifty years from March 31, 1877, of supplying the City of New Orleans and its inhabitants—other than those contiguous to the Mississippi River—with water from that stream, by means of pipes and conduits placed in the streets of that city; and that the obligation of that contract was protected by the Constitution of the United States against impairment by any enactment of the State. The defendant bases his right to proceed with the construction of pipes, mains and conduits upon an ordinance of the common council of New Orleans, adopted November 15, 1882, enacted, as he contends, in pursuance of authority conferred by the Constitution and laws of Louisiana.

[675]

The case made by the bill, the allegations of which are admitted by the demurrer, is substantially as follows:

By an Act of the Legislature of Louisiana, approved April 1, 1833, the Commercial Bank of Louisiana was incorporated. It is stated by

counsel to have been at that time the policy of the State to attach, as a condition of all banking charters, the construction of some work of public utility. At any rate, it appears that this bank was invested with authority to purchase and hold property necessary to carry into complete effect the object of its charter, which was declared to be "the furnishing of the city with good and wholesome water;" that it was given "the exclusive privilege," from and after the date of its charter, of "supplying the city and inhabitants of New Orleans and its *faubourgs* with water from the Mississippi River, by means of pipes and conduits, and for erecting, constructing, or working of any necessary engine;" that, to that end, it could lay and place any number of conduits, pipes and aqueducts, on or over any of the lands or streets of New Orleans and its *faubourgs;* that the city might, within a prescribed time, subscribe for five thousand shares of the capital stock of the Company, not subject to deduction, to be
[676] paid for by city bonds, redeemable in forty years, and bearing an annual interest not exceeding 5 per centum, payable half yearly; and might, at any time after the expiration of thirty-five years from the passage of the Act, purchase the water works constructed by the bank.

The city made the subscription authorized by the Act, issuing its bonds in payment therefor; and the bank constructed an extended system of water works, which it managed and operated for the full term of thirty-five years, at the end of which period, in 1888, the city, exercising the privilege reserved by the State, took possession of and purchased the water works at the appraised value of $2,000,000, paying, for the bank's interest, in city bonds, redeemable in forty years, the sum of $1,393,400. The balance of the appraised value represented the city's interest by original subscription, and by purchase subsequently from stockholders. Upon such payment being made, the bank, as it was bound to do, transferred to the city an absolute, complete title to the water works property, and to all the rights, privileges and immunities which it possessed.

The city managed and controlled the property for several years, during which period it became seriously embarrassed in its finances. That it might be relieved from such embarrassment, the Legislature of Louisiana, in 1877, passed an Act entitled "An Act to enable the City of New Orleans to promote the public health, and to afford greater security against fire, by the establishment of a corporation to be called the New Orleans Water Works Company, to authorize the said Company to issue bonds for the purpose of extending and improving the said works, and to furnish the inhabitants of the City of New Orleans an adequate supply of pure and wholesome water, and to permit holders of the water works bonds to convert them into stock, and provide for the liquidation of the bonded and floating debt of the City of New Orleans."

By that Act, the New Orleans Water W rks Company was created a corporation, with a capital stock of $2,000,000, to which the mayor of New Orleans was directed, as soon after the election of directors as the city council should determine, to transfer the water works and all the property app
The Company was required, i
its organization, to issue to t
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The Act provided, among o
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and its inhabitants with wate
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Orleans accepted the pro-
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any, according to the alle-

gations of the bill, was executing in good faith the requirements of its charter, a new State Constitution was adopted, commonly known as the Constitution of 1879. It contained, among other clauses, the following: "Art. 258. All rights, actions, prosecutions, claims and contracts, as well of individual as of bodies corporate, and all laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, shall continue as if the said Constitution had not been adopted But the monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby repealed." Under the sanction of that constitutional provision, the city council of New Orleans passed, on November 15, 1882, an ordinance which provided "that Robert E. Rivers, or the lessee of the St. Charles Hotel, of the City of New Orleans, be allowed the right of way and privilege to lay a water-pipe from the Mississippi River, at any point opposite the head of Common or Gravier Streets, through either of these streets to said hotel, its front and side streets, with all needed attachments and appurtenances, and to distribute said water through said hotel as said Rivers, or lessee, may desire from said pipes, the pipes to be put at a depth of three feet under the surface of said streets, to be of iron, and of not more than — inches in diameter; that the said pipes and all attachments thereto, in said streets, be arranged and placed under the supervision and approval of the city surveyor; the pavement and streets to be relaid to the satisfaction of the administrator of improvements and city surveyor." [680]

The New Orleans Water Works Company was in existence before the adoption of the present Constitution of Louisiana, one of the articles of which, as we have seen, repeals the monopoly features in the charters of all then existing corporations other than railroad companies. This case is, therefore, controlled by the decision just rendered in *New Orleans Gas Light Co.* v. *Louisiana Light and Heat Producing and Manufacturing Co.* [*ante*, 516]. The two are not to be distinguished upon principle; for if it was competent for the State, before the adoption of her present Constitution, as we have held it was, to provide for supplying the City of New Orleans and its people with illuminating gas by means of pipes, mains, and conduits placed, at the cost of a private corporation, in its public ways, it was equally competent for her to make a valid contract with a private corporation for supplying, by the same means, pure and wholesome water for like use in the same city. The right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water is a franchise belonging to the State, which she could grant to such persons or corporations, and upon such terms, as she deemed best for the public interest. And as the object to be attained was a public one, for which the State could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and the public [681]

comfort, or the protection of public and private property. Such was the nature of the plaintiff's grant, which, not being at the time prohibited by the Constitution of the State, was a contract, the obligation of which cannot be impaired by subsequent legislation, or by a change in her organic law It is as much a contract, within the meaning of the Constitution of the United States, as a grant to a private corporation for a valuable consideration, or in consideration of public services to be rendered by it, of the exclusive right to construct and maintain a railroad within certain lines and between given points, or a bridge over a navigable stream within a prescribed distance above and below a designated point.

It is idle to insist that this contract was prejudicial either to the public health or to the public safety, as might, perhaps, be said to be the case if the State, after making it, was prevented from exercising any control whatever over the matter of supplying the city and its inhabitants with water. But, notwithstanding the exclusive privileges granted to the plaintiff, the power remains with the State, or with the municipal government of New Orleans, acting under legislative authority, to make such regulations as will secure to the public the uninterrupted use of the streets, as well as prevent the distribution of water unfit for use, and provide for such a continuous supply, in quantity, as protection to property, public and private, may require. In the case just decided we said: "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. [682] Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals and the public safety, in the same sense as are all contracts and all property, whether owned by natural persons or corporations."

The contract with the Water Works Company does not interfere with, but expressly reserves, the riparian rights of anyone "contiguous to the river." To that class the appellee does not belong; for his hotel is distant many blocks from the Mississippi River, and others own and occupy the intervening property. Nor does the contract assume to interfere with the right of any person or corporation, even when not contiguous to that stream, to supply their places of business or reside therefrom, obtained otherwise mains, or conduits laid in the the city. The restriction, imp tract upon the use by others t the public streets and ways, fo is not one of which the appelle He was not thereby restrained or liberty he had before; for h without the consent of the gov up the streets and alleys of the pose of conveying water to his he question the authority of th to a private corporation the e public streets and alleys for suc means of accomplishing the p supplying one of her municipa habitants with pure and wh The permission given to the city council to lay pipes in the purpose of conveying water plainly in derogation of the Sta appellant; for if that body ca use of the public ways to him, like use to all other citizens and of every kind, thereby material if not destroying, the value o contract, upon the faith of w pended large sums of money, an ices to the public which might been performed by the State o public expense.

Without discussing the aut to in the other case, or repeat considerations there stated, equally applicable here, we are the court below erred in sus murrer to the bill. Under its plaintiff was entitled to a dec restraining the defendant fro conduits, or mains in the publi Orleans for the purpose of c from the Mississippi River to common with all corporations citizens of New Orleans, he m contract which the State made iff; for such is the mandate tion of the United States.

The decree is reversed, and the for further proceedings in conf opinion.

True copy. Test:
James H. McKenney, Clerk,

END OF VOL. 115.

1-25, 29 L. 319, PACIFIC RAILWAY REMOVAL CASES.

al of causes.— Corporations of the United States, created ts of Congress, are entitled, as such, to remove to Circuit uits brought against them in State courts, under removal rch 3, 1875, pp. 11-17.

med in Butler v. National Home, 144 U. S. 66, 36 L. 349, 582, Texas, etc., Ry. v. Cox, 145 U. S. 601, 36 L. 832, 12 S. Allen v. Texas, etc., Ry., 25 Fed. 513, People v. Colorado ., 42 Fed. 639, Supreme Lodge v. Hill, 76 Fed. 471, 42 U. 200, United States, etc., Co. v. Gallegos, 89 Fed. 771, 61 U. 8, and Texas, etc., Ry. v. Bloom, 85 Tex. 285, 20 S. W. 135. l in Starin v. New York, 115 U. S. 257, 29 L. 390, 6 S. Ct. ng term "suit arising under Constitution or laws of United Metcalf v. Watertown, 128 U. S. 589, 32 L. 544, 9 S. Ct. holding Federal jurisdiction on ground of diverse citizen- t appear from record; McNulta v. Lochridge, 141 U. S. . 799, 12 S. Ct. 13, holding adverse State court judgment m of Federal receiver, reviewable by Supreme Court; Lux- rth River Bridge Co., 153 U. S. 529, 38 L. 810, 14 S. Ct. 892, Congress may create corporation to build bridge over navi- ters between States; Texas, etc., Ry. v. Cody, 166 U. S. 41 L. 1133, 1134, 17 S. Ct. 704, 705, holding Federal corpo- fendant entitled to removal, although described in com- State corporation; Sonnentheil v. Mœrlein Brewing Co., . 405, 19 S. Ct. 234, holding suit against Federal marshal, ng under United States laws; State v. Bradley, 26 Fed. ing point once decided by Federal Supreme Court presents al question; Hendee v. Connecticut, etc., Ry., 26 Fed. 678, suit in behalf of corporation created by Congress, arises vs of United States; Briscoe v. Southern Kan. Ry., 40 Fed. ing Federal court has jurisdiction over suits by or against authorized by Congress to operate in Indian country; Grant ne Nat. Bank, 47 Fed. 673, holding suit to control official of national bank receiver, arises under Federal laws; . Windsor Nat. Bank, 56 Fed. 80, 5 U. S. App. 423, holding bond of national bank cashier involves Federal question; Drake, 70 Fed. 882, holding action for false imprisonment al marshal removable; Lund v. Chicago, etc., Ry., 78 Fed. ing suit against corporation of plaintiff's State, joined with

Federal corporation, removable; State of Arkansas v. Kansas T. Coal Co., 96 Fed. 355, 357, holding cause removable where rec show that either party claims right under Federal Constitutio laws; Austin v. Northern Pac. Ry., 34 Minn. 474, 26 N. W. allowing amendment of complaint in action involving Federal poration by increasing demand to jurisdictional amount for moval; Texas, etc., Ry. v. Gay, 86 Tex. 582, 26 S. W. 601, 25 L. A. 54, holding jurisdiction of Federal court over case to which F eral corporation is party, will be presumed; Texas, etc., Ry. v. W son, — Tex. Civ. App. —, 43 S. W. 1061, holding principles appl ble to diverse citizenship may be applied to Federal corporati Cited generally in Pacific Gas Imp. Co. v. Ellert, 64 Fed. 429, Caples v. Texas, etc., Ry., 67 Fed. 10; arguendo, in California v. cific Ry. Co., 127 U. S. 40, 32 L. 157, 8 S. Ct. 1080, Northern P Ry. v. Austin, 135 U. S. 317, 34 L. 219, 10 S. Ct. 759, and Rob v. Northern Pac. Ry., 158 U. S. 22, 39 L. 881, 15 S. Ct. 763.

Distinguished in Leather, etc., Bank v. Cooper, 120 U. S. 780, L. 818, 7 S. Ct. 778, holding, since act of 1885, suits by or agai national banks not necessarily removable; Petri v. Commercial N Bank, 142 U. S. 648, 35 L. 1145, 12 S. Ct. 326, and Ex parte Jo 164 U. S. 692, 41 L. 601, 17 S. Ct. 223, holding Federal jurisdict over action by and against national banks depends upon dive citizenship; Colorado Cent. Min. Co. v. Turck, 150 U. S. 143, 37 1032, 14 S. Ct. 37, and Tennessee v. Union, etc., Bank, 152 U. 460, 38 L. 514, 14 S. Ct. 656 (but see dissenting opinion in 152 U 468, 38 L. 516, 14 S. Ct. 659), denying Federal jurisdiction of as arising under Federal Constitution, unless it appears from c plaint; Oregon, etc., Ry. v. Skottowe, 162 U. S. 496, 40 L. 1050, S. Ct. 870, holding, on application for removal, Federal chara of defendant corporation must appear from complaint; Seattle, e Ry. v. State, 52 Fed. 596, holding Federal corporation joined as fendant cannot remove, where it does not appear concerned in litigation; State of Kansas v. Atchison, etc., Ry., 77 Fed. 343, hold action not removable unless fact that it arises under Federal la appears from plaintiff's statement of his own claim; Follett v. lingbast, 82 Fed. 241, denying right of removal on ground that c arises under Federal laws, where disputed amount did not exc $2,000; Chicago, etc., Ry. v. Martin, 59 Kan. 447, 53 Pac. 464, h ing Federal corporation not entitled to removal unless its co fendant joins in petition; Conlon v. Oregon, etc., Ry., 21 Or. 464, Pac. 501, holding rule inapplicable to corporations organized territory and afterwards granted privileges by Congress; State Southern Pac. Ry., 23 Or. 431, 31 Pac. 962, holding defendant a Federal corporation for purposes of removal.

Corporations.— Railroad company formed under acts of C gress, by consolidation of various State and United States corpo tions, is at least a de facto corporation, and its existence will be inquired into collaterally, p. 16.

ed in Oregon Short Line, etc., Ry. v. Skottowe, 162 U. S. . 1049, 16 S. Ct. 869, and Allen v. Texas, etc., Ry., 25 Fed. ling, by consolidation of Federal with State corporation, oses no rights as such; United States v. Stanford, 70 Fed. J. S. App. 68, holding stockholders of Central Pacific rail- individually liable to government for bonds advanced to on; Chicago, etc., Ry. v. Commissioners, 36 Kan. 128, 12 , reaffirming holding; dissenting opinion in Central Pac. alifornia, 162 U. S. 165, 40 L. 928, 16 S. Ct. 794, majority property of Federal corporation taxable by State through hise.

al of causes.— Objection that removal petition was unveri- o delay in filing it, is waived if not made at the time, p. 17. ed in Martin v. Baltimore, etc., Ry., 151 U. S. 683, 38 L. . Ct. 537, holding objection to Federal jurisdiction because petition was filed too late, waived if not taken until trial al court.

al of causes.— Missouri proceeding before mayor and jury, ain value of land condemned for widening street, is not a in meaning of removal acts; hence, petition for removal, ling appeal therefrom to State court, is not too late, p. 18. ed in Delaware County v. Diebold Safe Co., 133 U. S. 487, , 10 S. Ct. 403, holding claim against county, appealed from oners to County Court, removable before trial in latter; County v. Rich, 135 U. S. 474, 34 L. 199, 10 S. Ct. 653, hold- al from tax assessment, to court acting as non-judicial on, not a suit for removal purposes; In re Chicago, 64 , 901, 903, holding assessment proceedings for municipal nent, not a suit; Sugar Creek, etc., Ry. v. McKell, 75 Fed. ng proceeding to enforce, between parties, right to con- nds, not a suit for removal purposes; Hartford, etc., Ry. ng proceeding to enforce, between parties, right to con- eminent domain, not a suit for removal purposes. uished in Searl v. School Dist., 124 U. S. 199, 31 L. 416, 8 , holding Colorado proceeding to condemn land for schools, law; Mineral, etc., Ry. v. Lake Superior, etc., Co., 25 Fed. ing Michigan condemnation proceedings in Probate Court, r removal purposes; Colorado, etc., Ry. v. Jones, 29 Fed. ing, where only question remaining for determination in ation proceedings is computation of value of land, cause vable; Brodhead v. Shoemaker, 44 Fed. 525, 11 L. R. A. n., holding Georgia proceeding to contest will a suit for purposes; In re The Jarnecke Ditch, 69 Fed. 165, holding proceeding to establish drain a "controversy of civil na- re Stutsman County, 88 Fed. 340, holding North Dakota gs for collection of delinquent taxes, a suit within re- s.

Removal of causes.— Controversies between property-owners city, in Missouri proceeding for widening streets, are distinct separate; hence, Federal corporation, property-owner, may rem its controversy to Federal court, notwithstanding proceedings a other owners may be indirectly affected thereby, p. 23.

Approved in Whelan v. New York, etc., Ry., 35 Fed. 863, 1 L A. 74, and n., holding action by citizen of Ohio against Ohio New York corporations, to enforce joint liability, separable purpose of removal; New York, etc., Ry. v. Cockroft, 46 Fed. holding controversy between railroad and owners of land so to be condemned, separable from that between railroad and to Sugar Creek, etc., Ry. v. McKell, 75 Fed. 36, holding controv between State and non-citizen owner in condemnation proceed in which resident lessee of non-resident is made co-defendant, arable for removal purposes; In re Stutsman County, 88 Fed. holding controversy presented by each owner in North Dak proceeding for collection of delinquent taxes, a separate suit.

Questioned in Mineral Range, etc., Ry. v. Lake Superior, Co., 25 Fed. 518, doubting whether single non-resident owner, wh land, with that of others, is sought to be condemned, may rem Distinguished in Bellaire v. Baltimore, etc., Ry., 146 U. S. 119 L. 911, 13 S. Ct. 17, holding condemnation proceedings against le and non-resident lessee not removable upon ground of separ controversy between city and lessee; In re City of Chicago, 64 902, holding no separable controversy in assessment proceed for municipal improvement, where court determines parties; In The Jarnecke Ditch, 69 Fed. 169, holding all parties to Indiana ceedings for establishment of drains inseparably interested in n issue.

115 U. S. 25-28, 29 L. 333, HADDEN v. MERRITT.

Customs duties.— Value of foreign coins, as ascertained by mate of director of mint and proclaimed by secretary of treas is conclusive upon custom-house officers and importers, p. 27.

Reaffirmed in Heinemann v. Arthur, 120 U. S. 85, 30 L. 606, Ct. 447, Wood v. United States, 72 Fed. 255, 38 U. S. App. 226, United States v. Knauth, 77 Fed. 600. Approved in United St v. Klingenberg, 153 U. S. 95, 97, 38 L. 648, 649, 14 S. Ct. 791, holding action of collector in fixing value of foreign coins not pealable to board of general appraisers; United States v. All Newhall, 91 Fed. 527, 528, 532, affirming rule and holding basis fixing value in pure metal, not exchange value.

115 U. S. 29-40, 29 L. 341, WHEELER v. NEW BRUNSWI ETC., RY.

Appeal and error.— Circuit Court's finding of fact that cer correspondence created contract of sale, is sufficient to estab such contract, p. 34.

cts.— To annul or set aside contract requires meeting of d consent of both parties, p. 34.

ed in The Sappho, 89 Fed. 369, holding substitution of vritten agreement requires same meeting of minds as orig- ract; Lanahan v. Heaver, 77 Md. 609, 26 Atl. 866, 20 L. R. greement to submit case to court without jury; Claes, etc., v. McCord, 65 Mo. App. 509, holding, in absence of fraud, must be mutual; Swift v. Pacific Mail S. S. Co., 106 N. 2 N. E. 589, holding, in absence of conclusive evidence of e of bills of lading in place of contract, latter controls; opinion in Randolph v. Frick, 57 Mo. App. 406, argu- riger v. Jœst, 22 Ind. App. 645, 52 N. E. 769, arguendo.

- Agreement to accept from two to six hundred tons of agreement to accept any number between two and six tons, at vendor's option, p. 38.

ed in Dingley v. Oler, 117 U. S. 501, 29 L. 987, 6 S. Ct. 853, ne bound to deliver, has choice of time permitted by con- rens, etc., Mfg. Co. v. Hœher, — Ky. —, 51 S. W. 198, offer to sell different sizes at different prices gave pur- ght to name quantity of each size; Dambmann, etc. v. etc., 70 Md. 382, 14 Am. St. Rep. 365 (see 17 Atl. 389), hold- dants agreeing to deliver three to five hundred tons, may lled to deliver five hundred.

41–45, 29 L. 331, PIRIE v. TVEDT.

al of causes.— Joint action in tort against several defend- er of whom could have been sued separately, is not divided rate controversies for purposes of removal by separate an- 43.

ed in Crump v. Thurber, 115 U. S. 61, 29 L. 329, 5 S. Ct. in v. New York, 115 U. S. 259, 29 L. 391, 6 S. Ct. 32, Sloane on, 117 U. S. 278, 29 L. 900, 6 S. Ct. 732, Fidelity Ins. Co. gton, 117 U. S. 281, 29 L. 899, 6 S. Ct. 734, Plymouth Min. nador Canal Co., 118 U. S. 270, 30 L. 234, 6 S. Ct. 1037, Giles, 118 U. S. 601, 30 L. 271, 7 S. Ct. 35, Thorn Wire, v. Fuller, 122 U. S. 543, 30 L. 1237, 7 S. Ct. 1267, Graves , 132 U. S. 588, 33 L. 468, 10 S. Ct. 202, Louisville, etc., angelin, 132 U. S. 601, 33 L. 476, 10 S. Ct. 204, Torrence 144 U. S. 531, 36 L. 531, 12 S. Ct. 727, Powers v. Chesa- e., Ry., 169 U. S. 97, 42 L. 675, 18 S. Ct. 266, Rumsey v. ed. 771, Stanbrough v. Cook, 38 Fed. 373, 3 L. R. A. 402, Chicago, etc., Ry., 39 Fed. 883, State v. Columbus, etc., ed. 628, O'Harrow v. Henderson, 52 Fed. 769, and Arrow- Nashville, etc., Ry., 57 Fed. 169, all holding separate de- joint action do not create separate controversies for pur removal.

location entitling him to possession against United States, as as against defendant; hence admission that portion of claim been patented to stranger, justified instructions for defendant,

Approved in Erwin v. Perego, 93 Fed. 612, holding claim upon discovery within limits of another claim, void; Anthon Jillson, 83 Cal. 300, 23 Pac. 420, holding each party must esta claim against government, as well as against adversary; L Stahl, 9 Colo. 211, 11 Pac. 78, holding all rights and equiti premises must be adjusted prior to issuance of patent; Kend San Juan, etc., Co., 9 Colo. 357, 12 Pac. 202, holding location tiously made on Indian reservation, before extinguishment o dian title, will not avail against location made after land is op up; Manning v. Strehlow, 11 Colo. 453, 454, 18 Pac. 626, 627, ho issue in action to determine adverse claims, is whether either was entitled to patent; Girard v. Carson, 22 Colo. 347, 44 Pac. holding defendant may defeat plaintiff by showing better to claim in third party; Miller v. Girard, 3 Colo. App. 279, 33 69, holding locator permitting adjoining claimant to obtain p for portion of territory, including discovery shaft, loses tit claim; Lalande v. McDonald, 2 Idaho, 289, 13 Pac. 349, ho plaintiffs must establish valid location; Burke v. McDonal Idaho, 313, 13 Pac. 358, holding right of possession of claim of the action; Burke v. McDonald, 2 Idaho, 651, 33 Pac. 51, ho verdict not finding defendants are entitled to possession ag government, bad; Deno v. Griffin, 20 Nev. 252, 20 Pac. 309, ho one whose claim has been dismissed, cannot claim that p issued to another, is void, because irregularly issued; Ines Co. v. Kinney, 46 Fed. 835, remanding case, because Federal involved had been settled herein; Upton v. Larkin, 7 Mont. 45 Pac. 732, holding portion of discovery being on adjoining will not render location invalid.

Distinguished in McFeters v. Pierson, 15 Colo. 207, 22 Am Rep. 393, 24 Pac. 1078, holding plaintiff, in civil action for inj to claim, need not allege citizenship; South End Min. Co. v. Ti 22 Nev. 33, 35 Pac. 93 (but see dissenting opinion in 22 Nev. 5 Pac. 103), holding patent fraudulently obtained by locator, abandonment, invalid against relocator; Wills v. Blain, 4 N. 383, 5 N. Mex. 250, 20 Pac. 803, holding plaintiff in action m for possession, need only show better title than defendant's; S City, etc., Co. v. Lowry, 19 Utah, 345, 57 Pac. 12, 13, upho claim developed in good faith, notwithstanding loss of origina covery by allowing adjoining locator to obtain patent cov same.

Mines and minerals.— No one can have benefit of locator' covery for purpose of location adverse to him, except as relo after loss or abandonment of prior right, p. 50.

Approved in Del Monte Min. Co. v. Last Chance Min. Co., S. 78, 18 S. Ct. 904, holding second location ineffectual to app

s.— Where defendants' liability is joint as well as sev-
intiff has option to sue individually or jointly, p. 43.

ved in Little v. Giles, 118 U. S. 602, 30 L. 271, 7 S. Ct. 36,
lefendants cannot object to plaintiffs' election to sue jointly;
n v. Clay, 33 Fed. 898, Kaitel v. Wylie, 38 Fed. 867, Bacon v.
Fed. 871, and Sexton v. Seelye, 39 Fed. 705, all holding, when
elects to sue jointly, defendants cannot make action several;
Chicago, etc., Ry., 39 Fed. 884, holding right of removal, on
f separable controversy, testable by allegations of complaint;
Bradstreet Co., 46 Fed. 825, holding allegations of complaint
letermining whether cause is separable; Fox v. Mackay, 60
olding bringing action against part of tortfeasors only, not
o treat it as several; Brown v. Coxe, 75 Fed. 690, and Moore
ngeles, etc., Co., 89 Fed. 78, holding, on plaintiffs' election to
ly, neither defendant can treat action as several for removal
; Deere, etc., Co. v. Chicago, etc., Ry., 85 Fed. 881, holding
may sue jointly, although motive is to prevent removal.

ous prosecution.— Cause of action against several defend-
malicious prosecution is several as well as joint, p. 43.

in Anderson v. Appleton, 32 Fed. 859, holding action to
will not a separable controversy.

45-51, 29 L. 348, GWILLIN v. DONNELLAN.

and minerals.— Valid location of mineral lands, made and
in accordance with statutes, has effect of grant by United
right of present and exclusive possession of lands located,

ved in Manuel v. Wulff, 152 U. S. 511, 38 L. 534, 14 S. Ct.
ing qualified locator's deed to alien operates as a transfer,
inst all except government; Gillis v. Downey, 85 Fed. 487,
App. 575, holding owner of valid claim may maintain action
title prior to issuance of patent; McFeters v. Pierson, 15
, 22 Am. St. Rep. 390, 24 Pac. 1077, holding mining claim
c domain subject of complete ownership as a claim; Sey-
Fisher, 16 Colo. 192, 27 Pac. 241, holding owner of valid
entitled to exclusive use thereof as against all the world;
Mix, 24 Or. 268, 33 Pac. 809, holding locator, having merely
y right, may sue for possession in justices' court; Gorman
v. Alexander, 2 S. Dak. 564, 51 N. W. 347, holding alien
uire title to location, valid against all but government;
g opinion in South End Min. Co. v. Tinney, 22 Nev. 57, 35
, arguendo.

guished in Mt. Rosa Min., etc., Co. v. Palmer, 26 Colo. 59,
177, holding placer patent confers no possession to known
veins within its limit.

and minerals.— In proceedings under R. S., §§ 2325, 2326,
oine adverse claims to mineral location, plaintiff must show

32 Fed. 862, holding resident defendants cannot remove, altho
plaintiff is citizen of another State; Rogers v. Van Nortwick,
Fed. 514, holding resident corporation essential party to action
stock in name of non-resident holders; Garner v. Second Nat. B
66 Fed. 371, holding any one of several non-residents sued in S
court may remove; Missouri v. New Madrid County, 73 Fed.
holding trustee charged with fraudulent disposition of prope
necessary party in suit against fraudulent grantees to reclaim s
Scoutt v. Keck, 73 Fed. 904, 36 U. S. App. 586, holding resi
trustee necessary party to suit against non-resident vendee
specific performance; Kennedy v. Ehlen, 31 W. Va. 558, 8 S
408, holding, to justify removal, all on one side of controversy
be of different citizenship from all on other.

Distinguished in Williamson v. Krohn, 66 Fed. 661, 31 U. S.
325 (but see dissenting opinion in 66 Fed. 663, 31 U. S. App.
holding corporation proper, but not necessary, party to suit
stock owned by individuals.

115 U. S. 61-67, 29 L. 329, STEWART v. DUNHAM.

Removal of causes.— Jurisdiction of Federal court over
itor's bill, removed from State court on ground of diverse cit
ship, is not ousted by admission, subsequent to removal, of
creditors, who were co-citizens of defendants, p. 64.

Approved in Phelps v. Oaks, 117 U. S. 239, 29 L. 890, 6 S. Ct.
holding Federal jurisdiction of action against tenant for land,
ousted by admitting landlord, co-citizen of plaintiff; Rous
Letcher, 156 U. S. 50, 39 L. 343, 15 S. Ct. 268, holding, where a
are in course of administration, all parties may come unde
cillary proceedings, although original jurisdiction would have
lacking; Jarboe v. Templer, 38 Fed. 217, holding Federal jur
tion not ousted by subsequent transfer of cause of action t
citizen of defendant; Thouron v. East Tennessee, etc., Ry., 38
679, holding coming in of new parties into representative suit,
not confer right of removal; Belmont Nail Co. v. Columbia,
Co., 46 Fed. 338, a case on all fours; Society of Shakers v. Wa
68 Fed. 736, 37 U. S. App. 141, holding permitting co-citizen of
tiff to intervene, does not oust Federal jurisdiction; D. A. T
kins Co. v. Catawba Mills, 82 Fed. 785, holding all creditor
necessary original parties to creditor's bill; Cross v. Evans, 86
4, 52 U. S. App. 728, holding Federal jurisdiction over action ag
receiver, not divested because road passes to co-citizens of
tiff; Compton v. Jesup, 68 Fed. 279, 31 U. S. App. 486, argu
dissenting opinion in Cates v. Allen, 149 U. S. 464, 37 L. 810,
Ct. 979, majority ordering suit remanded, where Federal c
lacked equity jurisdiction.

Distinguished in Mangels v. Donau Brewing Co., 53 Fed.
dismissing foreclosure suit where intervening bondholders

of defendants and necessary parties; Tug River Coal, Brigel, 67 Fed. 629, 31 U. S. App. 665, where foreclosure ll interested parties defendants and some proved to be of complainant.

nd error.— Supreme Court has no jurisdiction over ap- several decree by appellants against whom respective did not exceed sum of $5,000, p. 64.

l in Ex parte Phœnix Ins. Co., 117 U. S. 369, 29 L. 924, 2, holding distinct decrees against distinct parties on dis- s cannot be joined to confer appellate jurisdiction; Gib- eldt, 122 U. S. 37, 39, 30 L. 1087, 1088, 7 S. Ct. 1071, 1072, Knight, 123 U. S. 432, 31 L. 192, 8 S. Ct. 194, and Smith . v. McGroarty, 136 U. S. 239, 34 L. 348, 10 S. Ct. 1018, Clay v. Field, 138 U. S. 479, 34 L. 1049, 11 S. Ct. 425, gregation of distinct demands or liabilities cannot confer urisdiction; Walter v. Northeastern Ry., 147 U. S. 373, 13 S. Ct. 350, denying Circuit Court jurisdiction over bill ollection of taxes, when respective assessments in sepa- es did not amount to $2,000; Davis v. Schwartz, 155 U. L. 296, 15 S. Ct. 243, dismissing appeal as to mortgage jurisdictional amount; Putney v. Whitmire, 66 Fed. 387, creditor's bill by several complainants, each holding emand of less than $2,000; Busey v. Smith, 67 Fed. 16, deral jurisdiction over creditor's suit against heirs, where as several and that of each was under $2,000; Smithson , 81 Fed. 594, holding jurisdiction over creditor's suit tional bank receiver determined by individual claim of

nt conveyances.— Fact that debtor had attempted, by invalid under laws of Mississippi, to transfer property to secure debt, does not vitiate subsequent transfer by trustee to same creditor to satisfy debt, p. 66.

l in Jewell v. Knight, 123 U. S. 434, 31 L. 193, 8 S. Ct. g whether sale and delivery of debtor's goods by way of is fraudulent, question of fact; Huntley v. Kingman, 152 38 L. 543, 14 S. Ct. 691, upholding failing debtor's assign- benefit of certain creditors; Davis v. Schwartz, 155 U. S. 294, 15 S. Ct. 240, upholding mortgage given for avowed preferring creditor; Sioux City, etc., Ry. Co. v. Trust Co., 8, 49 U. S. App. 533, holding consolidations and inter- not oust Federal jurisdiction, once attached; Bank of v. Schlotfeldt, 40 Neb. 215, 58 N. W. 728, holding transfer or's property to preferred creditor, not presumed fraudu- wich Mfg. Co. v. Max, 5 S. Dak. 132, 58 N. W. 16, 24 28, holding insolvent debtor may use his property to pay creditors.

[illegible] Reports.

[illegible] v. HOGABOOM.

[illegible] of public land, withou[illegible] of patent therefor, p. 68.

[illegible] McLaughlin, 12 Sawy. 199, [illegible] U. S. 518, 30 [illegible] of swamp lands by secre[illegible] dissenting opinion in Doc[illegible] majority holdi[illegible] provable in action at la[illegible]

[illegible] regular on its face, [illegible] as to any lands covered t[illegible] passed to State under g[illegible]

[illegible] Co., 149 U. S. 90, [illegible] v. Hayes, 159 U. [illegible] United States v. W[illegible] holding land depart[illegible] collaterally conclusive [illegible] U. S. App. 210, [illegible] conclusive, collat[illegible] holding validity of [illegible] government or others; B[illegible] 29 N. E. 4, [illegible] where extrinsic ev[illegible] Winona, etc., Co. v. Eb[illegible]

[illegible] Powell, 116 Mo. 476, 38 A[illegible] holding lack of authority to convey t[illegible] provable by parol; Mendota Club v. [illegible] holding patent purporting to [illegible] void to that extent.

[illegible] on secretary of interior, a[illegible] what lands are of desc[illegible] and his decision is controlling; [illegible] to show that lands covered by [illegible] under pre-emption laws, are such [illegible]

[illegible] Cal. 343, 10 Pac. 724, h[illegible] admissible only where secreta[illegible] Sav. Bank, 106 Ind. 444, 7[illegible] as to what were swamp [illegible] Ry. v. Gilliam, 85 Ala. [illegible]

[illegible] Locomotive Works v. Emigrant C[illegible] denying authority of secret[illegible] under railroad act of 1856, previously granted to

rant of 1850; Chism v. Price, 54 Ark. 272, 15 S. W. 1034,
eral land department's approval of railroad's selection,
nation that lands had not passed under swamp grants;
edd, 161 Ill. 491, 52 Am. St. Rep. 396, 44 N. E. 296, 33
), holding grant bordering on meandering lake, extends
thereof.

nds.— It is duty of secretary of interior, as head of land
to determine whether land patented to settler, is of
t to settlement, under pre-emption laws, and his judg-
contestable in action at law, by mere intruder without

in Noble v. Union River, etc., Ry., 147 U. S. 175, 37 L.
t. 274, holding decision of secretary that designated rail-
itled to right of way over public land, irrevocable by
Chandler v. Calumet, etc., Co., 149 U. S. 89, 37 L. 661,
1, holding listing by surveyor-general, and approval by
perate as adjudication as to what were swamp lands;
v. Hayes, 159 U. S. 342, 40 L. 174, 16 S. Ct. 41, reaffirm-
; Winona, etc., Land Co. v. Ebilcisor, 52 Minn. 323, 54
olding certification of land to State, as being with grant,

shed in Lake Superior, etc., Ry. v. Cunningham, 44 Fed.
; land department's approval of land selection, void, as
braced in prior grant.

9–78, 29 L. 316, THE CHARLES MORGAN.
— Where record does not show contrary, first signal
n assented to by offending vessel, will be presumed to
made at proper distance, p. 75.

y.— Under admiralty rule 24, Circuit Court may, in its
permit amendment of libel, so as to include claim for
rowing out of original cause of action, and litigated in
urt, but rejected because not specified in pleadings, p. 76.
l in Irvine v. The Hesper, 122 U. S. 267, 30 L. 1178, 7 S.
evy v. The Thomas Melville, 37 Fed. 272, and Nelson v.
Fed. 217, 48 U. S. App. 660, all holding appeal in admi-
tically trial de novo; Liverpool Steam Co. v. Phenix Ins.
S. 447, 462, 32 L. 794, 799, 9 S. Ct. 474, holding cause
manded with instructions to allow amendment pleading
; The City of New Orleans, 33 Fed. 685, allowing intro-
new allegations and proofs; The J. E. Trudeau, 54 Fed.
S. App. 596, allowing amendment paying interest; The
lan, 60 Fed. 425, 426, 21 U. S. App. 90, holding amend-
matters of substance, not allowable on appeal, in causes
.
ished in The Beeche Dene, 55 Fed. 527, 13 U. S. App. 211,
appeal in fifth circuit, new evidence cannot be taken by

deposition de bene esse; The Iona, 80 Fed. 936, 52 U. S. Ap
holding amendment, after release on stipulation, setting up
not germane to original, not allowable.

Collision.— Findings of board of local inspectors, in inv
tions under R. S., § 4450, of facts of collision, as bearing on l
officers, are inadmissible, in suit against steamer for damage
collision, as evidence that libellants were in proper course, p

Witnesses.— Contradictory declarations of witness, oral o
ten, made at another time, cannot be used for purpose of im
ment, until witness has been examined on subject, and his at
particularly directed to circumstances, in such a way as t
him full opportunity for explanation or exculpation, p. 77.

Approved in Mattox v. United States, 156 U. S. 246, 39 L.
S. Ct. 341, Nelson v. White, 83 Fed. 217, 48 U. S. App. 660, Mi
Ins. Co. v. Wich, 8 Colo. App. 418, 46 Pac. 690, and Carder v. K
32 Mo. App. 108, all applying rule to various facts; State v.
29 S. C. 227, 7 S. E. 309, holding testimony at trial may be c
dicted by testimony at inquest.

115 U. S. 79-87, 29 L. 352, CLARK v. BEECHER MFG. CO.

Patents.— Clark patent for blanks for carriage thill shack
not infringed by Smith patent, p. 87.

Approved in Heine, etc., Co. v. Anheuser, etc., Co., 43 Fed
holding inventor merely changing form, should be closely li
to specifications; Johnson Co. v. Pacific, etc., Co., 47 Fed. 589,
ing, where patent is broader than claim, patentee presum
surrender surplus to public.

115 U. S. 87-96, 29 L. 355, WOLLENSAK v. REIHER.

Patents.— Reference should be made to state of art at time
cation was made, in construing patents, p. 94.

Patents.— Wollensak patent for transom lifters, must be li
to combination described and claimed, p. 94.

Approved in Gage v. Kellogg, 23 Fed. 894, holding reissue, ex
ing original claim, void; Wollensak v. Reiher, 28 Fed. 425,
case; Wollensak v. Sargent, 151 U. S. 224, 38 L. 140, 14 S. Ct
affirming S. C., Wollensak v. Sargent, 33 Fed. 841, and 41 Fe
passing upon like patent; Heine, etc., Co. v. Anheuser, etc., C
Fed. 790, holding inventor merely changing form of recep
strictly limited to terms of claim.

115 U. S. 96-102, 29 L. 350, WOLLENSAK v. REIHER.

Notice.— Law imputes knowledge, when opportunity and int
combined with reasonable care, would necessarily impart it; h
patentee is presumed to know at date of issuance of patent, wh
same covers area of his invention, p. 99.

l in Ives v. Sargent, 119 U. S. 661, 30 L. 547, 7 S. Ct. 441, tentee neglecting to compare patent within invention e years, cannot obtain valid reissue; Arnheim v. Finster, , holding delayed reissue, void.

- Failure to improve opportunity to acquire knowledge ne's interests, constitutes laches, disabling party seeking ight from enforcing it to detriment of those who have act as though it were abandoned, p. 99.

l in Kittle v. Hall, 24 Blatchf. 188, 29 Fed. 511, holding not entertain case, where complainant has delayed suit ement seven years; Buffington's, etc., Co. v. Eustis, 65 7 U. S. App. 693, and Adams, etc., Ry. v. Lindell Ry., 77 0 U. S. App. 482, holding patentee cannot subsequently m to cover device not claimed therein.

– Reissue, for purpose of correcting mistake in original t be granted within reasonable time, otherwise it may void pro tanto, in any suit founded thereon, p. 100.

l in Electric Gas Co. v. Boston Electric Co., 139 U. S 60, 11 S. Ct. 593, holding unexplained delay of eight and ars, rendered reissue invalid; Wollensak v. Sargent, 151 38 L. 140, 14 S. Ct. 293, holding excuse that patentee licitor's advice insufficient to excuse delay; Haines v. ed. 627, holding ignorance of patent laws no excuse for taining reissue; Boland v. Thompson, 23 Blatchf. 442, , holding ignorance of English, and ignorance of omis- m from patent, do not excuse twenty-six months' delay reissue.

shed in Topliff v. Topliff, 145 U. S. 170, 36 L. 664, 12 S. staining reissue to correct palpable mistake, obtained months. See also citations under next syllabus.

– Question whether delay in applying for reissue, to take in original claim, is unreasonable, is for the court, e circumstances, p. 101.

l in Ives v. Sargent, 119 U. S. 662, 30 L. 548, 7 S. Ct. 441, ee years' delay invalidated reissue; Hoskin v. Fisher, 125 l L. 762, 8 S. Ct. 837, holding nine years' delay invalidated llensak v. Sargent, 151 U. S. 228, 38 L. 141, 14 S. Ct. eight years' delay unreasonable; Wollensak v. Sargent, , holding delay of eight years invalidated reissue; Phila- .. Mfg. Co. v. Rouss, 39 Fed. 274, and Peoria Target Co. d. etc., Co., 47 Fed. 735, both holding delays of three ered reissue void. See, also, citations under preceding

– Decision of patent office, as to reasonableness of delay for reissue, to correct mistake in original claim, is not p. 101.

[illegible]

[illegible]

[illegible]

[illegible]

Misc.—Mentioned in Hoe v. Kehler, [illegible] Fed. [illegible].

115 U. S. 102-114. 29 L. 311. FRASHER v. O'CONNOR.

Public lands.—Grantee under confirmed Mexican grant [illegible] specific quantity of land in California, lying within larger area, [illegible] until segregation by government, entitled to possession of whole [illegible] as tenant in common, with government, as against strangers, [illegible]

Approved in McCreery v. Haskell, 119 U. S. 333, 30 L. 431, [illegible] Ct. 179.

Distinguished in Northern Pac. Ry. v. Hussey, 61 Fed. [illegible] U. S. App. 291, holding land-grant company not tenant in common with government, in respect to unsurveyed lands within its limits; United States v. Northern Pac. Ry., 6 Mont. 367, [illegible] holding government and railroad, tenants in severalty, under [illegible] to Northern Pacific railway.

Public lands.—Where selections by State, under United [illegible] grant thereto, have been approved by government, land [illegible] have no jurisdiction to review regularity of proceedings be[illegible] State and its grantees, or its locating agents, or to dete[illegible] whether State laws regarding sale of lands, have been com[illegible] with, p. 112.

Approved in Mower v. Fletcher, 116 U. S. 384, 29 L. 594, 6 [illegible] 411, holding questions of irregularity in selection of lieu lan[illegible] issuance to State of certified lists; McCreery v. Haskell, 119 [illegible] 332, 30 L. 409, 7 S. Ct. 179, arguendo.

Public lands.—Under act of July 23, 1866, it was duty o[illegible] veyor-general of California to extend lines of public surveys

l Mexican grants, upon failure of grantees to have same and after setting off quantity confirmed remainder not in grant became subject to general land laws, p. 113.

ed in McCreery v. Haskell, 119 U. S. 334, 30 L. 410, 7 S. holding land without grant as surveyed, subject to State in lieu of lands covered by grant; Durand v. Martin, 120 30 L. 677, 7 S. Ct. 589, reaffirming rule; Horsky v. Moran, 363, 53 Pac. 1070, holding townsite patent not attackable, ly; Mower v. Fletcher, 116 U. S. 385, 29 L. 594, 6 S. Ct. rally.

lands.— Under act of April 23, 1866, surveys of confirmed grants became operative by approval of government sur- eral for State and his filing of township plats in local land d lands thereby excluded from grant were thereafter sub- election by State, or to pre-emption, p. 115.

ed in McCreery v. Haskell, 119 U. S. 330, 30 L. 409, 7 S. holding survey by surveyor-general for State, operative approval of commissioner of general land office; Tubbs v. 138 U. S. 144, 34 L. 890, 11 S. Ct. 282, approving same e, with respect to swamp lands.

uished in Wells County v. McHenry, 7 N. Dak. 251, 74 2, arguendo.

lands.— State's title to lands selected by it under govern- nt, listed thereto by commissioner of general land office, fect as if resting on patent, p. 116.

ed in Cragin v. Powell, 128 U. S. 699, 32 L. 568, 9 S. Ct. ing courts cannot correct surveys of public lands, decisions office being conclusive, collaterally; Williams v. United 38 U. S. 516, 34 L. 1028, 11 S. Ct. 458, Curtner v. United 49 U. S. 675, 37 L. 894, 13 S. Ct. 990, Hough v. Buchanan, 329, and Garrard v. Silver Peak Mines, 94 Fed. 984, all certified list to State transfers title effectively as patent; Union, etc., Ry., 147 U. S. 172, 37 L. 126, 13 S. Ct. 273, determination of secretary of interior, that designated rail- ntitled to right of way over public land, not revocable by ; Chandler v. Calumet, etc., Co., 149 U. S. 92, 37 L. 662, 802, holding such certification, followed by State's con- to grantee, presents evidence of title, not open to parol McCormick v. Hayes, 159 U. S. 346, 40 L. 175, 16 S. Ct. 42, ers, etc., Works v. Emigrant Co., 164 U. S. 573, 41 L. 558, 192, holding parol evidence inadmissible to show that certified was really swamp land; Deweese v. Reinhard, 61 19 U. S. App. 698, and Schieffery v. Tapia, 68 Cal. 186, 79, holding one not in privity with United States, cannot sting to State; Buena Vista, etc., Co. v. Tulare, etc., Co., 228, holding listing to State, lands selected for agricultural conclusive determination that said lands are such as

covered by grant; United States v. Winona, etc., Ry., 67 Fed. 9
32 U. S. App. 272, holding certification to State for benefit of r
road, has effect of patent; Mower v. Kemp, 42 La. Ann. 1018, 8
832, holding lands so granted, pass into domain of private proper
Broussard v. Pharr, 48 La. Ann. 232, 19 So. 273, arguendo.

Distinguished in Michigan, etc., Co. v. Rust, 168 U. S. 593, 42
592, 18 S. Ct. 209, holding title remains in government, where gra
ing act specifically provides for issuance of patent.

115 U. S. 116, 29 L. 316, GOOD v. O'CONNOR.

Adjudged in conformity with Frasher v. O'Connor, supra, q. v

115 U. S. 116–121, 29 L. 309, GRAY v. NATIONAL S. S. CO.

Corporations.— Company organized to continue, and buying bu
ness of, former company, upon same going into liquidation, is
chargeable with payment of judgment against former, for dama
for collision by vessel, subsequent to its transfer to new compa
p. 121.

Cited in 59 Am. St. Rep. 550, note.

115 U. S. 122–136, 29 L. 305, BUNCOMBE COUNTY v. TOMMEY

Railroads being legal highways, established for convenience
public, intent of legislature to subject them to ordinary liens, v
not be presumed; hence, North Carolina acts of 1870, creating
chanics' liens on "buildings — or any other kind of property,
herein enumerated," and of 1873, regulating sales under mortga
by corporations, do not create liens on railroads, for work perform
or materials furnished in construction thereof, pp. 127, 129, 130

Approved in Industrial, etc., Co. v. Electrical, etc., Co., 58 F
741, holding general lien law of Ohio, gives no right to lien up
railroad; Pennsylvania Steel Co. v. Potts, etc., Co., 63 Fed. 13,
22 U. S. App. 537, similarly construing Michigan lien law, acts
1885; Farmers' Loan, etc., Co. v. Cape Fear, etc., Ry., 73 Fed. 7
holding railroad's mortgage of unbuilt portion, precedes contract
lien thereon; Greenwood, etc., Ry. v. Strang, 77 Fed. 500, hold
railroad not subject to liens, under South Carolina lien law; Cle
land, etc., Ry. v. Knickerbocker, etc., Co., 86 Fed. 74, holding l
on railroad bridge in Ohio, obtainable only under railroad lien la
Eufaula Water Co. v. Addyston, etc., Co., 89 Ala. 560, 8 So.
doubting whether property of water company is liable to executi
Yellow River Imp. Co. v. Wood County, 81 Wis. 562, 51 N. W. 10
17 L. R. A. 95, and n., holding dam of quasi-public river impro
ment company improperly included in assessment of land on wh
located; Chicago, etc., Ry. v. Forest County, 95 Wis. 89, 70 N.
79, holding property necessary to operation of railroad, not seiza
for taxes; dissenting opinion in Pipe, etc., Co. v. Howland, 111 N.

16 S. E. 863, 20 L. R. A. 750, majority holding water com-
operty liable to mechanic's lien.
uished in Giant Powder Co. v. Oregon Pac. Ry., 14 Sawy.
ed. 473, 8 L. R. A. 705, and n., holding Oregon lien law
iudes railways; National, etc., Works v. Oconto Water Co.,
3, 49, holding plant of water company subject, in Wisconsin,
l courts, and is valid, p. 142.

137–142, 29 L. 834, MAYFIELD v. RICHARDS.

tion of actions.— Federal act of June 11, 1864, suspending
of statute during Rebellion, applies to State as well as
courts, and is valid, p. 142.

ed in Brown v. Walker, 161 U. S. 607, 40 L. 824, 16 S.
but see dissenting opinion in 161 U. S. 623, 40 L. 830, 16
1), holding act of 1893, protecting witnesses before inter-
merce commission, extends to prosecutions in State courts.

143–150, 29 L. 357, SMITH v. WOOLFOLK.

— Judgments.— After final decree, parties are not bound
otice of subsequent proceedings, unless served with process,
arily appearing, p. 147.

ed in Great Western Tel. Co. v. Purdy, 162 U. S. 336, 40
6 S. Ct. 813, holding bill, subsequent to decree beginning
ation, requires service. See 23 Am. St. Rep. 116, note.

.— Service on defendants is necessary, where petition is
sequent to final decree, instituting new litigation on new
nct issues, not raised by original proceedings, or properly
by amendment thereto, and between claimants in original
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med in Sheffield, etc., Ry. v. Newman, 77 Fed. 793, 41 U. S.

— If one complainant can, under any circumstances, have
ainst another, upon supplemental or amended bill, it must
notice to latter, p. 148.

ed in Meyer v. Kuhn, 65 Fed. 711, 25 U. S. App. 174, hold-
rance of defendant to cross-bill, as between co-defendants,
e enforced by service; Gregory v. Pike, 79 Fed. 522, 30
p. 11, holding proceedings to enjoin defendant from prose-
y suits touching any matters except certain equity suit,
ervice; Jewett v. Iowa Land Co., 64 Minn. 538, 58 Am. St.
67 N. W. 641, holding one defendant cannot have decree
o-defendant, upon cross-bill, demanding affirmative relief
issues, without notice to co-defendant.

ent against party who has not been heard, and has had
e to be heard, is not a judicial determination of his rights,
d to respect in other courts, p. 149.

Approved in Brooks v. Dun, 51 Fed. 147, holding Tennessee la authorizing service on any agent of non-resident corporation, u constitutional; dissenting opinion in Elsasser v. Haines, 52 N. J. 29, 18 Atl. 1102, majority recognizing foreign judgment, founded o recognizance, on return of two writs scire facias, nil habet. See 9 Am. Dec. 769, extended note.

Adverse possession for period sufficient to bar ejectment, togethe with open and notorious denial of mortgagee's title, are necessar in Arkansas, to bar suit for foreclosure, p. 150.

115 U. S. 151-160, 29 L. 336, PHILLIPI v. PHILLIPE.

Partnership.— Promise to render account of partnership an trust affairs, and to make final settlement thereof, is not acknow edgment that anything is due; hence, bill averring such promise, bu not that on settlement something would be due plaintiff, is insuf cient, p. 156.

Cited in 99 Am. Dec. 392, extended note.

Trusts.— Statute of limitations does not run against expre trust, p. 156.

Reaffirmed in Stimis v. Stimis, 54 N. J. Eq. 23, 33 Atl. 470, an Raymond v. Flavel, 27 Or. 235, 40 Pac. 163. See 99 Am. Dec. 38 note.

Trusts.— When trust is repudiated by trustees, unequivocal word and acts, so brought to beneficiary's notice that he is called upo to assert his equitable rights, statute of limitations begins to ru p. 157.

Reaffirmed in Speidel v. Henrici, 120 U. S. 386, 30 L. 719, 7 S. C 611, Naddo v. Bardon, 47 Fed. 790, De Mares v. Gilpin, 15 Colo. 8 24 Pac. 570, Raymond v. Flavel, 27 Or. 237, 40 Pac. 163, and Woo v. Fox, 8 Utah, 401, 32 Pac. 52. Approved in Starkey v. Fox, 5 N. J. Eq. 768, 29 Atl. 215, where open and exclusive possession wa sought to be defeated as a trust. See 99 Am. Dec. 391, note.

Trusts.— It is general rule, prevailing in Alabama, apart fro statute of limitations, that lapse of twenty years from time pr ceedings could have been instituted for settlement of trust, durin which trustee has not admitted trust, creates presumption of settl ment, p. 159.

Approved in Ware v. Galveston City Co., 146 U. S. 116, 36 L. 91 13 S. Ct. 38, where delay was of thirty-five years; Alsop v. Rike 155 U. S. 460, 39 L. 222, 15 S. Ct. 166, holding equity may refu relief for delay of less time than period of limitations; Westenfeld v. Green, 78 Fed. 895, holding rights of liens barred by lapse twenty years, with adverse possession; Girard v. Futterer, 84 Al 324, 4 So. 293, holding presumption of payment of legacies b executor does not arise until lapse of twenty years; Semple v. Glen

262, 24 Am. St. Rep. 901, 9 So. 267, applying rule to suit stockholder, for balance unpaid on stock.

S. 163–185, 29 L. 360, LAMAR v. McCULLOCH.

s.— Under R. S., § 1059, making remedy for unlawful taking erty, under captured and abandoned property act, exclusively rt of Claims, suit against secretary of treasury by alleged other than in Court of Claims, is barred, p. 186.

in National Bank v. Rutledge, 84 Fed. 409, arguendo.

S. 188–212, 29 L. 366, NORRINGTON v. WRIGHT.

acts.— In contracts of merchants, time is of the essence,

oved in Peace River, etc., Co. v. Graffiin, 58 Fed. 551, holding eging that vessels did not sail at times agreed, good in action ract; Foerderer v. Moors, 91 Fed. 479, 62 U. S. App. 546, hold- horization of drafts in payment of merchandise to be shipped t include merchandise already shipped. See 54 Am. Rep. e.

guished in Beck, etc., Co. v. Colorado, etc., Co., 52 Fed. 702, App. 465, holding time not of essence of contract for work or requiring artistic skill; Cent. Appalachian Co. v. Buchanan, 1012, 43 U. S. App. 265, vendee cannot avoid payment of price for installments received and used.

— In mercantile contracts, statements descriptive of sub- tter, or of some material incident, such as time or place of t, is ordinarily to be regarded as a warranty, or condition nt, upon failure or non-performance of which, party ag- may repudiate whole contract, p. 208.

oved in Filley v. Pope, 115 U. S. 219, 29 L. 373, 6 S. Ct. 21, case; Pope v. Allis, 115 U. S. 372, 29 L. 398, 6 S. Ct. 72, undertaking that article to be subsequently made, shall certain qualities, a condition precedent; Crane Co. v. Colum- ., Co., 73 Fed. 993, 46 U. S. App. 52, holding vendee cannot e as to part of goods and enforce as to remainder; Cleve- lling Mill v. Rhodes, 121 U. S. 261, 30 L. 922, 7 S. Ct. 885, nt that iron was to be shipped during navigating season of ray v. Moore, 37 Fed. 267, holding time and situation of naterially essential parts of contract of charter-party: Wil- Myers, 40 Fed. 174, representations as to cubical capacity el; The B. F. Bruce, 50 Fed. 123, holding party charging by charter with obligation, must make it good; Beck, etc., Colorado, etc., Co., 52 Fed. 703, 10 U. S. App. 465, holding nt of time of shipment, condition precedent; Cresswell, etc., Martindale, 63 Fed. 88, 27 U. S. App. 277, holding right to for non-performance, by other party, not dependent on

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," is only to provide against accidental variations from slight
important excesses or deficiencies in number, measure, or
p. 205.

oved in United States v. Pine River, etc., Co., 89 Fed. 911,
S. App. 80, holding specification of quantity material and
inative, although qualified by "about;" Salmon v. Boykin,
., 66 Md. 550, 7 Atl. 703, holding vendor cannot compel vendee
ct stipulated amount from larger quantity.

.— Where goods are to be shipped in certain proportions
y, seller's failure to ship required quantity in first month
uyer right to rescind whole contract, p. 205.

oved in Cleveland Rolling Mill v. Rhodes, 121 U. S. 264, 30
7 S. Ct. 886, where contract was to be "shipped during navi-
season of 1881;" Horst v. Rœhm, 84 Fed. 570, holding notice
ntion of non-compliance with contract, may be accepted as
atory breach; Smith v. Keith, etc., Coal Co., 36 Mo. App.
lding buyer's rejection of two installments justified seller's
on; Pope v. Porter, 102 N. Y. 371, 7 N. E. 307, holding vendees
npelled to accept part performance in inverse order of con-
Bennett v. Shaughnessy, 6 Utah, 277, 22 Pac. 158, holding, on
to perform condition precedent to other party's further per-
ce, latter may rescind, suing for work already done. Ap-
arguendo, in Buzby v. Phœnix Ins. Co., 31 Fed. 424, The
Assurance v. Companhia, etc., 68 Fed. 250, 28 U. S. App.
guendo; Blake v. Pine Mt., etc., Co., 76 Fed. 640, 43 U. S.
0, as to rescission by court and by parties; Miller v. Moore,
693, 20 Am. St. Rep. 331, 10 S. E. 361, 6 L. R. A. 377, and n.
, but application refused, in Hoffman v. King, 70 Wis. 379,
W. 29, holding agreement to keep lumber from accumulating
s independent of main contract. Distinguished in Clark v.
ng Steel Works, 58 Fed. 498, 3 U. S. App. 358, where vendee,
nowledge of defects, continued to retain and use portion of
Cresswell, etc., Co. v. Martindale, 63 Fed. 89, 27 U. S. App.
lding vendee refusing to accept and pay for substantial part
allment, cannot recover for vendor's refusal to deliver further
nents; Cherry Valley, etc., Works v. Florence, etc., Co., 64
72, 22 U. S. App. 655, where vendee failed to make money
nt in time; German Sav. Inst. v. De La Vergne, etc., Co., 70
55, 36 U. S. App. 184, where portion of goods were accepted
ed; Crane Co. v. Columbus, etc., Co., 73 Fed. 992, 46 U. S.
2, holding termination by vendee not being justified, he
maintain action for breach by vendor; Gerli v. Poidebard,
., 57 N. J. L. 435, 51 Am. St. Rep. 613, 31 Atl. 402, 30 L. R. A.
(but see dissenting opinion in 57 N. J. L. 440, 31 Atl. 404, 30
A. 72), holding vendor's failure to deliver first installment
, does not enable vendee to rescind entire contract.

115 U. S. 213–221, 29 L. 372, FILLEY v. POPE.

Sales.— In mercantile contracts, descriptive statements, time place of shipment, etc., are ordinarily warranties, upon failure non-performance of which, aggrieved party may repudiate contra p. 220.

Approved in Pope v. Allis, 115 U. S. 372, 29 L. 398, 6 S. Ct. 7 holding undertaking that article to be subsequently manufactur shall possess certain qualities, a condition precedent; Clevela Rolling Mill v. Rhodes, 121 U. S. 261, 30 L. 922, 7 S. Ct. 885, stat ment that iron was to be shipped during navigation season of 188 Bank of Brit. N. A. v. Cooper, 137 U. S. 477, 34 L. 761, 11 S. Ct. 16 holding description of place indicated where payment was to made; Gray v. Moore, 37 Fed. 267, holding time and situation vessel materially essential parts of contract of charter-party; T B. F. Bruce, 50 Fed. 123, holding party charging himself by chart with obligation, bound to make it good; Peace River, etc., Co. Graffiin, 58 Fed. 551, holding contract for sale broken by failure vessels to sail at times agreed upon; Cresswell, etc., Co. v. Marti dale, 63 Fed. 88, 27 U. S. App. 277, holding right to rescind for oth party's non-performance not dependent on latter's good faith; Sa ders v. Munson, 74 Fed. 651, 45 U. S. App. 32, holding recital time of vessel's departure, a warranty.

Distinguished in Culliford v. Gomila, 128 U. S. 158, 32 L. 389, S. Ct. 57, holding court not bound to give effect to provisions omitt by parties; Harrison v. Fortlage, 161 U. S. 63, 40 L. 618, 16 S. C 489, holding provision for shipment on certain vessel does not quire arrival on same.

Sales.— Under contract for sale of 500 tons of iron, "to be shipp from Glasgow," shipment from any other port gives buyer right rescind contract, p. 220.

Approved in Pierson v. Crooks, 115 N. Y. 555, 12 Am. St. Re 842, 22 N. E. 354, a similar case; Reid, etc. v. Field, 83 Va. 32, S. E. 399, but holding party entitled to strict performance waiv same by accepting substitution.

Distinguished in Harrison v. Fortlage, 161 U. S. 65, 40 L. 619, S. Ct. 490, where contract called for shipment, but not for arriv on certain steamer.

115 U. S. 221, 29 L. 392, BOSTON, ETC., CO. v. EAGLE, ETC., C

Appeal and error.— Where assignment of errors are wanting, a appearance of counsel for plaintiffs in error has been withdraw judgment will be affirmed without opening record, p. 221.

Not cited.

115 U. S. 222–227. 29 L. 373. LANCASTER v. COLLINS.

Appeal and error.— No judgment should be reversed, on appe for unprejudicial error, p. 227.

Approved in West v. Camden, 135 U. S. 522, 34 L. 258, 10 S. Ct. 841, refusing reversal for erroneous instruction, where plaintiff could not have recovered in any event; Lazarus v. Phelps, 156 U. S. 206, 39 L. 398, 15 S. Ct. 273, holding party not prejudiced by erroneous ruling, cannot complain thereof on appeal; United States v. Shapleigh, 54 Fed. 137, 12 U. S. App. 26, refusing reversal for technical error in rulings; Connecticut, etc., Ins. Co. v. McWhirter, 73 Fed. 451, 44 U. S. App. 492, holding instruction that entire theory of defense is based upon contention as to one issue, harmless, where upon other, evidence wholly fails to support contention; Sipes v. Seymour, 76 Fed. 118, 40 U. S. App. 185, holding rejection of admissible, but insufficient, testimony harmless error; Creswell v. Wilmington, etc., Ry., — Del. —, 43 Atl. 633, affirming rule; Tracewell v. Farnsley, 104 Ind. 497, 4 N. E. 163, holding error in overruling demurrer to bad paragraph, harmless, where judgment rests on good paragraph; McFadden v. Schroeder, 9 Ind. App. 52, 35 N. E. 131, holding overruling demurrer harmless error, where allegation demurred to was found false.

Distinguished in Cahill v. Chicago, etc., Ry., 74 Fed. 289, 46 U. S. App. 85 (but see dissenting opinion in 74 Fed. 296, 46 U. S. App. 85), reversing for erroneous instruction.

Trial.— Question as to which party shall make closing argument to jury, is one of practice, and is not subject of a bill of exception or writ of error, p. 225.

Reaffirmed in May v. International, etc., Co., 92 Fed. 447, 63 U. S. App. 776.

Appeal and error.— Supreme Court cannot, on error, review weight of evidence, and can look into it only to see whether there was error in not directing verdict for plaintiff, on question of variance, or because there was no evidence to sustain verdict, p. 225.

Approved in Bank of Brit. N. A. v. Cooper, 137 U. S. 474, 34 L. 760, 11 S. Ct. 160, holding appellate court must regard contested facts as established by verdict; Crumpton v. United States, 138 U. S. 363, 34 L. 959, 11 S. Ct. 356, holding granting or refusing new trial, because evidence does not support verdict, discretionary; New York, etc., Ry. v. Estill, 147 U. S. 617, 37 L. 305, 13 S. Ct. 454, refusing to review findings; Lehnen v. Dickson, 148 U. S. 72, 37 L. 373, 13 S. Ct. 482, holding general finding of court trying case without jury, conclusive; Hahn v. Billings Bros., 18 R. I. 553, 28 Atl. 1028, holding findings of fact in trial by court, not reviewable; dissenting opinion in Searcy County v. Thompson, 66 Fed. 99, 27 U. S. App. 715, arguendo.

115 U. S. 228-247, 29 L. 384, VAN WEEL v. WINSTON.

Equity.— Mere words, even as qualifying adjectives of specific charges, are not sufficient grounds of equity jurisdiction for breach

of trust, unless transactions to which they refer in their ess
nature, constitute fraud or breach of trust, p. 238.

Approved in St. Louis, etc., Ry. v. Johnston, 133 U. S. 577,
687, 10 S. Ct. 393, holding it insufficient to charge fraud in ge
terms; Horsford v. Gudger, 35 Fed. 389, holding allegations of
must be connected with specific acts; Heller v. Dyerville Mfg
116 Cal. 135, 47 Pac. 1017, holding general averments of fraud
purpose were conclusions, not admitted by demurrer; Warr
Para Rubber-Shoe Co., 166 Mass. 103, 44 N. E. 114, holding
ments of fraud must be certain; Wood v. Amory, 105 N. Y. 281
11 N. E. 637, 638, holding mere allegations of fraud or consp
of no avail; Leasure v. Forquer, 27 Or. 339, 41 Pac. 666, h
allegations that deed was made to defraud, insufficient to su
decree.

Corporations.— President of railroad is not personally liab
losses resulting from purchases of bonds thereof induced by fr
lent representations in circular signed by him as president, p.

Railroads.— Representations in circulars issued by railro
advertise bonds for branch, are superseded by mortgage giv
company and accompanying bonds when offered for sale, p. 2

Railroads.— Mortgage of branch to secure bonds for its
struction, providing that it shall not exceed fifty miles, doe
require it to be of that length, especially as bondholders wer
given second mortgage on main line, p. 243.

Corporations.— No privity exists between president of ra
and purchasers of its bonds, and president is liable for fraudule
propriation of proceeds of bonds only to company, p. 245.

Approved in Banque Franco-Egyptienne v. Brown, 34 Fed
denying fiduciary relation between promoters of corporatio
bondholders; Kittel v. Augusta, etc., Ry., 65 Fed. 863, holdi
turn of unsatisfied execution necessary to charge officers perso
Middletown v. Boston, etc., Ry., 53 Conn. 359, 5 Atl. 707, gene
Mellen v. Moline Iron Works, 131 U. S. 367, 33 L. 183, 9 S. C
and Atlanta, etc., Ry. v. Western Ry., 50 Fed. 794, 2 U. S.
227, arguendo.

115 U. S. 248-259, 29 L. 388, STARIN v. NEW YORK.

Removal of causes.— If it appears that some title, right,
lege, or immunity, on which recovery depends, will be defeat
one construction of Federal Constitution or laws, or sustain
opposite construction, case will be one arising under Federal
stitution or laws, and reviewable, p. 257.

Reaffirmed in Gibbs v. Crandall, 120 U. S. 106, 30 L. 590, 7
497, Shreveport v. Cole, 129 U. S. 41, 32 L. 591, 9 S. Ct. 212,
ards v. Rock Rapids, 31 Fed. 506. Approved in Robinson v

derson, 121 U. S. 524, 30 L. 1021, 7 S. Ct. 1012, holding Circuit Court should dismiss where averments giving jurisdiction are immaterial in determination of matter; Central Nat. Bank v. Haseltine, 73 Mo. App. 61, holding appellate jurisdiction over such questions in State Supreme Court. Upon authority of the principal case, following have been held to involve Federal questions; Southern Pac. Ry. v. California, 118 U. S. 112, 30 L. 104, 6 S. Ct. 994, whether State may tax franchises of corporation derived from acts of Congress; Cooke v. Avery, 147 U. S. 385, 37 L. 212, 13 S. Ct. 344, where plaintiff's title rested upon validity of lien claimed under Federal judgment; In re Lennon, 166 U. S. 554, 41 L. 1113, 17 S. Ct. 660, bill to enforce compliance with interstate commerce act; Leonard v. Shreveport, 28 Fed. 257, State constitutional provision limiting taxation rate so low as to necessitate breach of contract; Illinois v. Illinois Cent. Ry., 33 Fed. 725, quo warranto against railroad for exercising possessory rights over submerged land, defense being legislation impairing contract; Cheesman v. Shreve, 37 Fed. 37, right to enter beneath surface, where depending upon construction of Federal mining laws; Briscoe v. Southern Kan. Ry., 40 Fed. 277, action for damages against railroad running through Indian country; Smith v. Bivens, 56 Fed. 355, bill charging that defendants damaged him under color of act violative of Federal Constitution; Wood v. Drake, 70 Fed. 882, action for damages for false imprisonment, based on acts done as Federal marshal; National Bank v. Wade, 84 Fed. 12, suit by national bank against former managers for loss by reason of loans made in violation of banking act; Nashville, etc., Ry. v. Taylor, 86 Fed. 176, 182, suit involving validity of taxation statute, alleged to be violative of State Constitution and hence deprivation of property without due process; Minnesota v. Duluth, etc., Ry., 87 Fed. 498, where complainant's right of recovery depended on validity of statute when tested by Federal Constitution; Arkansas v. Kansas, etc., Coal Co., 96 Fed. 357, suit to enjoin railroad from bringing certain class of meat into State; Fleitas v. Meraux, 47 La. Ann. 240, 16 So. 851, question involving effect of Federal bankrupt act.

Approved in following, holding no Federal question involved: Germania Ins. Co. v. Wisconsin, 119 U. S. 476, 30 L. 461, 7 S. Ct. 261, suit to recover statutory penalty for doing insurance business in State without complying with laws thereof; New Orleans v. Benjamin, 153 U. S. 424, 38 L. 769, 14 S. Ct. 909, where construction of Constitution was not essential to determination of suit; Pratt v. Paris Gas, etc., Co., 168 U. S. 259, 42 L. 460, 18 S. Ct. 64, assumpsit for use of patent, not involving construction of patent laws; McCain v. Des Moines, 174 U. S. 177, 19 S. Ct. 647, where allegation of existence of Federal question was unsupported by facts found in bill; State v. Bradley, 26 Fed. 289, point once decided by Federal Supreme Court; Iowa v. Chicago, etc., Ry., 33 Fed. 895, where record did not show determination of Federal ques-

tion necessary to disposal of case; Murray v. Bluebird Min. Co
Fed. 386, action to try title to mining property; Inez Min. C
Kinney, 46 Fed. 834, question of abandonment of mining cl
Pacific Gas, etc., Co. v. Ellert, 64 Fed. 429, suggestion in bill
defendant will claim that plaintiff's acts violate Constitution;
gus Falls v. Fergus Falls Water Co., 72 Fed. 876, 36 U. S. App
(but see dissenting opinion in 72 Fed. 882, 883, 36 U. S. App.
allegation that certain resolution was law impairing obligatio
contract; Wise v. Nixon, 76 Fed. 5, complaint seeking to quiet
to mining claims, alleging defendants claimed under relocat
Crystal Springs, etc., Co. v. Los Angeles, 76 Fed. 151, and Cr
Springs, etc., Co. v. Los Angeles, 82 Fed. 123, where both pa
claimed under confirmed Mexican grants, and controversy is
what rights were granted thereunder; King v. Lawson, 84 Fed.
bill to protect homestead entrymen in making required imp
ments, against claimant whose claim was rejected; McCain v.
Moines, 84 Fed. 728, question whether statute enlarging corp
limits is invalid under State Constitution: Dewey Min. Co. v. M
96 Fed. 2, suit to determine conflicting claims to mining location
raising question of construction or effect of mining laws; Calif
Oil & Gas Co. v. Miller, 96 Fed. 21, bill to quiet title to m
claim, though complainant's claim is based on Federal mining l
State v. Southern Pac. Ry., 23 Or. 432, 31 Pac. 962, where pet
showed that plaintiff was not Federal corporation, and action
to settle tariff rates fixed by State; dissenting opinion in Tenn
v. Union, etc., Bank, 152 U. S. 468, 38 L. 516, 14 S. Ct. 659, maj
denying jurisdiction, unless existence of Federal question ap
by plaintiff's own statement of his claim.

Distinguished in Carson v. Dunham, 121 U. S. 427, 30 L. 9
S. Ct. 1033, distinguishing between jurisdiction to review Stat
cisions adverse to right claimed under Federal laws, and to rev

Removal of causes.— Whether New York city has, by cha
exclusive right to establish ferries between Manhattan and S
islands, is not a Federal question, p. 258.

Pleading.— Prayer for judgment must be construed in conne
with the cause of action as stated in complaint, and limited ac
ingly, p. 258.

Removal of causes.— Separate defense by one defendant in
or joint and several action creates no separate controversy
to entitle him, if possessing necessary citizenship, to removal u
act of 1875; e. g., action for violation of exclusive ferry right
united efforts of defendants, p. 259.

Approved in Fidelity Ins. Co. v. Huntington, 117 U. S. 28
L. 899, 6 S. Ct. 734, holding creditor's bill presents no sepa
controversy as to respondent lienholders; Little v. Giles, 118
601, 30 L. 271, 7 S. Ct. 35, Rumsey v. Call, 28 Fed. 771, Wood

v. Clay, 33 Fed. 899, and Patchin v. Hunter, 38 Fed. 52, all holding separate answers by joint defendants, creating separable issues, do not render cause separable; Brooks v. Clark, 119 U. S. 511, 30 L. 485, 7 S. Ct. 303, and Graves v. Corbin, 132 U. S. 588, 33 L. 468, 10 S. Ct. 202, holding separate defenses do not create separate controversies within act; Weller v. Pace Tobacco Co., 32 Fed. 862, remanding where controversy of non-resident intervenor was inseparable from that of resident defendant; State v. Columbus, etc., Ry., 48 Fed. 628, holding mandamus proceeding to compel railroads to lower joint street crossing not separable as between State and one road; Ryder v. Bateman, 93 Fed. 22, holding non-resident wife, sued jointly with resident husband, not entitled to removal on ground of separate controversy and diverse citizenship.

Distinguished in Beuttel v. Chicago, etc., Ry., 26 Fed. 52, and Fergason v. Chicago, etc., Ry., 63 Fed. 178, holding petition for damages against railroad for injuries from defective engine, and employees for negligence, contained separable causes of action; Rich v. Gross, 29 Neb. 340, 45 N. W. 468, holding controversy separate as to non-resident creditor filing answer in nature of creditor's bill in foreclosure suit.

115 U. S. 260-263, 29 L. 375, CLAY v. FIELD.

Executors and administrators.— Mississippi code provision, specifying limitation of actions to set aside administrator's sale, construed, p. 262.

Ejectment.— Under Mississippi code of 1880, tenant in common ousted by co-tenant may maintain ejectment and recover rents and profits in same action, p. 263.

Approved generally in Clay v. Freeman, 118 U. S. 105, 30 L. 107, 6 S. Ct. 968.

115 U. S. 264-284, 29 L. 377, HENDERSON v. WADSWORTH.

Appeal and error.— Where judgment against defendant, pleading no counterclaim or set-off, and not asking affirmative relief, is appealed, amount in dispute is amount of judgment sought to be reversed, p. 276.

Approved in New York Elevated Ry. v. Fifth Nat. Bank, 118 U. S. 609, 30 L. 260, 7 S. Ct. 24, holding value of matter in dispute determined by judgment, irrespective of verdict; Gibson v. Shufeldt, 122 U. S. 33, 30 L. 1067, 7 S. Ct. 1072, holding defendant can appeal only as to several plaintiffs decreed $5,000; Decker v. Williams, 73 Fed. 311, applying rule to appeals from commissioner to District Court.

Appeal and error.— Neither co-defendants nor co-plaintiffs can unite their separate and distinct interests for purpose of making up amount essential to appellate jurisdiction of Supreme Court;

hence, where heirs are sued on ancestor's note, and separate
ments rendered against each, appellate jurisdiction extend
to judgments exceeding $5,000, p. 276.

Reaffirmed in Clay v. Field, 138 U. S. 479, 34 L. 1049, 11
425, and Busey v. Smith, 67 Fed. 15. Approved in Walter v.
eastern Ry., 147 U. S. 374, 37 L. 208, 13 S. Ct. 350, where bi
to enjoin assessments in separate counties, each under
Wheless v. St. Louis, 96 Fed. 867, holding owners in severa
lots abutting on streets cannot, by joining, confer Federal ju
tion to enjoin assessment, no single assessment equalling $2,0

Husband and wife.— In Louisiana, widow having accepte
cession of husband without benefit of inventory, is not lia
solido with surviving partners for note of husband's firm; an
ments by surviving partners are inadmissible to show interr
of prescription running in her favor, p. 284.

115 U. S. 285–288, 29 L. 391, MOSES v. WOOSTER.

Appeal and error.— Appeal of defendants from joint decree
joint cause of action, may, upon death of an appellant and f
of his representatives to appear, proceed at suit of survivors, al
as to deceased, p. 288.

Cited in Martin v. Baltimore, etc., Ry., 151 U. S. 703, 38 L. 3
S. Ct. 545, holding question whether action survives defenda
law of State.

115 U. S. 288–289, 29 L. 392, JACKS v. HELENA.

Courts.— Where State court's opinion, which is, by State
part of the record, shows decision properly went upon other
Federal ground, Supreme Court has no jurisdiction to review
ment, p. 289.

Approved in Kreiger v. Shelby Ry., 125 U. S. 44, 31 L. 678,
Ct. 755, holding opinion of highest State court examinable to
tain grounds for judgment.

115 U. S. 290, 29 L. 406, WATERVILLE v. VAN SLYKE.

Appeal and error.— To obtain dismissal before printing re
motion papers must present case so as to enable Supreme Cou
act understandingly without referring to transcript, p. 290.

Followed in Maag v. Hyde, 122 U. S. 632 (Appendix).

115 U. S. 291–299, 29 L. 382, HAZLETT v. UNITED STATES.

Contracts for transportation of soldiers and supplies, const
p. 299.

Not cited.

115 U. S. 300-307, 29 L. 406, MERRICK'S EXECUTOR v. GIDDINGS.

Appeal and error.— Instructions to find verdict for defendant must be held by rules applying in case of demurrer to evidence, p. 305.

Reaffirmed in Meyer v. Manhattan L. Ins. Co., 144 Ind. 447, 43 N. E. 451.

Miscellaneous.— Miscited in Mower v. Kemp, 42 La. Ann. 1018, 8 So. 832.

Attorney and client.— Agents of State, to recover bonds, are not liable to attorneys previously appointed for same purpose, upon promise to latter to withhold amount recovered until attorneys should be paid, where attorneys, before money was paid over, compromised for less sum, p. 307.

115 U. S. 308-321, 29 L. 398, SMITH v. BLACK.

Mortgages.— Absence from sale advertised by both trustees, of one of them, is not sufficient reason to set same aside as against former owner, p. 315.

Approved in Loveland v. Clark, 11 Colo. 270, 18 Pac. 547, upholding sale by one trustee; Monroe v. Fuchtler, 121 N. C. 103, 28 S. E. 64, arguendo.

Mortgages.— In absence of disqualifying circumstances, creditor may purchase at sale under deed of trust, p. 315.

Approved in Pewabic Min. Co. v. Mason, 145 U. S. 362, 36 L. 736, 12 S. Ct. 890, holding permission unnecessary to enable litigating stockholder to bid at judicial sale; Black v. Caldwell, 83 Fed. 884, holding denying foreign corporation mortgagor right to buy at foreclosure, denial of equal protection of laws; Deck v. Whitman, 96 Fed. 879, holding American rule allows either party to suit to bid at judicial sale; Monroe v. Fuchtler, 121 N. C. 104, 28 S. E. 64, holding cestui que trust may buy at trust sale.

Mortgages.— Settlement with trustee for cash, by purchaser at sale under trust deed providing for credit, violates no rights of former owner, p. 320.

115 U. S. 321-339, 29 L. 414, KENTUCKY RY. TAX CASES.

Taxation proceedings are not necessarily judicial, and "due process of law," as applied to that subject, does not imply right to such notice and hearing as are regarded essential to validity of judicial proceedings. Tax law requiring owners to send lists to designated official and fixing time for protests against assessment, is valid, p. 331.

Approved in Lent v. Tillson, 140 U. S. 328, 35 L. 425, 11 S. Ct. 830, affirming S. C., 72 Cal. 413, 419, 14 Pac. 74, 76, denying right of

parties affected by proposed improvement to be heard before ass
ment; Pittsburgh, etc., Ry. v. Backus, 154 U. S. 426, 38 L. 1036
S. Ct. 1116, holding personal notice unnecessary, statute fixing t
and place for meeting of board; San Diego, etc., Co. v. Natio
City, 174 U. S. 753, 19 S. Ct. 809, holding water company not enti
to formal notice of precise day for fixing rates; Board of Equal
tion Cases, 49 Ark. 528, 6 S. W. 5, holding provision for appeal
fore assessment becomes final, sufficient; St. Louis, etc., Ry.
Worthen, 52 Ark. 538, 13 S. W. 256, 7 L. R. A. 376, holding fai
to provide appeal from board's valuation, not fatal to law; S
v. Weyerhauser, 68 Minn. 363, 71 N. W. 267, upholding law of 1
providing for taxation of property unlawfully omitted from ass
ment; Board of Assessors v. Central Ry., 48 N. J. L. 284, 4 Atl.
upholding law providing for assessment and taxation of railro
and canals; State v. Sponangle, 45 W. Va. 424, 32 S. E. 287, 43
R. A. 732, upholding constitutional provision for forfeiture of l
not entered for taxation; Meggett v. Eau Claire, 81 Wis. 332, 51
W. 569, holding provision for issuance of certificate, stating amo
of street assessment, sufficient notice; Hennessy v. Douglas Cou
99 Wis. 151, 74 N. W. 990, upholding assessments for sidewalks,
though only notice was entry on tax-rolls; dissenting opinion
Water Works v. San Francisco, 82 Cal. 334, 22 Pac. 1051, as
notice to water company of intention to fix rates. Cited also
Louisville, etc., Ry. v. Louisville, 166 U. S. 714, 41 L. 1175, 17 S.
727, Castillo v. McConnico, 168 U. S. 684, 42 L. 626, 18 S. Ct.
Scott v. Toledo, 36 Fed. 394, 1 L. R. A. 694, and Wade v. Kimber
5 Ohio C. C. 44, arguendo. See 16 Am. St. Rep. 136, note.

Distinguished in Hood River, etc., Co. v. Wasco County, 35
510, 57 Pac. 1020, holding river improvement law void, as provid
for taking property without notice.

Taxation.— Kentucky act of 1878, providing for notice of
posed assessment to property-owner, by requiring him to pre
estimate of value to designated officer, providing for public sess
of board, at which party may appear and be heard, and wh
allows opportunity to contest validity of proceedings in suit to
lect tax, does not deprive taxpayer of property without "due p
ess," p. 336.

Approved in Winona, etc., Land Co. v. Minnesota, 159 U. S.
40 L. 251, 16 S. Ct. 87, upholding Minnesota law of 1881, provid
for assessment of property omitted from roll of preceding ye
Sanford v. Poe, 69 Fed. 553, 37 U. S. App. 378, holding right to
present and be heard in assessment proceedings, due process; I
v. Tillson, 72 Cal. 420, 421, 14 Pac. 77, upholding act of 1876,
widening of street in city; Ames v. People, 26 Colo. 99, 56 Pac.
upholding power of legislature to fix situs of real and general p
erty for taxation purposes; Ball v. Ridge Copper Co., 12 Mich.
76 N. W. 132, upholding act of 1893, providing for sale of land

taxes; St. Louis v. Ranken, 96 Mo. 506, 9 S. W. 914, holding defendant having received notice of proposed assessment, it was not necessary that he be made party to condemnation proceedings to open street; State v. Jones, 51 Ohio St. 514, 37 N. E. 951, upholding 90 Ohio Laws, 330, providing for taxation of telephone, telegraph and express companies; Baldwin v. Ely, 66 Wis. 188, 28 N. W. 399, upholding provision that title to land sold for taxes for five successive years shall vest in county; dissenting opinion in Water Works v. San Francisco, 82 Cal. 333, 22 Pac. 1051, arguendo; Mallory et al. v. La Crosse, etc., Co., 80 Wis. 184, 49 N. W. 1076, majority upholding labor lien law of 1889; Board of Assessors v. Central Ry., 48 N. J. L. 278, 4 Atl. 584, arguendo.

Distinguished in Scott v. Toledo, 36 Fed. 398, 1 L. R. A. 696, holding street assessment without notice, invalid; Meyers v. Shields, 61 Fed. 721, holding proceeding to enter assessment for back taxes, without notice or hearing, unconstitutional; Baker v. Norwood Village, 74 Fed. 1000, holding condemnation of street through private land, and assessment thereon of expenses therefor, unconstitutional; Power v. Larabee, 2 N. Dak. 153, 49 N. W. 727, holding tax invalid, where board did not meet at time and place designated.

Taxation.— Rule of equal taxation only requires same method for all constituents of each class of property, so that law shall operate uniformly upon all in similar circumstances; hence, Kentucky law, providing different methods for assessment of railroads than for other real property, is not denial of "equal protection of laws" within fourteenth amendment, p. 338.

Approved in Pacific Exp. Co. v. Seibert, 142 U. S. 354, 35 L. 1040, 12 S. Ct. 254, holding diversity of taxation allowable if all of a class are taxed uniformly; Chamberlain v. Walter, 60 Fed. 793, holding assessment of railroads at higher percentage of value than other property, not unconstitutional; Brown's case, 91 Va. 767, 21 S. E. 359, 28 L. R. A. 111, holding tax, to be uniform, need not be assessed on all property by same agency; Bridge Co. v. County Court, 41 W. Va. 668, 24 S. E. 1005, holding legislature may provide different manner for assessment of different classes of property; State v. Mann, 76 Wis. 477, 45 N. W. 529, sanctioning reasonable classification for purposes of taxation. On authority of principal case, following have been upheld: Columbus, etc., Ry. v. Wright, 151 U. S. 482, 38 L. 243, 14 S. Ct. 400, Georgia law of 1889, distributing rolling-stock of railroads among counties for taxation; Pittsburgh, etc., Ry. v. Backus, 154 U. S. 425, 38 L. 1036, 14 S. Ct. 1116, provision for different method of assessing railroads; Adams Exp. Co. v. Ohio, 165 U. S. 228, 41 L. 698, 17 S. Ct. 312, classification of express companies with railroad and telegraph companies, for taxation; Magoun v. Illinois Trust, etc., Bank, 170 U. S. 293, 42 L. 1042, 18 S. Ct. 598, Illinois inheritance tax law of 1895; Wallace v. Myers, 38 Fed. 185, 4 L. R. A. 172, and n., New York inheritance tax; St.

Louis, etc., Ry. v. Worthen, 52 Ark. 536, 13 S. W. 256, 7 L.
375, classification of railroads for taxation; People v. Hend
12 Colo. 375, 376, 21 Pac. 146, 147, classification of mines for
poses of taxation; Ames v. People, 26 Colo. 107, 56 Pac. 664
Northern Pac. Ry. v. Barnes, 2 N. Dak. 339, 346, 51 N. W. 393
separate classification of railroads for purposes of taxation; Br
case, 173 Mass. 499, 53 N. E. 998, act providing for examinati
judgment debtors, owing for necessaries; Sawyer v. Dooley, 21
399, 32 Pac. 440, statute providing summary process for sa
property for delinquent taxes amounting to less than $300; Bos
Assessors v. Central Ry., 48 N. J. L. 289, 313, 319, 4 Atl. 598, 60
(but see dissenting opinion in 48 N. J. L. 346, 4 Atl. 627), holdin
of 1884, "for taxation of railroad and canal property." See 25
St. Rep. 885, monographic note on fourteenth amendment.

Distinguished in Western Union Tel. Co. v. Poe, 61 Fed. 467,
ing assessment on corporation determined by aggregate val
shares of stock, not uniform taxation.

115 U. S. 339–348, 29 L. 432, KNICKERBOCKER, ETC., INS
v. PENDLETON.

Appeal and error.— It appearing after reversal of judgmen
low for plaintiffs, that writ and citation were served on bu
plaintiff, although supersedeas bond was executed to all, ar
ment of writ and new citation were allowed, p. 342.

Approved in Dolan v. Jennings, 139 U. S. 387, 35 L. 218, 11
585, Walton v. Marietta Chair Co., 157 U. S. 347, 39 L. 727,
Ct. 628, and Dunlop v. United States, 165 U. S. 495, 41 L. 80
S. Ct. 378, holding proof of custom to deliver papers at home
presumption that paper was delivered; Cotter v. Alabama, etc.,
61 Fed. 750, 22 U. S. App. 372, as to practice in allowing ar
ments of writ.

Banks are quasi-public institutions, p. 344.

Evidence of bank's customs and usages is admissible to cor
rate cashier's conviction and belief of presentation of draft, p.

Evidence.— After long lapse of time it will be presumed
duties have been performed and business done in accordance
custom and course of business of bank, p. 344.

Approved in The City of Naples, 69 Fed. 795, 32 U. S. App.
holding presumption is against disregard of one's safety; Spu
United States, 87 Fed. 705, 59 U. S. App. 677, holding bank off
legal duty to be informed of condition of account, prima facie
dence of his information.

115 U. S. 348–352, 29 L. 412, SARGENT v. HELTON.

Courts.— Where sale of lands of bankrupt estate has been
and confirmed by Bankruptcy Court, and assignee has conv

Circuit Court cannot, at suit of purchaser, enjoin sale of same lands upon order of State court, p. 351.

Approved in In re Sawyer, 124 U. S. 220, 31 L. 409, 8 S. Ct. 493, denying Federal power to enjoin mayor from removing city officer; Louisville Trust Co. v. Cincinnati, 73 Fed. 734, refusing to enjoin party from enforcing State court judgment; Chicago, etc., Ry. v. St. Joseph, etc., Co., 92 Fed. 26, refusing to enjoin maintenance of action in State court on ground of its prior adjudication of question: Sullivan v. Rabb, 86 Ala. 439, 5 So. 748, incidentally; Harrison v. Powers, 76 Ga. 243, arguendo.

115 U. S. 353-363, 29 L. 406, WATTS v. CAMORS.

Shipping.— In charter-party describing ship by name and as of certain tonnage, or thereabouts, and in which owner agrees to receive cargo of 11,500 quarters of wheat, statement of tonnage is not warranty of condition precedent, and if her actual carrying capacity equals 11,500 quarters, charterer is bound to accept her, p. 360.

Approved in Harrison v. Fortlage, 161 U. S. 63, 40 L. 618, 16 S. Ct. 489, holding agreement to ship on designated vessel, not broken by arrival on other; E. A. Packer v. New Jersey Lighterage Co., 140 U. S. 363, 35 L. 456, 11 S. Ct. 795, The City of New York, 147 U. S. 76, 37 L. 87, 13 S. Ct. 213, and Warehouse, etc., Supply Co. v. Galvin, 96 Wis. 530, 65 Am. St. Rep. 60, 71 N. W. 806, arguendo.

Admiralty.— United States courts will enforce general admiralty law as construed in United States, rather than that of loci contractu, p. 361.

Approved in Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 453, 32 L. 796, 9 S. Ct. 476, and The Brantford City, 29 Fed. 387, holding carrier's stipulations exempting himself from liability, construable irrespective of law of the flags; The Scotia, 35 Fed. 912, holding lien for supplies depends on law of place, not of flag.

Shipping.— Charter-party clause, whereby parties mutually bind themselves, ship, freight, etc., "in penal sum of estimated freight," to performance of agreements, is not stipulation for liquidated damages, but a penalty to secure payment of amount of damage that either party may actually suffer from breach of contract, p. 361.

Approved in Bignall v. Gould, 119 U. S. 498, 30 L. 492, 7 S. Ct. 295, construing specified damages as penalty; Dalbeattie S. S. Co. v. Card, 59 Fed. 160, holding net freight earned by taking another cargo deductable from damages for refusing vessel; The Oscoda, 70 Fed. 112, arguendo.

Distinguished in Nilson v. Jonesboro, 57 Ark. 175, 20 S. W. 1094, holding, where damages from breach would be uncertain, sum named presumed liquidated damages.

Shipping.— It is not duty of master to seek another **cargo** mediately upon tender and refusal of ship, where charter-p allows fifteen days for loading, when negotiations are pending tween parties thereafter, p. 363.

115 U. S. 363–373, 29 L. 393, POPE v. ALLIS.

Pleading.— Where complaint alleges contract for delivery at place, and answer at another, plaintiff's evidence tending to port answer is admissible under Wisconsin statute, providing no variance shall be material unless actually misleading, p. 3

Approved in Kuhn v. McKay, 7 Wyo. 56, 49 Pac. 476, w proof sustained answer.

Appeal and error.— Party failing to prove at trial that he been misled by variance between complaint and proof, cannot plain thereof upon appeal, p. 368.

Approved in Grayson v. Lynch, 163 U. S. 479, 41 L. 234, 16 S 1069, holding variance immaterial unless of character to mis adversary.

Evidence.— Bill or answer in equity, or pleading in law, s to by party, is competent evidence against him in another su a solemn admission of facts stated, p. 370.

Distinguished in Deleware County v. Diebold Safe Co., 133 487, 33 L. 680, 10 S. Ct. 403, holding unverified complaint, si by attorney, incompetent as admission of facts; Cleveland v. C land, etc., Ry., 93 Fed. 129, holding allegation that defendants lawfully keep plaintiff out of possession, not admission of adv possession.

Evidence.— Averment upon information and belief, in ve pleading, is admissible, although not conclusive evidence in an suit, of facts stated, p. 370.

Approved in Chicago, etc., Ry. v. Ohle, 117 U. S. 129, 29 L. 6 S. Ct. 635, holding affidavit on information, etc., as to citizen admissible against affiant on motion to remand.

Sales.— When subject-matter of sale is not in existence, o ascertained at time of contract, undertaking that it shall, whe isting, or ascertained, possess certain qualities, is not a mere ranty, but a condition, performance of which is precedent to obligation upon vendee under contract, p. 371.

Approved in Peace River, etc., Co. v. Graffiin, 58 Fed. 551, up ing defense that vessels did not sail at times specified in cont Rubin v. Sturtevant, 80 Fed. 932, 51 U. S. App. 289, holding ve on breach of express warranty in executory contract, may rejec rescind, or accept and sue on warranty; Alden v. Hart, 161 580, 37 N. E. 743, holding vendee may reject unmerchantable American Bronze Co. v. Gillette, 88 Mich. 235, 26 Am. St. Rep.

50 N. W. 138, holding omission of age from monument gives orderer right to reject; Henry Gaus, etc., Mfg. Co. v. Magee, etc., Mfg. Co., 42 Mo. App. 313, holding vendee not bound to accept chattel different from article sold, as long as contract remains executory; Charter, etc., Co. v. Coleridge, etc., Bank, 54 Neb. 746, 74 N. W. 1071, holding development of specified power, condition precedent to completion of sale of engine; Pierson v. Crooks, 115 N. Y. 553, 12 Am. St. Rep. 840, 22 N. E. 354, holding quality part of description of goods, and vendee may inspect; Wadhams v. Balfour, 32 Or. 324, 51 Pac. 645, sale by sample.

Distinguished in Crane Co. v. Columbus Const. Co., 73 Fed. 992, 993, 994, 46 U. S. App. 52, holding vendee, under entire executory contract of sale, cannot repudiate in respect to part of goods and enforce as to remainder.

Sale by sample amounts to undertaking that all the goods are similar in nature and quality to those exhibited, and if not, buyer may refuse to receive, or if received, may return in reasonable time allowed for examination, p. 372.

Reaffirmed in Wadhams v. Balfour, 32 Or. 325, 326, 327, 51 Pac. 645, 646.

Sales.— When vendor sells goods of specified quality, but not in existence or ascertained, and undertakes to ship to distant buyer, when in existence or ascertained, and delivers them to carrier for buyer, latter has right of inspection on arrival, and to reject them if not of specified quality, p. 373.

Approved in Pierson v. Crooks, 115 N. Y. 549, 12 Am. St. Rep. 837, 22 N. E. 352, holding carrier not vendee's agent to accept goods as corresponding with contract; Albion, etc., Min. Co. v. Wyllie, 77 Fed. 549, 42 U. S. App. 214, generally; McLane v. Creditors, 47 La. Ann. 142, 16 So. 768, arguendo.

115 U. S. 373-383, 29 L. 409, BELL v. FIRST NAT. BANK.

Bill dated March 4th, payable in London sixty days after sight, drawn in Illinois on person in Liverpool, and accepted thereby, "due 21 May," without date of acceptance, was prematurely protested on May 21st, it not appearing that days of grace were allowed, p. 383.

Bills and notes.— As to bills not payable on demand, day on which payment is to be made to prevent dishonor is to be determined by adding three days of grace, where bill itself does not otherwise provide, p. 383.

Not cited.

115 U. S. 384-392, 29 L. 430, MERCHANTS' BANK v. BERGEN COUNTY.

Municipal corporations.— Purchasers of municipal securities risk genuineness of official signature of those executing paper, includ-

ing not only that of signature itself, but of official charact
maker thereof, p. 390.

Approved in Coler v. Cleburne, 131 U. S. 174, 33 L. 150, 9 S
724, holding recitals do not estop municipality from allegin
validity of signature; Ennis v. Bank, 94 Tenn. 68, 28 S. W.
holding seller of municipal bonds does not incur liability of
antor of genuineness and solvency.

Municipal corporations.— Purchasers of securities having
special power to issue same for specified purpose, must see
that conditions prescribed for exercise of power exist, p. 391.

Approved in Burnett v. Denison, 145 U. S. 139, 36 L. 653, 12 S
829, where recital of ordinance was incomplete; Myers v. Jeffe
ville, 145 Ind. 437, 44 N. E. 454, holding purchasers chargeable
notice of irregularity of issue; Keehn v. Wooster, 13 Ohio C. C.
holding purchasers of bonds chargeable with requirements of
thorizing act; Brown v. Bon Homme County, 1 S. Dak. 225, 4
W. 175, affirming rule; dissenting opinion in West Plains Twp
Sage, 69 Fed. 352, 32 U. S. App. 725, majority holding municipa
estopped by recitals from setting up illegality. See 98 Am.
688, note on municipal bonds and defenses.

Bills and notes.— Doctrine of bona fide purchaser does not
ply to commercial paper, purporting to be issued under deleg
authority, until delegation is established, p. 391.

Approved in Brown v. Bon Homme County, 1 S. Dak. 228,
N. W. 176, arguendo.

Municipal corporation is not estopped to deny validity of bo
issued in excess of authority, where bonds contain no recit
p. 392.

Approved in Daviess County v. Dickinson, 117 U. S. 665, 29
1030, 6 S. Ct. 902, holding bonds issued in excess of number
thorized, void; Mercer County v. Provident, etc., Co., 72 Fed.
43 U. S. App. 21, where validity of bonds depended on complet
of railroad; Brown v. Bon Homme County, 1 S. Dak. 227, 46 N.
176, holding county must have legislative authority to issue bon
and officers participating in issue must perform respective dut
Edinburgh, etc., Co. v. City of Mitchell, 1 S. Dak. 607, 48 N. W. 1
arguendo.

Distinguished in Note Holders v. Funding Board, 16 Lea, 59,
Am. Rep. 213, arguendo.

115 U. S. 392-407, 29 L. 423, DEFFEBACK v. HAWKE.

Statutes.— Reference to original statutes cannot be had to c
trol revised statutes, when meaning thereof is plain, p. 402.

Approved in Bate Refrigerating Co. v. Sulzberger, 157 U. S.
39 L. 612, 15 S. Ct. 517, holding courts cannot look to statutes

see if Congress erred in revision; Hamilton v. Rathbone, 175 U. S. 420, 20 S. Ct. 158, holding prior acts may be examined only to solve ambiguity.

Mines and minerals.— No title from government to land known, at time of sale, to be valuable for minerals of gold, silver, cinnabar or copper, can be obtained under pre-emption, homestead or townsite laws, or otherwise than by laws specially authorizing sale of such lands, except in Michigan, Wisconsin, Minnesota, Missouri and Kansas, p. 404.

Approved in Sparks v. Pierce, 115 U. S. 411, 29 L. 429, 6 S. Ct. 104, holding one without title, making improvements on public mineral land without claim for same; Davis's Administrator v. Wiebold, 139 U. S. 515, 517, 35 L. 241, 242, 11 S. Ct. 631, 632, reaffirming rule; Barden v. Northern Pac. Ry., 154 U. S. 322, 38 L. 1000, 14 S. Ct. 1036, United States v. Cent. Pac. Ry., 84 Fed. 220, cancelling patent conveying mineral lands knowingly purchased as agricultural; Butte City Smoke-House Lode Cases, 6 Mont. 405, 12 Pac. 863, holding mining claim owner not required to file adverse claim to townsite patent covering claim; King v. Thomas, 6 Mont. 411, 12 Pac. 866, holding townsite patent to Butte City does not cover mineral ground included therein; United States v. San Pedro, etc., Co., 4 N. Mex. 294, 296, 17 Pac. 406, 408, holding act confirming title under Mexican grant, conveys no title to mineral lands therein included; dissenting opinions in Northern Pac. Ry. v. Barden, 46 Fed. 615, 616, arguendo; Shreve v. Copper Bell Min. Co., 11 Mont. 339, 28 Pac. 321, majority defining "valuable mineral deposit;" Horsky v. Moran, 21 Mont. 364, 53 Pac. 1071, arguendo.

Distinguished in New Dunderberg Min. Co. v. Old, 79 Fed. 602, 49 U. S. App. 208, holding judgment of land department in issuing patent to mineral lands, conclusive collaterally; McCormick v. Sutton, 97 Cal. 376, 32 Pac. 445, holding patent to townsite conveys perfect title in fee, except as to lands known to contain mines.

Mines and minerals.— Term "mineral lands" does not include lands in which minerals are found, but not in sufficient quantity to justify expenditure in effort to extract them, p. 404.

Approved in Davis's Administrator v. Weibold, 139 U. S. 524, 35 L. 244, 11 S. Ct. 634, holding grant carries with it determination of proper authorities that land is not subject to exception; Richards v. Dower, 81 Cal. 51, 22 Pac. 306, denying presumption that ledge, once profitably worked, continues valuable; Hermocilla v. Hubbell, 89 Cal. 9, 26 Pac. 612, holding proof sufficient that lands in question were mineral; Smith v. Hill, 89 Cal. 129, 26 Pac. 646, holding paying mine must be known or believed to exist at time of townsite grant in order to render same invalid; Brownfield v. Bier, 15 Mont. 414, 415, 39 Pac. 464, 465, holding lode or vein exempted from placer [illegible] under § 2333, R. S., must be clearly ascertained, and of extent

to justify exploration; dissenting opinions in Iron Silver C
Mike, etc., Co., 143 U. S. 424, 36 L. 211, 12 S. Ct. 553, ma
question whether sufficient gold existed in vein to justify ex
tion, for jury; Shreve v. Copper Bell Min. Co., 11 Mont. 336, 3
Pac. 320, 322, majority holding discovery of deposits suffic
valuable to justify exploration, sufficient as condition of rec
notice.

Mines and minerals.— Subsequent discovery of valuable mi
upon land settled for agricultural purposes, and patented
pre-emption laws, does not invalidate title thereto, p. 405.

Approved in Davis's Administrator v. Weibold, 139 U. S. 5
L. 245, 11 S. Ct. 635, holding exception includes only lands kno
date of grant to be of mineral value; Dower v. Richards, 151
663, 38 L. 307, 14 S. Ct. 454, affirming S. C., 81 Cal. 52, 22 Pa
holding land must be known to be more valuable for mineral
agricultural purposes, at date of townsite patent; Shaw v. Ke
170 U. S. 333, 42 L. 1058, 18 S. Ct. 641, holding title once p
free from conditions of subsequent mineral discoveries; Mig
Montana Cent. Ry., 77 Fed. 256, 44 U. S. App. 724 (affirming
68 Fed. 814), United States v. Cent. Pac. Ry., 93 Fed. 873
Hunt v. Steese, 75 Cal. 625, 17 Pac. 922, holding claimant
mineral location, as against patentee, must prove known g
mineral than agricultural value of land at time of patent; B
v. Meikle, 82 Fed. 704, and McCormick v. Sutton, 97 Cal. 3
Pac. 444, both holding discovery of mine, after issuance of to
patent, gives claimant no right as against patentee; Colorado
Co. v. United States, 123 U. S. 327, 31 L. 190, 8 S. Ct. 141, h
mere fact of surface indications of coal, will not prevent acqu
by patent; Benson Min. Co. v. Alta Min. Co., 145 U. S. 433,
764, 12 S. Ct. 879, holding price of claim being paid, obligat
do annual work ceases; dissenting opinion in Northern Pac.
Barden, 46 Fed. 619, majority holding exclusion of mineral
from grant to plaintiff, applied only to known mineral lands
proved, obiter, in Van Brocklin v. Tennessee, 117 U. S. 169,
851, 6 S. Ct. 680.

Distinguished in Barden v. Northern Pac. Ry., 154 U. S. 3
L. 1000, 14 S. Ct. 1036, holding grant to Northern Pacific ra
excluded all mineral lands, known or unknown; United Sta
San Pedro, etc., Co., 4 N. Mex. 295, 17 Pac. 407, where land pa
was notoriously mineral.

Mines and minerals.— Where land is entered as mining cla
adverse claim is filed with register and receiver of local land
and entry is not cancelled or disapproved by land departmen
tificate of purchase given upon entry is, as to strangers, equi
to patent, and land ceases to be subject to sale by govern
which thenceforth holds legal title only in trust for holder o
tificate, p. 405.

d in United States v. Freyberg, 32 Fed. 197, holding, t to patent becomes vested, government holds legal title or purchaser; Aurora Hill, etc., Min. Co. v. Eighty-five 2 Sawy. 360, 34 Fed. 518, holding uncancelled entry, and equivalent to patent, as to strangers; Amador, etc., Min. th Spring, etc., Min. Co., 13 Sawy. 525, 36 Fed. 670, hold- ble title vests in purchaser upon entry, payment, and rtificate; Knabe v. Burden, 88 Ala. 438, 7 So. 93, holding certificate of entry vests title sufficient to maintain eject- o v. Griffin, 20 Nev. 253, 20 Pac. 309, completion and pay- rice passed equitable title; Godding v. Decker, 3 Colo. 32 Pac. 834, holding receiver's receipt good title, concern- parties may contract; Horsky v. Moran, 21 Mont. 350, 35, holding government certificate may be collaterally at- want of authority for issuance can be shown; dissenting South End Min. Co. v. Tinney, 22 Nev. 57, 35 Pac. 102,

ished in United States v. Steenerson, 50 Fed. 507, 4 U. S. and American Mtge. Co. v. Hopper, 64 Fed. 558, 29 U. S. oth holding issuance of certificate of payment does not partment of right to cancel entry for fraud, before patent

nd minerals.— Patent to mineral lands, subsequently tes back to inception of right of patentee, p. 405.

d in Gilkerson, etc., Co. v. Forbes, 54 Ark. 149, 26 Am. , 15 S. W. 191, holding one becoming entitled to patent nestead acts, may mortgage before issuance thereof; City of Butte, 7 Mont. 68, 14 Pac. 657, holding patent location of mine, cutting off subsequent grants; Deno v. Nev. 252, 20 Pac. 309, holding doctrine of relation applies ut off intervening claimants from subsequent locations; ank v. Riley, 29 Or. 292, 54 Am. St. Rep. 795, 45 Pac. 767, d acquired by homesteader on public domain, not liable contracted after final proofs; dissenting opinion in South Co. v. Tinney, 22 Nev. 46, 35 Pac. 98, majority holding upon plaintiff's abandonment, valid, as against patent ly obtained by plaintiff.

nd minerals.— Government land officers have no author- rt in patent to mineral lands, any other terms than those ance, with recitals showing compliance with law and prescribed thereby, p. 406.

d in Davis's Administrator v. Weibold, 139 U. S. 528, 35 S. Ct. 636, holding exception of townsite occupancy and nts, invalid; Sullivan v. Iron Silver, etc., Co., 143 U. S. 218, 12 S. Ct. 559, holding exception from placer patent claimed to exist," too broad; Shaw v. Kellogg, 170 U. S. 1059, 18 S. Ct. 643, Francœur v. Newhouse, 40 Fed. 622, 14

Sawy. 357, and Northern Pac. Ry. v. Barden, 46 Fed. 603, all hol
insertion in patent, of exception not expressly authorized by
void; Butte City Smoke-House Lode Cases, 6 Mont. 407, 12
863, holding reservation in mining patent, excluding streets, etc
surface, void.

Mines and minerals.— Patent of placer mining claim ca
with it title to surface included within lines of location, as we
to land beneath surface, p. 406.

Approved in South End Min. Co. v. Tinney, 22 Nev. 62, 35
105, majority holding plaintiff's patent void as against party
cating after plaintiff's abandonment, prior to patent.

Ejectment.— There can be no color of title in occupant not
ing under any instrument, proceeding, or law purporting to t
fer title to him, or to give him right of possession; hence, defen
not so holding, denied allowance for improvements under Da
statute, allowing value thereof to be set up by defendant hol
under color of title, p. 407.

Approved in Sparks v. Pierce, 115 U. S. 413, 29 L. 430, 6 S
105, denying right to compensation for improvements made
mineral land, by party without title; State v. Portsmouth
Bank, 106 Ind. 460, 7 N. E. 395, holding State not estopped
asserting title, by permitting improvements, where its title is
to notice; Woodruff v. Wallace, 3 Okl. 375, 41 Pac. 364, hol
homestead filing does not convey "color of title" within mea
of occupying claimants act of 1874.

Distinguished in Cameron v. United States, 148 U. S. 308, 3
462, 13 S. Ct. 598, holding color of title exists whenever reason
doubt exists regarding title.

Ejectment.— Adverse holding is not in good faith, where p
knows that he has no title, and that under law he can acquire
by occupation; hence, benefit of Dakota statute allowing defend
in ejectment holding adversely to claim of plaintiff, in good f
to set up value of improvements, denied defendant occup
mineral lands claimed by plaintiff, p. 407.

Approved in Sparks v. Pierce, 115 U. S. 412, 29 L. 429, 6 S
105, holding mere occupancy of public lands gave no vested ri
against government or its grantees; Litchfield v. Sewell, 97 I
251, 66 N. W. 106, holding possession under quitclaim from c
pant known to have no title, not adverse; Woodruff v. Wallac
Okl. 378, 41 Pac. 365, holding party whose homestead entry
been cancelled for fraud, not entitled to benefits of occupying cl
ants act of 1874.

115 U. S. 408–413, 29 L. 428, SPARKS v. PIERCE.

Mines and minerals.— Patent for mineral lands is itself evid
that all requirements of law, for sale thereof, have been com
with, p. 412.

ved in Irvine v. Tarbat, 105 Cal. 243, 38 Pac. 897, holding unattackable collaterally; Butte City Smoke-House Lode Mont. 409, 12 Pac. 864, holding mineral patent evidence of nce with law in all proceedings prior to issuance.

: lands.— Mere occupancy of public lands, and improve- hereon, give no vested right as against government, or its , p. 413.

ved in Hays v. United States, 175 U. S. 260, 20 S. Ct. 84, possession since treaty of Guadaloupe Hidalgo, will not con- ; Southern Pac. Ry. v. Purcell, 77 Cal. 71, 18 Pac. 887, mere possession of public lands gives no right as against ent; King v. Thomas, 6 Mont. 411, 12 Pac. 866, holding of limitations cannot run against mining claim until issu- patent; Mills v. Traver, 35 Neb. 296, 53 N. W. 68, holding f limitations only runs against entryman in favor of adverse , where former's right to patent vests; Parker v. Lynch, 0, 56 Pac. 1091, holding offer to file contest against home- try, gives no right in land; Wilson v. Triumph, etc., Min. Utah, 74, 56 Pac. 302, holding, as against one connecting with government, mere occupancy cannot avail.

guished in Bonner v. Meikle, 82 Fed. 700, holding occupants lots on public lands have possessory right, entitling them to issuance of patent to claimant of mining location therein; . Price, 54 Ark. 258, 15 S. W. 885, holding occupant, with purchase, may attack patent fraudulently issued to another.

: lands.— To entitle party to relief against patent, it is not to show patentee's want of right, but it must affirmatively hat officers of land department should have issued it to instead, p. 413.

rmed in Lee v. Johnson, 116 U. S. 50, 29 L. 571, 6 S. Ct. 240, v. Sanford, 139 U. S. 648, 35 L. 292, 11 S. Ct. 667, Bangs v. son, 63 Mich. 669, 30 N. W. 320, South End Min. Co. v. 22 Nev. 33, 35 Pac. 93 (but see dissenting opinion in 22 35 Pac. 102), and Sanford v. Sanford, 19 Or. 5, 13 Pac. 603. d in Driver v. Evans, 47 Ark. 300, 1 S. W. 519, holding of swamp land from State, provable only by deed.

d in Duluth, etc., Ry. v. Roy, 173 U. S. 590, 19 S. Ct. 550, claimant against patent must so far bring himself within to entitle him to complete claim.

: lands.— Party making improvements on public land, know- he has no title, and of its mineral nature, and making no secure title, cannot claim compensation for his improve- s adverse holder in good faith, when sale is made to an- der mineral patent, p. 413.

Approved in State v. Portsmouth Sav. Bank, 106 Ind. 460, 7
394, holding permitting improvements to be made, does not
State from asserting title, where its title was open to notice.

115 U. S. 413–429, 29 L. 435, ALABAMA v. BURR.

Corporations.— Liability of railroad officers and stockhold
State, on its loan, under Alabama acts of 1867, 1870, is sta
only, and recovery can be had only when facts stated in decla
bring them within operation of liability clause in statute, p.

Cited in Wisconsin v. Pelican Ins. Co., 127 U. S. 296, 32 L
8 S. Ct. 1377, arguendo.

Railroads.— Obligation to use State indorsed bonds to buil
equip railroad, is satisfied by actual completion thereof, in a
ance with statute, at bona fide cost to company of more than a
of bonds, p. 427.

Pleadings must state facts, not conclusions of law, p. 429.

Approved in Stutsman County v. Mansfield, 5 Dak. 86, 37
398, holding conclusion in pleading of no legal effect; diss
opinion in Fideler v. Norton, 4 Dak. 282, 32 N. W. 59, arguend

115 U. S. 429–439, 29 L. 419, EACHUS v. BROOMALL.

Patents.— Comparison of two patents to determine qu
raised, as to identity of inventions therein described, requires
pretation of original patent, in light of state of the art when
cation was filed, p. 434.

Approved in Grier v. Wilt, 120 U. S. 429, 30 L. 718, 7 S. C
holding other patents admissible evidence to show prior state
Britton v. White Mfg. Co., 61 Fed. 96, and Martin, etc.,
Martin, 67 Fed. 787, 33 U. S. App. 157, both holding proof of
state of art admissible to aid in construction of patent; Kenn
Solar Ref. Co., 69 Fed. 719, holding proof of prior state of a
missible without notice in pleadings; Missouri, etc., Mfg.
Stempel, 75 Fed. 584, investigating state of art to determine wh
patent should be construed broadly or narrowly.

Patent No. 142, 154, to Eachus, for cutting paper boards, co
only particular organization of machine described, and not pr
p. 436.

Cited obiter in Arnheim v. Finster, 26 Fed. 280.

Patent.— Where original patent is for machine, reissue att
ing to cover process also, is invalid, p. 438.

Approved in Eastern Paper-Bag Co. v. Standard, etc., Co., 3
65, holding claim to process cannot be secured by reissuing ma
patent.

115 U. S. 439–453, 29 L. 440, GIBSON v. LYON.

Mortgagee is under no obligation to accept offer of stranger to pay mortgage debt, in consideration of assignment of mortgage to third party, p. 445.

Ejectment.— In Pennsylvania, former judgment in ejectment is no bar to subsequent action, p. 445.

Approved in Barber v. Pittsburgh, etc., Ry., 166 U. S. 99, 41 L. 933, 17 S. Ct. 491, and Barber v. Pittsburgh, etc., Ry., 69 Fed. 503, both holding single judgment in ejectment in Pennsylvania, not conclusive in Federal courts.

Courts.— Judgment of highest State court, on question of local law, is entitled to greatest respect in Supreme Court, p. 446.

Approved in Miller v. Ammon, 145 U. S. 423, 36 L. 761, 12 S. Ct. 885, following Illinois court's construction of city ordinance; Balkam v. Woodstock Iron Co., 154 U. S. 189, 38 L. 957, 14 S. Ct. 1014, following State construction of State statute of limitations; Buchanan v. Denig, 84 Fed. 865, following State court's construction of will.

Courts.— State court judgment on local law is not conclusive in Federal courts, unless a rule of property, p. 446.

Approved in Barber v. Pittsburgh, etc., Ry., 166 U. S. 100, 41 L. 933, 17 S. Ct. 491, holding single State judgment on construction of will, not conclusive.

Estoppel.— Party cannot be permitted to claim both under and against same deed; hence, purchaser under sale of Probate Court is estopped to deny its authority to sell subject to incumbrances, p. 447.

Approved in Merritt v. Byers, 46 Minn. 78, 48 N. W. 418, holding grantee accepting expressly subject to mortgage, estopped to claim benefit of prior warranty against incumbrances; Scanlon v. Alexander, 71 Minn. 358, 70 Am. St. Rep. 329, 74 N. W. 148, holding vendee assuming mortgage, estopped to claim obligation thereof usurious.

Judicial sales.— Fact that judgment was erroneous, and might have been reversed on error, does not invalidate sale thereunder, before reversal, p. 453.

Approved in Andrews v. National, etc., Works, 77 Fed. 776, 46 U. S. App. 622, 36 L. R. A. 154, and n., holding foreclosure sale not attackable collaterally, in subsequent creditor's bill.

115 U. S. 454–463, 29 L. 449, GAGE v. PUMPELLY.

Courts.— Highest State court decisions, establishing rules of property, will be followed by Federal courts, p. 462.

Approved in Lowndes v. Huntington, 153 U. S. 19, 38 L. 618, 14 S. Ct. 760, holding State decisions on purposes for which submerged

land may be granted, controlling; San Diego Flume Co. v. Sout
90 Fed. 168, 61 U. S. App. 142, holding State decision on power
irrigating companies, controlling.

Taxation.— In Illinois, tax sale of land is void, when portio
tax is illegal, p. 462.

Approved in Baldwin v. Elizabeth, 42 N. J. Eq. 14, 6 Atl.
but holding claimant must pay legal tax before sale can be
aside; Morris v. Roseberry, 46 W. Va. 29, 32 S. E. 1021, but hol
claimant must reimburse purchaser for taxes paid.

Appellate court cannot consider objection, on part of appellee
decree appealed from, p. 463.

115 U. S. 464, 29 L. 446, JONES v. BENTHUYSEN.

Internal revenue.— Tobacco merchant is not liable to be ta
for revenue stamps required, before removal from bonded w
house, unless affixed at time of sale, and part of price paid b
p. 464.

Not cited.

115 U. S. 465-469, 29 L. 445, LEONARD v. OZARK LAND CO.

Injunction ordered by final decree is not vacated by app
p. 468.

Approved in Knox County v. Harshman, 132 U. S. 16, 33 L.
10 S. Ct. 9, and Teasdale v. Jones, 40 Mo. App. 250, both hold
appeal from order dissolving injunction does not revive same; S
v. Dillon, 96 Mo. 62, 8 S. W. 783, and Ex parte Whitmore, 9 U
447, 35 Pac. 526, both holding lower court may punish violation
injunction, pending appeal.

Distinguished in Neiser v. Thomas, 46 Mo. App. 51, holding app
with supersedeas does not keep restraining order in force.

Injunction.— Supreme Court may modify injunction granted
decree below, in advance of final hearing of appeal on merits, p.

Injunction.— Under Supreme Court equity rule 93, judge be
may, when allowing appeal from final injunction decree, m
order that injunction continue in force, p. 469.

Approved in Ferguson v. Dent, 29 Fed. 9, refusing to dispos
receiver, pending appeal; American, etc., Co. v. Indianapolis Ws
Co., 81 Fed. 423, 46 U. S. App. 526, refusing to suspend injunct
pending appeal, previous to hearing on merits; dissenting opinion
Elliot v. Whitmore, 10 Utah, 245, 37 Pac. 461, majority holding
fusal of supersedeas to stay injunction against taking water, er

115 U. S. 469-476, 29 L. 446, ST. LOUIS, ETC., RY. v. McGEE.

Public lands granted by Congress, to aid railroad constructi
do not revert, after condition broken, until forfeiture has been

serted by government, either through courts or legislative action, equivalent to office found, p. 474.

Reaffirmed in Houston, etc., Ry. v. Texas, 170 U. S. 260, 42 L. 1029, 18 S. Ct. 616, Farmers' Loan, etc., Co. v. Chicago, etc., Ry., 39 Fed. 149 (overruled, see Angle v. Chicago, etc., Ry., 151 U. S. 27, 36), Northern Pac. Ry. v. Cannon, 46 Fed. 239, Steele v. Walker, 115 Ala. 490, 67 Am. St. Rep. 65, 21 So. 944, Wilson v. Beckwith, 117 Mo. 76, 22 S. W. 642, and United States Trust Co. v. Atlantic, etc., Ry., 8 N. Mex. 685, 47 Pac. 728. Approved in Doe v. Larmore, 116 U. S. 198, 29 L. 598, 6 S. Ct. 365, a like case; Bybee v. Oregon, etc., Ry., 139 U. S. 675, 35 L. 307, 11 S. Ct. 643, construing grant of 1866 to Central Pacific railroad; Lake Superior Ry. v. Cunningham, 44 Fed. 822 (but see dissenting opinion, p. 841), holding subsequent grant to another, without assertion of forfeiture, void; Orr v. State, 56 Ark. 110, 19 S. W. 320, holding only State can take advantage of non-payment of interest on school lands; Wilson v. Beckwith, 140 Mo. 386, 41 S. W. 992, holding grants to State for railroads, grants in præsenti; The Wisconsin Cent. Ry. v. Comstock, 71 Wis. 92, 36 N. W. 845, holding fully-earned railroad lands liable to State taxation, prior to patent; Shepard v. Northwestern Ins. Co., 40 Fed. 353, arguendo.

Public lands.— Legislation, to be a sufficient assertion of forfeiture of railroad lands, for condition broken, must clearly manifest intention by Congress to reassert title, and resume possession; act of July 28, 1866, relating to grants in Arkansas and Missouri, manifests no such intention, p. 474.

Approved in Doe v. Larmore, 116 U. S. 199, 29 L. 598, 6 S. Ct. 366, holding act of April 10, 1869, an extension of time in original grants; New York Indians v. United States, 170 U. S. 25, 42 L. 936, 18 S. Ct. 537, holding treaty of 1838 vested legal title to reservation in Indians; United States v. Union Pac. Ry., 37 Fed. 553, holding Congress' intent to work forfeiture must be clear; Lake Superior, etc., Ry. v. Cunningham, 44 Fed. 827, construing joint resolution of July 5, 1862.

Cited, but application denied, in Miller's Executors v. Swann, 150 U. S. 137, 37 L. 1030, 14 S. Ct. 54, and Miller v. Swann et al., 89 Ala. 637, 7 So. 773.

Distinguished in Shepard v. Northwestern Ins. Co., 40 Fed. 352, 354, holding act of July 3, 1866, assertion of forfeiture of Amboy, etc., railway's grant; De Lancey v. Piegras, 138 N. Y. 40, 33 N. E. 825, holding act authorizing sale, sufficient assertion of forfeiture.

115 U. S. 477–481, 29 L. 453, DREW v. GRINNELL.

Customs duties.— Article of silk and cotton, sold as "dotted net," but really a lace, in which silk is component of chief value, is dutiable as silk lace, p. 481.

[illegible] Dates on U. S. Reports.

[illegible] v. [illegible], 145 U. S. 257, 36 L. [illegible] "State Currents," [illegible] general classificat[illegible]

[illegible] v. ABOHURS.

[illegible] replevin agains[illegible]

[illegible]—Where, under agreement to p[illegible] no right to [illegible] If he cuts timb[illegible] he has no such posses[illegible]

[illegible] 39 Fed. 136, incidentally, furt[illegible]

[illegible]—Pennsylvania act of 1871, reg[illegible] does not apply to tenants in common.

[illegible] v. MOFFITT.

[illegible] by one arrested for crime, is [illegible] to assert civil right of pers[illegible] as a criminal, p. [illegible]

[illegible] v. Burke, 146 U. S. 88, 36 L. 898, [illegible] judgments of Supreme Court [illegible] King v. McLean Asyl[illegible] 786, upholding juris[illegible] by citizen of one State see[illegible] by citizen of another.

[illegible]—Federal jurisdiction on rem[illegible] a certain sum or value, inclu[illegible] can be valued in money; h[illegible] under act of March 3, 1875, p. 49[illegible]

[illegible] v. United States, 118 U. S. 354[illegible] Territorial Sup[illegible] with more than [illegible] 32 L. 618, 9 S. C[illegible] Territorial Supreme Court, to [illegible] guilty of misdemeanor; Lau[illegible] 36 L. 344, 12 S. Ct. 520[illegible] Court of Appeals in habeas c[illegible] 38 L. 744, 14 S. Ct. [illegible] mandamus to compel re[illegible] Simms v. Simms, 175 U. S. 1[illegible] from decree of Territorial Su[illegible] v. Board of Supervisors, 1[illegible]

28 Fed. 225, holding mandamus not removable under act of 1875; Chappell v. Chappell, 86 Md. 544, 39 Atl. 989, holding divorce proceeding not removable, although involving alimony; In re Borrego, 8 N. Mex. 657, 46 Pac. 211, holding no appeal lies from Territorial Supreme Court to United States Supreme Court, in habeas corpus proceedings; Huskins v. Cincinnati, etc., Ry., 37 Fed. 508, arguendo.

Distinguished in Smith v. Whitney, 116 U. S. 173, 29 L. 602, 6 S. Ct. 573, sustaining appellate jurisdiction of judgment of Supreme Court, District of Columbia, dismissing petition for prohibition to court-martial, where offense was punishable by deprivation of salary exceeding $5,000; Erwin v. Walsh, 23 Blatchf. 536, 27 Fed. 581, holding mandamus to compel allowance of appeal from probate of will, removable.

Arrest.— At common law, neither civil officer nor private citizen had right, without warrant, to arrest for crime not committed in his presence, except in case of felony, p. 499.

Approved in Mackin v. United States, 117 U. S. 352, 29 L. 911, 6 S. Ct. 779, holding crime punishable by imprisonment in State prison, an infamous crime, within fifth constitutional amendment; United States v. Johannesen, 35 Fed. 413, holding punishment for violation of internal revenue laws, "infamous;" Palmer v. Maine Cent. Ry., 92 Me. 408, 409, 69 Am. St. Rep. 516, 517, 518, 42 Atl. 803, 44 L. R. A. 675, denying right to arrest without warrant, on complaint of "fraudulently evading payment of fare;" Scott v. Eldridge, 154 Mass. 27, 27 N. E. 677, 12 L. R. A. 382, holding officer cannot arrest without warrant, for past misdemeanor, committed in another State.

Army and navy.— Courts-martial form no part of judicial system of United States, and their proceedings, within limits of their jurisdiction, cannot be controlled or revised by civil courts, p. 500.

Approved in Smith v. Whitney, 116 U. S. 177, 29 L. 604, 6 S. Ct. 575, holding prohibition does not lie to court-martial to correct mistakes of law or facts on its decision; Johnson v. Sayre, 158 U. S. 115, 39 L. 917, 15 S. Ct. 776, holding paymaster's clerk in navy subject to trial by court-martial, for embezzlement; In re Kelly, 71 Fed. 553, holding United States criminal laws do not apply upon lands ceded for home for disabled volunteers.

Army and navy.— Desertion is exclusively a military crime, punishable by court-martial only, p. 501.

Army regulations derive their force from power of president, as commander-in-chief, and are binding upon all within sphere of his constitutional authority, p. 503.

Arrests.— Rule that peace officer, or private citizen, may, without warrant, arrest felon, does not extend to offender against military law; e. g., deserter, p. 504.

Approved in Kendall et al. v. Scheve, 3 Ohio C. C. 528, deny power of policeman to arrest deserter.

115 U. S. 505–512, 29 L. 456, SHEPERD v. MAY.

Vendor and purchaser.— Agreement merely to take land, subj to specified incumbrance, is not agreement to assume and pay sa and to raise such liability there must be words in deed from wh agreement to pay may be inferred, p. 510.

Approved in Winters v. Hub Min. Co., 57 Fed. 289, holding m gagee can only recover in equity against grantee assuming inc brance; Chilton v. Brooks, 72 Md. 558, 20 Atl. 127, holding gran does not assume mortgage debt by implication; Pendleton v. C ling, 11 Mont. 50, 27 Pac. 389, reaffirming rule; Lavelle v. Gord 15 Mont. 519, 39 Pac. 741, holding assignee of half interest in c tract to purchase land, not personally liable for payments; Gran v. Roll, 6 S. Dak. 619, 625, 62 N. W. 972, 974, holding grantee property subject to mortgage, not personally liable; Michigan S ings, etc., Co. v. Attebery, 16 Tex. Civ. App. 226, 42 S. W. holding purchaser of incumbered property estopped to deny l but not personally bound to pay debt.

Principal and surety.— There being no mutual agreement tween grantor, grantee and incumbrancer to that effect, relation principal and surety does not exist between grantee and grant hence, latter is not discharged of his liability by agreement extension of mortgage between other parties, p. 511.

Approved in Compton v. Jesup, 68 Fed. 318, 31 U. S. App. holding no novation unless mortgagee releases mortgagor and agr to look to grantee; Campbell v. Clay, 4 Colo. App. 553, 36 Pac. holding agreement between mortgagor and grantee for latter assume debt, does not affect mortgagee; Fish v. Glover, 154 Ill. 39 N. E. 1082, holding conveyance to one assuming mortgage d does not make mortgagor surety as to mortgagee; Chilton v. Bro 72 Md. 559, 20 Atl. 127, holding relation of principal and sur does not arise between grantor and grantee of mortgaged prope Washington Slate Co. v. Burdick, 60 Minn. 271, 62 N. W. 286, Guderian v. Leland, 61 Minn. 71, 63 N. W. 175, but holding bur on surety to prove extension given principal without his conse Shapleigh Hardware Co. v. Wells et al., 90 Tex. 112, 59 Am. St. 784, 37 S. W. 411, holding several debtors cannot, by mutual ag ment, change liability of one from principal to surety; dissent opinions in Hall et al. v. Johnston et al., 6 Tex. Civ. App. 24 S. W. 865, majority holding retiring partners discharged by tension of time to grantee by creditors; Willard v. Wood, 164 U 520, 41 L. 539, 17 S. Ct. 180, arguendo.

Distinguished in Keller v. Ashford, 133 U. S. 625, 33 L. 674, S. Ct. 498, where grantee assumed debts; Union Life Ins. Co. Hanford, 142 U. S. 190, 36 L. 120, 12 S. Ct. 438, holding, in Illin

grantee of mortgaged property becomes principal, and mortgagor surety; Travers v. Dorr, 60 Minn. 177, 62 N. W. 270, holding extension to grantee, without consent of mortgagor, releases latter to extent of value of land; Pratt v. Conway, 148 Mo. 295, 71 Am. St. Rep. 604, 49 S. W. 1029, holding grantee assuming mortgage debt principal, and mortgagor surety; Poe v. Dixon, 60 Ohio St. 130, 71 Am. St. Rep. 715, 54 N. E. 87, where grantee, as part of purchase price, assumed mortgage debt.

Mortgages.— Trust deed clause, providing that terms of sale should be amount due on note, and expenses of sale in cash, does not estop holder from denying payment in full, where he purchased at trust sale for sum less than amount due, p. 511.

Approved in Mallory v. Kessler, 18 Utah, 15, 72 Am. St. Rep. 766, 54 Pac. 892, holding amount realized on trust sale, payment on note, holder having action for deficiency; Granger v. Roll, 6 S. Dak. 623, 62 N. W. 973, arguendo.

115 U. S. 512-523, 29 L. 463, MISSOURI PAC. RY. v. HUMES.

Courts.— Highest State court's ruling on validity of State statute, under State Constitution, is not reviewable in Federal Supreme Court, p. 519.

Constitutional law.— If State laws be within legitimate sphere of legislative power, and enforced according to general rules prescribed for security of private rights, their harshness, injustice and oppressiveness will not invalidate them as affecting life, liberty, or property, without due process of law, p. 520.

Reaffirmed in New York, etc., Ry. v. Bristol, 151 U. S. 570, 38 L. 274, 14 S. Ct. 441, Marchant v. Pennsylvania Ry., 153 U. S. 387, 38 L. 755, 14 S. Ct. 896, Fallbrook Irr. Dist. v. Bradley, 164 U. S. 157, 41 L. 388, 17 S. Ct. 63, and St. Louis, etc., Ry. v. Mathews, 165 U. S. 24, 41 L. 620, 17 S. Ct. 252. Approved in Pembina Min. Co. v. Pennsylvania, 125 U. S. 190, 31 L. 654, 8 S. Ct. 741, sustaining exaction of State license fee from foreign corporation maintaining office therein; Kansas v. Bradley, 26 Fed. 291, holding State may absolutely prohibit manufacture or sale of intoxicants; Leep v. Railway Co., 58 Ark. 415, 41 Am. St. Rep. 113, 25 S. W. 77, 23 L. R. A. 268, holding oppressiveness of constitutional law cannot be considered by courts; Waters, etc., Oil Co. v. State, 19 Tex. Civ. App. 14, 44 S. W. 942, upholding laws prohibiting combinations restraining trade; Virginia, etc., Co. v. Crozier, etc., Co., 90 Va. 131, 44 Am. St. Rep. 897, 17 S. E. 808, holding fact that law is special does not invalidate it; Attorney-General v. Jochim, 99 Mich. 373, 41 Am. St. Rep. 618, 58 N. W. 615, 23 L. R. A. 705, arguendo.

Distinguished in State v. Loomis, 115 Mo. 312, 22 S. W. 351, 21 L. R. A. 803, and n. (but see dissenting opinion in 115 Mo. 323, 22 S. W. 354, 21 L. R. A. 806, and n.), holding law prohibiting mining or manufacturing corporations from paying in irredeemable "store checks," invalid.

Damages.—Legislature may fix amount of damages beyond c[illegible] pensation, for injuries resulting from gross negligence, or may [illegible] scribe limits within which jury may exercise discretion, p. 522.

Approved in New York, etc., Ry. v. Bennett, 50 Fed. 502, 6 U[illegible] App. [illegible], holding willful misconduct or gross negligence necess[illegible] to warrant punitory damages; Winters v. Cowen, 90 Fed. 103, h[illegible] ing [illegible] jury in awarding exemplary damages, may consider pl[illegible] tiff's expenses; Baker Wire Co. v. Chicago, etc., Ry., 106 Iowa, [illegible] 76 N. W. [illegible], holding action for damages for excessive frei[illegible] charges, within limitations applying to penal actions; Railro[illegible] v. [illegible], [illegible] Tenn. [illegible], [illegible] S. W. 621, upholding provision mak[illegible] unfenced railroads refusing to pay for injured stock, liable [illegible] attorney's fees; Mayer v. Frobe, 40 W. Va. 250, 261, 22 S. E. 59, [illegible] holding exemplary damages may be inflicted in civil suit. See [illegible] Am. St. Rep. [illegible], note.

Distinguished in S. A. & A. P. Ry. v. Wilson, 4 Tex. App. C[illegible] [illegible], holding law penalizing railroads failing to pay employees, [illegible]

Damages.—Power of States to impose fines and penalties for v[illegible] lations of statutory requirements is coeval with government, a[illegible] mode of enforcement, whether at suit of individual or of public, a[illegible] disposition of amounts collected, are within legislative discreti[illegible] hence receipt of punitory damages by sufferer instead of by St[illegible] cannot be objected to by tortfeasor, p. 523.

Approved in Barry v. Edmunds, 116 U. S. 564, 29 L. 733, 6 S. [illegible] [illegible], holding exemplary damages recoverable for malicio[illegible] trespass; Denver, etc., Ry. v. Harris, 122 U. S. 610, 30 L. 1148, 7 [illegible] Ct. [illegible], holding punitive damages depend upon malice, gross n[illegible] [illegible] or illegality of act; Minneapolis Ry. v. Beckwith, 129 U. [illegible] [illegible], [illegible] L. [illegible], [illegible] S. Ct. 208, upholding imposition of punitive damag[illegible] for violation of statutory duty; Dent v. West Virginia, 129 U. S. 1[illegible] [illegible] L. [illegible], [illegible] S. Ct. 234, sustaining enforcement of West Virginia st[illegible] [illegible] prescribing qualifications for practicing medicine, as to pers[illegible] practicing prior to passage thereof; Home Ins. Co. v. New York, 1[illegible] U. S. [illegible], [illegible] L. [illegible], 10 S. Ct. 597, holding validity of State tax up[illegible] domestic corporations, not dependent upon mode adopted in fixi[illegible] annual amount exacted for franchise; St. Louis, etc., Ry. v. Mathew[illegible] [illegible] U. S. [illegible], 41 L. 620, 17 S. Ct. 252, upholding law rendering ra[illegible] roads liable for loss from fires communicated by engines; Goodrid[illegible] v. Union Pac. Ry., 35 Fed. 36, holding Colorado act authorizing [illegible] covery of triple damages for freight-rate discrimination, penal; Ma[illegible] shall v. Wabash Ry., 46 Fed. 272, holding action for statutory pe[illegible] alty for death by defendant's negligence penal, and unenforceab[illegible] in Federal court in another State; Atchison, etc., Ry. v. Tanner, [illegible] Colo. 563, 36 Pac. 543, holding act making railroads liable for doub[illegible] value of animals killed, penal; Cameron v. Chicago, etc., Ry., [illegible] Minn. 389, 65 N. W. 654, 31 L. R. A. 556, upholding law allowi[illegible]

attorneys' fees in actions to recover possession of land unlawfully taken by railroads; Briggs v. St. Louis, etc., Ry., 111 Mo. 174, 20 S. W. 33, upholding law including attorneys' fees in judgments against unfenced railroads for injury to stock; In re Roe Chung, 9 N. Mex. 133, 49 Pac. 953, upholding law imposing fine for practicing medicine without certificate, and imprisonment for default; Railroads v. Crider, 91 Tenn. 502, 19 S. W. 621, upholding provision for appraisement by freeholders of stock injured by unfenced railroad; Mayer v. Frobe, 40 W. Va. 252, 254, 22 S. E. 60, 61, sustaining judgment for exemplary damages for selling liquor to plaintiff's husband; dissenting opinion in Atchison, etc., Ry. v. Matthews, 174 U. S. 120, 19 S. Ct. 618, arguendo. See also 25 Am. St. Rep. 873, and 62 Am. St. Rep. 169, notes.

Distinguished in Leep v. Railway Co., 58 Ark. 441, 41 Am. St. Rep. 133, 25 S. W. 85, 23 L. R. A. 276, upholding act making wages due by corporation, upon unwarranted discharge by corporation, and penalizing delay.

Constitutional law.— Missouri statute, requiring railroads to fence tracks and maintain cattle-guards, imposing double damages for injuries from failure to do so, does not deprive railroad of property without due process of law, or deny equal protection of laws, p. 523.

Approved in Hartford Ins. Co. v. Chicago, etc., Ry., 175 U. S. 101, 20 S. Ct. 37, holding validity of agreement exempting railroad from statutory liability for fires, question of local law; Savannah, etc., Ry. v. Geiger, 21 Fla. 700, holding fact that owner allowed stock to run at large does not release railroad; Dickson v. Omaha, etc., Ry., 124 Mo. 148, 46 Am. St. Rep. 433, 27 S. W. 478, 25 L. R. A. 324, and n., holding railroad liable for death of engineer caused by collision with bull on track; Northern Pac. Ry. v. Barnes, 2 N. Dak. 346, 51 N. W. 395, holding railroads may be classified by themselves for taxation purposes; Waters, etc., Oil Co. v. State, 19 Tex. Civ. App. 13, 44 S. W. 942, holding legal restraints on use of property do not deprive owner thereof without due process. Under authority of principal case, the following have been upheld: Missouri Ry. Co. v. Mackey, 127 U. S. 210, 32 L. 109, 8 S. Ct. 1163, Peirce v. Van Dusen, 78 Fed. 697, 47 U. S. App. 339, Pittsburgh, etc., Ry. v. Montgomery, 152 Ind. 13, 71 Am. St. Rep. 311, 49 N. E. 586, and Atchison, etc., Ry. v. Kœhler, 37 Kan. 469, 15 Pac. 571, laws making railroads liable to employees for injuries by fellow servants; Powell v. Pennsylvania, 127 U. S. 687, 32 L. 257, 8 S. Ct. 997, Pennsylvania statute, prohibiting sale of imitation butter; Minneapolis Ry. v. Beckwith, 129 U. S. 31, 32 L. 587, 9 S. Ct. 208, similar Iowa statute; Pacific Exp. Co. v. Seibert, 142 U. S. 355, 35 L. 1040, 12 S. Ct. 249, Missouri act defining and taxing express companies; Charlotte, etc., Ry. v. Gibbes, 142 U. S. 394, 35 L. 1055, 12 S. Ct. 257, South Carolina tax on gross income of railroads in proportion to mileage in State;

St. Louis, etc., Ry. v. Mathews, 165 U. S. 18, 41 L. 618, 17 S. Ct. 2
and Leavitt v. Canadian Pac. Ry., 90 Me. 159, 37 Atl. 888, 38 L.
A. 153, statutes making railroads liable for losses from fires co
municated by locomotives; Atchison, etc., Ry. v. Matthews, 174
S. 98, 19 S. Ct. 610 (but see dissenting opinion in 174 U. S. 109,
S. Ct. 614), Kansas law making railroads liable for damages fro
fire, with attorneys' fees; Western Union Tel. Co. v. New Yo
38 Fed. 559, 3 L. R. A. 454, law requiring electric wires to be plac
under street surface; Pacific Exp. Co. v. Seibert, 44 Fed. 317, a
taxing express companies on receipts for business done in Sta
Jacksonville, etc., Ry. v. Prior, 34 Fla. 284, 285, 15 So. 764, Lou
ville, etc., Ry. v. Belcher, 89 Ky. 199, 12 S. W. 197, and Dacres
Oregon, etc., Nav. Co., 1 Wash. 531, 20 Pac. 604, acts making ra
roads liable for stock killed on unfenced tracks; Missouri Pac. R
v. Merrill, 40 Kan. 409, 19 Pac. 795, statutes making occurrence
fire caused by operation of railroad prima facie evidence of neg
gence thereof; Chicago, etc., Ry. v. State, 47 Neb. 571, 53 Am. S
Rep. 568, 66 N. W. 629, 41 L. R. A. 485, requirement that railroa
keep in repair viaducts over streets crossed by tracks; McGow
v. Wilmington, etc., Ry., 95 N. C. 428, law imposing penalty f
failing for five days to forward freight; Railroads v. Crider,
Tenn. 497, 19 S. W. 620, law fixing upon unfenced railroads absolu
liability for injuries to live-stock; Phœnix Ins. Co. v. Levy, 12 Te
Civ. App. 48, 33 S. W. 993, law applying to all fire insurance co
panies alike; Virginia, etc., Co. v. Crozier, etc., Co., 90 Va. 130,
Am. St. Rep. 896, 17 S. E. 807, law creating liens on manufacturi
corporations, superior to their deeds of trust.

Approved also in dissenting opinion in New York Life Ins. C
v. Smith, — Tex. Civ. App. —, 41 S. W. 689, majority holding la
making defaulting insurance companies liable to policy-holders
additional damages, invalid; Pennsylvania Ry. v. Miller, 132 U.
83, 33 L. 272, 10 S. Ct. 37, reprinted in 129 Pa. St. 199, arguend
See 52 Am. Rep. 375, note, 20 Am. St. Rep. 558, note on "due pro
ess," 25 Am. St. Rep. 884, monographic note on fourteenth amen
ment, 59 Am. St. Rep. 608, note on liability of corporations for e
emplary damages, and 62 Am. St. Rep. 170, note on protection
corporations from hostile legislation.

Distinguished in Huntington v. Attrill, 146 U. S. 680, 36 L. 113
13 S. Ct. 232, holding courts of one State will not enforce penal sta
utes of another; Gulf, etc., Ry. v. Ellis, 165 U. S. 158, 41 L. 669, 1
S. Ct. 258, holding provision for recovery of attorneys' fees invali
where statute did not compel maintaining fences; Dow v. Beide
man, 49 Ark. 456, 5 S. W. 718, upholding act making railroad liab
for penalty and attorneys' fees for overcharging passengers; Wad
worth v. Union Pac. Ry., 18 Colo. 611, 36 Am. St. Rep. 318, 33 Pa
519, 23 L. R. A. 817, holding Colorado stock-killing statute unco
stitutional; S. A. & A. P. Ry. v. Wilson, 4 Tex. App. Civ. 570, hol
ing law penalizing failure of railroads to pay employees withi
specified time, unconstitutional.

115 U. S. 523-524, 29 L. 467, MISSOURI PAC. RY. v. TERRY.

Argued and decided with preceding case, q. v.

115 U. S. 524-527, 29 L. 480, DAVIS SEWING-MACH. CO. v. RICHARDS.

Guaranty.— If guaranty is signed by guarantor at request of other party, or if latter's agreement to accept is contemporaneous with guaranty, or if receipt from him of any valuable consideration is acknowledged in guaranty, delivery of guaranty to other party completes contract, p. 527.

Approved in Hall v. Weaver, 13 Sawy. 194, 34 Fed. 108, holding one executing bond with another, conditioned for repayment of advance to principal by obligee, not a mere guarantor; Doud v. National Park Bank, 54 Fed. 847, 2 U. S. App. 655, holding personal guaranty by stockholders of bank to another bank, in consideration of loans, requires no notice of acceptance.

Guaranty signed by guarantor without previous request of other party, in his absence, and for no consideration moving between them except future advances to be made to principal debtor, is, in effect, an offer on part of guarantor requiring other party's acceptance to complete contract, p. 527.

Approved in Barnes Cycle Co. v. Reed, 84 Fed. 605, reaffirming rule; Saint v. Wheeler, etc., Mfg. Co., 95 Ala. 373, 36 Am. St. Rep. 213, 10 So. 541, Lennox v. Murphy, 171 Mass. 378, 50 N. E. 646, De Cremer v. Anderson, 113 Mich. 580, 71 N. W. 1091, Winnebago, etc., Mills v. Travis, 56 Minn. 484, 58 N. W. 37, and Deering Harvesting Co. v. Sulser, 78 Mo. App. 675, all holding such proposal requires acceptance by guarantee and notice thereof to guarantor; Page v. White, etc., Mach. Co., 12 Tex. Civ. App. 332, 34 S. W. 991, holding, where guarantor alone contracts with guarantee to stand responsible for acts of third party, rules as to notice obtain.

Limited in Barnes Cycle Co. v. Reed, 91 Fed. 482, 63 U. S. App. 288, holding direct proof of notice not essential, circumstances warranting jury in finding same. Distinguished in Ferst & Co. v. Blackwell, 39 Fla. 625, 22 So. 894, holding offer of continuing guaranty, accepted by guarantee's agent, requires no further notice; Bryant v. Stout, 16 Ind. App. 394, 44 N. E. 72, holding acceptance unnecessary where bond signed by guarantors was delivered to guarantee.

115 U. S. 528-542, 29 L. 467, TRÆR v. CLEWS.

Courts.— Supreme Court has jurisdiction to review judgment of highest State court on validity of transfer by trustee in bankruptcy, and limitations under bankrupt act, p. 534.

Bankruptcy.— Two years' limitation under bankruptcy act does not begin to run against action founded on fraud, plaintiff being innocent of negligence or laches, until discovery of fraud, p. 538.

Approved in Kirby v. Lake Shore, etc., Ry., 120 U. S. 137, 30
572, 7 S. Ct. 434, and McKneely v. Terry, 61 Ark. 544, 33 S. W. 9
both holding statute runs only from notice of fraud; Avery v. Clea
132 U. S. 610, 33 L. 472, 10 S. Ct. 222, holding the assignee must
free from laches in discovering fraud; Foster v. Mansfield Ry.,
Fed. 638, discussing what constitutes concealment of fraud su
cient to keep statute from running; Lant v. Manley, 75 Fed. 635,
U. S. App. 623, holding statute does not run against action to
aside fraudulent conveyance until discovery thereof; Anderson
Northrop et al., 30 Fla. 643, 12 So. 326, action by remaindermen
recover property remaining in executor's possession; Deake, A
pellant, 80 Me. 56, 12 Atl. 793, holding bar against action to est
lish concealed will does not begin to run until discovery.

Distinguished in Rock v. Dennett, 155 Mass. 503, 30 N. E. 1
holding writ of entry to recover land conveyed to demandant
assignee, two years after assignee has been disseized, barred.

Assignment of mere right to file bill for fraud committed up
assignor, is void as contrary to public policy, and savoring of ma
tenance, p. 539.

Reaffirmed in Gruber v. Baker, 20 Nev. 475, 23 Pac. 865, 9 L.
A. 309.

Distinguished in Edmunds v. Illinois Cent. Ry., 80 Fed. 84, ho
ing claims for damages to recover overcharges, under interst
commerce law, assignable.

Vendor and purchaser.— Conveyance of property is not inva
dated by fact that grantee may be compelled to sue to enforce
right thereto, p. 539.

Approved in Edmunds v. Illinois Cent. Ry., 80 Fed. 80, 81, holdi
choses in action, constituting property rights passing to legal r
resentative, assignable; Snell v. Harrison, 104 Mo. 191, 16 S. W. 1
holding transfer carries right to have fraudulent deed cancelled.

Bankrupt, after adjudication of bankruptcy, and prior to d
charge, may purchase property surrendered to assignee, p. 541.

Approved in Sparhawk v. Yerkes, 142 U. S. 14, 35 L. 918, 12
Ct. 106, holding discharged bankrupt may purchase like strang
In re Herdic, 40 Fed. 361, holding discharged bankrupt may p
chase at assignee's sale; Harrison v. Powers, 76 Ga. 243, holdi
relations of parties to commercial paper, unaffected after dischar

115 U. S. 542-550, 29 L. 489, FERRY v. LIVINGSTON.

Customs duties.— Beet and cabbage seeds held "garden seed
and certain mangel-wurzel and turnip seeds, contra, under tariff
1883, p. 549.

Approved in Robertson v. Salomon, 130 U. S. 415, 32 L. 996, 9
Ct. 560, arguendo, beans; Clay v. Magone, 40 Fed. 232, reaffirmi
ruling.

115 U. S. 550–565, 29 L. 472, THOMPSON v. ALLEN COUNTY.

Equity.— Inadequacy of law, justifying interference of equity, consists in fact that in its nature or character it is not fitted or adapted to end in view, p. 554.

Approved in Burdon, etc., Co. v. Leverich, 37 Fed. 68, holding legal remedy for breach of contract to have sugar crop refined at certain refinery, adequate; Safe-Deposit, etc., Co. v. Anniston City, 96 Fed. 663, denying equitable relief where legal remedy exists in theory, though inadequate in practice.

Equity — Municipal corporations.— It is not within province of a court of equity to levy and collect taxes through its receiver, to satisfy judgments against municipal corporations, even where remedy at law by mandamus has proved ineffectual, because no municipal officers can be found who will act, p. 558.

Approved in O'Brien v. Wheelock, 78 Fed. 679, holding Federal courts will not act as tax collectors; Safe-Deposit, etc., Co. v. Anniston City, 96 Fed. 662, holding equity cannot subject funds of insolvent municipality to payment of judgment; Baldwin v. Auditor, 88 Ky. 681, 11 S. W. 805, holding, in absence of legislative authority, taxes not recoverable by suit; Grand Rapids, etc., Co. v. Trustees, — Ky. —, 44 S. W. 99, holding failure of trustees to secure tax collector does not justify equity collecting tax; Pierce County v. Merrill, 19 Wash. 178, 52 Pac. 854, denying jurisdiction of equity to collect taxes or appoint receiver to do so; Wilder v. New Orleans, 87 Fed. 849, arguendo.

Distinguished in Boody v. Watson, 64 N. H. 187, 9 Atl. 813 (see dissenting opinion in 64 N. H. 206, 9 Atl. 827), upholding judicial power to correct erroneous exemption by assessing board.

115 U. S. 566–576, 29 L. 495, EFFINGER v. KENNEY.

Contracts made in Confederate States, in Confederate money, but not in aid of insurrectionary government, are enforceable, p. 571.

Contracts.— Value of contracts, payable in Confederate notes, is to be determined by value of Confederate notes in United States money at time and place where contracts were made, p. 574.

Followed in White v. White, 50 La. Ann. 108, 23 So. 97.

Constitutional law.— Virginia statute of 1867, providing that fair value of property sold during Rebellion may be measure of recovery instead of express terms of contract, is an impairment of contract obligations, p. 576.

115 U. S. 577, 29 L. 498, KENNEY v. EFFINGER.

Appeal and error.— Whether or not bond was executed with reference to Confederate notes is question of fact for State court, and not reviewable on writ of error thereto, p. 577.

Approved in Dower v. Richards, 151 U. S. 671, 38 [illegible] 487, denying power, on error to highest State cou[illegible] judgment on question of fact.

[illegible] HARRISON v. MERRITT.

Customs duties.—Bone-black, for decolorizing sugar, [illegible] under R. S., § 2504, as "black of bone," and not exe[illegible] "burned" or manufactured, p. 579.

Not cited.

[illegible] ARNSON v. MURPHY.

Customs duties.—Under R. S., § 2931, 3011, for rec[illegible] cess duties, importer must show full compliance with st[illegible] difficulties; e. g., due protest, appeal, decision on appeal, a[illegible] of suit within time limited, pp. 584, 586.

Approved in Savings Inst. v. Blair, 116 U. S. 206, 29 [illegible] Ct. 358, and Commissioners v. Buckner, 48 Fed. 535, bo[illegible] rule to suits to recover internal revenue taxes; Auffmo[illegible] den, 137 U. S. 325, 34 L. 679, 11 S. Ct. 107, holding ap[illegible] termination conclusive collaterally; Hager v. Swayne, 14[illegible] 37 L. 720, 13 S. Ct. 842, holding common-law action agai[illegible] superseded by statutory; Saltonstall v. Russell, 152 U. S[illegible] 678, 14 S. Ct. 735, holding protest and appeal prerequisi[illegible] v. Brewster, 46 Fed. 474, 476, holding stipulation of co[illegible] duties on succeeding entries be governed by decision on [illegible] binding.

Customs duties.—Conditions imposed by statute for [illegible] excess duties cannot be regarded as matters failure to c[illegible] which must be pleaded by defendant as a statute of li[illegible] 584.

Approved in Beard v. Porter, 124 U. S. 443, 31 L. 494, [illegible] holding declaration need not show suit to have been bro[illegible] limitation of section; Schoenfeld v. Hendricks, 152 U. S[illegible] 602, 14 S. Ct. 735, holding statutory action exclusive [illegible] Merritt, 24 Blatchf. 217, 29 Fed. 683, arguendo.

Customs duties.—Decision of secretary of treasury [illegible] from protest against excess duties, is not required to b[illegible] cated to claimant, p. 586.

Approved in Tyre, etc., Co. v. Spalding, 116 U. S. 547[illegible] 6 S. Ct. 501, holding decision of secretary conclusive un[illegible] is shown in suit; John Shillito Co. v. McClung, 51 Fed. [illegible] App. 128, affirming S. C., 45 Fed. 780, reaffirming rule; [illegible] Brewster, 46 Fed. 475, arguendo.

115 U. S. 587-598, 29 L. 499, PULLMAN CAR CO. v. MISSOURI PAC. RY.

Corporations.— Consolidation of several railroad companies, under Missouri R. S., § 789, effects dissolution of old corporations and creation of new one, subject to obligations of consolidating companies, p. 595.

Approved in Louisville, etc., Ry. v. Boney, 117 Ind. 505, 20 N. E. 434, 3 L. R. A. 438, and n., holding consolidated company liable for debts of antecedent companies; Hancock, etc., Co. v. Worcester, etc., Ry., 149 Mass. 220, 21 N. E. 364, where bondholder recovered against new corporation; Combes v. Keyes, 89 Wis. 311, 46 Am. St. Rep. 843, 62 N. W. 93, 27 L. R. A. 374, holding corporation, by surrendering charter, ceased to exist; Weidenfeld v. Alleghany, etc., Ry., 47 Fed. 15, and Union Pac. Ry. v. United States, 59 Fed. 827, 19 U. S. App. 531, arguendo. See 59 Am. St. Rep. 555, monographic note.

Railroads.— Agreement of railroad to haul Pullman cars over entire line and all roads which it might thereafter control, does not apply to roads not controlled at time of consolidation, but thereafter acquired by new company formed by such consolidation, p. 596.

Approved in Express Cases, 117 U. S. 29, 29 L. 803, 6 S. Ct. 556, Little Rock, etc., Ry. v. St. Louis, etc., Ry., 41 Fed. 563, Paxton, etc., Co. v. Farmers, etc., Co., 45 Neb. 901, 50 Am. St. Rep. 596, 64 N. W. 346, 29 L. R. A. 858, and State v. Sioux City, etc., Ry., 46 Neb. 699, 701, 65 N. W. 771, 772, 31 L. R. A. 53, 54, holding courts cannot make business arrangements for carriers; St. Louis Drayage Co. v. Louisville, etc., Ry., 65 Fed. 41, and Post v. Southern Ry., 108 Tenn. 207, 52 S. W. 307, arguendo.

Equity.— Demurrer admits all facts in bill well pleaded, but not conclusions of law, p. 596.

Approved in Fogg v. Blair, 139 U. S. 127, 35 L. 107, 11 S. Ct. 478, holding demurrer does not admit allegations of "breach of trust;" Lumley v. Wabash Ry., 71 Fed. 28, holding allegations that things were done "surreptitiously," not admitted by demurrer.

Railroads.— Fact that one railroad acquires controlling interest in stock of another, does not oblige former to haul cars over road of latter, under agreement to haul cars over all roads which it may thereafter control, where latter company maintains and is managed by separate directors, p. 597.

Approved in Porter v. Pittsburgh, etc., Co., 120 U. S. 670, 30 L. 838, 7 S. Ct. 753, holding fact of owning majority of stock does not give legal control of corporation; Jessup v. Illinois Cent. Ry., 36 Fed. 741, holding averment that one corporation has obtained control of another's stock, does not show merger; Chicago, etc., Ry. v. Kansas City, etc., Ry., 38 Fed. 61, holding power of street railroad to

lay new tracks ceased upon consolidation; American Preservers' Co v. Norris, 43 Fed. 714, holding agreement of majority stockholders with stranger does not bind corporation; Electric Ry. v. Jamaica etc., Ry., 61 Fed. 678, holding ownership of patent by corporation gives individual stockholders no right to use thereof; Exchange Bank v. Macon, etc., Co., 97 Ga. 7, 25 S. E. 328, 33 L. R. A. 803, holding ownership of entire stock by another corporation does not vest title to property in latter; Higgins v. Lansingh, 154 Ill. 358, 40 N. E. 378, holding creditor holding majority of stock as security, not mortgagee in possession; Atchison, etc., Ry. v. Cochran, 43 Kan. 234, 19 Am. St. Rep. 131, 23 Pac. 155, 7 L. R. A. 418, holding one railroad not liable for negligence of another, stock of which it holds; White v. Pecos Land, etc., Co., 18 Tex. Civ. App. 637, 45 S. W. 209, holding corporations organized by same individuals, for same object, not identical. Cited in State v. Sioux City, etc., Ry., 46 Neb. 699, 65 N. W. 771, 31 L. R. A. 513, arguendo. See 61 Am. St. Rep. 458, note.

Distinguished in Jones v. Williams, 139 Mo. 24, 61 Am. St. Rep. 445, 39 S. W. 490, 37 L. R. A. 688 (but see dissenting opinion in 139 Mo. 73, 75, 40 S. W. 364, 37 L. R. A. 702), holding contract made by majority stockholder, ratified by silence of others.

115 U. S. 598-600, 29 L. 504, HASSALL v. WILCOX.

Appeal and error.— Separate judgments in equity being rendered in one decree, for separate creditors on separate claims, Supreme Court has appellate jurisdiction only as to those exceeding $5,000, p. 600.

Approved in Hassall v. Wilcox, 130 U. S. 503, 32 L. 1005, 9 S. Ct. 593, incidentally, further litigation between same parties; Gibson v. Shufeldt, 122 U. S. 37, 30 L. 1087, 7 S. Ct. 1071, holding defendant can appeal only as to plaintiff recovering over $5,000.

Appeal and error.— Trustee of railroad mortgage represents all bondholders; hence, his appeal is theirs, p. 600.

Distinguished in Press v. Woodley, 160 Ill. 436, 43 N. E. 719, holding trustee could not prosecute appeal for other lienholders.

115 U. S. 600-611, 29 L. 477, NORTHERN PAC. RY. v. TRAILL COUNTY.

Public lands.— Until lands granted railroad are earned by construction thereof and by other acts demanded by law, railroad has no such right therein as to prevent Congress from requiring payment of cost of surveying, selecting and conveying land before conveyance to railroad, p. 609.

Approved in New Orleans, etc., Ry. v. United States, 124 U. S. 131, 31 L. 386, 8 S. Ct. 421, holding plaintiff bound to pay cost of survey before receiving patent, although same was incurred before

grant; Atlantic, etc., Ry. v. Mingus, 7 N. Mex. 371, 34 Pac. 595, upholding act of 1886, forfeiting lands of Atlantic and Pacific railroad; State v. Central Pac. Ry., 21 Nev. 99, 25 Pac. 443, generally; dissenting opinion in Central Pac. Ry. v. California, 162 U. S. 164, 40 L. 928, 16 S. Ct. 793, arguendo; Barden v. Northern Pac. Ry., 154 U. S. 312, 38 L. 996, 14 S. Ct. 1032, Central Pac. Ry. v. Nevada, 162 U. S. 520, 40 L. 1059, 16 S. Ct. 886, State v. Central Pac. Ry., 20 Nev. 378, 22 Pac. 238, and Jackson v. La Moure County, 1 N. Dak. 243, 46 N. W. 451, arguendo.

Distinguished in Denny v. Dodson, 13 Sawy. 81, 32 Fed. 908, Northern Pac. Ry. v. Cannon, 46 Fed. 226, and Washington, etc., Co. v. Northern Pac. Ry., 2 Idaho, 517, 518, 21 Pac. 659, holding Northern Pacific grant of 1864 one in præsenti, subject to be defeated by non-compliance with terms; Tarpey v. Salt Co., 5 Utah, 499, 17 Pac. 633, holding railroad grant of 1862 one in præsenti.

Public lands.— Although railroad, by completion of road, has earned granted lands, it does not acquire equitable title thereto for purpose of State taxation until it has paid costs of surveying, selecting and conveying same, as provided in act of July 17, 1870, p. 610.

Approved in Van Brocklin v. Tennessee, 117 U. S. 169, 29 L. 851, 6 S. Ct. 680, holding land exempt from State taxation while held by United States for Federal taxes; Northern Pac. Ry. v. Cannon, 46 Fed. 227, reaffirming rule; Meldahl v. Dobbin, 8 N. Dak. 117, 77 N. W. 281, holding tax deed invalid, where founded on taxes on Northern Pacific lands prior to 1886; Ankeny v. Clark, 148 U. S. 356, 37 L. 479, 13 S. Ct. 621, affirming S. C., 1 Wash. 557, 20 Pac. 587, holding contract to convey cannot be satisfied by title derived from land-grant railroad which has not paid for survey; Pitts v. Clay, 27 Fed. 636, holding bounty land not taxable during period between filing original and substituted warrants, patent being withheld on former; State v. Central Pac. Ry., 21 Nev. 103, 25 Pac. 445, holding unsurveyed Central Pacific lands exempt; Jackson v. La Moure County, 1 N. Dak. 242, 46 N. W. 450, holding title to Northern Pacific indemnity lands does not pass from government until selection by railroad, with approval of secretary; Northern Pac. Ry. v. McGinnis, 4 N. Dak. 503, 61 N. W. 1035, holding unsurveyed railroad land not taxable; Wells County v. McHenry, 7 N. Dak. 252, 74 N. W. 243, holding Northern Pacific lands not taxable before surveyed; Duncan v. Newcomer, 9 S. Dak. 379, 69 N. W. 581, holding land not subject to State taxation until right to patent vests; Abney v. State, 20 Tex. Civ. App. 105, 47 S. W. 1045, holding title to Confederate scrip lands did not vest until all conditions were complied with; Montgomery v. Cowlitz Co., 14 Wash. 231, 44 Pac. 260, holding railroad lands not taxable prior to payment of cost of surveying, etc.; dissenting opinions in Central Pac. Ry. v. California, 162 U. S. 151, 40 L. 923, 16 S. Ct. 788, majority holding plaintiff's franchise subject to State taxation; Northern Pac. Ry. v. Barnes, 2 N. Dak. 303, 51 N. W. 414, arguendo; Rutland Ry. v. Cent. Vermont Ry., 159 U. S.

641, 40 L. 290, 16 S. Ct. 116, Rushton v. Burke, 6 Dak. 482, 43 N. 815, and Northern Pac. Ry. v. Barnes, 2 N. Dak. 359, 51 N. W. 4 arguendo.

Distinguished in Tyler v. Cass County, 142 U. S. 290, 35 L. 10 12 S. Ct. 226, dismissing writ of error to S. C., 1 N. Dak. 381, N. W. 233, McHenry v. Alford, 168 U. S. 660, 42 L. 617, 18 S. Ct. 2 State v. Central Pac. Ry., 20 Nev. 380, 22 Pac. 239, and State Central Pac. Ry., 21 Nev. 253, 30 Pac. 686, all holding act of July 1886, gave States right to tax surveyed, but unpatented Pacific r road lands; Northern Pac. Ry. v. Myers, 172 U. S. 598, 19 S. Ct. 2 holding Northern Pacific lands, granted in 1864, taxable by St prior to patent; Northern Pac. Ry. v. Wright, 51 Fed. 70, holdi grant of 1864 one in præsenti, and lands subject to State taxati Tyler v. Cass County, 1 N. Dak. 400, 48 N. W. 240, holding cou treasurer not personally liable for tax sales of lands, declared n taxable by principal case, made prior thereto; Northern Pac. I v. McGinnis, 4 N. Dak. 504, 61 N. W. 1035, holding surveyed la taxable, although survey fee is not paid.

115 U. S. 611-616, 29 L. 502, BOWMAN v. CHICAGO, ETC., RY.

Appellate jurisdiction of Supreme Court, in action on mon demand, is governed by value of actual matter in dispute there as shown by whole record, irrespective of damages claimed, prayer; hence, case dismissed where demand was, by stipulati increased, to confer jurisdiction, p. 614.

Approved in The Sydney, 139 U. S. 336, 35 L. 178, 11 S. Ct. 6 holding collateral effect of judgment in another suit, must be d regarded; Horst v. Merkley, 59 Fed. 503, dismissing, where plaintif testimony showed value of disputed matter insufficient to con jurisdiction; Cabot v. McMaster, 61 Fed. 131, reaffirming holdin Bank of Arapahoe v. Bradley, etc., 72 Fed. 870, 871, 36 U. S. Ap 519, holding setting up additional claim, over which court lac jurisdiction, does not confer jurisdiction; Hayward v. Nordbe Mfg. Co., 85 Fed. 7, 54 U. S. App. 646, holding what is colorable e largement of demand, depends on facts; Cowell v. City Water-Supp Co., 96 Fed. 771, in action to set aside conveyance, value of pro erty effected is amount in dispute, irrespective of complainan interest therein.

Distinguished in Barry v. Edmunds, 116 U. S. 561, 29 L. 733, 6 Ct. 507, holding Circuit Court cannot dismiss, unless record sho lack of jurisdiction; Schunk v. Moline, etc., Co., 147 U. S. 505, 37 258, 13 S. Ct. 417, where increased demand was not merely speciou Davis v. Kansas City, etc., Ry., 32 Fed. 864, allowing amendme where damages might have exceeded original claim; Pickham Wheeler, etc., Mfg. Co., 77 Fed. 663, 46 U. S. App. 605, holdi jurisdiction not affected by counterclaim, unknown to plaintiff.

Courts.— Action against carrier for damages for refusal to tran port liquor into State on ground that laws thereof forbid suc

importation, is not an action brought on account of deprivation of any Federal right, under R. S., § 699, conferring jurisdiction on Supreme Court in such actions, p. 616.

Approved in Cogswell v. Fordyce, 128 U. S. 392, 32 L. 485, 9 S. Ct. 112, holding action on bond, given to supersede judgment of Federal court, not within said section.

115 U. S. 616-619. 29 L. 482, CLAY COUNTY v. McALEER.

Municipal corporations cannot be required, by mandamus, to levy taxes in excess of maximum levy allowed them by law; hence, answer alleging that proceeds of maximum levy are insufficient to meet ordinary current county expenses, held good on demurrer, p. 619.

Approved in Stryker v. Commissioners, 77 Fed. 577, 40 U. S. App. 583, holding creditor can only demand annual levy of full amount until paid; White v. Mayor, etc., of Decatur, 119 Ala. 481, 23 So. 1001, holding courts cannot pass upon necessity of expenditure authorized by charter; Board of Improvement v. McManus, 54 Ark. 449, 15 S. W. 897, denying mandamus to treasurer, where no money was in treasury; Chicago, etc., Ry. v. Stanfield, 7 Kan. App. 275, 53 Pac. 773, City of Sherman v. Smith, 12 Tex. Civ. App. 583, 35 S. W. 295, and Portland Sav. Bank v. Montesano, 14 Wash. 573, 45 Pac. 159, like cases; McAleer v. Clay County, 42 Fed. 665, incidentally; Harshman v. Winterbottom, 123 U. S. 222, 31 L. 127, 8 S. Ct. 101, arguendo.

Distinguished in Eidemiller v. Tacoma, 14 Wash. 387, 44 Pac. 881, holding city cannot defeat payment of warrant, upon ground of necessity of using revenue for existence, until exhaustion of all available means of securing revenue.

115 U. S. 620-634, 29 L. 483, CAMPBELL v. HOLT.

Property.— One having peaceable, undisturbed, open possession of real or personal property, with assertion of ownership for period which, by law, bars action for its recovery, by real owner, acquires good title, p. 623.

Approved in Sharon v. Tucker, 144 U. S. 544, 36 L. 535, 12 S. Ct. 722, holding owner of title by adverse possession, may maintain bill against original owners, to quiet title; Nonce v. Richmond, etc., Ry., 83 Fed. 432, distinguishing statutes giving title by prescription, and those merely affecting remedies; McClaskey v. Barr, 42 Fed. 613, citing generally; Cleveland v. Cleveland, etc., Ry., 98 Fed. 123, as to defense of equitable estoppel in ejectment; Chapin v. Freeland, 142 Mass. 386, 56 Am. Rep. 702, 8 N. E. 130 (but see dissenting opinion in 142 Mass. 391, 8 N. E. 132), holding one prevented by limitations from suing for property, cannot, after seizing same, defeat replevin; Currier v. Studley, 159 Mass. 22, 33 N. E. 711 (but see dissenting opinion in 159 Mass. 27, 33 N. E. 713), upholding

prescriptive title to seat in stock exchange, as against former par ner; Flynn v. Lemieux, 46 Minn. 460, 49 N. W. 239, holding failu to pay occupant for improvements within one year, gives him titl Dean v. Goddard, 55 Minn. 294, 56 N. W. 1061, holding complete title by prescription, not lost by subsequent interruption; Baker Oakwood, 123 N. Y. 28, 25 N. E. 315, 10 L. R. A. 392, holding adver possession for period of limitation, conclusive evidence of titl Busby v. Railroad Co., 45 S. C. 314, 23 S. E. 51, holding adver possession of land for twenty years, gives title; Merrill v. Bullar 59 Vt. 391, 8 Atl. 158, holding absolute title acquired by six year adverse possession; Morris v. Lyon, 84 Va. 334, holding allegati in detinue, that defendant had acknowledged plaintiff's title, aft statute had run, demurrable; Thornburg v. Bowen, 37 W. Va. 54 16 S. E. 827, upholding title by five years' possession, though deriv through conveyance fraudulent on grantor's part. See 56 Am. Re 704, note.

Distinguished in Wilson v. Brookshire, 126 Ind. 506, 25 N. E. 13 9 L. R. A. 798, and n., holding action to have paid judgment d clared satisfied not barred by limitation applying to actions judgments. Departed from in Pate v. Hazell, 107 N. C. 190, 11 S. 1089, holding rule does not obtain in North Carolina.

Constitutional law.— Where property has been acquired by pr scription, removal of bar of statute of limitations by law, pass after bar has become perfect, deprives party of property witho due process of law, p. 623.

Limitations of actions.— Running of statute of limitations abs lutely vests rights in property adversely held, but operates only as defense, which must be specially pleaded, in actions on contracts for debts, p. 625.

Approved in In re Burton, 29 Fed. 639, holding defense of di charge in bankruptcy must be specially pleaded; and Hulbert Clark, 128 N. Y. 298, 28 N. E. 638, 14 L. R. A. 60, holding running statute on debt does not remove lien given as security; dissenti opinion in Currier v. Studley, 159 Mass. 26, 33 N. E. 713, arguend

Limitations of actions.— Original debt is sufficient considerati for new promise to pay, made after bar of statute has become pe fect, p. 625.

Cited in 39 Am. St. Rep. 739, monographic note on moral co sideration.

Limitations of actions.— Plea of statute of limitations affec remedy and not merits, p. 626.

Constitutional law.— Right to defense of statute of limitatio is not property; hence, repeal of statute applying to actions debts, after same had run against debt, does not deprive debtor property, without due process, p. 629.

Approved in Drury v. Henderson, 143 Ill. 320, 32 N. E. 187, holding period of limitation may be altered at will of legislature; Dyer v. Belfast, 88 Me. 142, 33 Atl. 791, holding statute extending time to appeal does not apply where right is already barred; Phenix Ins. Co. v. Pollard, 63 Miss. 663, upholding act permitting removing disabilities for non-payment of license, upon payment of back licenses; Guiterman v. Wishon, 21 Mont. 461, 54 Pac. 567, upholding statute shortening time upon which action for existing debt may be begun; Bates v. Cullum, 177 Pa. St. 637, 55 Am. St. Rep. 756, 35 Atl. 862, 34 L. R. A. 442, upholding act removing protection of non-resident clause from defendants removing from State, after accrual of causes; Landa v. Obert, 78 Tex. 46, 14 S. W. 300, where new Constitution extended period of limitation, already run; dissenting opinions in Oleson v. Wilson, 20 Mont. 553, 63 Am. St. Rep. 644, 52 Pac. 375, majority holding partial payment by one joint maker, does not extend time of action against other; Bettman v. Cowley, 19 Wash. 224, 58 Pac. 59, 40 L. R. A. 822, majority holding act shortening judgment liens unconstitutional as to existing judgments. Approved, arguendo, in Attorney-General v. Jochim, 99 Mich. 373, 41 Am. St. Rep. 618, 58 N. W. 615, 23 L. R. A. 705. See 25 Am. St. Rep. 887, note.

Distinguished in Fuller, etc., Co. v. Johnson, 8 Okl. 604, 58 Pac. 746, holding statute of limitations, repealing former statute, does not revive action barred thereby; Mellinger v. Houston, 68 Tex. 43, 3 S. W. 251, holding, under Texas Constitution, accrued right to defense of statute cannot be removed by retroactive legislation; Seattle v. De Wolfe, 17 Wash. 350, 49 Pac. 553, holding lengthening period of limitation, for actions on street assessments, does not revive actions already barred. Departed from in Board of Education v. Blodgett, 155 Ill. 448, 46 Am. St. Rep. 353, 40 N. E. 1027, 31 L. R. A. 73, holding defense of statute, property within constitutional protection; Eingartner v. Illinois Steel Co., 103 Wis. 378, 74 Am. St. Rep. 874, 79 N. W. 435, holding statute of limitations fully run, a vested property right.

Constitutional law.— Defense of statute of limitations once perfected, is a vested right which cannot be taken away by subsequent alteration of period of limitation, per Bradley, J., dissenting, p. 630.

Followed in Board of Education v. Blodgett, 155 Ill. 448, 46 Am. St. Rep. 353, 40 N. E. 1027, 31 L. R. A. 73, and Eingartner v. Illinois Steel Co., 103 Wis. 380, 74 Am. St. Rep. 874, 79 N. W. 435.

Distinguished in New Orleans v. New Orleans Water Works, 142 U. S. 92, 35 L. 948, 12 S. Ct. 147, holding right to pay for water supply in taxes, not vested right.

115 U. S. 634–649, 29 L. 505, BALTZER v. RALEIGH, ETC., RY.

Reformation of instruments.— Equity will only reform contract for mistake or fraud, when same are clearly shown, p. 645.

Approved in Baldwin v. National, etc., Fence Co., 67 Fed. [illegible] assignment of all patent rights, to include [illegible] Board of Trustees v. Blair, 45 W. Va. 82 [illegible] J. A. Coates & Son v. Buck, 93 Wis. [illegible] holding mere error or misconception, not ground [illegible] See [illegible] Am. St. Rep. 495, note.

Distinguished in Baldwin v. National, etc., Fence Co., 73 [illegible] but see dissenting opinion in 73 Fed. 58 [illegible] holding court may grant relief, though mistal [illegible] and testimony conflicting.

Specific performance.—Equity may compel parties to per[illegible] agreements, but cannot make agreements for them, p. 648.

Reaffirmed in Reynolds v. Louisville, etc., Ry., 143 Ind. 61[illegible]

Evidence.—Contract having been reduced to form of serie[illegible] documents, no evidence, other than itself can be given of its te[illegible] e. g., evidence of understanding between A. and B., that coven[illegible] of B. were covenants of C. is inadmissible, p. 648.

Cited in [illegible] Am. St. Rep. [illegible] note.

Contracts.—One not a party thereto, cannot be bound by un[illegible] standing of other persons, p. 648.

Approved in Reynolds v. Louisville, etc., Ry., 143 Ind. 622 [illegible] holding, one contracting to build railroad, cannot cl[illegible] lease by owner with another company forms part of transact[illegible] And see [illegible] Am. St. Rep. [illegible] note.

[illegible] U. S. [illegible] NEW ORLEANS GAS CO. v. LOU[illegible] ANA LIGHT CO.

Corporations.—Under Louisiana act of 1874, authorizing cons[illegible] dation of corporations "now existing, whose objects and busin[illegible] are, in general, of the same nature," gas company having exclus[illegible] privilege of supplying gas until 1875, may, immediately prior [illegible] expiration of its charter, consolidate with company granted s[illegible] privilege, from and after said expiration, p. 656.

Distinguished in Louisville, etc., Ry. v. Kentucky, 161 U. S. [illegible] 40 L. 858, 16 S. Ct. 723, holding charter power to unite with ot[illegible] roads, does not authorize consolidation with competing road.

Gas.—Manufacture and distribution of illuminating gas, [illegible] means of conduits, placed, under legislative authority, in the stre[illegible] of a city, is business of a public character, p. 658.

Approved in Gibbs v. Baltimore Gas Co., 130 U. S. 408, 32 L. 9[illegible] 9 S. Ct. 557, and Chicago Gas Co. v. People's Gas Co., 121 Ill. 5[illegible] 2 Am. St. Rep. 128, 13 N. [illegible] 172, both holding gas company cann[illegible] by contract with another company, disable itself from performa[illegible]

of duty to public; United States v. Freight Assn., 166 U. S. 383, 41 L. 1025, 17 S. Ct. 556, holding railroads public corporations; Mayor of Wilmington v. Addicks, — Del. —, 43 Atl. 304, holding gas company a "corporation for public improvement" within constitutional limitation of period of incorporation for other corporations; Portland Gas, etc., Co. v. State, 135 Ind. 56, 34 N. E. 818, 21 L. R. A. 640, holding duty to furnish gas to all applicants, enforceable by mandamus; Coy v. Indianapolis Gas Co., 146 Ind. 660, 46 N. E. 19, 36 L. R. A. 536, holding natural gas company liable in tort for failure to serve applicant complying with reasonable regulations; David v. Portland Water Com., 14 Or. 123, 12 Pac. 185, holding supplying water to city, a public work, which legislature may undertake; Haugen v. Albina, etc., Co., 21 Or. 418, 28 Pac. 246, 14 L. R. A. 426, holding duty of supplying water to any inhabitant, enforceable by mandamus; Crumley v. Watauga Water Co., 99 Tenn. 426, 41 S. W. 1060, holding water company cannot refuse to supply water because applicant is in its debt.

Distinguished in Watauga Water Co. v. Wolfe, 99 Tenn. 431, 63 Am. St. Rep. 842, 41 S. W. 1061, holding water company, although bound not to discriminate, may refuse to supply applicant refusing to agree to reasonable rules.

Gas.— Right to dig up public streets, and place therein gas mains, is a franchise, privilege of exercising which can only be enjoyed under legislative authority, p. 659.

Approved in Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 692, 29 L. 513, 6 S. Ct. 268, a similar case; Pensacola Gas Co. v. Pensacola, 33 Fla. 336, 14 So. 830, grant of franchise to lay gas pipes construable strictly against grantees; Western, etc., Supply Co. v. Citizens' St. Ry., 128 Ind. 541, 25 Am. St. Rep. 475, 28 N. E. 88, holding State may contract away right to tax street railroad; Newport v. Newport Light Co., 84 Ky. 180, holding city with power to maintain gas works, may grant corporation exclusive right to supply gas; Davenport v. Kleinschmidt, 6 Mont. 532, 13 Pac. 255, Smith v. Westerly, 19 R. I. 445, 35 Atl. 529, and Brenham v. Water Co., 67 Tex. 563, 4 S. W. 154, denying power of city, in absence of legislative permission, to grant exclusive right to supply water; Patterson v. Wollmann, 5 N. Dak. 617, 67 N. W. 1044, 33 L. R. A. 540, upholding acts authorizing counties to grant exclusive ferry privileges; Parkhurst v. Capital City Ry., 23 Or. 474, 32 Pac. 305, holding, without special legislative permission, city cannot grant exclusive privilege; Wheat v. City Council, 88 Va. 744, 14 S. E. 673, holding ordinance making right to open streets dependent on mayor's will, invalid as to previously chartered company; dissenting opinions in Bohan v. Port Jervis Gas Co., 122 N. Y. 35, 25 N. E. 251, 9 L. R. A. 720, and n., majority holding manufacture of gas may be enjoined as nuisance by neighboring property-owner; Bath Gas Co. v. Claffy, 151 N. Y. 42, 45 N. E. 395, 36 L. R. A. 670, and Los Angeles Water Co. v. Los Angeles, 88 Fed. 730, arguendo. See 9 Am. St. Rep. 141, note.

Constitutional law.— Charter granting exclusive right of lay pipes and supplying gas to city for certain period, constitutes contract between State and corporation, within constitutional pro tion; hence, charter to another company during said period invalid, p. 660.

Approved in New Orleans Water Co. v. Rivers, 115 U. S. 680, 2 527, 6 S. Ct. 276, a like case, concerning franchise of water c pany; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 699, 2 516, 6 S. Ct. 276, a very similar case; Walla Walla v. Walla W Water Co., 172 U. S. 9, 19 S. Ct. 81, holding erection of water w by city, an impairment of contract with company; Saginaw Gas v. Saginaw, 28 Fed. 532, holding suits upon conflicting legisla grants cognizable in Federal courts; Santa Ana Water Co. Buenaventura, 56 Fed. 349, holding town may, by contract, render its rights to fix water rates; Citizens' St. Ry. v. City Ry. Fed. 751, holding ordinances granting right to build street railv upon acceptance by company, constitutes contract; Baltimore, Co. v. Baltimore, 64 Fed. 160 (but see dissenting opinion, p. 1 holding municipality may, by ordinance, make irrepealable cont for use of streets by street railway; Africa v. Aldermen, 70 734, holding municipality cannot withdraw consent to use of str actually included in railway's route; Bartholomew v. Austin, Fed. 364, 52 U. S. App. 524, upholding ordinance granting privi of constructing and operating water system for twenty-five ye Los Angeles Water Co. v. Los Angeles, 88 Fed. 734, holding cannot reduce water rates below minimum stated in charter; Mountain Ry. v. Memphis, 96 Fed. 129, holding passage of resolu declaring forfeiture of contract with railroad, threatened viola of constitutional rights; Birmingham, etc., Ry. v. Birmingham Ry., 79 Ala. 470, 58 Am. Rep. 616, holding municipal franchise wi protection of constitutional prohibition of laws impairing contra Western, etc., Supply Co. v. Citizens' St. Ry., 128 Ind. 529, 25 St. Rep. 466, 26 N. E. 190, 10 L. R. A. 774, holding charter to struct street railway constitutes contract with city; Indianapoli Consumers' Gas Co., 140 Ind. 117, 49 Am. St. Rep. 190, 39 N. E. 27 L. R. A. 517, holding grant to maintain gas pipes in street legislative contract, which city cannot impair by subsequent c nance; Des Moines St. Ry. v. Des Moines B. G. St. Ry., 73 Iowa, 33 N. W. 614, upholding ordinance granting exclusive right operate street railways for thirty years; Pingree v. Michigan C Ry., 118 Mich. 320, 76 N. W. 637, holding right to regulate fares be granted to railroad, rendering subsequent attempted legisla regulations illegal; dissenting opinion in State v. City of Hamil 47 Ohio St. 81, 23 N. E. 941, majority holding erection of munic gas plant does not deprive company of property; Africa v. Al men, 70 Fed. 737, arguendo. And see 72 Am. Dec. 684, note.

Distinguished in Pearsall v. Great Northern Ry., 161 U. S. 40 L. 844, 16 S. Ct. 709, reversing S. C., 73 Fed. 936, holding

executed charter power, unnecessary to main object of grant, revocable; Baltimore v. Baltimore Trust Co., 166 U. S. 685, 41 L. 1164, 17 S. Ct. 701, and Lake Roland, etc., Ry. v. Mayor, 77 Md. 369, 26 Atl. 512, 20 L. R. A. 130, both holding ordinances authorizing laying double tracks, repealable, after laying thereof; Long Island Water Co. v. Brooklyn, 166 U. S. 690, 41 L. 1167, 17 S. Ct. 720, holding condemnation of water works by eminent domain proceedings not impairment of contract between company and city; Wabash Ry. v. Defiance, 167 U. S. 100, 42 L. 98, 17 S. Ct. 752, holding alteration of grade will override prior license surrendering control of street; Saginaw Gas Co. v. Saginaw, 28 Fed. 534, holding exclusive right to light city with gas, not impaired by subsequent contract to light with electricity; Grand Rapids, etc., Co. v. Grand Rapids, etc., Co., 33 Fed. 669, 673, holding city could not grant exclusive use of streets for wires and poles for fifteen years; Hamilton Gas Co. v. Hamilton, 37 Fed. 838, holding erection of gas works by city authority does not preclude city from building its own; Birmingham, etc., Ry. v. Birmingham St. Ry., 79 Ala. 474, 58 Am. Rep. 618, denying municipal power to grant exclusive perpetual franchise to run railway through designated streets; Indianapolis St. Ry. v. Citizens' St. Ry., 127 Ind. 389, 24 N. E. 1060, 8 L. R. A. 547, holding city cannot grant exclusive right to railway to occupy all its streets; Vincennes v. Citizens' Gas Co., 132 Ind. 127, 31 N. E. 577, 16 L. R. A. 490, holding contract with gas company conferred no exclusive privileges; Rockland Water Co. v. Camden, etc., Water Co., 80 Me. 568, 15 Atl. 790, 1 L. R. A. 396, upholding charter to another company, exclusive privilege not having been expressly granted first; Syracuse Water Co. v. Syracuse, 116 N. Y. 174, 22 N. E. 382, 5 L. R. A. 549, holding grant to water company not exclusive or preventative of grants to others; dissenting opinion in State v. Haworth, 122 Ind. 508, 23 N. E. 960, 7 L. R. A. 253, majority upholding statute providing for furnishing school books to State.

Constitutional law.— State's police power cannot encroach upon powers of general government, or rights secured by Federal Constitution, p. 661.

Approved in Walling v. Michigan, 116 U. S. 460, 29 L. 695, 6 S. Ct. 460, holding Iowa law imposing discriminatory tax on non-resident liquor sellers, unconstitutional; Brennan v. Titusville, 153 U. S. 299, 38 L. 722, 14 S. Ct. 831, holding municipal tax on drummer representing manufacturer in another State, unconstitutional; Gulf, etc., Ry. v. Hefley, 158 U. S. 105, 39 L. 913, 15 S. Ct. 804, holding State statute must yield to conflicting Federal statute; The Stockton Laundry Case, 11 Sawy. 477, 26 Fed. 614, holding ordinance prohibiting carrying on laundries within habitable portion of city, unconstitutional; Leavy v. United States, 92 Fed. 349, denying police power of State to close navigable waters for purpose of reclamation; Pingree v. Michigan Cent. Ry., 118 Mich. 318, 76 N. W. 636, holding

attempt of legislature to reduce fares, impairment of contract v
railroad; dissenting opinion in New York v. Roberts, 171 U. S.
19 S. Ct. 74, majority upholding New York tax on certain for
corporation; Bullard v. Northern Pac. Ry., 10 Mont. 180, 25
122, 11 L. R. A. 250, arguendo. See 47 Am. St. Rep. 537, note
quarantine regulations.

Distinguished in Morgan v. Louisiana, 118 U. S. 464, 30 L.
6 S. Ct. 1119, upholding Louisiana State quarantine law; Mugle
Kansas, 123 U. S. 663, 31 L. 211, 8 S. Ct. 298, upholding Kan
constitutional prohibition of manufacture and sale of liqu
Plumley v. Massachusetts, 155 U. S. 471, 39 L. 227, 15 S. Ct.
upholding Massachusetts law, forbidding sale of oleomargar
Western Union Telegraph Co. v. James, 162 U. S. 654, 40 L. 1
16 S. Ct. 935, upholding statute requiring telegraph compa
to transmit with diligence, as applied to interstate messa
Hennington v. Georgia, 163 U. S. 314, 41 L. 173, 16 S. Ct. 1092,
Norfolk, etc., Co. v. Commonwealth, 93 Va. 760, 57 Am. St.
835, 24 S. E. 840, 34 L. R. A. 109, upholding laws prohibiting runn
trains on Sunday.

See citations under sixth and tenth syllabi.

Constitutional law.— Police power extends only to preserva
of public health, morals, and safety, p. 661.

Approved in Jones v. Brim, 165 U. S. 182, 41 L. 678, 17 S. Ct.
holding establishment, maintenance and control of public highw
within State police power. The following have been held wi
State police power: Jamieson v. Indiana, etc., Co., 128 Ind.
28 N. E. 79, 12 L. R. A. 656, act regulating transportation
pressure of natural gas; State v. Roby, 142 Ind. 192, 51 Am. St.
191, 41 N. E. 153, 33 L. R. A. 221, statute prohibiting horse r
during certain months, and with less than thirty days betw
meetings; Territory v. Guyott, 9 Mont. 51, 22 Pac. 135, prohibi
on selling liquor to Indians; Health Department v. Rector,
N. Y. 39, 45 Am. St. Rep. 581, 39 N. E. 835, 27 L. R. A. 713,
requiring owners of tenement-houses to furnish adequate su
of water; dissenting opinion in Leisy v. Hardin, 135 U. S. 128
L. 139, 10 S. Ct. 691, majority holding act prohibiting sale of
toxicants, unconstitutional, as applied to sales in original packs
from other States.

Distinguished in Pingree v. Michigan Cent. Ry., 118 Mich. 340
N. W. 644, holding reduction of railroad rates without amendm
of charter, illegal; McCandless v. Richmond, etc., Ry., 38 S. C.
16 S. E. 430, 18 L. R. A. 442, holding act making railroads respons
for fires communicated by engines, not within police power.
citations under fifth and tenth syllabi of this case.

Constitutional law.— Statutory authority, given by State to
porations, or individuals, to engage in particular private busin
detrimental to public health or morals, does not constitute

tract, preventing withdrawal of such authority, or granting it to others, p. 669.

Approved in Chicago, etc., Ry. v. Chicago, 166 U. S. 253, 41 L. 990, 17 S. Ct. 591, holding railroad lays tracks subject to condition that city may regulate use to insure public safety; Chicago, etc., Ry. v. Nebraska, 170 U. S. 74, 42 L. 954, 18 S. Ct. 520, holding legislature may vary agreement with railroad, as to viaduct over crossing, as safety of community requires. See 62 Am. St. Rep. 172, note.

Constitutional law.— Charter granting exclusive right for certain period, to supply gas within city, is not a contract to prejudice of public health or safety, and hence, subject to abrogation under the police power, p. 671.

Approved in Stein v. Bienville Water Co., 34 Fed. 153, holding grant of exclusive franchise to supply water, not relinquishment of police power; State v. Laclede Gas Co., 102 Mo. 487, 22 Am. St. Rep. 796, 14 S. W. 980, denying right of city to regulate gas rates, as violative of charter contract; Stehmeyer v. City Council, 53 S. C. 279, 31 S. E. 330, holding city's police power does not authorize entering into contract for purchase of water works, to be paid for by taxing owners of property abutting streets where pipes are laid.

Constitutional law.— A State can no more impair contractual obligations, by her Constitution, than by legislation; hence, amendment repealing monopoly features of corporation charters, does not affect charter granting exclusive right to supply gas for stated period, p. 672.

Approved in Santa Ana Water Co. v. Buenaventura, 56 Fed. 345, holding California constitutional provision for fixing water rates, void as to contract made prior to adoption of Constitution; Columbus Water Co. v. Columbus, 48 Kan. 102, 28 Pac. 1098, 15 L. R. A. 356, upholding ultra vires contract of city with water company, where company had gone to expense and furnished water; State v. Hickman, 9 Mont. 379, 23 Pac. 743, 8 L. R. A. 405, holding appropriation for salaries may be made by Constitution as well as by legislation; generally in People v. Chicago Gas Co., 130 Ill. 296, 17 Am. St. Rep. 335, 22 N. E. 804, 8 L. R. A. 506, and n., holding State's public policy as to special privileges, may be indicated in Constitution; dissenting opinion in In re Ayers, 123 U. S. 515, 31 L. 283, 8 S. Ct. 188, arguendo; State v. Haworth, 122 Ind. 505, 26 N. E. 960, 7 L. R. A. 254, and Newport v. Newport Light Co., 84 Ky. 179, arguendo.

Constitutional prohibition upon State laws, impairing obligations of contracts, does not restrict power of State to protect public health, morals or safety, as one or the other may be involved in the execution of such contracts, p. 672.

Approved in Hockett v. State, 105 Ind. 257, 55 Am. Rep. 205, holding fact that telephones are protected by patent, does not pre-

vent State regulation of charges for use thereof; Spriggs v. Ga
Park, 89 Md. 411, 43 Atl. 815, holding order abolishing cess-poo
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Pac. Ry., 10 Mont. 184, 25 Pac. 124, 11 L. R. A. 251, 252, an
as to police power over railroads; Morris, etc., Ry. v. Orang
N. J. L. 264, 43 Atl. 734, holding railroad not entitled to damage
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regulations. Under authority of principal case, following
been held within police power, irrespective of contracts: Mugl
Kansas, 123 U. S. 665, 31 L. 211, 8 S. Ct. 299, Kansas law forbid
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act compelling removal of grade crossings; St. Louis, etc., R
Mathews, 165 U. S. 23, 41 L. 620, 17 S. Ct. 251, statute making
roads liable for fires communicated by locomotives; Millbur
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solely for burial purposes; dissenting opinion in Bowman v. Chic
etc., Ry., 125 U. S. 517, 31 L. 718, 8 S. Ct. 711, majority hol
Iowa law forbidding common carriers to bring intoxicants
State, unconstitutional.

Distinguished in Attorney-General v. Fitchburg Ry., 142 M
41, 6 N. E. 855, holding State railroad commissioner cannot n
order violating contract with railroad. See citations under
and ninth syllabi of this case.

115 U. S. 674–683, 29 L. 525, NEW ORLEANS WATER WORK
RIVERS.

Water and water-courses.— Right to dig up and use city st
for purpose of placing pipes to supply city with water, is a franc
belonging to State, grantable to such persons or corporations,
upon such terms, as she deems best for public interest, p. 681.

Approved in State v. Street Ry., 140 Mo. 549, 62 Am. St. Rep.
41 S. W. 957, 38 L. R. A. 221, holding franchise an executed
tract on part of State, forfeitable for condition broken; dissen
opinions in Danville v. Danville Water Co., 178 Ill. 317, 53 N. E.
majority denying power of city authorizing construction of w
works, to bind itself to certain rates for thirty years; Car
Louisville Water Co., 90 Ky. 529, 14 S. W. 505, majority hol
act exempting water company, unconstitutional, though city ov
stock thereof; Los Angeles Water Co. v. Los Angeles, 88 Fed.
arguendo.

Waters and water-courses.— Business of supplying water to
being a public one, grant of franchise therefor may be accompa
by exclusive privileges to grantee, p. 681.

Approved in Santa Ana Water Co. v. Buenaventura, 58 Fed. 349, holding town may contract to surrender right to fix water rates; Mayor of Wilmington v. Addicks, — Del. —, 43 Atl. 304, holding gas company a "corporation for public improvement," within constitutional limitation of period of incorporation; Newport v. Newport Light Co., 84 Ky. 180, holding city with power to maintain gas works, may grant corporation exclusive right to supply gas; Davenport v. Kleinschmidt, 6 Mont. 532, 13 Pac. 255, and Brenham v. Water Co., 67 Tex. 564, 4 S. W. 155, denying power of city, in absence of legislative permission, to grant exclusive right to supply water; Patterson v. Wollmann, 5 N. Dak. 617, 67 N. W. 1044, 33 L. R. A. 540, upholding act authorizing counties to grant exclusive ferry privileges; Parkhurst v. Capital City Ry., 23 Or. 474, 32 Pac. 305, holding, without special legislative permission, city cannot grant exclusive privileges.

Distinguished in Birmingham, etc., Ry. v. Birmingham St. Ry., 79 Ala. 474, 58 Am. Rep. 618, denying municipal power to grant exclusive perpetual franchise to run railway on designated streets; Indianapolis St. Ry. v. Citizens' St. Ry., 127 Ind. 389, 24 N. E. 1060, 8 L. R. A. 547, holding city cannot grant exclusive right to railway to occupy its streets.

Constitutional law.— Charter granting exclusive right to lay pipes in streets and to supply city with water for certain period is, when proceeded under, a contract, obligation of which cannot be impaired by subsequent State legislation or change in Constitution; hence, subsequent grant to individual of right to lay pipes to supply his premises, is invalid, p. 681.

Approved in Tammany Water Works v. New Orleans Water Works, 120 U. S. 65, 67, 30 L. 563, 564, 7 S. Ct. 406, 407, case on all fours; City Ry. v. Citizens' Ry., 166 U. S. 563, 41 L. 1116, 17 S. Ct. 655, holding grant of exclusive privileges to street railroad invalidated subsequent franchise to another; Walla Walla v. Walla Walla Water Co., 172 U. S. 9, 19 S. Ct. 81, holding erection of water works by city, impairment of contract with company; New Orleans Water Co. v. Ernst, 32 Fed. 6, a like case; Santa Ana Water Co. v. Buenaventura, 56 Fed. 345, holding California constitutional provision for fixing water rates, void as to contract made prior to adoption of Constitution; Citizens' St. Ry. v. City Ry., 56 Fed. 751, holding ordinance granting right to build street railway, after acceptance by company, constitutes contract; Baltimore, etc., Co. v. Baltimore, 64 Fed. 160, holding municipality may, by ordinance, make irrepealable contract for use of streets by railway; Africa v. Aldermen, 70 Fed. 734, holding municipality cannot withdraw consent to use of streets actually included in railway's route; Westerly Water Co. v. Westerly, 75 Fed. 189, holding construction of water works by town, after granting exclusive franchise, impairment of contract; Cleveland City Ry. v. Cleveland, 94 Fed. 395, holding city ordinance granting franchise to street railway, when

accepted, a contract; Iron Mountain Ry. v. Memphis, 96 Fed.
129, holding passage of resolution declaring forfeiture of con
with railroad, threatened violation of constitutional rights; Co
bus Water Co. v. Columbus, 48 Kan. 102, 28 Pac. 1098, 15 L. R
356, upholding ultra vires municipal contract with water comp
where latter had gone to expense and furnished water; Schust
Weiss, 114 Mo. 173, 21 S. W. 443, 19 L. R. A. 187, holding sur
contract cannot be changed by change in laws regulating ap
Wheat v. City Council, 88 Va. 743, 14 S. E. 673, holding ordin
making right to open streets dependent on mayor's will, invali
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v. Fergus Falls Water Co., 72 Fed. 877, 879, 36 U. S. App.
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Distinguished in New Orleans Water Works v. Louisiana S
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Louisiana decision, holding grant to individual within exce
in charter; Stein v. Bienville Water Co., 141 U. S. 77, 79, 35 L.
627, 11 S. Ct. 895, 896, holding exclusive grant to supply water
designated source, not violated by grant to another to supply
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L. 844, 16 S. Ct. 709, reversing S. C., 73 Fed. 936, holding unexe
charter power, unessential to main object of grant, revocable;
Orleans Water Works v. New Orleans, 164 U. S. 474, 475, 41 L.
17 S. Ct. 162, 164, holding city council cannot be restrained
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Syracuse, 116 N. Y. 174, 22 N. E. 382, 5 L. R. A. 549, holding
company's grant not exclusive; Allen v. Forrest, 8 Wash. 70
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Constitutional prohibition upon State laws impairing cont
does not restrict power of State to protect public health, m
or safety; hence, grant of exclusive privilege of supplying
does not prevent State from making regulations securing un
rupted use of streets to public or preventing distribution of unw
some water, p. 681.

Approved in St. Louis, etc., Ry. v. Mathews, 165 U. S. 23, 41 L. 620, 17 S. Ct. 251, upholding statute making railroads liable for fires communicated by locomotives; Stein v. Bienville Water Co., 34 Fed. 152, holding grant of exclusive right to supply water, not relinquishment of police power; Stehmeyer v. City Council, 53 S. C. 279, 31 S. E. 330, arguendo.

Distinguished in McCandless v. Railroad, 38 S. C. 109, 16 S. E. 430, 18 L. R. A. 442, holding act making railroads responsible for fires communicated by locomotives, not within police power.

115 U. S. 683-700, 29 L. 510, LOUISVILLE GAS CO. v. CITIZENS' GAS CO.

Gas.— Services rendered in supplying gas to municipality and inhabitants thereof constitute such public services as, under Kentucky Constitution, authorize legislature to grant exclusive privileges, p. 698.

Approved in Gibbs v. Baltimore Gas Co., 130 U. S. 408, 32 L. 984, 9 S. Ct. 557, and Chicago Gas Co. v. People's Gas Co., 121 Ill. 539, 2 Am. St. Rep. 129, 13 N. E. 172, both holding gas company cannot, by contract with another, disable itself from performing duty to public; United States v. Freight Association, 166 U. S. 333, 41 L. 1025, 17 S. Ct. 556, holding railroads public corporations; Pensacola Gas Co. v. Pensacola, 63 Fla. 336, 14 So. 830, holding grant strictly construable against grantee; Newport v. Newport Light Co., 84 Ky. 180, holding city with power to maintain gas works, may grant corporation exclusive right to supply gas; Davenport v. Kleinschmidt, 6 Mont. 532, 13 Pac. 255, denying power of city, in absence of legislative permission, to grant exclusive right to supply water; Haugen v. Albina, etc., Co., 21 Or. 418, 28 Pac. 246, 14 L. R. A. 426, holding duty of supplying water to any inhabitant, enforceable by mandamus; Parkhurst v. Capital City Ry., 23 Or. 474, 32 Pac. 305, holding special legislative permission essential to power of city to grant exclusive rights; Crumley v. Watauga Water Co., 99 Tenn. 426, 41 S. W. 1060, holding water company cannot refuse to supply water because applicant owes it money; dissenting opinion in Clark v. Louisville Water Co., 90 Ky. 529, 14 S. W. 505, majority holding act exempting water company unconstitutional, though city owned stock thereof.

Distinguished in Watauga Water Co. v. Wolfe, 99 Tenn. 431, 63 Am. St. Rep. 842, 41 S. W. 1061, holding water company may refuse to supply applicant refusing to agree to reasonable rules; dissenting opinion in State v. Haworth, 122 Ind. 505, 23 N. E. 960, 7 L. R. A. 254, majority upholding State school-book contract.

Courts.— Whether alleged contract arises from State legislation, by agreement with State's agents, by its authority, or by stipulations between individuals exclusively, Supreme Court must, upon its own judgment, independently of State adjudications, decide

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Reaffirmed in Lehigh Water Co. v. Easton, 121 U. S. 392, 30
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Distinguished in Bacon v. Texas, 163 U. S. 219, 41 L. 137, 16
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Constitutional law.— Act amending charter of gas company un
the reserve power to alter, and providing that charter shall
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waives absolute power of State to alter charter, p. 698.

Cited in Citizens' Sav. Bank v. Owensboro, 173 U. S. 647, 19 S.
534, mere grant of tax immunity for stated time is not a contract

Distinguished in Louisville Water Co. v. Clark, 143 U. S. 14,
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tive, p. 699.

Approved in Africa v. Aldermen, 70 Fed. 737, holding char
granting use of streets to railway, irrevocable when acted on;
Angeles Water Co. v. Los Angeles, 88 Fed. 734, holding city can
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ANN

THE DECISIONS

OF THE

Supreme Court of the United States,

AT OCTOBER TERM, 1885.

MATTHIAS SIMMERMAN, *Plff. in Err.*,

v.

STATE OF NEBRASKA.

(See S. C., Reporter's ed., 54, 55.)

Jurisdiction—federal question—when it must arise.

1. Where it does not appear from the record that a federal question was actually presented or in any way relied upon before final judgment below, this court is without jurisdiction.

2. This court acts upon the case as made to the court below when the judgment was rendered, and cannot incorporate into the record new matter appearing on a petition for rehearing.

[No. 931.]

Submitted Dec. 3, 1885. Decided Dec. 7, 1885.

IN ERROR to the Supreme Court of the State of Nebraska.

On motion to dismiss.

Mssrs. **Wm. Leese,** *Atty-Gen. of Nebraska,* and **Enoch Totten,** for defendant in error, in support of motion.

Mr. **L. C. Burr,** for plaintiff in error, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

It nowhere appears from this record, either in the application for a change of venue or in the objections to the admissibility of evidence, in the charge of the court as given or to the refusals to charge as requested, or in the motion for a new trial, the assignment of errors in the Supreme Court of the State, or the opinion filed in that court, that any federal question was actually presented for consideration or in any way relied on before the final judgment from which the writ of error has been taken. Such being the case, we cannot take jurisdiction. *Detroit Railway Co.* v. *Guthard,* 114 U. S. 134 [Bk. 29, L. ed. 118]; *Brown* v. *Colorado,* 106 U. S. [illegible] [Bk. 27, L. ed. 132]. The fact that, after the final judgment and in the petition for a writ of error to this court, which seems to have been filed also as a petition for rehearing, a federal question was presented is not enough. It is decided in *Susquehanna Boom Co.* v. *W. Branch Boom Co.* 110 U. S. 57 [Bk. 28, L. ed. 4[illegible]]. As was said in that case: "We act on the case made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment on a petition for rehearing. Such a petition is no part of the record on which the judgment rests." [55]

The motion to dismiss for want of jurisdiction is granted.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

MICHAEL HANLEY ET AL., *Plffs. in Err.*, [1]

v.

CHARLES DONOGHUE.

(See S. C., Reporter's ed., 1-7.)

Suit in a state court upon a judgment rendered in another State—judicial notice of state laws by federal and state courts—general rules.

1. State courts do not take judicial notice of the laws of other States, the several States being considered in this respect, foreign to each other.

2. Although this court, in the exercise of its appellate jurisdiction from the lower Courts of the United States, takes judicial notice of the laws of all the States; yet, upon error to the highest court of a State it takes judicial notice of the laws of that State only; the laws of other States being only known to the court below as facts, to be proved as such.

3. In an action brought in a state court upon a judgment rendered in another State, an allegation as to the legal effect of the judgment in that State is admitted by demurrer.

4. Where a judgment of a state court in an action against joint defendants, one of whom has not been duly summoned, is by the law of that State valid as to those who were summoned, or who appeared, it will sustain an action against such defendants in another State.

[No. 229.]

Argued Nov. 18, 19, 1885. Decided Dec. 14, 1885.

IN ERROR to the Court of Appeals of the State of Maryland.

The history and facts of the case appear in the opinion of the court.

Mr. **Frederick J. Brown,** for plaintiffs in error.

NOTE.—*Evidence; proof of foreign and state laws.* See U. S. Bank v. Stearns, 15 Wend., 314, *note in Law. ed.*

Presumption as to the existence of the common or local law in other States or countries. See Abell v. Douglass, 4 Den., 305, *note in Law. ed.*

The courts of the United States take judicial notice of the laws of the several States. See M'Niel v. Holbrook, 37 U. S. (12 Pet.), 84, bk. 9, 1009, *note.* For an important exception to this rule, see the above case of Hanley v. Donoghue.

Mr. **Edward C. Eichelberger,** for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

[1] This was an action brought by Michael Hanley and William F. Welch against Charles Donoghue in the Circuit Court for Baltimore County in the State of Maryland, upon a judgment for $2,000 recovered by the plaintiffs on June 4, 1877, in an action of covenant against the defendant, Charles Donoghue, together with one John Donoghue, in the Court of Common

[2] Pleas of Washington County in the State of Pennsylvania, and there recorded.

The declaration contained three counts. The first count set forth the recovery and record of the judgment as aforesaid in said court of common pleas, and alleged that it was still in force and unreversed. The second count contained similar allegations, and also alleged that in the former action Charles Donoghue was summoned, and property of John Donoghue was attached by process of foreign attachment, but he was never summoned and never appeared, and that the proceedings in that action were duly recorded in that court. The third count repeated the allegations of the second count, and further alleged that "by the law and practice of Pennsylvania the judgment so rendered against the two defendants aforesaid is in that State valid and enforceable against Charles Donoghue and void as against John Donoghue," and that "by the law of Pennsylvania any appeal from the judgment so rendered to the Supreme Court of Pennsylvania (which is the only court having jurisdiction of appeals from the said court of common pleas) is required to be made within two years of the rendition of the judgment, nevertheless no appeal has ever been taken from the judgment so rendered against the said defendants, or either of them."

The defendant filed a general demurrer to each and all of the counts, which was sustained, and a general judgment rendered for him. Upon appeal by the plaintiffs to the Court of Appeals of the State of Maryland, the judgment was affirmed. 59 Md. 239. The plaintiffs thereupon sued out this writ of error, on the ground that the decision was against a right and privilege set up and claimed by them under the Constitution and laws of the United States.

[3] The question presented by this writ of error is, whether the judgment of the Court of Appeals of the State of Maryland has denied to the plaintiffs a right and privilege to which they are entitled under the first section of the fourth article of the Constitution of the United States, which declares that "Full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State; and the Congress may by general laws prescribe the manner in which such Acts, records and proceedings shall be proved and the effect thereof;" and under section 905 of the Revised Statutes, which re-enacts the Act of May 26, 1790, chap. 11, 1 Stat. at L. 122, and prescribes the manner in which the records and judicial proceedings of the courts of any State shall be authenticated and proved, and enacts that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every cou United States as they have by law the courts of the State from wh taken."

By the settled construction of ions of the Constitution and sta United States, a judgment of a sta cause within its jurisdiction and fendant lawfully summoned, or fully attached property of an absen is entitled to as much force and e the person summoned or the prope when the question is presented fo a court of another State, as it has i which it was rendered. *Maxwell* v Wall. 77 [89 U. S. bk. 22, L. ed. *ance Co.* v. *Harris*, 97 U. S. 331 [B 959]; *Green* v. *Van Buskirk*, 7 W U. S. bk. 19, L. ed. 109]; *Cooper* 10 Wall. 308 [77 U. S. bk. 19, L. ed it is within the power of the Leg State to enact that judgments wh rendered in its courts in actions defendants, one of whom has no served with process, shall be vali who have been so served, or who ha in the action. *Mason* v. *Eldred*, 6 W U. S. bk. 18, L. ed. 783]; *Eldred* Wall. 545 [84 U. S. bk. 21, L. ed. *Lanning*, 91 U. S. 160, 168 [bk. 2 274]; *Sawin* v. *Kenny*, 93 U. S. 28 ed. 926].

Much of the argument at the bar to the discussion of questions wh that we take of this case renders it to consider; such as the proper m peaching or avoiding judgments in which they are rendered, for wan vice of process upon one or all of ants; or the effect which a judgme in one State against two joint def of whom has been duly summo other has not, should be allowed former in the courts of another S allegation or proof of the effect a judgment has against him by th first State.

No court is to be charged with th of foreign laws; but they are wel to be facts which must, like oth proved before they can be receive of justice. *Talbot* v. *Seeman*, 1 Cran *Church* v. *Hubbart*, 2 Cranch, 187, U. S. bk. 2, L. ed. 15, 27, 249, 265] *Lucas*, 6 Pet. 763, 768 [31 U. S. bk. 575]; *Dainese* v. *Hale*, 91 U.S. 13, 2 ed. 190, 193]. It is equally well se several States of the Union are to b as in this respect foreign to eac that the courts of one State are not know, and therefore not bound to notice of the laws of another State. v. *Finley*, in which it was held exchange drawn in one of the S sons living in another were foreign said by *Mr. Justice* Washington, d unanimous opinion of this court: tional purposes embraced by the stitution, the States and the citizen one, united under the same sover ity, and governed by the same other respects, the States are necess to and independent of each other.

stitutions and forms of government being, although republican, altogether different, as are their laws and institutions." 2 Pet. 590 [27 U. S. bk. 7, L. ed. 530].

Judgments recovered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. *Buckner* v. *Finley*, [*supra*]; *M'Elmoyle* v. *Cohen*, 13 Pet. 312, 324 [38 U. S. bk. 10, L. ed. 177, 183]; *D'Arcy* v. *Ketchum*, 11 How. 165, 176 [52 U. S. bk. 13, L. ed. 648, 653]; *Christmas* v. *Russell*, 5 Wall. 290, 305 [72 U. S. bk. 18, L. ed. 475, 478]; *Thompson* v. *Whitman*, 18 Wall. 457 [85 U. S. bk. 21, L. ed. 897].

Congress, in the execution of the power conferred upon it by the Constitution, having prescribed the mode of attestation of records of the courts of one State to entitle them to be proved in the courts of another State, and having enacted that records so authenticated shall have such faith and credit in every court within the United States as they have by law or usage in the State from which they are taken, a record of a judgment so authenticated doubtless proves itself without further evidence; and if it appears upon its face to be a record of a court of general jurisdiction, the jurisdiction of the court over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself. *Knowles* v. *Gas Light & Coke Co.* 19 Wall. 58 [86 U. S. bk. 22, L. ed. 70]; *Settlemier* v. *Sullivan*, 97 U. S. 444 [Bk. 24, L. ed. 1110]. But Congress has not undertaken to prescribe in what manner the effect that such judgments have in the courts of the State in which they are rendered shall be ascertained, and has left that to be regulated by the general rules of pleading and evidence applicable to the subject.

Upon principle, therefore, and according to the great preponderance of authority (as is shown by the cases collected in the margin*), whenever it becomes necessary for a court of one State, in order to give full faith and credit to a judgment rendered in another State, to ascertain the effect which it has in that State, the law of that State must be proved, like any other matter of fact. The opposing decisions in *Ohio* v. *Hinchman*, 27 Pa. St. 479, and *Paine* v. *Schenectady Ins. Co.* 11 R. I. 411, are based upon the misapprehension that this court, on a writ of error to review a decision of the highest court of one State upon the faith and credit to be allowed to a judgment rendered in another State, always takes notice of the laws of the latter State; and upon the consequent misapplication of the postulate that one rule must prevail in the court of original jurisdiction and in the court of last resort.

*Scott v. Coleman, 5 Littell, 349; Thomas v. Robinson, 3 Wend. 267; Sheldon v. Hopkins, 7 Wend. 435; Van Buskirk v. Mulock, 3 Harrison (N. J.) 184; Elliott v. Ray, 2 Blackf. 31; Cone v. Cotton, 2 Blackf. 63; Snyder v. Snyder, 25 Ind. 399; Pelton v. Platner, 13 Ohio, 209; Horton v. Critchfield, 18 Ill. 123; Rape v. Heaton, 9 Wis. 328; Crafts v. Clark, 31 Iowa, 77; Taylor v. Barron, 10 Foster, 73, and 35 N. H. 484; Kemp v. Abell, 10 Allen, 485; Mowry v. Chase, 100 Mass. 79; Wright v. Andrews, 130 Mass. 149; Bank of United States v. Merchants' Bank, 7 Gill, 415, 431; Gaines v. Mackey, 56 Md. 416, 419.

When exercising an original jurisdiction under the Constitution and laws of the United States, this court, as well as every other court of the National Government, doubtless takes notice, without proof, of the laws of each of the United States.

But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here; and whatever was matter of fact in the court appealed from is matter of fact here.

In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every State of the Union, because those laws are known to the court below as laws alone, needing no averment or proof. *Course* v. *Stead*, 4 Dall. 22, 27 [4 U. S. bk. 1, L. ed. 724, 726]; *Hinde* v. *Vattier*, 5 Pet. 398 [30 U. S. bk. 8, L. ed. 168]; *Owings* v. *Hull*, 9 Pet. 607, 625 [34 U. S. bk. 9, L. ed. 246, 252]; *United States* v. *Turner*, 11 How. 663, 668 [52 U. S. bk. 13, L. ed. 856, 859]; *Pennington* v. *Gibson*, 16 How. 65 [57 U. S. bk. 14, L. ed. 846]; *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227, 230 [61 U. S. bk. 15, L. ed. 896]; *Cheever* v. *Wilson*, 9 Wall. 108 [76 U. S. bk. 19, L. ed. 604]; *Junction R. R. Co.* v. *Bank of Ashland*, 12 Wall. 226, 230 [79 U. S. bk. 20, L. ed. 385, 387]; *Lamar* v. *Micou*, 114 U. S. 218, [*ante*, 94].

But on a writ of error to the highest court of a State, in which the revisory power of this court is limited to determining whether a question of law depending upon the Constitution, laws or treaties of the United States has been erroneously decided by the state court upon the facts before it—while the law of that State, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error—yet, as in the state court the laws of another State are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up, as in *Green* v. *Van Buskirk*, [*supra*]. The case comes, in principle, within the rule laid down long ago by *Chief Justice* Marshall: "That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned." *Talbot* v. *Seeman* [*supra*]. [7]

Where by the local law of a State (as in Tennessee, *Hobbs* v. *Memphis & Charleston Railroad*, 9 Heisk. 878) its highest court takes judicial notice of the laws of other States, this court also, on writ of error, might take judicial notice of them. But such is not the case in Maryland, where the court of appeals has not only affirmed the general rule that foreign laws are facts which, like other facts, must be proved before they can be received in evidence in courts of justice, but has held that the effect which a judgment rendered in another State has by the law of that State is a matter of fact, not to be judicially noticed without allegation and proof; and consequently that an allegation of the effect which such a judgment has by law in that State is admitted by demurrer. *Baptiste* v. *De Volunbrun*, 5 Har. & J. 86, 98; *Wernwag* v. *Pawling*, 5 Gill & J. 500, 508; *Bank of United*

States v. *Merchants' Bank*, 7 Gill, 415, 431; *Coates* v. *Mackey*, 56 Md. 416, 419.

From these considerations, it follows that the averment in the third count of the declaration, that by the law of Pennsylvania the judgment rendered in that State against Charles Donoghue and John Donoghue was valid and enforceable against Charles, who had been served with process in that State, and void against John, who had not been so served, must be considered, both in the courts of Maryland and in this court on writ of error to one of those courts, an allegation of fact, admitted by the demurrer.

Upon the record before us, therefore, the plaintiff appears to be entitled, under the Constitution and laws of the United States, to judgment on this count. It having been admitted at the bar that the other counts are for the same cause of action, it is unnecessary to consider them. The general judgment for the defendant is erroneous, and the rights of both parties will be secured by ordering, in the usual form, that the

Judgment of the Court of Appeals of Maryland be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[33] WILLIAM C. HOLGATE ET AL., *Appts.*,
v.
RUFUS J. EATON, Admr. of ELIZABETH R. EATON, Deceased, ET AL.

(See S. C., Reporter's ed., 33–42.)

Husband and wife—contract by husband affecting wife's equitable estate—specific performance not decreed, when.

1. A wife's equitable estate in property held by her husband as trustee cannot be affected by a conveyance by him; nor can it be made liable for a contract made by him, to which she was not a party and which she has not sanctioned.

2. Upon the facts of this case, it is held that the wife was not bound by her husband's contract affecting her equitable estate; that having repudiated his action in the matter until after a material change in the circumstances, she could not then take advantage of the contract: that no contract had been completed between her and the defendants; and that the bill should be dismissed, but that the cross bill of the defendants should be prosecuted to determine their rights growing out of a tax title and the payment by them of a certain sum on account of the husband.

3. Where time is not expressly or impliedly of the essence of a contract, in case of gross laches or inexcusable negligence on the part of a party who seeks a specific performance, or a material change in the circumstances affecting the rights of the parties, a court of equity will refuse to decree a specific performance.

[No. 75.]

Argued Nov. 24, 25, 1885. Decided Dec. 14, 1885.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The history and facts of the case appear in the opinion of the court.

Messrs. **Henry Newbegin** and **William C. Holgate**, in person, for appellants.

Messrs. **James H. Hoyt** and *H. S. Sherman*, for appellees.

Mr. Justice **Miller** delivered t
the court:

This is an appeal from the Circ
the Northern District of Ohio.

The suit was originally brough
equity, in the name of Elizabeth
her next friend, Rufus J. Eaton
progress Mrs. Eaton died, and he
was appointed administrator of h
it was revived by him in that cha
wards her heirs were made plaint

The case as it was presented t
court for final decree, and as it co
is to be gathered from the pleadir
tary evidence, written correspond
ositions which are voluminous.
recapitulate the evidence, but stat
facts as we believe them to be est

John B. Eaton, the husband of
ant, who resided with her in Ma
claimed to be the owner in his own
ty-five acres of land near the town
the State of Ohio, lying between th
Erie Canal and the Pittsburgh and
Railroad, was in July, 1874, at
ing to sell it. Being in pressing w
he made his note for $400, payab
ance National Bank in ninety day
30, 1874, with Holgate and Newb
appellants here, as his sureties.
afterwards paid.

On the same day Eaton made a
absolute on its face, to Holgate
above mentioned, and at the same
Holgate executed the following a

"Defiance, Ohio, Ju

"This memorandum witnesseth
Eaton, of Fryeburg, Maine, has
to Wm. C. Holgate, 'that part of
of section twenty-seven (27), T. 4
lying between the Fort Wayne ro
& E. Canal, and containing nine
more or less, excepting 12 15/100 ac
by Michael Gorman, all more fu
and set forth in a deed this day
said John B. Eaton to said Holg
derstood said Holgate is to pay fo
sum of six thousand dollars, and
claim Adam Wilhelm may hold
ises, one thousand dollars of whic
on or before October 1, next: two
lars in six months thereafter; fif
dollars ($1,500) in one year there
teen hundred dollars in two yea
with interest from and after Octo
is further understood said Eaton
another deed of warranty, his wif
with him as grantor in same, an
said deed on to H. Newbegin for
which is to be substituted for the
executed to said Holgate as afores
Eaton agrees to send on to said N
mortgage and notes on which the
taken by which his title was acq
he can find same, which are to be
ing to law. It is further understo
that if, on or before said Octob
any cause, said Holgate shall pref
said premises on the terms herein
Eaton agrees to repurchase same
to release any installment that is u
Holgate, or portion of same, and
to pay said Wilhelm's tax claims;

with interest four hundred dollars ($400) this day advanced on said $1,000 installment to come due October first next, and for any advancements to said Eaton by said Holgate that is or may be made, said Holgate shall have a lien on said premises, and may hold the title for same as security till such advancements shall be adjusted. If, however, said Holgate shall be satisfied with said purchase on account of quality of land and all other particulars, he shall, at any time after sixty days, on demand of said Eaton, execute and deliver his notes for any unpaid part of said installments, secured by mortgage on the premises. It being understood that any amount the railway companies may pay over for the portion of said premises between the two railways shall be credited on the said $6,000 to be paid by said Holgate, or to go to said Eaton, less advancements aforesaid, if said Holgate shall prefer to release and reconvey his interest in the premises aforesaid. Given under our hands and seals the day and year above written.

J. B. Eaton. [Seal.]
Wm. C. Holgate. [Seal.]

"Attest: Henry Newbegin."

Holgate immediately assigned to Newbegin an undivided half interest in this contract, of which Eaton had due notice. He also, within the time limited, notified Eaton of his election to hold the property, and required him to furnish the deed in which Mrs. Eaton was to join, and the mortgage and notes on which the foreclosure proceeding was had, and on which Eaton's title depended.

This deed, however, was not tendered to appellants until December 7, 1876, though the notice and request for it was received before October 1, 1874. As appellants rely upon this delay as a defense to the suit for the purchase money, it is necessary to consider its importance in the contract and the excuses offered for the delay.

It appears sufficiently, we think, on the final hearing, that Mr. Eaton had no other interest in the land at the time he executed this agreement and made his deed to Holgate than that of trustee for his wife. "The mortgage and notes on which judgment was taken, by which his title was acquired," were never produced until the hearing before the master in 1882, and the effect of them as evidence is thus stated by the master:

"It appears that, by the will of William A. Allen, brother of Elizabeth R. Eaton, a share of his estate was given to her. Bartley Campbell, of Cincinnati, her agent, seems to have had possession of this share of the estate, being personal property, and used it as his own. In accounting for the same, he assigned a mortgage which he held on lands in Defiance to John B. Eaton, her husband, in trust for Mrs. Eaton and her children. This mortgage was foreclosed under proceedings at Defiance, in which John B. Eaton appeared to be the only party in interest, and at the sheriff's sale he became the purchaser, and the sheriff's deed was made to him, of about ninety-five acres of land in Defiance."

It should be added that the assignment of this mortgage expressed on its face that it was for the benefit of Mrs. Eaton.

It is said by the master that the deed from Mrs. Eaton required by the contract was unnecessary, because by the sale and purchase under the foreclosure proceedings Eaton had acquired title, and his deed to Holgate was sufficient to convey that title discharged of all equitable rights of Mrs. Eaton.

But we are of opinion that in this the master was in error.

It is quite clear to us that Holgate had full notice of Mrs. Eaton's interest in the land, for he seems to have been aware of the nature of the assignment by Campbell of the notes and mortgage to Eaton, and therefore required that they be delivered up to him, if they could be found, and they were found.

But as a still further security against Mrs. [38]
Eaton's equitable right or interest in the lands, he took from Eaton the covenant that if he elected to hold the land as a purchaser, Mrs. Eaton should join with him as grantor in another deed, with warranty of title. It is idle to say that Holgate did not have a pretty clear idea of Mrs. Eaton's rights in the land, and intended to have full protection against them, and that this part of the covenant had reference to a right of dower. She was to join as grantor in the warranty of title.

That all the parties understood that Mrs. Eaton had the paramount interest and equitable title to the land is seen in the whole subsequent correspondence.

It is argued on the part of the appellants, on the other hand, that the deed of Eaton and the accompanying contract constituted a mortgage for the security of Holgate in regard to the $400 note which he agreed to pay, and for the sum he might have to advance to buy in the tax title of Wilhelm, with the option, on the part of Holgate, to convert it into a purchase before October 1, that is, within sixty days. We do not deem it important to decide whether we call the transaction a mortgage or a conditional purchase. The effect is the same either way, as, if the purchase was perfected, the $400 was to be part of the purchase money. If it was not perfected, it, with the amount paid for the tax title, was to be a lien on the land conveyed.

It seems that when Mrs. Eaton was informed of the transaction between her husband and Holgate she refused to abide by it, and would not make the deed which the contract called for.

In August, Holgate had informed Eaton of his election to hold the land, and in a letter of September 30 he requests him to forward the deed in which his wife was to join. It is quite apparent that Mrs. Eaton had got possession or control of the notes and mortgage, which Mr. Eaton was therefore unable to surrender, and he had to confess his inability to get Mrs. Eaton to join him in the deed. About this time the railroad company, by judicial proceedings, condemned and appropriated thirteen acres of the land for its use; and the sum of $2,600 awarded as damages was matter of contention between Mrs. Eaton and her husband.

Under these circumstances, Holgate and New- [39]
begin entered into correspondence with Mrs. Eaton and her son, who acted for her in the matter. They both denied the binding force of the transaction with Mr. Eaton on Mrs. Eaton.

This correspondence ran through two years, in all of which Holgate and Newbegin urged

her to fulfill the contract by making a conveyance of the land, and Mr. Eaton seems to have dropped out of the matter in utter helplessness. Holgate insisted that the price of the land condemned by the railroad company should be deducted from the price he had agreed to pay, and still pressed for his deed. Finally, in June, 1875, Holgate sent to Mrs. Eaton a mortgage executed by him and Newbegin on the land, less the thirteen acres taken by the railroad company, with two notes for $1,500 each, payable directly to her, not negotiable, and requested her to send the deed of herself and Mr. Eaton for the land described in the mortgage; but she declined to do so, though she kept the notes and mortgage.

On the 7th December, 1876, she did, however, tender such a deed, which Holgate and Newbegin refused to receive, and demanded payment of the $400 they had paid the bank on the note for Mr. Eaton and the sum they had paid Wilhelm for his tax title, $424. Shortly after this the present suit was commenced.

We think that the correspondence shows that during all this time, until a few months before Mrs. Eaton sent her conveyance, the appellants showed themselves ready, willing and eager to perform the contract; that Mr. Eaton, with whom they had contracted, proved himself unable to perform his covenant to procure his wife's conveyance; and that she, when appealed to and offered the consideration which the contract provided for, repudiated the husband's action in the matter, and held the notes and mortgage of the appellants for eighteen months, refusing to make the deed, without which she had no right to hold them a day.

This deed was essential to the contract. Without it Holgate would get nothing for the money he had paid and the notes he had tendered. He had a right to prompt action on the [40] part of Mrs. Eaton if she intended to accept the contract. We are bound to hold that while she had a right to refuse to be bound by the contract, she could not play fast and loose with the other parties to suit her pleasure. When, a year and a half after the notes and mortgages were sent to her, she tendered her deed it was too late to bind the appellants without their consent.

An important consideration leading to the same conclusion is, that at the time the contract was made and for a year or more after the value of the property continued to increase, but, for reasons not necessary to discuss, it had decreased so largely that at the time she tendered her deed it was worth far less than when Holgate elected to keep the land as a purchaser and demanded of Eaton the joint deed of himself and Mrs. Eaton. It is reasonable to suppose that this depreciation in value entered into the motives which finally induced her change of mind in the matter. The injustice of permitting her to delay two years her consent under these circumstances is obvious.

The case before us is practically a bill by Mrs. Eaton for specific performance. At law she could sustain no action on the notes, and the circumstances under which she received and held them and the mortgage would be a perfect defense to a mere foreclosure of the mortgage. Her only ground of success in the present suit therefore is in the principles of equity jurisprudence in enforcing a specific
of the agreement to buy the land
purchase money, and the allowa
court of chancery sometimes ma
when time is not of the essence o

In the case of *Taylor* v. *Longu*
172 [39 U. S. bk. 10, L. ed. 405
Story uses language which has si
legal maxim in this class of cases
place (he says) there is no doubt
may be of the essence of a contra
of property. It may be made so
stipulation of the parties, or it ma
plication from the very nature of
or the avowed object of the seller
And even where time is not thus
ly or impliedly of the essence of
if the party seeking a specific per
been guilty of gross laches or h
cusably negligent in performing
on his part, or if there has been
diate period a material change of
affecting the rights, interests, or
the parties—in all such cases co
will refuse to decree any specific
upon the plain ground that it wo
table and unjust."

It is quite apparent, therefore,
Eaton is seeking to enforce the
with her husband, she has been
gent, until altered circumstances
the right to do so; and if she rel
tract with herself, no such contr
completed.

Her bill, therefore, should h
missed.

Holgate and Newbegin, howev
bill against Mr. & Mrs. Eaton ass
to recover the $400 paid for Eaton
paid for the deed of Wilhelm fo
and Mrs. Eaton having died whi
were pending, her executor and
were made parties in both bills.
presents more difficulty to our mi
main bill, for it seeks to subject t
payment of these sums with i
doubtedly, if Mrs. Eaton had acc
tract made by her husband she
been bound by this part of it a
other, and, failing to perform h
these sums would become a lien
according to the agreement. Bu
came bound by that contract. As
said, no contract was ever made
and Holgate. They never were
other at any time. There was ne
consent of minds on the subject.

We have also expressed the opi
ton's deed to Holgate did not con
table interest, nor did his contrac
the agreement. It did not bind h
in a conveyance, and it did not bi
security for the money advance
band. The same consideration
purchase of the Wilhelm tax titl
see how the equitable estate of
her lifetime, or of her heirs no
dead, can be made liable for a con
she was no party and which sh
tioned. But appellants have suc
terest in the land as Mr. Eaton ha
passed by his conveyance. This
estate. It may be a right to hold

costs and expenses, or it may be the naked legal title. Whatever it is passed to Holgate by the deed.

As regards the Wilhelm tax title, it may be a perfect title or it may be a lien for the taxes paid by the purchaser at the tax sale. Or it may be that Holgate, holding the legal title as Eaton did, in trust, was bound to protect that title by the purchase from Wilhelm; and if so, it may be a lien on the land, though not a perfect title.

Of all this we are unadvised. But in the cross bill Holgate and Newbegin tender a conveyance of both these rights upon payment of the two sums mentioned, with interest. If the heirs of Mrs. Eaton will pay these sums and accept the conveyance, they should be permitted to do so. If they decline, the plaintiffs in the cross bill may be entitled to a decree against Mr. Eaton *in personam*, for he is a defendant to that bill, has appeared, but made no answer. As regards the cross bill against the heirs of Mrs. Eaton, if they will not pay these sums, the appellants can dismiss their bill as to them without prejudice to the legal rights of Holgate and Newbegin under the deeds from Eaton and Wilhelm, or they can proceed in it according to the principles of equity.

The decree of the Circuit Court in the original bill is, therefore, reversed, and the decree in the cross bill also. The case is remanded to the Circuit Court, with instructions to dismiss the original bill at the cost of the plaintiffs in that bill, and to take such further proceedings in the cross bill as are not inconsistent with this opinion, and as may be appropriate to enforce the rights of plaintiffs therein.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plf. in Err.*, v. BEM PRICE.

(See S. C., Reporter's ed., 43-45.)

Suit to recover money paid under private Act—Secretary of the Treasury has no discretion.

Where, by Act of Congress, the Secretary of the Treasury is required to pay a certain claim against the United States, no discretion in the premises being vested in him, the claimant is entitled to payment; and a suit to recover back the amount when paid, on the ground of mistake, does not lie, unless Congress abrogates the law under which payment was made, or directs suit to be brought.

[No. 210.]

Submitted Nov. 23, 1885. Decided Dec. 14, 1885.

IN ERROR to the District Court of the United States for the Northern District of Mississippi.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **A. H. Garland**, *Atty-Gen.*, for plaintiff in error.

Mr. **J. Z. George**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit brought to recover back a sum of money collected by Bem Price from the United States on a claim "for property and supplies taken * * * for the use of the armies of the United States during the war of the rebellion," allowed by the Commissioners of Claims under the Act of March 3, 1871, 16 Stat. at L. 524, chap. 116, § 2, on the ground that "Said sum of money was paid to defendant under Act of Congress, approved March 3, 1875, as heir and legatee of his deceased father's estate, and in mistake that the said sum was due him as only heir and legatee of decedent, when in truth and in fact the property and supplies so taken * * * belonged jointly to defendant and his two brothers;" and "when in truth and in fact the defendant and his said brothers were disloyal to the Government during the war of the rebellion, and not entitled under the law to recover said sum of money or any part thereof." The Act of March 3, 1875, 18 Stat. at L. pt. 3, 637, 646, Private Laws, chap. 205, is as follows:

"*Be it enacted*, etc., That the Secretary of the Treasury be, and he is hereby, authorized and required to pay, out of any money in the Treasury not otherwise appropriated, to the several persons in this Act named, the several sums mentioned therein, the same being in full for and the receipt of the same to be taken and accepted in each case as a full and final discharge of the several claims presented by such persons to the Commissioners of Claims under the Act of March 3, 1871, and reported to the House of Representatives under the said Act, that is to say: * * * Bem Price, $6,306 * * *" [44]

The district court gave judgment for the defendant. To reverse that judgment this writ of error was brought.

We are unable to distinguish this case in principle from that of *United States* v. *Jordan*, 113 U. S. 418 [Bk. 28, L. ed. 1013], in which it was held that when an Act of Congress directed the Secretary of the Treasury to pay to a certain person a specific sum of money, the amount of taxes assessed upon and collected from him contrary to the provisions of certain treasury regulations, "no discretion was vested in the Secretary or in any court to determine whether the sum specified was or was not the amount of tax assessed contrary to the provisions of such regulations;" and that consequently the payment must be made whether the amount stated by Congress was the true amount collected or not. The court of claims had held that the language of the Act, "taken together, was too clear to admit of doubt, that Congress undertook, as it had the right to do, to determine not only what particular citizens of Tennessee, by name, should have relief, but also the exact amount which should be paid to each of them." In this we fully concurred.

The Act now under consideration "required" the Secretary of the Treasury to pay Price the money he got. It was when the payment was made and is now the law of the land that he was entitled to that sum from the United States on account of his claim. The Secretary of the Treasury could not refuse to pay it, and no authority has been given anyone to sue to recover it back. It may be that Congress required the payment to be made under a mistake, or that the claim was not a just one; but until Congress abrogates the law or directs suit to be brought to recover back the money, the con-

clusive presumption is that there was no mistake, and that Price is under no obligation to pay back what he has received.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[28] UTAH & NORTHERN RAILWAY COMPANY, *Appt.*,

v.

WILLIAM F. FISHER, Assessor and *ex officio* Collector of Territorial and County Taxes in and for ONEIDA COUNTY, IDAHO TERRITORY.

(See S. C., "*Utah & Northern Railway* v. *Fisher*," Reporter's ed., 28-33.)

Fort Hill Indian Reservation—subject to jurisdiction of Idaho—taxation of railroad property therein, valid.

1. The Fort Hill Indian Reservation is subject to the general jurisdiction of the Territory of Idaho, as to all matters not interfering with the rights secured to the Indians by treaty.
2. By force of the cession of the land upon which the road and other property of the Utah and Northern Railway Company are situated, it was, so far as necessary for railroad purposes, withdrawn from the reservation. The taxation of such property by the Territory does not impair the treaty rights of the Indians.
3. A stipulation of the parties and finding of the court thereon will be construed, on appeal, with reference to existing laws affecting the subject matter.

[No. 554.]

Submitted Oct. 21, 1885. Decided Dec. 14, 1885.

APPEAL from the Supreme Court of the Territory of Idaho

The history and facts of the case appear in the opinion of the court.

Messrs. **John F. Dillon and A. J. Poppleton,** for appellant.

Messrs. **Joseph K. McCammon and H. W. Smith,** for appellee.

Mr. Justice **Field** delivered the opinion of
[28] the court:

The plaintiff became a corporation of Utah under an Act of the Territory of February 12, 1869, for the incorporation of railroad companies; and by the Act of Congress of June 20, 1878, it was made a railway corporation, not only of that Territory but of Idaho and Montana also, with the same rights and privi-
[29] leges it had under its original articles of incorporation, with a proviso, however, that it should thereafter be subject to all laws and regulations in relation to railroads of the United States, or of any Territory or State through which it might pass. 20 Stat. at L. chap. 362, § 2. It now owns and operates in Idaho a railroad which, for the distance of sixty-nine miles and a fraction of a mile, passes through a tract of land in the County of Oneida, known as the Fort Hill Indian Reservation, which was, on the 30th of July, 1869, set apart by order of the President for the Bannock Tribe of Indians, pursuant to the provisions of a Treaty between the United States and the Eastern

Band of Shoshonees and the B
concluded July 3, 1868. 15 Sta

In 1882 there was levied unde
the Territory, upon the railroad
other property within the Reser
ritorial and county purposes, a t
in the aggregate to $4,478. Th
the assessor and tax collector c
and the tax having become delin
proceeding to enforce it by a sal
erty when the plaintiff commen
the district court of the county t
contending that the property be
boundaries of the Indian Reser
drawn from the jurisdiction of
A preliminary injunction was g
the hearing the court held tha
was subject to taxation and th
duly levied. The injunction wa
dissolved and judgment render
fendant. On appeal to the sup
the Territory this judgment was

The contention of the plain
Indian Reservation is excluded f
of Idaho by the Act of March 3,
the Territory; or that it is neces
from the jurisdiction of the Te
Treaty of July 3, 1868. Neithe
be sustained. The first sectio
embraces within the boundarie
tory the Reservation; and the
which the plaintiff relies only
nothing shall be construed to in
ing rights of the Indians in Ida
they shall remain unextinguishe
to include within its boundaries
any lands which, by treaty w
Tribes, were not, without their
included within the limits or
any State or Territory; or to aff
ity of the Government of the U
make any regulations respecti
their lands, property or other ri
law or otherwise, which it wo
competent for the government t
Act had not passed. 12 Stat. a
proviso excludes from the limi
tion of Idaho only such land
were not to be included without
the Indians; and it recognizes th
the United States to make the sa
respecting the lands, property a
of the Indians which it would h
petent to make before the pass
There was at that time no treat
dians that the lands which migh
to them should be thus excluded
its and jurisdiction of any State
The clause of the proviso on
therefore no application. *Harl*
98 U. S. 476 [Bk. 25, L. ed. 23
was held that the jurisdiction of
did not extend over the Reserv
cided upon the mistaken belie
treaty existed, and that to t
ferred. This error was correcte
v. *Monteith*, 102 U. S. 147 [Bk.
As no such treaty existed, the p
exclude the reservation from th
jurisdiction of the Territory.

By the Treaty it was agreed
the Bannocks desired a reserva
apart for their use, or the Presi

advisable to put them upon a reservation, he should cause a suitable one to be selected in their country. It was under this agreement that the Fort Hill Reservation was subsequently established and the Bannocks placed upon it. The Treaty provided a reservation for the Shoshonees, and declared that they should enjoy various rights and privileges; and that the Bannocks, when their reservation was made, should have the same rights and privileges therein. Among other things, it was stipulated that the reservations should be set apart for their absolute and undisturbed use and occupation, and for such other friendly tribes or individual Indians to whose admission from time to time they and the United States might consent; and that no person should ever be permitted by the United States to pass through, settle upon or reside on the reservation, except those designated in the Treaty, and such officers, agents and employees of the government as might be authorized to enter therein in the discharge of duties enjoined by law. The treaty also provided for the punishment, according to the laws of the United States, of any person among the Indians who should commit a wrong or depredation upon the person or property of anyone, white, black or Indian, subject to the authority of the United States, and at peace therewith; and that no treaty for the cession of any portion of the Reservation held in common should be of any force or validity as against the Indians, unless executed and signed by a majority of the adult male Indians occupying or interested therein; and that no cession should be construed to deprive, without his consent, any member of the tribe of his right to land selected by him under the Treaty.

It is contended by the plaintiff that these stipulations cannot be carried out if the laws of the Territory are enforced on the Reservation; and in support of the position special emphasis is placed upon the clause in regard to persons passing over, settling upon or residing in the Territory; and the clause touching wrongdoers among the Indians. As these treaty provisions have the force and effect of a law, it is insisted that the Reservation is excluded from the general jurisdiction of the Territory, as effectually as if the exclusion was made in specific terms.

To uphold that jurisdiction in all cases and to the fullest extent would undoubtedly interfere with the enforcement of the Treaty stipulations, and might thus defeat provisions designed for the security of the Indians. But it is not necessary to insist upon such general jurisdiction for the Indians to enjoy the full benefit of the stipulations for their protection. The authority of the Territory may rightfully extend to all matters not interfering with that protection. It has therefore been held that process of its courts may run into an Indian reservation of this kind, where the subject matter or controversy is otherwise within their cognizance. If the plaintiff lawfully constructed and now operates a railroad through the Reservation, it is not perceived that any just rights of the Indians under the Treaty can be impaired by taxing the road and property used in operating it. The authority to construct and operate the road appears from the agreement of July 18, 1881, between the United States and the Indians, which was ratified by Act of Congress of July 8, 1882. That agreement recites that the Utah and Northern Railway Company had applied for permission to construct a line of railway through the Reservation; and that the Indians had agreed, for the consideration thereafter mentioned, to surrender to the United States their title to so much of the Reservation as might be necessary for the legitimate and practical uses of the road. A strip of land and several parcels adjoining it forming part of the Reservation, were ceded to the United States for the consideration of $6,000, to be used by the Company and its successors or assigns as a right of way and road bed, and for depots, stations and other structures. By an Act of Congress confirmatory of the agreement the same right of way was relinquished by the United States to the Company for the construction of its road; and the use of the several parcels of land intended for depots, stations and other structures was granted to the Company and its successors or assigns, upon the payment to the United States of the $6,000; and on the condition of paying any damages which the United States or Indians, individuals or in their tribal capacity, might sustain by reason of the acts of the Company, or its agents or employees, or on account of fires originating in the construction or operation of the road. By force of the cession thus made, the land upon which the railroad and other property of the plaintiff are situated was, so far as necessary for the construction and working of the road, and the construction and use of buildings connected therewith, withdrawn from the Reservation. The road and property thereupon became subject to the laws of the Territory relating to railroads, as if the Reservation had never existed. The very terms on which the plaintiff became a corporation in the Territory rendered it subject to all such laws and, of course, to those by which the tax in controversy was imposed.

The only answer of the plaintiff to this view is that, by the stipulation of the parties and the [33] finding of the court thereon, it appears that the railway and property which are taxed are situated within the boundaries of and *upon the Reservation*. If this be so, it does not follow that the result would be changed. The moment that the road was lawfully constructed it came under the operation of the laws of the Territory. The stipulation and finding must, however, be read with reference to the legislation of Congress; and, therefore, as only establishing that the road and property are within the exterior boundaries of the Reservation. They will not be so construed as to allow the Company to escape taxation by the force of a stipulation as to an alleged fact which that legislation shows does not exist.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

[80]

WILLIAM S. ROBERTS, *Appt.*,

v.

PHILIP REILLY.

(See S. C., Reporter's ed., 80-97.)

Fugitives from justice—requisitions by Governor of one State upon Governor of another—lawfulness tested by habeas corpus—jurisdiction—what must appear before requisition can be complied with.

1. There is nothing in section 763, R. S., which requires that an appeal in cases of *habeas corpus* to the Circuit Court from the decision of a District Court or judge be to the next term of the Circuit Court thereafter to be held; on the contrary the subject is otherwise regulated by section 765.

2. The objection that the hearing of such appeal was before the Circuit Justice in chambers and not in open court cannot be made here for the first time.

3. Whenever the executive of the State causes the arrest of a person as a fugitive from justice from another State, such person can have the lawfulness of his arrest inquired into upon *habeas corpus*, issued either by the state or federal courts. The jurisdiction of the state courts is not excluded in such cases.

4. It must appear to the Governor of a State to whom a demand for an alleged fugitive from justice is presented, before he can lawfully comply with the demand: 1, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit certified as authentic by the Governor making the demand; 2, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand.

5. The first of these prerequisites is a question of law which is open upon the face of the papers to judicial inquiry. The second is a question of fact for the Governor upon whom the demand is made to decide. His decision is sufficient to justify the removal, until the presumption in its favor is overthrown by contrary proof.

6. The objection to the indictment in question, that it does not appear that the company alleged to have been the owner of the property which was the subject of the larceny charged, is a person capable in law of such ownership, is not matter of law arising upon the face of the indictment.

7. The objection that the circumstances set out in the affidavits show that the act of the accused constituted a crime in the State in which he was arrested, as well as in the demanding State, is immaterial.

8. To be a fugitive from justice in the sense of the Act of Congress regulating the subject, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun.

[No. 992.]

Argued Nov. 20, 1885. Decided Dec. 14, 1885.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

Statement of the case by *Mr. Justice* **Matthews**:

The record in this case shows the following state of facts:

On April 30, 1885, the appellant, Roberts, presented his petition to the Judge of the District Court for the Southern District of Georgia, and filed the same in the office of the clerk, alleging that he was illegally restrained of his liberty by the appellee, Reilly, wh
be acting as an agent of the State of
and as such to hold the petitioner,
of the authority of the United Stat
of an arrest made in pursuance c
tive warrant issued by the Gover
gia, on a requisition from the
New York, reciting that the pe
been indicted in the State of Nev
was a fugitive from the justice
State. He averred that the custo
he was restrained of his liberty
for various reasons assigned, and
the writ of *habeas corpus*. The
sued as prayed for, and duly serve
upon an amendment to the petition
follows:

"And now comes the said Will
erts and, by leave of the court first
said petition and says that he is
his liberty, in violation of a law o
States, viz.: the Act of February 1
tion 5278 of the Revised Statutes o
States, in this: that it appears from
now here to your honor shown, up
executive warrant under which h
strained issued, that the crime wi
is charged was committed in the S
gia; that the papers accompanying
of the Governor of New York are
ticated, as required by that Act;
where appears that the relator w
within the limits of the State of N
the time when said alleged crime
have been committed; that it now
that any evidence was before the
New York, at the time he issued
that relator was personally within
New York State when the crime
have been committed."

The defendant, Reilly, on May
his answer and return, under oath
of *habeas corpus* which had been
served upon him, as follows:

"United States of America,
Southern District of Georgia, Easte

"Pursuant to a writ of *habeas c*
by the Hon. Emory Speer, Judg
trict Court of the United States fo
ern District of Georgia, served upo
with produce the body of William
and return as the cause of his d
executive warrant of the Governor
of Georgia under which he was del
by authority issued to me by Hon
Governor of the State of New Yo
1885, here to the court shown, co
is annexed, under which I still
having, as agent of the State of N
ceived said Roberts from Wilberf
Sheriff of the County of Richmon
ried to the State of New York, the
with according to law; that a cert
the indictment found for grand la
State of New York, with evidenc
from justice after commission of
were produced by respondent as re
the Governor of New York and
the Governor of Georgia, and reta
office at the time of the issuing of t
warrant under which the said
placed in possession of the respon
sheriff of Richmond County,

NOTE.—*Habeas Corpus*; when, by what courts, and to what judge the writ may be issued; what may be inquired into. For a full discussion see U. S. v. Hamilton, 3 U. S. 17, bk. 1, 480, note.

"I further return that on April 26, 1885, after the delivery of the said Roberts to me by the sheriff of Richmond County, I was served with a writ of *habeas corpus* issued by the Hon. H. C. Roney, Judge of the Superior Court of the Augusta Circuit, of which circuit the County of Richmond is a part; and by his order required to produce the said Roberts before him April 27, 1885; that from that date until May 1, 1885, I held the said Roberts subject to the order of the said judge, who at said time remanded him into my custody, a certified copy of which proceedings, with the judgment thereon dismissing the writ and remanding him into my custody, is here to the court shown.

"Whereupon this respondent prays that the said writ may be dismissed at the costs of the relator."

On the hearing before the district court, documents were put in evidence, and constitute a part of the record, as follows:

1. The authority given by the Governor of New York to the respondent, as agent of the State, to take and receive the prisoner as a fugitive from justice and convey him to the State of New York to be dealt with according to law.

2. A copy of the requisition of the Governor of New York upon the Governor of Georgia, as follows:

"State of New York, Executive Chamber.

"David B. Hill, Governor of the State of New York, to his Excellency, the Governor of the State of Georgia:

"Whereas, it appears by a copy of an indictment which I certify to be authentic and duly authenticated, in accordance with the laws of this State, that William S. Roberts stands charged with the crime of grand larceny in the first degree, committed in the County of New York, in this State, and it has been represented to me that he has fled from justice of this State, and may have taken refuge in the State of Georgia; now, therefore, pursuant to the provisions of the Constitution and laws of the United States in such cases made and provided, I do hereby require that the said William S. Roberts be apprehended and delivered to Philip Reilly, who is authorized to receive and convey him to the State of New York, there to be dealt with according to law.

"In witness whereof I have hereunto signed my name and affixed the privy seal of the State, at the City of Albany, this twenty-second day of April, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal of the State of New York.] David B. Hill.

"By the Governor: William G. Rice,
Private Secretary."

3. A copy of the application for this requisition made by the district attorney of the County of New York, accompanied and supported by affidavits of Wm. W. Thurston and others, giving in detail the circumstances of the alleged offense, and averring that the prisoner and one Walton, charged with him, had fled from the justice of the State of New York and were to be found in Georgia.

4. A copy of the indictment, as follows:

"Court of General Sessions of the Peace of the City and County of New York.

The People of the State of New York
against
William S. Roberts and Edward H. Walton.

"The grand jury of the City and County of New York by this indictment accuse William S. Roberts and Edward H. Walton of the crime of grand larceny in the first degree, committed as follows: the said William S. Roberts and Edward H. Walton, each late of the first ward of the City of New York, in the County of New York aforesaid, on the fourteenth day of February, in the year of our Lord, one thousand eight hundred and eighty-four, at the ward, city and county aforesaid, with force and arms, ten written instruments and evidences of debt, to wit: the bonds and written obligations issued by the Georgetown and Lane's Railroad Company, a corporation duly existing under the laws of the State of South Carolina, and called "first mortgage bonds," in and by each of which the said railroad company acknowledged itself indebted to the bearer thereof in the sum of one thousand dollars, and which said sum the said railroad company thereby promised to pay on the first day of January, in the year of our Lord 1913, with interest, the same bearing date on the first day of January, in the year of our Lord 1883, and [85] being then and there each duly signed by the president and secretary of the said railroad company, and sealed with the seal thereof, and numbered nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen, respectively, and being then and there in full force and effect, and wholly unsatisfied, and of the value of one thousand dollars each (a more particular description of which said bonds and written obligations is to the grand jury aforesaid unknown) of the valuable things, evidences of debt, goods, chattels, and personal property of the Bethlehem Iron Company then and there being found, then and there feloniously did steal, take and carry away, against the form of the statute in such case made and provided and against the peace of the People of the State of New York and their dignity.

Randolph B. Martine,
District Attorney."

Indorsed on back of indictment:

"Filed 10 day of April, 1885. The People *vs.* William S. Roberts and Edward H. Walton. Grand larceny, 1st degree. Sections 528, 530, 540, Penal Code. Randolph B. Martine. District Attorney.

"A true bill.

Henry A. Oakley, *Foreman.*

"Witnesses: W. W. Thurston.
W. P. St. John."

The foregoing were certified by the Secretary of the Executive Department of Georgia to constitute a true and complete transcript or copy of papers of file in that office in the matter of the requisition for William S. Roberts by the Governor of New York upon the Governor of Georgia.

5. The executive warrant of the Governor of Georgia, with the return of the execution thereof by the sheriff as follows:

"State of Georgia, by Henry D. McDaniel, Governor of said State, to all the sheriffs and constables thereof, greeting:

"Whereas, His Excellency, David B. Hill, Governor of the State of New York, and as the executive authority thereof, has demanded of [86] me as the executive authority of this State, William S. Roberts, as a fugitive from jus-

tice from the State of New York, and has moreover produced a copy of indictment charging the said William S. Roberts with having committed in the said State of New York the crime of grand larceny in the first degree, which copy (of) indictment is duly certified as authentic by His Excellency the Governor of the State of New York, and has also appointed and commissioned Philip Reilly, agent, on the part of the State of New York, to receive said fugitive from the civil authorities of this State, to the end that he may be carried to the State of New York, there to be dealt with according to law; and whereas, it is suspected that the said fugitive from justice is now within the jurisdictional limits of this State:

"Now, in accordance with the provisions of an Act of Congress, passed the twelfth day of February, seventeen hundred and ninety-three, respecting 'fugitives from justice,' and in order that the said William S. Roberts may be brought to trial for the offense for which he stands charged, you are hereby commanded to arrest and deliver him to the said Philip Reilly, agent as aforesaid, so that he may be carried to the State of New York, within whose jurisdiction said offense is alleged to have been committed; and I moreover charge and require all officers, both civil and military, in this State, to be vigilant in endeavoring to apprehend the said William S. Roberts, fugitive as aforesaid.

"Given under my hand and the seal of the Executive Department, at the capitol, in Atlanta, this 25th day of April, in the year of our Lord one thousand eight hundred and eighty-five, and of American Independence the one hundred and ninth.

[Seal.] Henry D. McDaniel,
"By the Governor: *Governor.*
Howard E. W. Palmer,
Secretary, Executive Department."

Sheriff's Return.

"Georgia, Richmond County:

"Executed the within warrant by arresting
[87] William S. Roberts and delivering him, pursuant to the mandate of the Governor, to Philip Reilly, agent on the part of the State of New York, at one p. m., April 26, 1885.

W. Daniel, *Sheriff, R. C. Ga.*"

6. A transcript of the record of certain proceedings in the Superior Court of Richmond County in *habeas corpus*, on a petition therefor presented by the said William S. Roberts on April 26, 1885, the return thereto of the said Philip Reilly, and the order of the court thereon rendered May 1, 1885, remanding the petitioner to the custody of the said Reilly, under the executive warrant of the Governor of Georgia, issued in pursuance of the requisition of the Governor of New York, heretofore set out.

7. An affidavit of W. S. Roberts, setting forth the facts of the transaction imputed to him as a crime and on which the indictment is based, and denying the truth of the charge. It also denies that he was in New York on the day laid in the indictment as the date of the offense, and denies that he was in that State after indictment found or that he fled therefrom. And in support of these averments an affidavit of E. H. Walton was also made and filed.

On May 4, 1885, the matter was heard by the Judge of the District Court on these pleadings and proofs, when it was ordered a
that the writ be disallowed, and
tioner be remanded to the custod
spondent.

Thereupon, on May 5, 1885, t
order allowing an appeal was made
in the District Court:

"In the District Court of the Unit
the Southern District of Georgia
vision.

"*In Re* Petition of William S. R

"The Judge of the District Cour
dered a final decision in said cas
said writ and remanding said pe
said petitioner having prayed that
taken in his behalf to the next cir
said district, in which said cause
in accordance with the statute in
enacted, after argument had it i
and ordered that an appeal be, an
hereby, allowed upon the followi
under the following regulations:

"That the said William S. Rob
into the custody of the United St
for the said Southern District of
by him safely kept, and that the
S. Roberts do execute and deliver
sufficient bond in the sum of ten t
lars, with security, to be approved
of said District Court, which said
approved, shall be filed with the
circuit court, and shall be condit
lows: that the said William S. R
liver himself up to the marshal o
ern district, and do appear befor
court whenever and wherever ord
court, or by the said circuit court,
and there abide by and perform t
of the circuit court in the premise

"And that the said William S
cause to be sent to the said appe
a transcript of the petition, writ of
return thereto, and other proceed
ments and affidavits in said cause,
on execution of said bond. And
execution and approval of said b
said, and the tender of the same,
iam S. Roberts be discharged fro
of said marshal and allowed to go
to the terms of this order or the
of said appellate court.

"In open court, May 5, 1885.

"Emory Speer, *U.*

On May 16, 1885, the relator, W
erts, filed, in the clerk's office
Court for the Eastern Division, S
trict of Georgia, at a stated term
begun and holden in the City of
the second Monday in April, 188
of a record, on appeal from the
of the foregoing proceedings and
previously given the bond on ap
thereby.

Afterwards an order was made
court, the district judge presid
the clerk to transmit a transcript
ceedings in the cause to the circ
Atlanta, Georgia, that the same
before him on May 18th, or as s
as the same could be heard. A
May 19, the matter was heard be
tice Woods, at Atlanta, when a
parties appeared, the petitioner

by counsel, his personal presence being excused by reason of physical liability. The following order was thereupon made, and entered on the minutes of the circuit court:

"In the matter of appeal of Wm. S. Roberts from the decision of the District Judge of the United States for the Southern District of Georgia, Eastern Division, under petition for *habeas corpus* against Philip Reilly:

"This case came on to be heard before me pursuant to the order of the Circuit Court of the United States for the Southern District of Georgia, Eastern Division, dated May 15, 1885, to which court an appeal was allowed May 5, 1885, and which was perfected upon the execution of a bond approved by the district judge, and filed May 7, 1885.

"After argument heard, it is ordered that the judgment of the district judge of May 4, 1885, 'that the writ is disallowed and the petition of the relator be dismissed, and that he be remanded to the custody of Philip Reilly,' be, and it is hereby, affirmed at the costs of the relator.

"It is further ordered that this order be entered on the minutes of the Circuit Court of the United States for the Southern District of Georgia, Eastern Division, and a certified copy transmitted to the district judge of the United States for the Southern District of Georgia, Eastern Division, for enforcement by him of his judgment of May 4, 1885.

"It further appearing that sufficient cause was shown before me for the nonappearance of the relator, it is ordered that no liability rest upon the sureties upon the bond filed May 7, 1885, for such nonappearance, but that said bond remain of full force until complied with by the delivery of the relator to the United States Marshal to be turned over to said Philip Reilly, or such other duly constituted agent as may be appointed by the Governor of New York to receive him.

"It is further ordered that the relator have leave to apply to the district judge for stay of his order of May 4, 1885, until physically able to be removed; and that for the cause shown in the affidavit of Henry F Campbell of May 18, 1885, submitted at the hearing, and now ordered to be filed, the delivery of the relator to Philip Reilly to be made by the marshal of Georgia, the obligee in the bond, be stayed until June 19, 1885.

"May 19, 1885. W. B. Woods,
Circuit Justice."

Thereupon the relator, Roberts, filed in the circuit court, on June 20, 1885, his petition, praying an appeal from this order and judgment to this court, which was allowed, and it was ordered "that the clerk of the United States Circuit Court for the Southern District of Georgia, Eastern Division, do send up to the October Term, 1885, of the Supreme Court of the United States a transcript of the petition, writ of *habeas corpus*, return thereto, and other proceedings in said cause. Further ordered, that the judgments heretofore had in the cause remanding said Roberts into the custody of said Reilly be, and the same are hereby, superseded until the final decision of the supreme court can be had in the case, and that the bail of said Roberts retain him in their custody and produce him to answer whatever decision the supreme court may render in the cause, or if his bail have surrendered him into the custody of the United States Marshal, that said marshal hold him to be produced to answer said judgment, with liberty to said Roberts to give a new bond in the sum of $10,000, with surety, to be approved by the undersigned (the circuit justice), conditioned for his appearance to answer said judgment."

The appeal to this court having been perfected, the appellant filed the following assignment of errors:

"Afterwards, to wit: on the second Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, came the said William S. Roberts, by W W Montgomery, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit: that by the record aforesaid it appears that an order was passed referring said cause to Judge Woods, to be heard by him in vacation, said order having been passed at a term of said circuit court which was in session when the appeal from the district judge was allowed, whereas appellant insists that the appeal from the district judge was to the term of said circuit court next after the judgment of the district from which the appeal was taken. Appellant further insists that no hearing could be had in vacation unless the record shows on its face that such hearing was had by consent of parties. Appellant further insists that the judgment of His Honor, Judge Woods, was error, because there was no evidence showing that the relator had ever been in New York since the alleged commission of the crime, or at the time of its commission, which was not fully rebutted; and again, because no copy of the laws of New York was submitted to the Governor of Georgia showing what constituted grand larceny under the laws of New York. [91]

"And again; because no copy of the laws of New York was submitted to the Governor of Georgia showing that by such laws the indictment was sufficient, it manifestly appearing that said indictment did not charge any crime by the rules of the common law.

"And again; because the evidence submitted to the Governor of Georgia showed that if any crime was committed, it was committed in Georgia and not in New York.

"And again; because it nowhere appears that the affidavits accompanying the requisition of the Governor of New York were sworn to before officers authorized to take them.

"And the said Roberts prays that the said several judgments herein complained of may be reversed, annulled and altogether held for naught, and he be discharged from custody and restored to all rights which he has lost by reason of the said executive warrant of the Governor of Georgia and the judgments complained of."

And afterwards, the counsel for the appellant filed additional assignments of error, as follows:

"That the circuit court erred in not discharging appellant, for the reason that the affidavits on which the requisition of the Governor of New York is found are not authenticated by him. [92]

"And again; because the warrant of the Governor of Georgia does not state upon what evidence it is issued, or that the Governor was sat-

isfied from the testimony that a case was made which required him to exercise the power of extradition conferred upon him by the United States Constitution and the Act of Congress.

"And again, because the affidavits on which the indictment and requisition mainly rest are taken before the leading counsel of the prosecution in the case, such counsel acting as a notary public.

"And again; because the facts show a crime under the laws of Georgia, which, even if they show a crime under the laws of New York also, take the case out of the operation of the extradition laws."

Mr. **W. W. Montgomery,** for the appellant.

Messrs. **Frank H. Miller, Daniel Lord,** *Wm. E. Doster* and *Randolph B. Martine, Dist. Atty.*, for appellee.

[92] *Mr. Justice* **Matthews** delivered the opinion of the court:

There is nothing in the Revised Statutes, § 768, providing an appeal in cases of *habeas corpus* to the circuit court from the final decision of the district court, or the judge thereof, which requires it to be taken, as in ordinary cases at law or suits in equity or admiralty, to the next term of the circuit court thereafter to be held. On the contrary, the subject is regulated otherwise by section 765, R. S., which enacts, that "The appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of *habeas corpus*, return thereto and other proceedings as may be prescribed by the supreme court or, in default thereof, by the court or judge hearing the cause." This statutory provision evidently contemplates the summary character of proceedings under the writ of *habeas corpus* as not admitting, in favor of the liberty of the citizen, the delays usually and necessarily attending ordinary litigations between parties, and confers upon the judicial tribunal, or the judge hearing the application and making the order which is the subject of the appeal, discretion to send up the case to the appellate tribunal, under such regulations and orders as may seem best adapted to secure the speediest and most effective justice. This harmoniously adapts the practice in direct appeals in such cases, under these sections of the Revised Statutes, to that exercised independently of these provisions, by means of the original writ of *habeas corpus*, with the aid of a writ of *certiorari*, to bring up the record of the proceedings to be reviewed. This form of appellate jurisdiction was declared by this court in *Ex parte Yerger*, 8 Wall. 85 [75 U. S. bk. 19, L. ed. 332], to exist independently of the provisions for a direct appeal, now incorporated into the sections of the Revised Statutes above referred to; and it was exercised without regard to the beginning and ending of the terms of the appellate court, and in a summary manner. The appeal in the present case, from the judgment of the district court to the circuit court, was therefore not heard prematurely, although it was lodged and disposed of at a term of the latter court, which was current at the time the appeal was taken.

[93]

In regard to the objection now taken that the hearing of the appeal was had before the Circuit Justice at Atlanta at chambers, and not at Savannah in open court, it is sufficient to say that the order to that effect was made without objection taken at the time, or afterwards, in the district or circuit court, or at the hearing before *Justice* Woods; that the appellant appeared at the time and place by counsel and was heard; that the arrangement was made for the convenience of the parties and to avoid delay; and that it does not seem to have involved any hardship or injustice to the party now complaining. The objection, if it could ever have been properly interposed and insisted on, cannot now be made for the first time. It comes too late.

The other assignments of errors relate to the merits, and require a consideration of the limits of the jurisdiction of judicial tribunals in cases of the extradition of fugitives from justice under the clause of the Constitution by which it is regulated.

That constitutional provision declares that "A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." Art. IV. § 2, clause 2. There is no express grant to Congress of legislative power to execute this provision; and it is not, in its nature, self executing; but a contemporary construction, contained in the Act of 1793, 1 Stat. at L. 302, ever since continued in force, and now embodied in sections 5278 and 5279 of the Revised Statutes, has established the validity of its legislation on the subject. "This duty of providing by law" said *Chief Justice* Taney, delivering the opinion of the court in *Kentucky* v. *Dennison*, 24 How. 66, 104 [65 U. S. bk. 16, L. ed. 717, 728] "the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon Congress; for if it was left to the States, each State might require different proof to authenticate the judicial proceeding upon which the demand was founded, and as the duty of the Governor of the State where the fugitive was found is, in such cases, merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the State or of Congress to authorize it."

It follows, however, that whenever the Executive of the State upon whom such a demand has been made, by virtue of his warrant causes the arrest for delivery of a person charged as a fugitive from the justice of another State the prisoner is held in custody only under color of authority derived from the Constitution and laws of the United States, and is entitled to invoke the judgment of the judicial tribunals whether of the State or the United States, by the writ of *habeas corpus*, upon the lawfulness of his arrest and imprisonment. The jurisdiction of the courts of the States is not excluded in such cases, as was adjudged by this court in the case of *Robb* v. *Connolly*, 111 U. S. 63

[Bk. 28, L. ed. 542]; for although the party is restrained of his liberty under color of authority derived from the laws of the United States, he is not in the custody of or under restraint by an officer of the United States.

The Act of Congress (§ 5278 R. S.) makes it the duty of the executive authority of the State to which such person has fled, to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any State demands such person as a fugitive from justice, and produces a copy of an indictment found or affidavit made before a magistrate of any State, charging the person demanded with having committed a crime therein, certified as authentic by the Governor or Chief Magistrate of the State from whence the person so charged has fled.

It must appear therefore, to the Governor of the State to whom such a demand is presented, before he can lawfully comply with it; first, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the Governor of the State making the demand; and second, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand.

The first of these prerequisites is a question of law and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*. The second is a question of fact, which the Governor of the State upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in *habeas corpus*, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the executive of the State in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof. *Ex parte Bogel*, 114 U. S. 642 [*ante*, 250]. Further than that it is not necessary to go in the present case.

The objections taken in this proceeding to the sufficiency of the indictment, which were overruled both in the district and circuit courts and which are still relied on here, are not well founded. The indictment itself is certified by the Governor of New York to be authentic and to be duly authenticated, which is all that is required by the Act of Congress. It charges a crime under and against the laws of that State. It is immaterial that it does not appear that a certified copy of such laws was furnished to the Governor of Georgia. The statute does not require it, and the Governor could have insisted and it is to be presumed did insist upon the production of whatever he deemed necessary or important properly to inform him on the subject. And the courts of the United States, to whose process the relator has appealed, take judicial notice of the laws of all the States.

The indictment in question sufficiently charges the substance of a crime against the laws of New York. The objection to it, that it does not appear that the Bethlehem Iron Company, averred to be the owner of the property the subject of the larceny charged, is a person capable in law of such ownership, is not matter of law arising upon the face of the indictment, but can arise only at the trial upon the evidence, if the question should then be made. The averment in the indictment is the allegation of a fact which does not seem to be impossible in law and is, therefore, traversable. The further objection, that the facts and circumstances, set out in the affidavits as constituting the crime charged in the indictment, show that it is a crime in Georgia, and the possible subject of prosecution in that State under its laws, does not affect the question. These facts are, in brief, that the original taking of the bonds mentioned in the indictment is shown to have been in Georgia, whence they were brought into New York by the appellant and there finally appropriated to his own use. If that be true, it is none the less true that the offense charged is also a crime in New York against its laws; and the State of Georgia may choose to waive the exercise of its jurisdiction [97] by surrendering the fugitive to answer to the laws of New York.

On the question of fact, whether the appellant was a fugitive from the justice of the State of New York, there was direct and positive proof before the Governor of Georgia, forming part of the record in this proceeding. There is no other evidence in the record which contradicts it. The appellant in his affidavit does not deny that he was in the State of New York about the date of the day laid in the indictment when the offense is alleged to have been committed; and states by way of inference only that he was not in that State on that very day; and the fact that he has not been within the State since the finding of the indictment is irrelevant and immaterial. To be a fugitive from justice, in the sense of the Act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another.

We find no error in the judgment of the Circuit Court, and the same is affirmed; and it is directed that the order and judgment of the District Court, remanding the appellant to the custody of the respondent as the agent of the State of New York, be executed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[11]

WILLIAM D. MARVEL, *Plff. in Err.*,

v.

EDWIN A. MERRITT, Late Collector of the PORT OF NEW YORK.

(See S. C., Reporter's ed. 11-12.)

Duties—classification of iron ore—interpretation of words.

1. Under the Tariff Act of 1874 iron ore is within Schedule M., Sundries, Section 2504, R. S., and subject to a duty of 20 per centum *ad valorem*.
2. The interpretation of words of common speech is matter of law.

[No. 72.]

Argued and submitted Nov. 25, 1885. Decided Dec. 14, 1885.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The facts are stated by the court.

Mr. **B. F. Lee,** for plaintiff in error.

Mr. **John Goode,** *Solicitor-Gen.*, for defendant in error.

[11]

Mr. Justice **Matthews** delivered the opinion of the court:

The plaintiff in error brought his action to recover duties paid by him and exacted, as he claims, in excess of those imposed by law, upon certain quantities of iron ore imported by him into the port of New York in 1879.

The single question involved in the suit arose under the Tariff Act of 1874, being title XXXIII., R. S.

The plaintiff was assessed and compelled to pay a duty of 20 per centum *ad valorem* on his importations, as coming within the provision in Schedule M, Sundries, § 2504, Revised Statutes, for "mineral and bituminous substances in a crude state, not otherwise provided for." He claimed that iron ore was dutiable upon a proper classification as "an unmanufactured article not herein enumerated or provided for," and subject only to a duty of 10 per cent *ad valorem*, under the provisions of section 2516 of the Revised Statutes.

On the trial below, the plaintiff offered evidence to show that iron ore was known to the trade commercially only under that name, and that scientifically considered it was a metallic and not a mineral substance; but the offer was rejected by the court. It was proven that iron ore was not a bituminous substance.

[12]

The court instructed the jury, there being no disputed question of fact arising upon the evidence as admitted, to return a verdict for the defendant. Judgment was rendered thereon accordingly, to reverse which this writ of error has been brought.

The Tariff Act of 1874, R. S., Title XXXIII, under which this case arises, does not expressly enumerate iron ore as the subject of duty. It is not on the free list and is to be found, if at all, classified under some general description. The language in Schedule M, Sundries, R. S. p. 478, is: "Mineral and bituminous substances in a crude state, not otherwise provided for, 20 per centum *ad valorem*." This is to be taken distributively, so as to cover all substances within the description, whether mineral or bituminous or both, and is not to be confined to those which combine both characters.

The words used are not technical, either as having a special sense by commercial usage, or as having a scientific meaning different from their popular meaning. They are the words of common speech, and as such their interpretation is within the judicial knowledge, and therefore matter of law. Webster, in his Dictionary, defines the noun *mineral* as "any inorganic species having a definite chemical composition;" and *ore* as "the compound of a metal and some other substance, as oxygen, sulphur or arsenic, called its *mineralizer*, by which its properties are disguised or lost." The word *mineral* is evidently derived from *mine*, as being that which is usually obtained from a *mine;* and accordingly Webster defines the latter as "a pit or excavation in the earth from which metallic ores or *other mineral substances* are taken by digging, distinguished from the pits from which stones only are taken and which are called quarries."

The importations of iron ore in question, therefore, were properly subjected to a duty of 20 per centum *ad valorem*, as a mineral substance in its crude state, not otherwise provided for.

The judgment of the Circuit Court is accordingly affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Plff. in Err.*,

v.

JOHN H. MOONEY.

(See S. C., Reporter's ed., 104-108.)

Jurisdiction in actions for penalties and forfeitures—exclusive in district courts—Judiciary Acts construed.

1. Section 9 of the Judiciary Act of 1789, which conferred exclusive jurisdiction on the district courts (of suits for penalties and forfeitures incurred under the customs laws of the United States), still remains in force, there being no conflict between said section and section 1 of the Act of March 3, 1875.
2. The restricted meaning attached for eighty-six years to the language of section 11 of the Act of 1789 is presumed to attach to the same language in the Act of 1875.

[No. 78.]

Argued Nov. 25, 1885. Decided Dec. 14, 1885.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

Statement of the case by *Mr. Justice* **Woods:**

This was an action at law brought in the circuit court to recover of the defendant $20,000 the value of certain merchandise imported by him, which it was alleged he had forfeited to the United States, because he had knowingly and with intent to defraud the revenue made an entry of the same by means of false and fraudulent invoices.

The defendant moved the court to dismiss the suit for want of jurisdiction to entertain it. The court sustained the motion, and the plaintiffs brought this writ of error.

Mr. **John Goode,** *Solicitor-Gen.*, for plaintiff in error.

Mr. **Charles Levi Woodbury,** for defendant in error.

[104] *Mr. Justice* **Woods** delivered the opinion of the court:

The ninth section of the Judiciary Act of September 24, 1789 (chap. 20, 1 Stat. at L. 76), provided as follows: "The district courts shall have exclusive cognizance * * * of all suits for penalties and forfeitures incurred under the laws of the United States." Since the passage of that Act several statutes have been enacted giving the circuit courts jurisdiction of suits for penalties and forfeitures (see section 629 R. S. subd. 4, 5, 7, 15); but it is conceded by the counsel for the plaintiffs that the exclusive jurisdiction of all suits for penalties and forfeitures under the customs laws of the United States continued in the district courts until the passage of the Act of March 3, 1875, entitled "An Act to Determine the Jurisdiction of the Circuit Courts of the United States" (chap. 137, 18 Stat. at L. 470), and still continues, unless the Act mentioned gives concurrent jurisdiction of such suits to the circuit courts. The plaintiffs insist that such is the effect of the first section of the Act of March 3, 1875. That section provides that "The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law and in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and arising under the Constitution or laws of the United States, * * * or in which the United States are plaintiffs or petitioners," etc. The contention is that this section invests the circuit courts with jurisdiction, concurrent with the district courts, of all suits for penalties and forfeitures under the customs laws of the United States. The argument to support the contention is that the section includes within its terms all suits to recover penalties and forfeitures, because such suits are of a civil nature at common law and the United States are plaintiffs; and when the amount in controversy is over $500 all the conditions necessary to give jurisdiction are fulfilled.

Admitting the plausibility of the argument, we are not able to adopt the conclusion to which it leads. For more than three quarters of a century, under the ninth section of the Act of 1789, the exclusive jurisdiction of the district courts in suits for penalties and forfeitures under the customs laws was unquestioned. In *The Cassius*, 2 Dall. 365 [2 U. S. bk. 1, L. ed. 417], decided in 1796 by the United States Circuit Court for the District of Pennsylvania, and in *Bains v. Bollen*, 4 Dall. 342 [4 U. S. bk. 1, L. ed. 839], decided by this court in 1800, it was held that under the Judiciary Act of 1789 the circuit courts had no jurisdiction of suits for penalties and forfeitures under the laws of the United States. These decisions have never been overruled and the law has remained unchanged, except where jurisdiction of suits for penalties and forfeitures has been given to the circuit courts in special cases by statute. This construction of the ninth section of the Act of 1789 prevailed, notwithstanding the provisions of section 11 of that Act, which were as follows: "The circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs or petitioners." This is substantially the same, in respect of the question before us, as the first section of the Act of 1875, which is relied on to take away the exclusive jurisdiction of the district courts. But it was never supposed that under the Act of 1789 the provisions of section 11 interfered with the exclusive jurisdiction conferred on the district courts by section 9 of the same Act. It was never held that the words "all suits of a civil nature, at common law or in equity," used in section 11, included suits for penalties and forfeitures of which the district courts had been given exclusive jurisdiction by section 9. How, then, can the substantial reenactment of section 11 by the Act of March 3, 1875, with modifications immaterial, as far as the question in hand is concerned, have an effect which the original section did not? As said by the circuit court in its well considered opinion in this case (11 Fed. Rep. 476), "the restricted meaning attached for eighty-six years to the language of the eleventh section of the Act of 1789 is presumed to attach to the same language in the Act of 1875." It is not to be supposed that Congress, in using in the Act of 1875 the same language, so far as the present question is concerned, as that employed in the Act of 1789, intended to give it a meaning different from that put upon it by this court, and which had remained unchallenged for three quarters of a century.

To sustain the contention of the plaintiffs, we must hold that the purpose of section 1 of the Act of March 3, 1875, was to repeal by implication and supersede all the laws conferring jurisdiction on the circuit courts, and of itself to cover and regulate the whole subject. But this construction would lead to consequences which it is clear Congress did not contemplate. All the laws in force December 1, 1873, prescribing the jurisdiction of the circuit courts were reproduced in section 629 of the Revised Statutes, and the jurisdiction was stated under twenty distinct heads, eighteen of which had reference to the jurisdiction in civil cases. In [107] sixteen of these eighteen heads the jurisdiction is conferred without reference to the amount in controversy. This is the case, among others, in all suits at common law where the United States are plaintiffs; in all suits and proceedings for the enforcement of any penalties provided by laws regulating the carriage in merchant vessels; in all suits by the assignee of any debenture for drawback duties against the person to whom such debenture was originally granted to recover the amount thereof; in all suits at common law or in equity arising under the patent or copyright laws of the United States; in all suits brought by any person to recover damages for an injury to his person or property, on account of any act done by him under any law of the United States for the protection or collection of any of the revenues thereof; and in all suits to recover pecuniary forfeitures under any Act to enforce the right of citizens of the United States to vote in the several States. The Act of 1875 confers jurisdiction on the circuit courts only in cases where the matter in dispute exceeds $500. If that Act is intended

to supersede previous Acts conferring jurisdiction on the circuit courts, then those courts are left without jurisdiction in any of the cases above specified where the amount in controversy does not exceed the sum of $500, and in several classes of cases; for instance, suits arising under the patent or copyright laws, neither the Circuit nor District Court of the United States would have jurisdiction when the amount in controversy is less than $500. But by section 711 of the Revised Statutes, par. 5, the jurisdiction of the state courts in cases arising under the patent and copyright laws is excluded. Therefore, when the matter in dispute in a case arising under these laws is less than $500, if we yield to the contention of plaintiffs, it would follow that no court whatever has jurisdiction. A construction which involves such results was clearly not contemplated by Congress.

The Act of 1875, it is clear, was not intended to interfere with the prior statutes conferring jurisdiction upon the circuit or district courts in special cases, and over particular subjects. *Third Nat. Bank of St. Louis* v. *Harrison*, 8 McCrary, 162.

Its purpose was to give to the circuit courts a jurisdiction which the federal courts did not then possess, by enlarging their jurisdiction in suits of a civil nature at common law or in equi-
[108] ty, and not to take away from the circuit or district courts jurisdiction conferred by prior statutes, or to divide the jurisdiction which had for so long a time been vested exclusively in the district courts. *Price* v. *Abbott*, 17 Fed. Rep. 506.

Thus construed, there is no conflict between section 1 of the Act of March 3, 1875, and section 9 of the Act of 1789, which conferred exclusive jurisdiction on the district courts of suits for penalties and forfeitures incurred under the laws of the United States. The latter section, therefore, except as modified by statutes conferring jurisdiction upon the circuit courts in special cases, still remains in force; and the circuit court was right in dismissing the case for want of jurisdiction.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[22] ANTON MILLER AND CHRISTIAN WORLEY, JOHN FINZER ET AL., Partners, as JOHN FINZER & BROTHERS, *Appts.*,

v.

SAMUEL J. FOREE AND EDWARD J. FOREE.

(See S. C., Reporter's ed., 22-23.)

Validity of letters patent—application of old process.

1. The application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.

2. Letters patent and the reissue thereof, for an alleged improvement in finishing and marking tobacco plugs, are invalid, as the evidence shows that the invention was anticipated. But irrespective of this, the state of the art at the time of the application for the patent was such as to leave no ground for its issue.

[No. 36]

Argued Nov. 2, 1885. Decided Dec. 14, 1885.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The facts and case are stated by the court.

Messrs. **Arthur Stem, George Harding,** *James A. Beattie* and *Francis T. Chambers*, for appellants.

Mr. **Benjamin F. Thurston,** for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

This is a suit brought by the appellants against the appellees, complaining of the infringement of a certain patent granted to Anton Miller and Christian Worley, two of the complainants, for an alleged improvement in finishing tobacco plugs and in marking the same. A patent was applied for September 23, 1876, and was granted on the 5th day of December, 1876. It was subsequently surrendered and reissued on the 29th of January, 1878. The improvement, as declared in the specification, consists in pressing in the side of the plug, during the process of manufacture, letters or marks, so as to be ineffaceable. The description contained in the reissued patent, which does not differ materially from that contained in the original, after referring to the illustrative drawings, which are not necessary to the understanding of the invention, proceeds as follows:

"In carrying out our process, the plugs are packed with alternating plates in the finisher, so that they take their permanent set with the impression in them, whereby said impression is preserved ineffaceable.

"We have used the process of finishing tobacco as described in patent No. 181512, issued to Worley and McCabe, on the application of Christian Worley, and dated August 22, 1876; but this system of marking may be used in conjunction with the ordinary finishing process by having the devices in relief on pressure plates used in the last pressing.

"Our preferred manner of forming the letters on the plates A' is by stamping them therein, and then making the letters solid by filling in the concave side of the letters with melted metal, such as solder, so that said letters will withstand the extreme pressure to which they are subjected in the finishing box.

"In constructing said compress plate, however, any projecting surfaces in relief, either formed upon the plate or loose from the same, would secure the same result and may be employed."

From this description it appears that the process consists simply in attaching or placing raised characters on the metallic plates which are interlaid between the layers of tobacco to give it a smooth surface in its final compression, which characters leave their imprint in the sides of the plugs.

The claim of the original patent was for, —

"The mode of simultaneously stamping and finishing tobacco, consisting of tightly compressing the plugs between plates having in re

lief letters in alternating series, substantially in the manner described."

The claim of the reissued patent is for,

"1. The described process of marking plug tobacco, which consists in impressing letters or other marks directly into the side of the plug during the process of manufacture, and by the pressure employed in making the plug, substantially as described.

"2. A tobacco plug marked with an impression, substantially as described."

The second claim of the reissue was afterwards abandoned and formally disclaimed in the patent office. The first claim is, in its terms, broader than the claim of the original patent. It is a general claim for the described process of impressing letters or marks directly into the side of the plug during the process of manufacture. This embraces the application of the process at any stage of the manufacture, either in the molding process or the finishing process. But if it should be confined by construction to the latter, as in the claim of the original patent, it would still apply to every kind of finishing process, whether separate from the molding process or not.

The question then will be, whether this claimed invention was anticipated by prior invention or use in the art.

Impressions of letters, figures and other marks have for a long period been made by compression upon plastic substances, such as cakes of soap and chocolate, bars of lead, balls of butter, sealing wax, the leather covers of books, etc. It was not strange, therefore, that the same process for producing a like result should have been applied to tobacco when molded and compressed into solid plugs of definite form. An English patent was granted to Thomas and George Cope in April (specification filed October), 1868, for improvements in machinery for molding, pressing and stamping Cavendish and other tobacco into any desired form by suitable dies. These dies have any desired form and design; and, when filled with tobacco a powerful pressure is applied by means of a metallic die piece, which gives to the tobacco a durable form and solidity, with the impression of the shape and design of the dies. In describing the machine and its operation, the patentees say: "This machine is useful for various purposes in manufacturing tobacco; it can be advantageously employed in stamping or forming devices of various kinds on tobacco."

Another patent was granted to Gibson and others in April (specification filed October), 1871, for a mode of heating, pressing and curing roll and coil tobacco, in the course of which the tobacco (in the case of coil) is alternated with metallic plates, between which and the rolls are placed thin wooden discs of a size to match the plates, and between these and the rolls of tobacco a thin metal plate, bearing the manufacturer's name, abode, trade mark, etc. It is then heated, and afterwards submitted to great pressure. And the inventors add: "When the tobacco has cooled down sufficiently it is removed, and the sheath pipe being withdrawn by gentle pressure, the metallic discs, scale board discs, and name tablets are separated from the tobacco, and the tobacco is found to be impressed with the name or marks from the tablets, the rest of its surface having the impression of the wooden disc, smooth, or showing the grain of the timber. The tobacco, then thoroughly cured and pressed, is fit for sale."

Charles Siedler obtained a patent of the United States, dated January 12, 1875, reissued October 24, 1876, on application filed April 26, 1875, for impressing into the body of the plugs of tobacco metallic labels with raised letters, etc., either covered or not covered by the outside wrapper, whereby he obtained distinct and durable impressions. He says: "Before giving the plug of tobacco its final pressure the metal B b [the label] is placed in proper position upon it by an attendant, and by subsequent powerful pressure the label is sunk into the body of the tobacco so that its face is about flush with the outer surface thereof, and its points sink quite deeply into the most dense mass. It adheres firmly. * * * The plugs thus impressed with the hard labels, presenting the letters in relief, are then wrapped in a large leaf of properly dampened tobacco, and again powerfully compressed. The label appears beneath the wrapper of the finished plug, and is not liable to be removed by any ordinary or extraordinary cause."

In 1867 or 1868 Fisher and Harris of St. Louis fitted into a mold for plug tobacco a metallic plate, having on its face the word "Blackberry" in raised letters, in the form of types, which produced on the surface of the plug, as it was pressed in the mold, the word "Blackberry." Many plugs were made in this mold and received the said impression, from the time of its construction until 1876, and were sold in the market. Boyce and Brothers bought out Fisher and Harris in 1869, and continued to use the same mold. It is true that this mold was only one in a block or frame of fifteen molds; and eleven other frames were used in connection with this frame, without any such types in them, in making up boxes of tobacco. But in view of the fact that the mold having the types continued to be used for many years, and that the word "Blackberry" was invariably printed on the tobacco, the process, though somewhat imperfectly applied, cannot be regarded as an abandoned experiment. The impression, being made in the mold whilst the tobacco was moist, might not remain as clearly defined as if it were made in the finishing process (when a further finishing process was used); but it continued to appear quite distinctly and remained as a permanent mark on the tobacco, as is seen in the specimen which has been preserved and made an exhibit in the cause. [26]

There is also evidence in the case of a zinc plate with raised characters, forming the name of the maker, one "E. F. Smith," being used by him in the summer of 1875, both in the molding and in the finishing process, for the purpose of imprinting the name upon plug tobacco which he was then manufacturing in a small way in Evening Shade, a village in Arkansas. The plate was used in substantially the same way as that described in the patent of the complainants; and if the evidence is to be believed, the fact of prior anticipation is clearly established. The circuit judge who decided this case in the court below, after a careful examination of the testimony on the subject, came

to the conclusion that it was to be believed, and based his decision principally upon it. We have come to the same conclusion. It is true that a vigorous effort was made to break down the testimony of the principal witnesses, Smith and his foreman Lee; and it was pretty clearly shown that much could be affirmed derogatory to their general characters. But the complainants failed to show anything substantially affecting their characters for truth and veracity, or that they were not to be believed under oath. Besides, the manner in which their testimony was given and in which they bore the test of a somewhat rigorous cross examination tends to give confidence in the truth of their statements. And they are not without a good deal of corroboration. One of the alleged identical plates was produced; and the jeweler who made it, being called as a witness, recognized it and said that he thought he made two of them; and he corroborated the date, and testified that Smith [27] showed him some tobacco which he said had been marked with the plate, and which appeared to have been so marked. Metcalf, one of the complainants' witnesses, also states on cross examination that he had seen one or two plugs with Smith's name impressed on it, which he (Smith) represented to be his work, and that this was in 1875 or 1876. Huddleston, the sheriff of the county, testified that he had purchased plug tobacco from Smith, about that time, with Smith's name impressed upon it. The fact that the process was not used to a great extent, and not brought into more public notice, is explained by the further facts that Smith's manufacture was not of large extent, and that his establishment was closed by the internal revenue officers in the spring of 1876, in consequence of sales charged to have been made by him without the proper stamp.

We think that the alleged process of Smith is substantiated by the evidence, and that the decision of the case might be rested on his anticipation of the complainants' invention.

But it is not necessary to rely on this branch of the case alone. Leaving the evidence in relation to Smith's process out of the case, the state of the art at the time of Miller and Worley's application for a patent, as already pointed out, was such as to leave no ground for its issue. What more did they do, at most, than to apply a process of stamping tobacco, which was already well known, to the same tobacco at a later stage in the process of manufacture? Did this entitle them to a patent? According to the ruling of this court in *Pa. R. R. Co.* v. *Locomotive, etc. Truck Co.* 110 U. S. 490 [Bk. 28, L. ed. 222], this question must be answered in the negative. That case is precisely in point The contrivance for allowing the cars, in rounding a curve, to have a lateral motion so as to counteract the tendency to depart from the track, had been applied to passenger cars but not to locomotives. Smith, the patentee in that case, obtained a patent for applying that same device to locomotives. We decided the patent to be void and held, in general terms, that "The application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it and no result substantially distinct in [28] its nature, will not sustain a patent, even if the new form of result has not before been contemplated." We adhere to that ruling; and the principle involved in it is fatal to the patent now under consideration.

The decree of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U.S.

SAXONVILLE MILLS, *Plf. in Err.*,
v.
THOMAS RUSSELL, Late Collector of Customs.

(See S. C., Reporter's ed., 13-21.)

Duty on wool—invoice—construction of tariff laws.

1. The whole tariff revenue system must be regarded in the construction of each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress.

2. Where the invoice of wool shipped from Rosario showed the value to be above twelve cents per pound, it is held to be subject under the statutes to a duty of six cents per pound, less 10 per centum, although at the time of shipment the market value was less than twelve cents per pound.

[No. 81.]

Argued Dec. 4, 1885. Decided Dec. 14, 1885.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

Statement of the case by *Mr. Justice* **Matthews**:

This is an action brought by the plaintiff in error to recover duties on certain importations of wool, alleged to have been illegally assessed, in which judgment was rendered for the defendant, brought here for review by this writ of error.

In the circuit court judgment was rendered upon an agreed statement of facts, set out in the record, as follows:

The plaintiff, in August, 1873, imported into the Port of Boston from Rosario, by the bark Velox, 324 bales of unwashed Cordova wool and entered it in bond. It subsequently withdrew the same for consumption. The defendant, as Collector of Customs, assessed and exacted of the plaintiff a duty of six cents per pound less 10 per centum on this wool upon the appraisement as hereinafter set forth. The plaintiff claimed that this wool was only legally liable to a duty of three cents per pound less 10 per centum, and paid the extra three cents per pound under due protest, and seasonably appealed to the Secretary of the Treasury, who affirmed the decision and action of the defendant. In due time and in conformity to law plaintiff brought this action to recover the extra three cents per pound less 10 per centum. The pleadings may be referred to. As it appears by the invoice, this wool was bought in Rosario on the 28th day of March, 1873, and was shipped at Rosario on board The Velox for Boston on the 5th day of June, 1873, and the invoice was sworn to before the acting United States Consul on the 9th day of June, 1873. Rosario was the last port from which it was exported to the United States, and it was invoiced there and entered at the custom house in Boston at the price paid for it in the currency and weight in which it was bought, which, upon being reduced to United States

currency and weight, showed the cost to be above twelve cents per pound. Between the time of purchase and the time of shipment and exportation to the United States, the market value or wholesale price of this wool fell at Rosario; and at the time and place of shipment and exportation to the United States the market value or wholesale price was less than twelve cents per pound excluding charges in such port or place. The acting United States Consul made under his official seal the following certificate upon the invoice, which is objected to by the defendant as incompetent and immaterial:

"U. S. Consulate, Rosario, June 10, 1873.

"I, Thomas B. Wood, acting United States Consul for Rosario, do hereby certify, after investigation, that the market value of unwashed Cordova wool at this place at the date of shipment of the annexed invoice was thirty-two to thirty-two and one-half Bolivian reals, equivalent to $24\frac{11}{16}$ to $24\frac{13}{100}$ reals *fuerta per arroba* net weight.

"Given under my hand and seal, this day.

(Signed) Thomas B. Wood,
Acting U. S. Consul."

Which, being reduced to United States weight and currency, shows a value per pound less than twelve cents at Rosario. In conformity with law and treasury regulations, upon entry of this merchandise by the plaintiff, the proper number of designated packages thereof were sent to the public store, and this invoice was sent by the defendant as Collector to the United States Appraiser for his examination, appraisement and report. The Appraiser, after examination, made on the invoice the following report, and returned the same to the Collector, as and for his appraisement, from which no appeal was claimed or taken to merchant appraiser: "Wool, class 3, dutiable at invoice value six cents per pound less 10 per centum;" said report bearing date August 2, 1873; and upon this appraisement the Collector assessed and exacted the duty as aforesaid. It is admitted and agreed, if it be material and competent, that the appraiser made the said report to the Collector as and for his appraisement, believing that he had no legal right to appraise the wool at less than the invoice value, although in fact he believed the true market value of said wool at the last port or place whence exported to the United States, at the time of exportation, excluding charges thereon, was less than twelve cents per pound. The plaintiff contended that this was not a legal or sufficient appraisement. The defendant, as Collector, exacted the duty of six cents per pound less 10 per centum, upon the ground that whatever the market value or wholesale price of this wool might have been at Rosario at the time of shipment and exportation, inasmuch as the invoice showed the value to be above twelve cents per pound, it was legally liable to the duty exacted. This wool was of the third class named in the first section of the Act of March 2, 1867, 14 Stat. at L. 559, which provides "that upon wools of the third class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall be twelve cents or less per pound, the duty shall be three cents per pound. Upon wools of the same class, the value whereof at the last port or place whence exported to the United States, including charges in such port, shall exceed twelve cents per pound, the duty shall be six cents per pound."

If the court shall be of opinion upon the foregoing facts that said duty was illegally assessed and exacted of the plaintiff, then judgment shall be entered for the plaintiff for an amount equal to one half of the duties paid [17] in gold, with interest, to be ascertained by an assessor to be appointed by the court, and costs. On the contrary, if the court shall be of opinion that the duty was properly assessed and exacted, judgment shall be entered for the defendant, with costs.

Mr. **Charles Levi Woodbury,** for plaintiff in error.

Mr. **Wm. A. Maury,** *Asst. Atty-Gen.*, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court: [17]

The duties chargeable upon the importations in question were levied and collected under section 1 of the Act of March 2, 1867, "to provide increased revenue from imported wool and for other purposes." 14 Stat. at L. 559. It provides that "from and after the passage of this Act, in lieu of the duties now imposed by law on the articles mentioned and embraced in this section, there shall be levied, collected and paid on all unmanufactured wool, hair of the alpaca, goat, and other like animals, imported from foreign countries, the duties hereinafter provided." For the purpose of fixing the duties to be charged thereon, the articles mentioned are divided into three classes, as follows: class 1, clothing wool; class 2, combing wools; class 3, carpet wools and other similar wools, the last being "such as Douskoi, native South American, Cordova, Valparaiso, native Smyrna, and including all such wools of like character as have been heretofore usually imported into the United States from Turkey, Greece, Egypt, Syria and elsewhere." The importations affected by this suit were of this class. It was further provided that "Upon wools of the third class, the value whereof at the last port or place whence exported into the United States, excluding charges in such port, shall be twelve cents or less per pound, the duty shall be three cents per pound; upon wools of the same class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall exceed [18] twelve cents per pound, the duty shall be six cents per pound."

By the Act of June 6, 1872, 17 Stat. at L. 230, § 2, the duties on wool imposed by the Act of 1867, among other things, was reduced 10 per centum of such duties.

As the value of the wool in question, at the last port or place whence exported into the United States, excluding charges in such port at the time of shipment, was less than twelve cents per pound, under these provisions of the law, standing alone, it would be subject to a duty of but three cents per pound, and it is contended by the plaintiff in error that the case is governed exclusively by these sections. But as the wool was bought in Rosario, and was shipped from there to the United States,

and was invoiced there and entered at the custom house in Boston at the price paid for it in the currency and weight in which it was bought, which, upon being reduced to United States currency and weight, showed the cost to be above twelve cents per pound, it is contended on the part of the Collector that it was properly chargeable according to that value, with the duty actually exacted of six cents per pound.

This conclusion is based upon a proviso, occurring in the seventh section of the Act of March 3, 1865, "amendatory of certain Acts imposing duties upon foreign importations." 13 Stat. at L. 491, and repeated in the ninth section of the Act of July 28, 1866, "to protect the revenue, and for other purposes." 14 Stat. at L. 330. The first of these sections is as follows:

"Sec. 7. *And be it further enacted*, That, in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, wares or merchandise imported into the United States, and in all cases where the duty imposed by law shall be regulated by or directed to be estimated or based upon the value of the square yard, or of any specified quantity or parcel of such goods, wares or merchandise, it shall be the duty of the collector within whose district the same shall be imported or entered, to cause the actual market value or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same shall have been imported into the United States, to be appraised; and such appraised value shall be considered the value upon which duty shall be assessed.' That it shall be lawful for the owner, consignee or agent of any goods, wares or merchandise which shall have been actually purchased or procured otherwise than by purchase, at the time and not afterwards, when he shall produce his original invoice or invoices to the collector, and make and verify his written entry of his goods, wares or merchandise, as provided by section 36 of the Act of March 2, 1799, entitled 'An Act to Regulate the Collection of Duties on Imports and Tonnage,' to make such addition in the entry to the cost or value given in the invoice as in his opinion may raise the same to the actual market value or wholesale price of such goods, wares or merchandise, at the period of exportation to the United States, in the principal markets of the country from which the same shall have been imported; and it shall be the duty of the collector, within whose district the same may be imported or entered, to cause such actual market value or wholesale price to be appraised in accordance with the provisions of existing laws; and if such appraised value shall exceed by 10 per centum or more the value so declared in the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected and paid a duty of 20 per centum *ad valorem* on such appraised value; *Provided*, That the duty shall not be assessed upon an amount less than the invoice or entered value, any Act of Congress to the contrary notwithstanding."

[19]

The second section is as follows:

"Sec. 9. *And be it further enacted*, That in determining the dutiable value of merchandise hereafter imported, there shall be added to the cost or to the actual
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pressly added to the section
which contains the substitu

wools for dutiable purposes and fixes the varying rates of duty upon them. It would be an unsound and unsafe rule of construction which would separate from the tariff revenue system, consisting of numerous and diverse enactments, each new Act altering it, in any of its details, or prescribing new duties in lieu of existing ones on particular articles. The whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress.

"In the interpretation of our system of revenue laws, which is very complicated," as was said in the case of *U. S.* v. *Sixty Seven Packages of Dry Goods*, 17 How. 85, 93 [58 U. S. bk. 15, L. ed. 54, 56], "this court has not been disposed to apply with strictness the rule which repeals a prior statute by implication, where a subsequent one has made provision upon the same subject, and differing in some respect from the former, but has been inclined to uphold both, unless the repugnancy is clear and positive so as to leave no doubt as to the intent of Congress."

The judgment of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

BRIDGEWATER IRON COMPANY, *Plff. in Err.*,
v.
HERMAN LISSBERGER.

(See S. C., Reporter's ed., 8-10.)

Unrecorded transfer of corporation stock—validity of.

A transfer for a valuable consideration of shares in a Massachusetts manufacturing corporation, not recorded as required by a statute of that State, is valid against a subsequent attachment by a creditor having knowledge or notice of the transfer.

[No. 80.]

Argued Dec. 3, 4, 1885. Decided Dec. 14, 1885.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The history and facts of the case appear in the opinion of the court.

Mr. **Charles A. Welch**, for plaintiff in error.

Mr. **Darwin E. Ware**, for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This was an action of tort, brought by a citizen of New York against a manufacturing corporation established under the laws of Massachusetts, for refusing to issue to him a certificate of twenty shares of its capital stock.

At the trial, the plaintiff introduced evidence tending to show that the defendant Corporation in 1874 accepted a new charter from the Legislature of Massachusetts (Mass. Stat. 1874, chap. 38, which made it subject to the provisions of the general Act of 1870, chap. 224; that on August 10, 1877, George B. Stetson, being the owner of these shares, executed to the plaintiff a transfer of them, absolute in form but intended as collateral security for a debt due from him to the plaintiff, and annexed the transfer to his certificate, and delivered both to the plaintiff; and that on December 15, 1878, the plaintiff tendered them to the defendant Corporation, and duly demanded that the transfer be recorded on its books and a new certificate issued to him.

The defendant Corporation introduced competent and uncontroverted evidence that on May 24, 1878, it brought an action against George B. Stetson on a debt due to it from him, and duly attached these shares on *mesne* process and afterwards obtained judgment and execution, under which the shares were levied on and sold to the defendant in November, 1878.

To meet this, the plaintiff offered evidence tending to show that, before the attachment, an agent of the plaintiff informed a director of the defendant Corporation of the transfer to the plaintiff, and that the plaintiff wanted the Corporation to know it; and the director mentioned it to Nahum Stetson, the defendant's treasurer, clerk and business agent.

The defendant took no objection to the admission or sufficiency of this evidence, otherwise than by requesting the court to instruct the jury that "If said evidence was competent to prove a notice to said Nahum, or to put him on the inquiry whether said shares had been transferred to the plaintiff, yet no such notice was effectual to deprive the defendant of the right as creditor to attach said shares as the property of said George B. Stetson, under the statutes of the State of Massachusetts." [9]

The court declined so to rule; and instructed the jury "that if they, upon the evidence, believed that said Nahum, being the treasurer, clerk and business agent of the Company, knew or had notice that said George B. Stetson had conveyed said shares to the plaintiff, prior to said attachment, the plaintiff was entitled to recover."

To this instruction the defendant excepted and, after verdict and judgment for the plaintiff, tendered a bill of exceptions which was allowed.

The principal question argued by counsel and the only one presented by the bill of exceptions for decision is, whether a transfer for valuable consideration, of shares in a Massachusetts manufacturing corporation, not recorded as required by the Statute of Massachusetts of 1870, chap. 224, § 26, is valid against a subsequent attachment by a creditor having knowledge or notice of the transfer.

That statute provides that "Shares may be transferred by the proprietor, by an instrument in writing under his hand, which shall be recorded by the clerk of the corporation in a book to be kept for that purpose;" and "the purchaser named in such instrument so recorded shall, on producing the same to the treasurer and delivering to him the former certificate, be entitled to a new certificate." These provisions were re-enacted in the Public Statutes of Massachusetts of 1882, chap. 106, § 30; and similar provisions had existed since 1809. Mass. Stat. 1808, chap. 65, § 4; 1829, chap. 53, § 4; R. S. 1836, chap. 38, § 12; Stat. 1846, chap. 45, § 1; Gen. Stat. 1860, chap. 60, § 18. [10]

By a series of decisions of the Supreme Judicial Court of Massachusetts, on which the plaintiff in error relies, it has been held that

these provisions, taken in connection with the contemporaneous statutes of that State, authorizing and facilitating the attachment of such shares by creditors of the owner, are not to be construed as intended merely for the convenience and benefit of the corporation and the regulation of its relations to its stockholders; but are to be considered as in the nature of a Registry Act, regulating the transfer of the stock as to third persons, and therefore preventing an unrecorded transfer from taking effect against a creditor afterwards attaching the shares without notice of the transfer. *Fisher* v. *Essex Bank*, 5 Gray, 373; *Blanchard* v. *Dedham Gaslight Co.* 12 Gray, 213; *Sibley* v. *Quinsigamond Bank*, 133 Mass. 515, 521; *Central National Bank* v. *Williston*, 138 Mass. 244.

But the learned counsel for the plaintiff in error fails to show that an unrecorded transfer of shares has ever been held invalid as against a subsequent attachment by a creditor who has notice or knowledge of the transfer. The language and the reasoning of the opinions in the very cases that he cites clearly imply the contrary And under the early Massachusetts Registry Act of 1783, chap. 37, § 4, which provided that no unrecorded deed of lands should "be good and effectual in law to hold such lands against any other person or persons but the grantor or grantors and their heirs only," it was always held that, the intent of the statute being to give notice to subsequent purchasers and attaching creditors, a deed was valid, without record, against those who had notice or knowledge of it. *Farnsworth* v. *Childs*, 4 Mass. 637; *Priest* v. *Rice*, 1 Pick. 164.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[45] BROOKE MACKALL, JR., *Appt.*,

v.

ALFRED RICHARDS.

(See S. C., Reporter's ed., 45-48.)

Practice—mandate of this court—further proceedings on change of circumstances.

1. An appeal will not be entertained from a decree of an inferior court in exact accordance with the mandate of this court upon a previous appeal. Where such appeal is taken upon application of the appellee, this court will examine the decree entered and, if it conforms to the mandate, dismiss the case with costs.

2. Where one appeal was taken for the sole purpose of correcting a certain error, it is proper to construe the mandate as in effect nothing more than an order for such correction, leaving the remainder of the decree to stand.

3. Where, since the original decree, the rights of the parties have so changed as to make it improper to carry the decree into execution, relief can only be had through some form of original proceeding. It cannot be had by way of defense before decree upon the mandate.

4. The decree in this case, although rendered at general term, was still the decree of the Supreme Court of the District of Columbia.

[No. 999.]

Submitted Dec. 8, 1885. Decided Dec. 14, 1885.

APPEAL from the Supreme Court of the District of Columbia.

On motion to dismiss.

The history, facts, and case sufficiently appear in the opinion of the court.

Messrs. **Wm. B. Webb** a
ten, for appellee, in support
Mr. **W. Willoughby,** for
position.

Mr. Chief Justice **Waite** d
ion of the court:

This is an appeal from a
preme Court of the District
tered at general term upon a m
court. In *Stewart* v. *Salam*
[Bk. 24, L. ed. 1044], this rule
ed: "An appeal will not be e
court from a decree entered i
or other inferior court in exact
our mandate upon a previous
decree when entered is in e
and the appeal would be from
selves. If such an appeal is
we will, upon the application
examine the decree entered an
to the mandate, dismiss the ca
it does not, the case will be re
propriate directions for the co
ror."

This suit was begun in the S
the District of Columbia, May
ject to the payment of certa
much of lot 7, in square 22
Washington, as had not been
the Marshal of the District of
fred Richards by deed bearing
1870. A decree was entered
complainants, at special term
May, 1873. This decree was
eral term, October 16, 1873, a
March 19, 1877. Under the d
made and reported to the c
upon the return Mackall file
cause the property sold had n
ly described. Upon hearing,
were sustained and the sale
court then took steps to fix t
the property, and on the 11
1879, a decree was entered at
recting that the sale be made
certain description. From th
taken to the general term, w
was affirmed April 5, 1881, in
cept that one of the two truste
appointed to make the sale wa
own request, and the other dir
alone. An appeal was thereu
court, where the only error a
the boundaries of the propert
neously fixed. At the last term
heard and the cause remanded
"to set aside the de ree from w
is prosecuted, and to order the s
of complainant's demands, an
as may be consistent with the
court and with law, of all of l
side of that on which the bui
Palace Market stands." *Mack*
112 U. S. 369 [Bk. 28, L. ed.
production of this mandate,
entered a decree at general ter
respects like that appealed fro
description of the property, wh
conform exactly to the order o

Upon examination, therefore
that the decree as entered is in

the mandate. As no complaints were made on the second appeal about the terms of sale or the manner in which the sale was to be made, it was quite right in the court to follow the old decree in those particulars, which has been substantially done. As the appeal was taken for the sole purpose of correcting the description, it was proper to construe the mandate as in effect nothing more than an order for such a correction, leaving the remainder of the decree to stand.

The decree upon the mandate, although rendered at general term, was still the decree of the Supreme Court of the District. *Richards* v. *Mackall*, 113 U. S. 540 [Bk. 28, L. ed. 1132]; and the order on the trustee to report his sale to this court can work no injury. The order to take possession was part of the original decree; and as no objection was taken to it on the former appeals, it ought not to be permitted now.

A motion was made by Mackall in the court below after the mandate was received, for leave to file what was called a "supplemental bill" but which was in reality a supplemental answer to the original bill, setting up new defenses growing out of matters occurring since the original decrees. This was properly denied. No discretion was left in that court to grant such a motion. The order of this court was in effect to enter the precise decree which has been made. If since the original decree the debts have been paid or anything else has happened which makes it improper to carry the decree into execution, resort must be had to some form of original proceeding appropriate to relief on that account. It cannot be done by way of defense before decree upon our mandate. The order of this court places the case where it would be if the original decree had been what it is now.

It follows that the appeal must be dismissed under the rule, with costs; and it is so ordered.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

ASA C. CALL, *Appt.*,
v.
HENRY H. PALMER.

(See S. C., Reporter's ed., 98-103.)

Usury, what constitutes—intent—new security—unauthorized acts of agent.

1. To constitute usury, within the prohibition of the usury laws, there must be an intention knowingly to contract for or to take usurious interest.

2. When an agent who is authorized by his principal to lend money for lawful interest exacts for his own benefit more than the lawful rate, without authority or knowledge of his principal, the loan is not thereby rendered usurious.

3. Where the promisor in a usurious contract makes it the consideration of a new contract with a third person not a party to the original contract or to the usury paid or reserved upon it, and the new contract is not a contrivance to evade the statutes against usury, the latter is not illegal or usurious.

[No. 67.]

Argued Nov. 18, 1885. Decided Dec. 14, 1885.

APPEAL from the Circuit Court of the United States for the District of Iowa.

Statement of the case by *Mr. Justice* **Woods**:

This was a suit in equity brought by Henry H. Palmer, the appellee, against Asa C. Call, the appellant, to foreclose a mortgage on the land of the latter given by him to secure his note for $11,000. [98]

The record disclosed the following facts: Albert C. Burnham, residing in Illinois, was a partner in the firm of Burnham, Ormsby & Co., bankers, at Emmetsburg, Iowa. He had in his hands for investment $10,000 belonging to his relative, one Mrs. Davidson. Call applied in writing to Burnham, Ormsby & Co. for a loan of $10,000. Soon after the application was made Call met Burnham at Emmetsburg, Iowa, and they entered upon a treaty for the loan. Burnham, thinking Call's proposition to be a favorable one, decided to accept it for Mrs. Davidson; and after his return to Illinois sent the money to Burnham, Ormsby & Co., at Emmetsburg, to be lent to Call on the terms proposed by him. Burnham, Ormsby & Co. took the note of Call dated in November, 1872, for $10,000, payable to A. C. Burnham, or order, on November 1, 1875, with 10 per cent interest, payable semi-annually, which Call secured by a mortgage on certain of his real estate in Iowa. Call received from Burnham, Ormsby & Co. $8,000 for his note, they retaining $2,000 as a compensation for their services in negotiating the loan. No part of this sum was paid to Mrs. Davidson; she did not know that it had been deducted from the $10,000 lent by her to Call, and she never authorized Burnham or Burnham, Ormsby & Co. to lend her money at a greater rate of interest than 10 per cent, or to retain any commission or bonus out of the sum lent. In short, she received no benefit from the usury and had no knowledge of it. A. C. Burnham held the note as the agent and trustee of Mrs. Davidson, but subject to her control. Afterwards the appellee, Palmer, who lived in New Jersey, bought of Burnham the $10,000 note of Call, with five coupon notes of $500 each, not then due, given by the latter for interest thereon. The notes were indorsed by Burnham to Palmer in September, 1873, and Palmer paid therefor in cash to Burnham for Mrs. Davidson the face of the principal note, $10,000, and the accrued interest. In this purchase Palmer acted for himself without the intervention of any agent whatever. [99]

On November 13, 1875, the principal note being past due, Call, in order to raise money to pay it, applied in writing to Burnham, Ormsby & Co. to lend him $11,000 for five years. They, as agents of Palmer, agreed to loan Call the money. They took his note, dated November 1, 1875, for $11,000, payable to the order of Palmer, on November 1, 1880, with 10 per cent interest, payable semi-annually, secured by a mortgage executed by Call on his lands in Iowa.

The consideration for the note was as follows: Palmer delivered up to Call the $10,000 note, which he had purchased from Mrs. Davidson

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NOTE.—*Usury—acts of agent of lender; when render transaction usurious.* See Zabriskie v. Spielman, 46 N. J. L., 35; Fisher v. Porter, 23 Fed. R., 162; Meers v. Stevens, 106 Ill., 549; Jordan v. Humphrey, 31 Minn., 435; Fellows v. Longyor, 91 N. Y., 324; Phillips v. Mackellar, 92 N. Y., 34; N. E. Mfg. Security Co. v. Hendrickson, 13 Neb., 157.

[illegible]

1887

[illegible]

[illegible] Sherry Chalmers Whitney S. Chase, [illegible]

The [illegible] Burnham [illegible] principal [illegible] agent, [illegible] no [illegible] liability [illegible] agent.

When a third person has dealt with an agent in relation to a loan, knowing that the principal will be a stranger to the transaction, it becomes the duty of such third person to see to the agent's authority, or at least to contract solely on the credit of the principal, in the same way as if the agent were not interposed.

Story, Agency, §§ 159, 404, 419, [illegible]; Lime Rock Bank v. Plimpton, 17 Pick. 159; Freeman v. Bail, 3 Iowa, 467; Hackamack v. Hackamack, 6 Ib. 74.

Where there is notice of the usury the new security is also usurious.

Cuthbert v. *Haley*, 8 T. R. 390; *Powell* v. *Waters*, 8 Johns. 492; *Dey* v. *New York*, 2 Hill, 222; *Kent* v. *Walton*, 7 Wend. 257; *Barrow* v. *Barstow*, 3 Mass. 48; *Campbell* v. *McHarry*, 3 Iowa, 257; *Wendleborne* v. *Parks*, 18 Iowa, 341; *Chapman* v. *Black*, 2 B. & Ald. 569.

If the assignee give up the usurious note and take another without knowledge of the usury, the substituted security is valid.

2 Pars. N. & B. 419, and authorities there cited.

A renewal between the original parties or others cognizant of the usury is in like manner usurious.

Id. 420; Edwards, B. & N. 351, and authorities there cited; *Cuthbert* v. *Haley*, 8 T. R. 390; *Chapman* v. *Black*, 2 B. & Ald. 569.

The Statute of Iowa acts upon the *original* contract or consideration, without reference to the form which that contract may subsequently assume, or the writings by which it is evidenced.

[100] *Smith* v. *Chapen*, 9 Iowa, 283; *Garth* v. *Cooper*, 12 Iowa, 365; *Burrows* v. *Cook*, 17 Iowa, 441; *Bacon* v. *Lee*, 4 Iowa, 494; *French* v. *Rowe*, 15 Iowa, 576; *Dicely* v. *Cedar Falls*, 21 Iowa, 569.

Mr. M. P. Morris, for appellee.

Mr. Justice **Woods** deliver[illegible] of the court:

The [illegible] that the note given [illegible] was infected with usury [illegible] the hands of [illegible] was [illegible] usurious, by reason [illegible] Burnham. Bunnay & Co. [illegible] $600 as a consideration for the loan for [illegible].

The note which is the basis of this suit was made in Iowa, and the contract must be governed by the law of Iowa. *De Wolf* v. *Johnson*, 10 Wheat. 390; 6 L. ed. 363; *Gardner* v. *Thomas Bank*, 8 U. S. 466 (6 L. ed. 45).

The code of Iowa of 1873, title 14, chap. 3, sec. [illegible] provides: "The rate of interest shall be six cents on the hundred for the year in * * * money, [illegible] become due when there is a contract for any interest and no rate is stipulated. It is the same above contemplated parties may give a written for payment of interest, not exceeding ten cents on the hundred by the year.

"Sec. 979. No person shall, directly or indirectly, receive in money, goods or things in action, or in any other manner, any greater sum or value for the loan of money, or upon contract founded upon any bargain, sale or loan of any personal property, than is in this chapter reserved.

"Sec. 980. If it shall be ascertained in any suit founded on any contract that a rate of interest has been contracted for greater than is authorized by this chapter, either directly or indirectly, on money or property, the same shall work a forfeiture of ten cents on the hundred for the year upon the amount of such contract to be sued and taken by the county in which the suit is brought, and the plaintiff shall have judgment for the principal sum, without either interest or costs. * * *

"Sec. 981. Nothing in this chapter shall be so construed as to prevent the proper assignee in good faith and without notice of any usurious contract recovering against the usurer the full amount of the consideration paid by him for such contract, less the amount of the principal money, but the same may be recovered of the usurer in the proper action before any court having competent jurisdiction."

We are of opinion that under these sections, as construed and administered by the Supreme Court of Iowa, the defense of usury was not [illegible].

The $[illegible] loan to Hall by Burnham was the money of Mrs. Davidson; and the note taken therefor, though taken in the name of Burnham, was her note. Counseling that Burnham acted as her agent in making the loan, it does not follow that Mrs. Davidson is chargeable with making a usurious contract. It was said by this court in *Bank of United States* v. *Weagner*, 9 Pet. 397; 34 U. S. bk. 9, L. ed. 170, 171 [illegible]: "That in construing the usury laws the uniform construction in England has been (and it is equally applicable here) that, to constitute usury, within the prohibitions of the law, there must be an intention knowingly to contract for or to take usurious interest. * * * Where the contract on its face is for legal interest only, there it must be proved that there was some corrupt agreement or device or shift to cover up [illegible] and that it was in the full contemplation of [illegible]

parties. * * * There must be an intent to take illegal interest." To the same effect are the cases of *Lloyd* v. *Scott*, 4 Pet. 205 [29 U. S. bk. 7, L. ed. 833]; *Condit* v. *Baldwin*, 21 N. Y. 219; and *Jones* v. *Berryhill*, 25 Iowa, 289.

It is clear, therefore, that Mrs. Davidson cannot be charged with taking or reserving usurious interest, unless she was bound by the acts of her agent, Burnham. But she was not so bound. It is settled that when an agent who is authorized by his principal to lend money for lawful interest exacts for his own benefit more than the lawful rate, without authority or knowledge of his principal, the loan is not thereby rendered usurious. *Dagnel* v. *Wigley*, 11 East, 62; *Solartee* v. *Melville*, 7 Barn. & C. 427; *Barrette* v. *Snowden*, 5 Wend. 181; *Condit* v. *Baldwin*, 21 N. Y., 219; *Bell* v. *Day*, 32 N. Y. 165; *Conover* v. *Van Mater*, 18 N. J. Eq. 486; *Rogers* v. *Buckingham*, 33 Conn. 81; *Gokey* v. *Knapp*, 44 Iowa, 32; *Wyllis* v. *Ault*, 46 Iowa, 46; *Brigham* v. *Myers*, 51 Iowa, 397.

In *Gokey* v. *Knapp*, *ubi supra*, the Supreme Court of Iowa said: "Although Danforth may have been the agent of Knapp for the purpose of loaning the money, and may have contracted for more than 10 per cent interest, yet the loan was not necessarily usurious. An authority to loan money at a legal rate of interest does not include, by implication, the authority to loan it at an illegal rate. An authority to violate the law will never be presumed. When Danforth exacted, in addition to the 10 per cent interest which was embraced in the note, something for the benefit of himself, he went outside the legitimate purposes of his agency, and as Knapp did not authorize it expressly or by implication, he should not be affected thereby."

So in *Brigham* v. *Myers*, 51 Iowa, 397, it was held to be "well settled that when an agent for loaning money takes a bonus or commission to himself beyond the legal rate of interest, without the knowledge, authority or consent of his principal, it does not affect with usury the loan of the principal."

These decisions seem to be founded on plain principles of justice and right; for when two persons, the agent and the borrower, conspire together and for their own purposes violate the law, how can punishment for their acts be justly imposed on the innocent third party, the lender?

The fact on which stress is laid by counsel for defendant, that Burnham in his treaty with Call did not disclose his agency but professed to be acting for himself, appears to be an immaterial circumstance. The misrepresentation of Burnham did not injuriously affect any right of Call, unless it can be said that he was entitled to know who the real lender was, so as to place himself in a position to plead usury against her. It can hardly be contended that the penalties imposed for a violation of the usury laws are intended as a reward to the borrower.

According to the principles of jurisprudence as generally administered, and especially as applied by the Supreme Court of Iowa under the same law of that State, if suit had been brought by Mrs. Davidson herself to enforce the payment of the note given by Call to Burnham for her, the defense of usury would have failed. It cannot, therefore, hold as against Palmer.

But the defense of usury set up in this suit must fail for another reason. For it is settled that where the promisor in a usurious contract makes it the consideration of a new contract with a third person not a party to the original contract, or to the usury paid or reserved upon it, and the new contract is not a contrivance to evade the statutes against usury, the latter is not illegal or usurious. *Cuthbart* v. *Haley*, 8 T. R. 390; *Bearce* v. *Barstow*, 9 Mass. 48; *Powell* v. *Waters*, 8 Cow. 669; *Kent* v. *Walton*, 7 Wend. 257; *Houghton* v. *Payne*, 26 Conn. 396.

This rule is recognized by the Supreme Court of Iowa. Thus, in *Wendlebone* v. *Parks*, 18 Iowa, 546, it was held in substance that when the maker of a usurious note, which was secured by a deed of trust, borrowed money of a third party to pay the same, and, instead of executing new securities for the money so borrowed, caused the note to be transferred by the payee to the lender, as evidence and security for the new debt, the note was not tainted with usury in the hands of the second holder.

The authorities cited are conclusive against Call on both the grounds noticed. As the propositions upon which Palmer relies to defeat the plea of usury have both been sustained by the Supreme Court of Iowa while the present law against usury was in force, it is unnecessary to construe or discuss the statute. The result of the decisions of the Supreme Court of the State is that there is nothing in the statutes of Iowa which, upon the facts of this case, is a bar to the relief demanded by Palmer in his bill.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[55]

*ANGUS M. CANNON, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 55-80.)

Polygamy—construction of Act of March 22, 1882—indictment, sufficiency of.

1. Under the Act of March 22, 1882, a man "cohabits" with more than one woman, when, holding out to the world two or more women as his wives, by his language or conduct or both, he lives in the same house with them and eats at the table of each a portion of the time, although he may not occupy the same bed, sleep in the same room or actually have sexual intercourse with either of them.

2. Objections, that the indictment does not allege that the defendant is a male person and does not allege a cohabitation with the women as wives or as persons held out as wives, cannot be raised after the defendant has pleaded to it, especially as no substantial right was thereby prejudiced.

3. In an indictment for a misdemeanor it is sufficient to charge the offense in the words of the statute, unless they fail to cover every element of the offense charged.

4. While this court can say that the conduct of the defendant in this case was unlawful, it cannot undertake to indicate in advance what the conduct of a polygamous husband towards his plural wives must be, in order to conform to the requirements of the law.

[No. 1169.]

Argued Nov. 20, 23, 1885. Decided Dec. 14, 1885.

IN ERROR to the Supreme Court of the Territory of Utah

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*The question of jurisdiction having for the first time been raised and discussed in the parallel case

The history and facts of the case appear in the opinion of the court.

On May 10, 1886, the court, having dismissed the writ of error in a similar case, Snow v. U. S. 118 U. S. 346, for want of jurisdiction, recalled the mandate and dismissed the writ of error in this case.

Mr. **Franklin S. Richards**, for plaintiff in error.

Mr. **John Goode**, *Solicitor-Gen.*, for defendant in error.

[56] *Mr. Justice* **Blatchford** delivered the opinion of the court:

Angus M. Cannon was indicted by a grand jury in the District Court of the Third Judicial District in and for the Territory of Utah, in February, 1885, for a violation of section 3 of the Act of Congress approved March 22, 1882, chap. 47, entitled "An Act to Amend Section Fifty-Three Hundred and Fifty-Two of the Revised Statutes of the United States, in Reference to Bigamy and for Other Purposes." 22 Stat. at L. 31. Section 1 of the Act amends section 5352 of the Revised Statutes, which was a re-enactment of section 1 of the Act of July 1, 1862, chap. 122 (12 Stat. at L. 501); and, in order that the amendment may be understood, the original and new sections 5352 are here placed side by side, the parts in each which differ from the other being in italic:

Original.	*New.*
"Every person *having* a husband or wife living, who marries another, whether married or single, *in a Territory or other place over which the United States have exclusive jurisdiction*, is guilty of *bigamy*, and shall be punished by a fine of not more than $500, and by imprisonment for a term not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage *is* absent for five successive years, and is not known to such person to be living; nor to any person by reason of any former marriage which *has* been dissolved by decree of a competent court; nor to any person by reason of any former marriage which has been pronounced void by decree of a competent court, on the ground of [57]	"Every person *who has* a husband or wife living who, *in a Territory or other place over which the United States have exclusive jurisdiction, hereafter* marries another, whether married or single, *and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction*, is guilty of *polygamy*, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage *shall have been* absent for five successive years, and is not known to such person to be living, *and is believed by such person to be dead;*

of *Snow* v. *U. S.* reported in book 30, in the order of its date of decision, judgment in this case was vacated by filing the following:

CANNON v. UNITED STATES—No. 1169.

Mr. Justice BLATCHFORD delivered the opinion of the court:

The decision in *Snow* v. *United States* [118 U. S. p. 346], dismissing the writs of error for want of jurisdiction, shows that there was no jurisdiction of the writ of error in this case. As the decision, reported in 116 U. S. 55 [above case], was made at the present term, the judgment rendered on the 14th of December, 1885, affirming the judgment of the Supreme Court of the Territory of Utah, is set aside and vacated; the mandate is recalled; and the writ of error is dismissed.

True copy. Test:

James H. McKenney, Clerk, Sup. Ct. U. S.

as he shall think proper; but no such amnesty shall have effect unless the conditions thereof shall be complied with.

Sec. 7. That the issue of bigamous or polygamous marriages, known as Mormon marriages, in cases in which such marriages have been solemnized according to the ceremonies of the Mormon sect, in any Territory of the United States, and such issue shall have been born before the first day of January, *Anno Domini* 1883, are hereby legitimated.

Sec. 8. That no polygamist, bigamist or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or to be entitled to hold any office or place of public trust, honor or emolument, in, under or for any such Territory or place, or under the United States."

Section 9 of the Act contains provisions declaring vacant registration and election offices, and enacting that persons shall be appointed to execute those offices, by a board of five persons, which is directed to canvass votes to be returned to it for members of the legislative assembly, with the proviso "that said board of five persons shall not exclude any person otherwise eligible to vote, from the polls, on account of any opinion such person may entertain on the subject of bigamy or polygamy; nor shall they refuse to count any such vote on account of the opinion of the person casting it on the subject of bigamy or polygamy."

The indictment against Cannon was as follows: "The grand jury of the United States of America within and for the district aforesaid, in the Territory aforesaid, being duly empaneled and sworn, on their oaths do find and present; that Angus M. Cannon, late of said district, in the Territory aforesaid, to wit: on the first day of June, in the year of our Lord 1882, and on divers other days and continuously between the said first day of June, A.D. 1882, and the first day of February, A. D. 1885, at the County of Salt Lake and Territory of Utah, did unlawfully cohabit with more than one woman, to wit: one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same."

The defendant pleaded not guilty, and the case was tried in April, 1885, resulting in a verdict of guilty, and a judgment imposing a fine of $200, imprisonment in the penitentiary for six months, and further imprisonment till the payment of the fine.

After the jury was empaneled and sworn, and the prosecution had called a witness, the defendant objected to the giving of any evidence under the indictment, on the ground that the indictment was defective and did not charge any criminal offense, nor any offense under the statutes of the United States, nor the offense described in the statute, either in the statutory words or equivalent words, and especially did not show that the person charged was a male person; and was insufficient to warrant a verdict or support a judgment of conviction. The court overruled the objection, and the defendant excepted. The following proceedings then took place, as shown by the bill of exceptions:

Clara C. Cannon, a witness called for the prosecution, was sworn, when the defendant renewed the said objection to the indictment, with a like ruling by the court and a like exception. The witness testified as follows: "My full name is Clara C. Cannon. I know the defendant. I have been his wife. I was his wife. I was married to him about ten years ago, and have since lived at 246 First South Street, Salt Lake City. I live there now, and have lived in the same house since shortly after I was married. The defendant has lived in the same house part of the time, and in the same house during the past three years. I have one living child, which is a child of that marriage, born January 11, 1882. I have had two other children by that marriage, both born before the living one. In this house I occupy two rooms on the ground floor, a parlor and a dining room, on the east side. My kitchen is back, not attached to my part of the house. I have occupied this part of the ground floor since I first went to live in the house. There is a hall running through the house on the ground floor, and the rooms I occupy on that floor are on the east side of the hall. I know [61] Amanda Cannon. She has lived in the same house that I live in during the past three years. She has occupied, on the ground floor, two rooms on the west side of the hall, beside her kitchen, which is attached to the back of the main building, and is not the kitchen I use. I suppose Amanda Cannon is defendant's wife. I have heard him speak of her as his wife, as Mrs. Cannon, and she has lived in the house ever since I went to live there. She has nine children, I think. During the past three years, I think, all her children have been living there at home, but not all the time. My little child lives with me in my part of the house; I mean the child of this marriage. The children of Amanda Cannon live with her in her part of the house. During the past three years and prior to the month of February in this year, the defendant has been in the habit of taking his meals with me, in my part of the house, a portion of the time, about one third of the time. There were stated intervals; he took his meals with me every third day; with me and my children. I have a son and daughter grown up, and two orphan children. He took his meals with me and the child of this marriage and the other children every third day. He took his meals with Amanda Cannon and her family one third of the time. He took all three of his meals with me every third day, on week days, and on Sunday morning he had breakfast at my house; that is, he took his meals with me two days of each week, and also his breakfast Sunday morning, which made one third of the time. On Sunday he took his dinner at Sarah's, and his supper at Amanda's. There are four rooms on the second floor of the house used as bed rooms; and a hall, with two of the rooms on either side of it. The rooms open into the hall. During the past three years I have occu

pied the bed room in the northeast corner, and Amanda has occupied the one in the southwest corner of the house. The defendant has occupied the bed room in the southeast corner. The room occupied by me as a bed room, and the one occupied by the defendant as a bed room, are on the same side of the hall, and there is no intervening room. The house I speak of is in Salt Lake County, Utah Territory." Cross examined: "My oldest daughter
[62] is twenty-three years old and my son twenty. I have a little girl, Clara Hardy, twelve years old, and a little girl ten years old, who are orphans. Their mother was a niece of mine; and when she died she left them to me. These, with my little daughter Alice, three years old past, are the members of my family. My daughter Alice was three years old last January. The two orphan children have lived with me for the last five years. The two little girls and my oldest daughter and the youngest daughter have occupied my room with me. We have two beds, and have all slept in that room."

Q. State whether that state of things and that relation with your children and the orphans continued until February last.

Objected to by the prosecution, on the ground that it is immaterial, irrelevant and incompetent. The objection was argued, the prosecuting attorney announcing that the objection was on the relevancy, materiality, and competency of the evidence offered, and not on the ground it was not a proper subject of cross examination or that the offer was out of order, but that any proof tending to show nonaccess was immaterial; and defendant's counsel admitted and stated to the court that the evidence was offered as tending to show, with other evidence to be given, nonaccess during the time charged in the indictment, and as tending to disprove any presumption of sexual intercourse which might be raised by testimony of the witness. The court sustained the objection, stating that the question presented by the objection had been deemed by both parties as being properly raised by the interrogatory objected to; and the defendant excepted.

Q. Was Amanda Cannon married to defendant prior to the time you was married to him?

Counsel for the prosecution objected to the question as irrelevant, incompetent, and immaterial. The court sustained the objection, and defendant excepted to the ruling. The following questions were severally propounded to the witness, counsel stating that the sole purpose for which the questions were asked was to establish sexual nonintercourse.

Q. Did you hear and know of the passage of the Act of Congress usually called the "Ed-
[63] munds Act," about the time it was passed?

Q. What had been the habit of defendant prior to that time, as to his occupation of your room and bed, and the room and bed of Amanda Cannon?

Q. About the time of the passage of that law did he say anything to you and the other members of the family in respect to his intention to not violate that law, and what did he say?

Q. Did you assent to what he proposed?

Q. After that did any change occur in his habit as to occupying your room and bed, and what, if any, was the change?

Q. After March 22, 1882, has t
at any time occupied your room c
he had any sexual intercourse wit

To each of these questions the
attorney objected, on the ground
dence sought was irrelevant, im
incompetent, and the objections
solely on these grounds, and not t
the questions, or time or manner o
evidence. The court sustained ea
and to the ruling on each the c
cepted.

George M. Cannon, a witness s
prosecution, testified: My fathe
Angus M. Cannon; he is the def
My mother's name is Sarah M. Ca
heard my father state he was marr
da Cannon.

Q. Have you heard your father
married to Sarah Cannon?

Defendant objected to the que
ground it is immaterial; that Sara
not named in the indictment, nor
with her charged.

The prosecuting attorney expl
intended to show that Sarah and A
non were married to defendant
ceremony, and that he offered th
show whom he had the right to
ness.

The court overruled the objec
lowed the evidence for this purpos
fendant excepted to the ruling.

Witness. I have heard my fath
married to my mother and Amand
one and the same time.

Angus M. Cannon, Jr., sworn
cution, testified: My father's name
Cannon and my mother's name
Cannon. I have lived during t
years in the same house with m
mother. My mother has nine ch
of them are living at home and
this period. I took my meals th
there on my mother's side of the h
taken my meals at the same table
of the family. My father has tak
about one third of the time at Clar
of the time at Sarah's and one thir
with my mother. About every
takes his meals with my mother a
dren. There are four sleeping a
the second story of the house; two
of the hall way which goes nort
and the rooms on each side open
During the period mentioned Clar
has occupied the northeast bed
father has occupied the southe
mother the southwest bed room.
ined: Clara Cannon has occupie
east bed room to my knowledge
years.

Q. Who occupied it with her?

Objected to as immaterial, etc
sustained and defendant excepted.

My father has occupied the sam
Clara and Amanda Cannon. I h
at home continuously for the past
years. I have been away proba
five and six months and, with th
I have been there more than three

Q. Do you know where your f
that time passed his nights?

Objected to. Objection sustained, and defendant excepted to the ruling.

The prosecution here rested.

George M. Cannon recalled for further cross examination: the substance of what my father said about his marriage to Sarah and Amanda Cannon was, that he married them at the same time. He said he married them prior to any Act against polygamy, and when he considered it legal. He perhaps stated the year, but I don't at present recollect it. I am in my twenty-fourth year.

[66] Clara C. Cannon recalled by the defendant and testified: I am a member of what is called the Church of Latter-Day Saints, and I have been a member for twenty-four years. The defendant is also a member of that church. I don't know how long he has been a member, but it is ever since I first knew him. Mrs. Amanda Cannon is a member of the same church, and has been since I first knew her; that is, thirteen years.

Q. Was Mrs. Amanda Cannon married to the defendant prior to your marriage to him?

Objected to by counsel for prosecution as irrelevant and immaterial. Objection sustained, and defendant excepted to the ruling.

Defendant's counsel then made the following offer of proofs: "We offer to prove, by this and other witnesses to be called, that Amanda Cannon was married to the defendant before the marriage with this witness; that, prior to the passage of the Edmunds Law, he had alternately occupied the sleeping room and bed of each; that each, with her family, occupied, and still occupies, separate apartments, including separate dining rooms and kitchens; that after the Edmunds Law had passed both Houses of Congress, and before its approval by the President, the defendant announced to witness, Amanda, and their families, that he did not intend to violate that law, but should live within it so long as it should remain a law, and at the same time assign his reasons for so doing; and thereafter and during the times alleged in the indictment he did not occupy the rooms or bed of or have any sexual intercourse with the witness, and to this extent, by mutual agreement, separated from the witness; that, during all the time mentioned in the indictment, the two families have taken their meals in their respective dining rooms; that defendant has taken his meals with the witness and her family, in her dining room, two or three days each week, has provided for the support of the witness and her family distinct from other family expenses, and allowed them to occupy separate apartments in the same house occupied by him and Amanda, and this is the extent of his relations with the witness; and also, that the defendant was financially unable to provide a separate house for witness and her family; also, that the witness and her family and [67] Amanda and her family are dependent on the defendant for their support. To this offer and each paragraph thereof the prosecution objected, and the objection was sustained by the court, and the defendant excepted to the ruling."

The foregoing was all the evidence given in the case. The court instructed the jury as follows: "The indictment in this case charges that the defendant, on the first day of June, in the year of our Lord 1882, and on divers other days, continuously, between said first day of June, 1882, and the first day of February, 1885, did unlawfully cohabit with more than one woman, to wit: one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon. [If you believe from the evidence, gentlemen of the jury, beyond a reasonable doubt, that the defendant lived in the same house with Amanda Cannon and Clara C. Cannon, the women named in the indictment, and ate at their respective tables one third of his time or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives, you should find him guilty.] [It is not necessary that the evidence should show that the defendant and these women or either of them occupied the same bed or slept in the same room; neither is it necessary that the evidence should show that, within the time mentioned, he had sexual intercourse with either of them.] I will state, the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; that you are the judges of the credibility of the witnesses, the weight of the evidence and of the facts, and if you find the defendant guilty you will say in your verdict, 'We, the jury, find the defendant guilty in manner and form as charged in the indictment;' and, if you find him not guilty, you will say, 'We, the jury, find the defendant not guilty.'" No further or other instructions were given to the jury.

The defendant excepted to the parts of the instructions which are enclosed in brackets. He also submitted the following prayers for instructions, each of which was separately refused, followed by a separate exception:

"1. The offense charged is that defined in the third section of the Act of Congress entitled 'An Act to Amend Section 5352 of the Revised Statutes in Reference to Bigamy, and for Other Purposes,' approved March 22, 1882, commonly known as the 'Edmunds Act.' [67]

2. That section is applicable to Utah Territory, and provides that if any male person here since March 22, 1882, has cohabited with more than one woman he shall be deemed guilty of a misdemeanor.

3. This section does not apply to male persons who have at successive periods cohabited with lawful wives, but only to contemporaneous cohabitation with two women.

4. Cohabitation includes living together as members of one family, a consorting in social intercourse and eating and lodging together. They need not occupy the same bed, but there must be an equivalent intimacy.

5. The word 'cohabit,' in this section, is to be understood in a technical or restricted sense. It does not apply to all persons who live with each other under one roof as members of one family, but only to adults of different sexes who live together in the manner that husbands and wives do, including the intimacy of occupying continuously or for recurrent periods the same bed.

6. (Requested if the last refused.) The word 'cohabit,' in this section, is to be understood in a technical or special sense. It does not apply to all persons of opposite sexes who live with each other under one roof as members of one family, but only to adults of different sexes liv-

ing together in the manner that husbands and wives do. So understood, it must include a continuous or recurrent occupying of the same apartments, in the manner usual with persons of opposite sex who live in sexual intimacy.

7. No case is within this section which does not include such association of a man with two women in their mode of living as to make it an example of immorality, by necessarily indicating an habitual intimacy with each of two or more women by mutual consent.

8. The cohabitation which is made a misdemeanor by this section is an habitual residence or dwelling by a man with two or more women in intimate sexual relations.

[68] 9. The ingredients of this offense are: first, that the person charged be a male person; second, that he has lived or dwelt with two women, either continuously at the same time or with each in alternate periods of time; third, that he has so lived with each of two or more women in such personal intimacy as to indicate that he has had sexual intercourse with them, respectively, at his and their pleasure.

10. The court will interpret this Edmunds Act by its terms, and in view of the actual situation in this Territory, of which the court is judicially cognizant, and thus deduce that Congress intended to apply a corrective to polygamy and the anomalous status produced by its long practice.

11. The Act is intended to prevent any future polygamous marriages, and to prevent the continued cohabitation of persons who are already in polygamy. The section making cohabitation a misdemeanor has special or primary application to a cohabitation with a plurality of wives. This obvious intention indicates the ingredients of the criminal cohabitation; that it is a living together in the sexual intimacy usual between persons united in the marital relation, immoral in example for not having the sanction of lawful marriage, and pernicious in producing an illegitimate offspring.

12. This Act legitimizes all children born prior to January 1, 1883; it authorizes amnesty to all offenders prior to its enactment, and thus it is shown that the Act was passed in view of the long existence of polygamy in this Territory, and the multitudes of children born therein; it is merciful to those who have broken the laws against polygamy, and humane and paternal to the children born in polygamy.

13. This Act does not command polygamous fathers to abandon their children nor to break off all communication with their mothers. Such fathers are at liberty, and under the strongest moral obligation, to support both. He may hold any friendly and familiar relations, other than sexual, naturally incident in the proper discharge of such duties. All his social familiarity with the mothers of such families, established prior to the passage of said Act, not shown to include all the particulars of cohabitation as the court has defined it, should [69] be considered by the jury with the legal presumption of innocence; and the failure to establish such cohabitation entitles the defendant to acquittal.

14. The existence at the time of the passage of the Edmunds Act of a polygamous relation between the defendant and the women mentioned in the indictment, though an illegal relation, is not and cannot be made by the statute evidence of any fact necessary to or tending to a conviction for violating the third section. Any enactment intended for such a purpose would be *ex post facto* and void.

15. The law presumes innocence; and therefore that all persons who were cohabiting when the Edmunds Law took effect, contrary to the provisions of that Act, then ceased to do so.

16. No fact in the conduct of the defendant subsequent to the passage of the Edmunds Act can be made more significant of guilt in violating the section against cohabitation, by reason of the existence of the polygamous relation between him and the women mentioned in the indictment, prior to the passage of that statute.

17. The defendant is entitled to show his marital and parental status at the time of the the passage of the Edmunds Act, to explain his subsequent conduct towards the women mentioned in the indictment, and to show an innocent and laudable motive therefor.

18. For this purpose, he may show that he had families of children by said women respectively, at and prior to the passage of said Act; that such women and their children had been and were still dependent on him for their support; that he has continued since to support them; that he has visited them for that purpose and as the father of said children; and that he has not had sexual intercourse with such women since the passage of said Act; and no inference of cohabitation can be drawn from the fact of such relations, from the fact of furnishing support for such mothers and children without living with them, nor from the fact of visiting them, taking meals with them, nor from his living in a separate suite of rooms in the same house, belonging to himself, as that occupied by them, if they occupied separate apartments and habitually lived as a separate and distinct household; nor can such inference be drawn from all such facts. They do not, of themselves, constitute cohabitation.

19. There is no evidence in this case tending to show this defendant recognized Clara C. Cannon as his wife, or held her out to the world as such, since the passage of the Edmunds Bill, and within the dates named in the indictment; and without such proof the jury should acquit the defendant.

20. If the jury find that the defendant has not held out to the world, and announced and recognized as his wife, the Clara C. Cannon named in the indictment, since the passage of the Edmunds Bill, and within the dates named in the indictment, then they should acquit the defendant.

21. Sexual intercourse is a necessary element of the crime of cohabitation; and if the jury find the defendant has not had sexual intercourse with both Clara C. and Amanda Cannon since the passage of the Edmunds Bill, and within the dates named in the indictment, then they should acquit the defendant.

22. In order to find the defendant guilty of the offense charged, it must appear that the defendant had gone through the forms of marriage with both of the women named in the indictment, Amanda and Clara C. Cannon;

that, it not appearing in this case that he was ever married to Clara C. Cannon, the jury should acquit.

23. If the jury find that there never was the form of marriage between Clara C. Cannon and the defendant, they should acquit.

24. There can be no conviction under the indictment in this case, for the reason that there is no charge that the defendant was ever married to either Amanda or Clara C. Cannon, nor any charge that he held out either or both as his wives."

From the judgment the defendant appealed to the supreme court of the Territory, which affirmed it; and he has brought the case to this court by a writ of error.

The principal question argued at the bar was the proper construction of section 3 of the Act of 1882. That question depends on the meaning of the word "cohabit," in the section. The meaning contended for by the defendant is indicated by his offer to show by Clara C. Cannon nonaccess, and facts to rebut the presumption of sexual intercourse with her, and the actual absence of such intercourse; and by the requests for instructions to the jury, which are based on the view that the word "cohabit" necessarily includes the idea of having sexual intercourse. But we are of opinion that this is not the proper interpretation of the statute; and that the court properly charged the jury that the defendant was to be found guilty if he lived in the same house with the two women and ate at their respective tables one third of his time or thereabouts, and held them out to the world, by his language or conduct or both, as his wives, and that it was not necessary it should be shown that he and the two women or either of them occupied the same bed or slept in the same room, or that he had sexual intercourse with either of them.

This interpretation is deducible from the language of the statute throughout. It refers wholly to the relations between men and women, founded on the existence of actual marriages or on the holding out of their existence. Section 1 makes it an offense for a man or a woman, with a living wife or husband, to marry another, and calls such offense polygamy. Section 3 singles out the man, and makes it a misdemeanor for him to cohabit with more than one woman. Section 4 provides that counts for any or all of the offenses named in sections 1 and 3 may be joined in the same information or indictment. This certainly has no tendency to show that the cohabitation referred to is one outside of a marital relation, actual or ostensible. So in section 5, bigamy, polygamy and unlawful cohabitation are classed together, and it is provided that, in any prosecution for any one of such offenses, it shall be sufficient cause of challenge to a juror, that he has been living in the practice of bigamy, polygamy or unlawful cohabitation with more than one woman, or has been guilty of an offense punishable by the preceding sections, or that he believes it to be right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman. It is the practice of unlawful cohabitation with more than one woman that is aimed at; a cohabitation classed with polygamy and having its outward semblance. It is not on the one hand meretricious unmarital intercourse with more than one woman. General legislation as to lewd practices is left to the Territorial Government. Nor on the other hand does the statute pry into the intimacies of the marriage relation. But it seeks not only to punish bigamy and polygamy when direct proof of the existence of those relations can be made, but to prevent a man from flaunting in the face of the world the ostentation and opportunities of a bigamous household, with all the outward appearances of the continuance of the same relations which existed before the Act was passed; and without reference to what may occur in the privacy of those relations. Compacts for sexual nonintercourse, easily made and as easily broken, when the prior marriage relations continue to exist, with the occupation of the same house and table and the keeping up of the same family unity, is not a lawful substitute for the monogamous family which alone the statute tolerates. In like manner, bigamy, polygamy and unlawful cohabitation are classed together in sections 6 and 8 of the Act. Section 6 authorizes the President to grant amnesty to persons guilty of bigamy, polygamy or unlawful cohabitation before the passage of the Act. Any unlawful cohabitation, under the laws of the United States, before that time, could only have been ostensibly marital cohabitation, for the only statute on the subject was section 5352 of the Revised Statutes in regard to bigamy. Section 8 excludes from voting every polygamist, bigamist or person cohabiting with more than one woman, and every woman cohabiting with any polygamist, bigamist or person cohabiting with more than one woman. This section was considered by this court in *Murphy* v. *Ramsey* [*ante*, 47], where *Mr. Justice* Matthews, speaking for the court, in construing the words "bigamist" and "polygamist" in that section, says [56]: "In our opinion, any man is a polygamist or bigamist, in the sense of this section of the Act, who, having previously married one wife, still living, and having another at the time when he presents himself to claim registration as a voter, still maintains that relation to a plurality of wives, although, from the date of the passage of the Act of March 22, 1882, until the day he offers to register and to vote, he may not in fact have cohabited with more than one woman. Without regard to the question whether at the time he entered into such relation it was a prohibited and punishable offense, or whether by reason of lapse of time since its commission, a prosecution for it may not be barred, if he still maintains the relation, he is a bigamist or polygamist, because that is the status which the fixed habit and practice of his living has established. He has a plurality of wives; more than one woman whom he recognizes as a wife, of whose children he is the acknowledged father, and whom with their children he maintains as a family, of which he is the head. And this status as to several wives may well continue to exist, as a practical relation, although for a period he may not in fact cohabit with more than one; for that is quite consistent with the constant recognition of the same relation to many, accompanied with a possible intention to renew cohabitation with one or more [73]

of the others when it may be convenient. It is not, therefore, because the person has committed the offense of bigamy or polygamy at some previous time, in violation of some existing statute, and as an additional punishment for its commission, that he is disfranchised by the Act of Congress of March 22, 1882; nor because he is guilty of the offense as defined and punished by the terms of that Act; but because, having at some time entered into a bigamous or polygamous relation, by a marriage with a second or third wife, while the first was living, he still maintains it and has not dissolved it, although for the time being he restricts actual cohabitation to but one. He might in fact abstain from actual cohabitation with all, and be still as much as ever a bigamist or a polygamist. He can only cease to be such when he has finally and fully dissolved in some effective manner, which we are not called on here to point out, the very relation of husband to several wives, which constitutes the forbidden status he has previously assumed. Cohabitation is but one of the many incidents to the marriage relation. It is not essential to it. [74] One man, where such a system has been tolerated and practiced, may have several establishments, each of which may be the home of a separate family, none of which he himself may dwell in or even visit. The statute makes an express distinction between bigamists and polygamists on the one hand, and those who cohabit with more than one woman on the other; whereas, if cohabitation with several wives was essential to the description of those who are bigamists or polygamists, those words in the statute would be superfluous and unnecessary. It follows, therefore, that any person having several wives is a bigamist or polygamist in the sense of the Act of March 22, 1882, although since the date of its passage he may not have cohabited with more than one of them." In the spirit of this interpretation, a man cohabits with more than one woman, in the sense of sections 3, 5 and 8 of the Act, when, holding out to the world two women as his wives, by his language or conduct or both, he lives in the house with them and eats at the table of each a portion of his time, although he may not occupy the same bed or sleep in the same room with either of them, or actually have sexual intercourse with either of them. He holds two women out to the world as his wives, by his conduct, when, being the recognized and reputed husband of each, so understood to be by the two wives and by the son of one of them and by the son of a third reputed wife, he maintains the two wives and the children of each, all in the same house with himself, and regularly eats at the table of each, and acts as the head of the two families.

This meaning of the phrase "cohabit with more than one woman," in the statute, is in consonance with a recognized definition of the word "cohabit." In Webster "cohabit" is defined thus: "1. To dwell with; to inhabit or reside in company, or in the same place or country. 2. To dwell or live together as husband and wife." In Worcester it is defined thus: "1. To dwell with another in the same place. 2. To live together as husband and wife." The word is never used in its first meaning, in a criminal statute; and its second meaning is that to which its use in this statute has relation. The context in which it is found, and the manifest evils which gave rise to the special enactments in regard to "cohabitation," require that the word should have the meaning which we have assigned to it. Bigamy and polygamy might fail of proof for want of direct evidence of any marriage; but cohabitation with more than one woman, in the sense proved in this case, was susceptible of the proof here given; and it was such offense as was here proved that section 3 of the Act was intended to reach: the exhibition of all the *indicia* of a marriage, a household and a family twice repeated. However, in some divorce cases and in reference to a question of the condonation of adultery, the word "cohabit" may have been used in the limited sense of sexual intercourse, or however its meaning may have been so limited by its context in other statutes, it has no such meaning in the statute before us.

These views of the proper construction of section 3 show that the evidence which the court rejected was properly excluded, and that there was no error in the instructions given to the jury, or in refusing to give those asked, aside from those which were proper to have been given, but were covered by the instructions given. Nor is the charge given open to the objection that the paragraphs in it which follow the first are not confined to the time laid in the indictment.

Objection is taken to the indictment because it does not allege that the defendant was a male person, section 3 making the offense it specifies punishable only when committed by a male person. By the Criminal Procedure Act of the Territory of Utah, passed February 22, 1878, and which was in force from and after March 10, 1878 (Laws of 1878, p. 91), it is provided as follows:

"Sec. 148. All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Act.

Sec. 149. The first pleading on the part of the people is the indictment.

Sec. 150. The indictment must contain:

1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties.

2. A clear and concise statement of the act or omissions constituting the offense, with such particulars of the time, place, person and property as will enable the defendant to understand distinctly the character of the offense complained of and answer the indictment. It must be substantially in the following form:

Territory of Utah.

In the ——— Judicial District Court. The People of the Territory of Utah against A. B.

A. B. is accused by the Grand Jury of the Court, by this indictment, of the crime of (giving its legal appellation, such as murder, arson or the like, or designating it as felony or misdemeanor), committed as follows: The said A. B., on the — day of ———, A. D. eighteen ———, at the county of ——— (here set forth the act or omission charged as an offense).

Sec. 151. It must be direct and certain as regards:

1. The party charged.

2. The offense charged.

3. The particular circumstances of the offense."

"Sec. 156. The words used in an indictment are construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are construed according to their legal meaning.

Sec. 157. Words used in a statute to define a public offense need not be strictly pursued in the indictment; but other words conveying the same meaning may be used.

Sec. 158. The indictment is sufficient if it can be understood therefrom:

1. That it is entitled in a court having authority to receive it, though the name of the court be not stated.

2. That it was found by a grand jury of the district in which the court was held.

3. That the defendant is named or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury unknown.

4. That the offense committed was within the jurisdiction of the court, and is triable therein.

5. That the offense was committed at some time prior to the time of finding the indictment.

6. That the act or omission charged as the offense is clearly and distinctly set forth, without repetition and in such a manner as to enable the court to understand what is intended, and to pronounce judgment upon a conviction, according to the right of the case."

"Sec. 190. The only pleading on the part of the defendant is either a demurrer or a plea."

Section 192 provides that the defendant may demur to the indictment when it appears upon the face thereof that it does not substantially conform to the requirements of section 150, or that the facts stated do not constitute a public offense.

Section 200 provides that when the objections mentioned in section 192 appear upon the face of the indictment they can only be taken by demurrer, except that the objection that the facts stated do not constitute a public offense may be taken at the trial, under the plea of not guilty, or after the trial, in arrest of judgment.

"Sec. 479. Neither a departure from the form or mode prescribed by this Act in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant or tended to his prejudice, in respect to a substantial right."

Certainly under these provisions, the defendant, having pleaded to the indictment and not demurred, must be held to have understood distinctly that the charge was against a male person, as guilty of the offense complained of, the offense being one which only a male person could commit; and the omission from the indictment, of the allegation that he was a male person, could not have prejudiced him or tended to his prejudice, in respect to a substantial right.

The same statutory provisions apply to the objection that the indictment contains merely a charge of unlawful cohabitation with more than one woman, and does not allege a cohabitation with the women as wives or as persons held out as wives. The defendant having pleaded and not demurred, it must be held, under section 150, that the statement of the acts constituting the offense was such as to enable him to understand distinctly the character of the offense complained of, as that offense is now interpreted, and to answer the indictment. The objection now made cannot be regarded as an objection that the facts stated do not constitute a public offense, because the statement is in the words of the statute, and they, as is now held, have but one meaning; and there could not have been any prejudice to the defendant or tendency to prejudice, in respect to a substantial right, in not alleging any more pointedly that he cohabited with the women as wives. [78]

In connection with these statutory rules, section 8 of the Act of Congress makes the offense a misdemeanor. In *United States* v. *Mills*, 7 Pet. 138, 142 [32 U. S. bk. 8, L. ed. 636, 637], it was said by this court: "The general rule is that in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute. * * * But in all cases the offense must be set forth with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged." These principles were applied to a case of misdemeanor, in *United States* v. *Britton*, 107 U. S. 655 [Bk. 27, L. ed. 520], and an indictment was held sufficient because it embodied the language of the statute, and that language covered every element of the crime, and thus the offense created by the statute was set forth with sufficient certainty, so as to give the defendant clear notice of the charge he was called on to defend. That case was distinguished by the court from *United States* v. *Carll*, 105 U. S. 611 [Bk. 26, L. ed. 1135], as this is distinguishable. In *Carll's Case*, the statute made it an offense to pass a forged obligation of the United States with intent to defraud, and the punishment was a fine and imprisonment at hard labor. The question arose on a motion in arrest of judgment, whether the indictment was sufficient, it setting forth the offense in the language of the statute, without further alleging that the defendant knew the instrument to be forged. This court held that the offense at which the statute was aimed was similar to the common-law offense of uttering a forged bill; that, therefore, knowledge that the instrument was forged was essential to make out the crime; and that the uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object. The omitted allegation in that case, a knowledge of the forgery, was a separate, extrinsic fact, not forming part of the intent to defraud or of the uttering or of the fact of forgery; and in the absence of that allegation it was held that no crime was charged. In other words, the case was of the class provided for under the Utah Statute, where the facts stated do not constitute a public offense. This, as has been shown, is not that case. The word "cohabit" has, in the statute, a definite meaning, including every element of the offense created, as before defined. The allegation of cohabiting with the two women as wives is not an extrinsic fact, but is covered by the allegation of cohabiting with them. [79]

WILLIAM [illegible]

ESOR JOHNSON

[illegible]

Publication—evidence of land department conclusive, except in case of fraud or mistake—restitution of Secretary of Interior.

1. In proceedings required for the alienation of public lands, in the absence of fraud or imposition, the action of the land department, upon matters of fact appropriate to it, is conclusive.

2. If the department issues a patent, under a mistake of law, to one not entitled to it, a court of equity will correct the error by requiring a transfer of the legal title to the true owner.

3. In proceedings before the department, if it appears that the claim of the prevailing party is against public policy or the law, it should be disregarded, although such objection was not raised by the allegations of the parties.

4. Where, in a contest before the department involving the question of the abandonment of a homestead, it appeared that the claimant was not a

[illegible]

[illegible]

[illegible]

ent documents have been presented; it must appear that they affected its determination, which, otherwise, would have been in favor of the plaintiff. He must in all cases show that but for the error or fraud or imposition of which he complains, he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought; not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued. *Bohall* v. *Dilla*, 114 U. S. 47 [Bk. 29, L. ed. 61]; *Sparks* v. *Pierce*, 115 U. S. 408 [Bk. 29, L. ed. 428].

If, now, we apply these doctrines, which have been settled by repeated decisions, the case before us will be readily disposed of. The plaintiff below, Enos Johnson, on the 17th of April, 1875, entered the land in controversy, situated in Emmet County, Michigan, under the homestead laws. Previously, and for many years, he had resided in Kent County, in that State, distant several miles from the land. After the entry he resided upon the land only occasionally, offering as an excuse that the health of his wife required him to remain at "their home in Kent County." At the outset he employed his son-in-law, Shaeffer, and family, to go upon the land and remain there in his employ until his wife's health should so improve as to admit of his leaving her or taking her with him in his personal settlement upon the land It would seem that afterwards some attempts were ostensibly made towards such a personal settlement, but they were at long intervals apart and for comparatively short periods. During these attempts Shaeffer and his family remained on the land, cultivating and improving it. More than a year after his entry Johnson, whilst living at the old home, voted in Kent County It appears also that in June, 1876, at one of the periods, as is alleged, during which Johnson resided with his wife on the land, Lee complained at the land-office that Johnson had abandoned the land for more than six months prior to that date; that a contest was thereupon initiated between Johnson and Lee for the right to the land, that the usual proceedings in such cases were had before the register, by whom testimony was taken and forwarded to the Commissioner of the General Land Office. The commissioner decided in favor of Johnson; but on appeal the decision was reversed by the Secretary of the Interior, and the entry ordered to be cancelled. When the land was subject to a new entry, Lee entered it under the homestead laws; and subsequently, availing himself of the privilege of commutation under the statute, paid the government price and obtained a patent bearing date July 13, 1878.

Without going into any detail of the evidence presented to the Commissioner and the Secretary of the Interior, but taking the general statement of its nature, which we have given, it is clear that their attention was drawn by it to the character of the settlement of Johnson, and that they considered whether his entry was made to acquire a home for himself or for his son-in-law; whether his residence had been sufficiently personal and continuous to save and perfect any right, if in fact he had ever obtained any, and whether or not he had abandoned the land. The findings of the Secretary upon any of these matters must be taken as conclusive, in the absence of any fraud and imposition such as we have mentioned. Upon this point it is only necessary to refer to the cases where this conclusive character of the action of the department, upon matters of fact cognizable by it, has been expressly affirmed. *Johnson* v. *Towsley*, 13 Wall. 72 [80 U. S. bk. 20, L. ed. 485]; *Shepley* v. *Cowan*, 91 U. S. 330, 340 [Bk. 23, L. ed. 424, 428]; *Moore* v. *Robbins*, 96 U. S. 530, 535 [Bk. 24, L. ed. 848, 850]; *Quinby* v. *Conlan*, 104 U. S. 420, 426 [Bk. 26, L. ed. 800, 802]; *Smelting Co.* v. *Kemp*, Id. 636, 640 [Bk. 26, L. ed. 875, 876]; *Steel* v. *Smelting Co.* 106 U. S. 447, 450 [Bk. 27, L. ed. 227].

The Supreme Court of Michigan held the decision of the Secretary of the Interior inconclusive because it was not upon a point in issue between the contestants; stating that the question was that of abandonment, which only was inquired into by the register, or could be considered on appeal; that the jurisdiction of the secretary, if he disposed of the case finally on other grounds, was not appellate but original, and that this had not been conferred; that the register on the hearing and the commissioner on appeal had decided that the plaintiff had not abandoned the land, and upon that ground there was no reversal of the decision. It, therefore, held that the plaintiff was entitled to the relief prayed. [52]

Whilst there are no formal pleadings in such cases, it is undoubtedly true, as a general rule, that in contested matters before the Land Department, as in those before the courts, the decision should be confined to the questions raised by the allegations of the respective parties; but this rule has its exceptions. If in any case it appears from the evidence that the claim of the complaining or moving party is against public policy or the law, so that in no event could he recover a final judgment or decision, whatever be the nature or extent of the testimony upon the point at issue, the tribunal should not hesitate to dismiss the suit or the proceeding.

An illustration of this rule is found in *Oceanyan* v. *Arms Co.* reported in 103 U. S. There a large sum was claimed from the vendor of fire arms, as commissions on sales that through the influence of the plaintiff had been made to the Turkish Government, of which he was then an officer. The defendant pleaded the general issue; and it was contended that the illegality of the contract could not be noticed, because not affirmatively pleaded. But the court held that, assuming the contract to be a corrupt one, forbidden by morality and public policy, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties; that it was one which the court itself was bound to raise in the interest of the due administration of justice. 103 U. S. 268 [Bk. 26, L. ed. 542].

So, in the present case, the Secretary of the Interior came to the conclusion, from the evidence returned by the register, that Johnson must be considered, not as a *bona fide* homestead claimant, acting in good faith, but as one seeking, by a seeming compliance with the forms of law, to obtain a tract of land for his

son-in-law, who had previously exhausted his homestead privileges; observing that the element of good faith is the essential foundation of all valid claims under the homestead law. Under these circumstances, so far from having exceeded his jurisdiction in directing a cancellation of the entry, he was exercising only that just supervision which the law vests in him over all proceedings instituted to acquire portions of the public lands. Upon the testimony the question of abandonment could be of no consequence, as no just right in Johnson's favor had been initiated. Upon an application for a rehearing, the secretary reiterated his judgment, stating that he was unable, upon the testimony of Johnson himself, to arrive at the conclusion that he had complied with the provisions of the Homestead Law to an extent to entitle him to its benefits.

[53]

In the bill of complaint it is alleged that in the testimony reported by the register there was an interpolation to the effect that the plaintiff testified that he had intended the land as a homestead for his son-in-law, and not as a personal home for himself; and that while in Kent County, in the spring of 1878, he had voted at an election. His allegation that he gave no such testimony is contradicted; the answer averring that the testimony as reported was read over to him before he signed it and was reported as signed. And in his examination in this case he admits, whilst denying that he testified as stated before the register, that he voted in Kent County a year after he had made his entry; and his direct testimony that he intended the land for Shaeffer could not be more persuasive of the fact than his conduct subsequent to the entry. To allow the conclusions of the Secretary of the Interior, on questions of fact, to be subjected to review by the courts in cases of this kind would open the door to endless litigation.

We are of opinion, therefore, that the Supreme Court of Michigan erred in its decision. The decree of that court will accordingly be reversed, and the cause remanded to the Circuit Court, with directions to enter a decree in conformity with this opinion. And it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[145] DANIEL McCLURE, *Appt.*,
v.
UNITED STATES.

(See S. C., Reporter's ed., 145-154.)

Special statute referring case to Court of Claims, construed—findings of fact by that court, conclusive here.

1. Under the rules regulating appeals from the Court of Claims the evidence cannot be brought up; and the special statute in the present case contains nothing to withdraw the case from the operation of those rules.

2. A cause will not be remanded to the Court of Claims for further findings where the findings desired would simply bring before this court the comparative weight, as evidence, of the facts found on one side with those found on the other.

[No. 90.]

Argued Dec. 8, 1885. Decided Dec. 21, 1885.

APPEAL from the Court of
On motion.

The case is stated by the co
Messrs. **J. M. Wilson, S.**
and **Joseph E. McDonald,**
support of the motion.

Mr. **Wm. A. Maury,** *As*
opposition.

Mr. Chief Justice **Waite** d
ion of the court:

This is a motion for an ord
of Claims "to transmit to th
evidence on which the cause
determined" in that court; or,
cannot be made, that the cau
"with directions to make retu
whether or not the evidence
cause was heard and determin
not, establish and prove the
and distinct propositions of f
the requests for findings of fact
to the said court before the tri
and upon the motion for a n
hearing of said cause, that the
be directed to find specifically
facts involved in the case."

The suit was brought und
Act of Congress, passed Feb
entitled "An Act for the Relie
McClure, Assistant Paymaste

"*Be it enacted, etc.*, That th
iel McClure, Assistant Payma
credits and differences in his
master, under his official bo
2, 1859, shall be and are hereb
court of claims, with jurisdic
determine said claims. And
shall be satisfied from the evid
the moneys charged to him w
ceived by him, or that other j
grounds exist for credits cla
shall make a decree, setting
to which the said McClure sh
receive credit; upon which the
ing officers of the Treasury
the amount so decreed as a
tlement of his accounts; *Pr*
testimony of said McClure sh
his own behalf by said court,
termination of said cause the
of his said accounts is suspend
further, That an appeal sha
either party as in other cases
pt. 3, 531; Pr. Laws, chap. 37

In his petition filed in the
made three claims for credit
$1,183.13, money on deposi
credit as paymaster, with the
urer of the United States a
which was seized by the insurg
Confederate States and appropr
use without any fault on his pa
taken from his possession by
acting for and in behalf of
authorities; and (3) for $1,00
tion made of pay rolls by his
no manner inured to his
There were also three claims
tween his accounts and thos
States, being for moneys char
as he alleged were not in fact
(1) $1,432.48, said to have be

him by J. L. Hewitt; (2) $25,000 by C. S. Stevenson; and (3) $4,998 by V. C. Hanna.

The court of claims has found as facts: (1) that the sum of $289.05 was taken from McClure by an armed force in charge of one of the Commissioners of the State of Texas while it was in his hands as government money; and (2) that the sum of $1,183.13 was turned over by the Assistant Treasurer of the United States to the Confederate States while it was on deposit with him to the credit of McClure as paymaster. As to the sum of $1,000, it is found that McClure stated an account showing payments made to troops and accompanied the same with vouchers, one of which was overadded $1,000; and he got credit at the time for the over addition as for money paid out. As to the several items of differences, it is found that the parties by whom the transfers were respectively supposed to be made had each obtained a receipt from McClure for the amount stated, and that they were allowed credit therefor in the settlement of their own accounts at the Treasury. As to the moneys taken by the confederate authorities, the court was satisfied from the evidence that just and equitable grounds existed for their allowance as credits. As to the over-addition, the court was not satisfied from the evidence that any just and equitable grounds existed for the credit thereof to McClure; and as to the several amounts specified in the receipts obtained by the different parties, the court was not satisfied from the evidence that the moneys charged to McClure by the United States were not in fact received by him, or that other just and equitable grounds existed for giving him credit for these amounts.

1. As to bringing up the evidence:

It is not pretended that this can be done unless the statute under which the suit is brought takes the case out of the operation of our rules regulating appeals from the court of claims. The original Act which gave the right of appeal from the court of claims to this court was passed March 3, 1863, and provided that the appeals should be "under such regulations as the supreme court may direct." 12 Stat. at L. 766, chap. 92, sec. 5. This provision is still found in section 706 of the Revised Statutes. At the December Term, 1865, this court adopted certain rules for the regulation of such appeals, and Rule 1 was as follows:

"Rule 1. In all cases hereafter decided in the court of claims in which, by the Act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments and decrees as may be necessary to a proper review of the case.

2. A finding of the facts in the case by said court of claims, and the conclusions of law on said facts on which the court founds its judgment or decree.

The finding of the facts and the conclusions of law to be stated separately and certified to this court as part of the record.

The facts so found are to be the ultimate facts or propositions which the evidence shall establish, in the nature of a special verdict, and not the evidence on which those ultimate facts are founded." See *Burr* v. *Des Moines Nav. & R. Co.* 1 Wall. 102 [68 U. S. bk. 17, L. ed. 562].

This rule was amended in some particulars at the December Term, 1872, but not in a way to affect the present case. It has been in force substantially in its original form from the time of its adoption until now, and has always been strictly adhered to. Such being the case, when Congress passes a special statute allowing a suit to be brought in the court of claims, with a right of appeal to this court, the appeal will be governed by the rules applicable to cases arising under the general jurisdiction of the court, unless provision is made to the contrary.

In *Harvey* v. *United States*, 105 U. S. 671 [Bk. 26, L ed. 1206], the suit was brought under a statute passed August 14, 1876, 19 Stat. at L. 490, chap. 279, which authorized the court of claims "to proceed in the adjustment of the accounts between the claimants and the United States as a court of equity jurisdiction; and may, if according to the principles of equity jurisprudence in its judicial discretion, reform said contract and render such judgment as justice and right between the parties may require." An appeal to this court was also given; and we held that as the suit was to be in equity, the parties were entitled to an appeal in equity which should bring up for review the facts as well as the law. But in *Tillson* v. *United States*, 100 U. S. 43 [Bk. 25, L. ed. 543], where the court was "authorized and directed to * * * ascertain, determine and adjudge the amount equitably due said firm, if any, for such loss or damage," we decided that "The reference was made to the court as a court, and not to the judges as arbitrators. The determination is to be made according to the fixed rules which govern that court in the adjudication of causes, and not at the discretion of the judges. The same principles of jurisprudence and the same statutory regulations as to practice are to be applied here that would be if the case had come into the court under its general jurisdiction. It is to be ascertained and determined what, if anything, is due the claimants from the Government, according to the rules of law applicable to the settlement in that court of controversies between the Government and its citizens. * * * To our minds the word 'equitably' means no more than that the rules of law applicable to the case shall be construed liberally in favor of the claimants." [150]

This suit clearly comes within the principle of *Tillson's Case*. It is in the nature of a defense to an action at law brought by the United States to recover the balance claimed to be due upon the account as stated at the Treasury. The statute requires the court to hear and determine judicially: (1) whether the disputed sums charged to McClure were in fact received by him; and (2) whether any other just or equitable grounds exist for the credits claimed by him. The statute under which the court of claims is organized would have been enough to give that court jurisdiction of the claims for credit on account of the moneys seized by the confederate authorities. R. S. sec. 1059, clause 3, and sec. 1062. But under that statute McClure could not have given testimony in his own behalf. The special Act relieves him from that disability and allows him to join his

[illegible]

[illegible]

[illegible]

found on one side with those found on the other. In other words, whether the evidence offered on the part of McClure is sufficient to overcome the effect as evidence of his receipts and the other testimony against him. The rule contemplates no such practice. All we can do is to declare the law upon facts which, so far as we are concerned, must be taken to be undisputed.

As to the proposed findings, with a view to ascertaining the existence of "just and equitable grounds for credits claimed," they are clearly immaterial for the purpose of a judicial determination of the rights of the parties.

At most they would only show that McClure had been compelled to conduct his business under very unfavorable circumstances; that the amounts disbursed by him had been large; that much of his business had necessarily been done by his clerks, upon the accuracy of whose statements and calculations he was compelled in a great measure to rely; that with the exception of the present differences his accounts had always been found correct; that he had sometimes given receipts in advance of the time he had actually got the money, and by reason of the limited facilities for transacting business in his office it was possible for a receipt to be got without the money being actually paid over; that there had been great delay in advising him of the errors in his accounts, and things of a like character. These are facts proper for the consideration of Congress on an application by McClure for legislative action in his favor; but, under the most liberal construction of the rules which govern courts of justice in determining the rights of parties, they fall far short of what is necessary for affording him judicial relief.

The motion is denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited post, 555, in U. P. R. Co. v. U. S.

LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, *Plf. in Err.*,
v.
AMELIA AUGUSTA GUNTHER, EXEX., AND GEORGE A. GUNTHER, EXR. of CHARLES GODFREY GUNTHER, Deceased.

(See S. C. "*Liverpool & London Ins. Co.* v. *Gunther*," Reporter's ed. 113-131.)

Breach of conditions of fire insurance policy—instructions to jury—practice and pleadings under New York Code.

1. Where the answer fairly covered a certain defense, although so indefinitely that, had a motion been made at the proper time, greater certainty might have been required, and evidence proper in support such defense had been admitted without objection, it was improper for the court to instruct the jury, on the ground that the proper foundation had not been laid in the pleadings, that they should disregard such evidence.

2. It is contrary to the practice established by the New York Code, to deprive a defendant of a defense, legitimately arising from the evidence in the case, admitted without objection. The objection should have been raised at such a time that the pleadings could have been amended if necessary.

3. Where the policy contained conditions that if the assured should keep or use certain prohibited articles without written permission the policy would be void; and that certain articles should not be stored, used, kept or allowed on the premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on the policy; a violation of these prohibitions, by anyone permitted by the assured to occupy the premises, is a violation by the assured himself.

4. The privilege indorsed on the policy "to use gasoline gas, gasometer, blower and generator being underground about sixty feet from main building, in vault; no heat employed in process," did not sanction the keeping, using or storing of gasoline or its equivalent, burning fluid or oil, except for actual use in that gas apparatus.

[No. 61.]

Argued Nov. 13, 1885. Decided Dec. 21, 1885.

IN ERROR to the Circuit Court of the United States for the Eastern District of New York.

Statement of the case by *Mr. Justice* Matthews:

This is an action at law brought by Charles Godfrey Gunther, a citizen of New York, in the Supreme Court of that State, against the plaintiff in error, a Corporation created by the laws of Great Britain, and consequently an alien, and by the latter removed into the Circuit Court of the United States for the Southern District of New York. There was a verdict and judgment for the plaintiff below, brought here for review by this writ of error. [113] [114]

The object of the action was to recover the amount claimed to be due on two policies of fire insurance, issued by the defendant below, in favor of the plaintiff, one for $20,000 on the two story hotel, frame building, with one story frame kitchen and two story frame pavilion building adjoining and communicating, situate in Gravesend Bay, of Bath, Kings County, Long Island; $1,000 on the two story frame stable occupied in part as a dwelling, and $200 on frame bathing houses; and the other for $8,500 on the contents of the buildings insured. The loss by fire is alleged to have occurred on August 15, 1879, while both policies were in force.

The execution of the policies and the fact of the destruction by fire of the insured premises were admitted by the answer, which, however, denied generally all the allegations of the complaint not expressly admitted or otherwise controverted in the answer, and in addition set out the following special defense:

"Tenth. For a separate and distinct defense to the causes of action alleged in the complaint, in addition to the matters and things hereinbefore set forth, the defendant avers that it was provided in and by the terms and conditions of said policies of insurance, among other things, as follows: 'If the assured shall keep gunpowder, fireworks, nitro-glycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas or any burning fluid or chemical oils, without written permission in this policy, then and in every such case this policy shall be void;' and further, 'That petroleum, rock earth, coal, kerosene, or

carbon oils of any description, whether crude or refined; benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, gasoline, phosgene or any other inflammable liquid, are not to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void.'

[115]

"And the defendant avers that the said conditions of insurance were broken and violated on the part of the plaintiff, among other things, in that without written permission of the defendants, indorsed on said policies or otherwise, there were stored, used, kept and allowed on the insured premises mentioned and described in said policies, benzine or benzole, or other inflammable burning fluids or liquids, prohibited by said policies; and defendant avers that the fire mentioned and referred to in the complaint originated and was caused by such storing, using, keeping and allowance of such prohibited articles on said insured premises; and defendant avers that it is advised and believes that, by reason of the premises, the said policies became and were null and void."

Each of the two policies, after the description of the premises insured, contained the following clause: "Privilege to use gasoline gas, gasometer, blower and generator being underground about sixty feet from main building, in vault; no heat employed in process." Among the conditions in the body of the policies is also the following:

"Petroleum, rock earth, coal, kerosene or carbon oils of any description, whether crude or refined; benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, gasoline, phosgene or any other inflammable liquid, are not to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene or other carbon oil for lights, if the same is drawn and the lamps filled by daylight. Otherwise this policy shall be null and void."

To the first policy there was attached the following: "Privileged to use kerosene oil for lights, lamps to be filled and trimmed by daylight only." And also the following: "Privileged to keep not exceeding five barrels of kerosene oil on said premises."

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To the second policy the first only of the foregoing privileges was attached.

On the trial, the plaintiff, having produced the policies sued on, with the renewal receipts showing that they were in force at the time of the loss, was called as a witness and testified, among other things, as follows:

"I was the owner of the insured property at the time of the insurance, and have continued such until the present time. A fire occurred on the 15th of August, 1879, about dusk, by which the building and its contents were totally destroyed. I was seated on the piazza of the building proper in sight of the pavilion. I saw some parties with pails and a light. There were some children playing. Mr. Lanier Walker was playing with some boys around some small trees that I had planted in the lot, and my attention was attracted by hallooing, and I saw the men come out as though they were on fire. It did not occur to me then that there was any fire in the oil room, although I saw it. I saw these men, and ran out and said: 'Roll in the grass.' One man struck for the water and the other one had the fire thrashed out by the crowd. In another instant I saw the oil room burning. The wind was from the southwest, blowing very hard right over the kitchen. The pavilion immediately caught, and in one hour's time or less the building was level with the ground."

The proofs of loss were read in evidence and the amount of the loss proven. The plaintiff also testified that during the summer of 1879 he had a room at the hotel where he stayed on an average of four nights out of the week. The rest of the time he was in New York. Mrs. Fanny Walker kept the hotel as his tenant, her husband, Mr. John Walker, being manager for her.

The plaintiff having rested his case the defendant introduced evidence, not objected to, tending to prove the following facts:

A gas-making apparatus for the use of gasoline, including a gasometer, generator and blower, about sixty feet from the house, and all under ground but the roof, had been in use for lighting the main building for about eleven years up to and including the summer of 1878 but its use was discontinued in the fall of 187 and it was not in use at all during the year 1879

There was an oil room in the basement o the hotel under the pavilion, about ten by twelv feet, with low ceiling. In this room the lighting material was kept.

The fire originated in the oil room "abou dusk, August 15, 1879." Three persons wer in the room at the time: Jacob Constine, Jame Marrion and one Schuchardt. The last name was in Walker's employ as night watchma and had charge of the oil room. The othe were employed at premises about a mile di tant from the Locust Grove Hotel, called t Bath Park Hotel, where gasoline was used f lighting the last named hotel and an adjoini pavilion.

Constine and Marrion were sent by the boo keeper of the Bath Park House to the Locu Grove Hotel to borrow five gallons of gasolin and each of them carried a wooden pail which to fetch it. On reaching Locust Gro they saw Walker, who directed Schuchardt give them the gasoline. Schuchardt took th into the oil room. He carried a glass lant with a wire frame around it, "a regular clo stable lamp with wire and then little holes top." The lamp was lighted.

Schuchardt placed the lantern on the floor a drew fluid from a barrel which was raised stanchions, a little above the floor. He d from the end of the barrel, into which a pi of gas pipe had been placed as a faucet. pouring into the pails it was found that on them leaked; and Schuchardt got a five gal can into which to pour the oil, and while fil the can there was "a sort of bluish flame explosion, and the place was full of fire."

The fire spread with great rapidity. So

chardt was burned to death. Constine was badly burned and was laid up thirteen weeks. Marion was burned a little, not much.

The hotel and all the buildings were destroyed by the fire. "In one hour's time or less the building was level with the ground."

There was no conflict of evidence as to the origin of the fire.

Walker purchased in New York and had shipped to the hotel, on August 13, a barrel of kerosene, and a half barrel of benzine containing about twenty-one gallons, which were received and put into the oil room under the pavilion on the morning of August 14, the day before the fire. There was evidence tending to show that gasoline, benzine or naphtha was used in torches for the purpose of lighting the pavilion; and also other evidence that it was intended for use in lighting grounds for a picnic.

The plaintiff introduced evidence in rebuttal tending to prove that no gasoline or benzine had been brought to the premises or was kept there. The testimony having been closed on both sides, the defendant's counsel then requested the court to direct the jury to find a verdict for the defendant, on the ground that it appeared from the undisputed evidence that there was a violation of the condition of the policy providing that in the use of refined kerosene oil the same must be drawn by daylight; the evidence being undisputed that three persons went into the oil room with a lighted lamp, and that whatever was drawn there was drawn, not by daylight, but by the use of a lighted lamp, the presence of which was the direct cause of the fire. The court refused so to direct the jury, to which refusal the defendant's counsel then and there excepted.

The defendant's counsel requested the court to instruct and charge the jury as matters of law, as follows:

1. That the several conditions contained in the policy respecting the keeping, using or allowance on the insured premises of the products of petroleum, specified therein, were lawful provisions and formed a part of the conditions of the insurance which if violated rendered the policy void.

2. That if the jury believe from the evidence that gasoline, naphtha or benzine were kept, used or allowed on the insured premises at the time of the fire, whether permanently or temporarily, the plaintiff cannot recover, and the defendant is entitled to a verdict.

3. That if the jury believe from the evidence that gasoline, naphtha or benzine was used in the summer of 1879, previous to the fire, on the insured premises, for lighting the pavilion by means of the torches described in the evidence, then the plaintiff cannot recover, and the defendant is entitled to a verdict.

4. That if the jury believe from the evidence that any fluid product of petroleum used for lighting purposes was actually drawn, after sundown, in the oil room by the light of a lamp, the flame of which ignited the fumes or vapors of such fluid and caused the fire, then there was a violation of the conditions of insurance, and the plaintiff cannot recover, and the defendant is entitled to a verdict. Also, and as a part of the above request, that the permission indorsed on the policy to keep five barrels of kerosene oil did not vary or affect the conditions of the policy in drawing refined oil by daylight; and if the fire was caused by drawing refined kerosene oil after sundown, and in the presence of a lighted lamp, the plaintiff cannot recover, and the defendant is entitled to a verdict.

5. That if the jury believe from the evidence that the risk of fire was increased by the actual presence on the insured premises of gasoline, naphtha or benzine, then the plaintiff cannot recover, and the defendant is entitled to a verdict.

6. That, irrespective of the questions raised by the preceding fourth and fifth requests, if the jury believe from the evidence that the fire was caused by the ignition of the fumes of gasoline, naphtha or benzine in the oil room, while such gasoline, naptha or benzine was being drawn from a barrel or keg, or poured from one vessel to another in the oil room, then the plaintiff cannot recover, and the defendant is entitled to a verdict.

7. That if any of the conditions of the policy were violated by the presence or use of gasoline, naphtha or benzine on the insured premises, it is immaterial whether or not the plaintiff knew of such violation. If the fact of the violation is established, the defendant is entitled to a verdict.

8. That the permission in the policy to use gasoline gas—the generator, gasometer and blower to be under ground sixty feet from the main building, no heat to be used in the process—did not authorize the plaintiff or anyone occupying the premises under him, to use gasoline, naphtha or benzine for lighting the pavilion by the torches described by defendant's witnesses, or to keep gasoline, naphtha or benzine [120
in the oil room for use in such torches.

9. That in weighing the evidence the jury must determine on which side the preponderance of proof lies, and decide accordingly. That the testimony of the plaintiff in his own favor must be scrutinized in view of his interest as plaintiff; and that the evidence of witnesses not discredited or impeached, who swear positively to certain facts as within their own knowledge and actual observation, is not to be overcome by mere negative testimony of other witnesses that such facts were not observed by them at the same time and place.

At the conclusion of the charge, a juror asked the court whether the jury were to consider the matter of drawing oil in the daylight.

The court thereupon charged and instructed the jury that there was no question in the case in reference to the drawing of the oil by daylight, no such question having been made by the pleading; to which ruling and charge the defendant's counsel then and there excepted.

The defendant's counsel then excepted specifically to that part of the charge which instructed the jury that any question arose in the case under the permission in the policy to use gasoline gas.

The defendant's counsel then further excepted specifically to the refusal of the court to charge that if benzine was allowed on the premises at all, the plaintiff cannot recover, so far as the court did refuse.

The defendant's counsel then further excepted to that portion of the charge which confined the questions in the case to the three questions

specified in the charge as being the sole questions which the jury were to consider.

The defendant's counsel then further excepted specifically to that portion of the charge which instructed the jury that if the benzine was brought to the insured premises by Walker for an outside purpose it did not vitiate the policy.

The defendant's counsel then further excepted specifically to that portion of the charge which instructed the jury that the only effect of the question whether torches were used was in reference to the question of the half barrel [121.] of benzine being brought to the insured premises or not.

The defendant's counsel then further specifically excepted to the refusal of the court to charge the several propositions contained in the foregoing second, third, fourth, fifth, sixth, seventh, eighth and ninth requests on the part of the defendant in the language as requested, and separately to each separate refusal to charge each separate request, so far as the court did so refuse.

In the charge to the jury the circuit court stated, in substance, that under the pleadings and upon the evidence there were but three questions for their consideration. The first was, whether in fact the half barrel of benzine, testified to, had been brought to the premises and stored in the oil room; if not, the whole defense was taken away and the verdict must be for the plaintiff.

Second. If otherwise, had it been brought over and stored there by the authority of Walker in his management of the premises for his wife under her lease? If it had been brought and stored there by him for an outside purpose, referring to some testimony in reference to its intended use in lighting the picnic grounds, then the verdict should be for the plaintiff.

Third. This question was stated by the court as follows:

"If it was brought there, and brought there by Walker in the course of his management, then would bringing that benzine there and putting it in the oil room come within what would be expected when the Company gave the assured the privilege of using the gasoline gas, the gasometer, generator and blower to be under ground, sixty feet from the main building? It would not come within that, unless you can say that by the common and ordinary mode of the use of such apparatus, as it would be understood by this contract to be used, it was proper to store somewhere else benzine or gasoline for use in the apparatus. If you can see that it would come within that, then that would be written permission to have so much stored there, although it was not to be used for that purpose. And if you find that the benzine was there and then that Walker got it there, still, if you find that it came within that clause [122] of the policy, then you may return a verdict for the plaintiff; otherwise, you must return a verdict for the defendant.

"If the defendant has made out these three things, then you must return a verdict for the defendant, and you must find this upon the proof, and not upon any conjecture.

"And I feel bound to say to you that as to the use of a gasometer, generator and blower, it is a matter with which perhaps you might not be familiar. (I am not sufficiently so to know what the ordinary use would be). The only evidence directly is what one of these manufacturers and dealers in such things and familiar with them (I don't remember his name) said; he said the gasometer was used to store the gasoline or benzine or whichever was used in it. That is all the direct evidence I call to mind on that subject. Still, I submit it to you to say, on the whole, what you think the fact is in this view."

Mr **William Allen Butler,** for the plaintiff in error:

The court erred in refusing to charge the jury as requested, that the presence of benzine or gasoline on the premises, whether with or without the knowledge of the plaintiff, avoided the policies. The performance by the insured of that part of the contract which prohibited the allowance as well as the use on the premises "temporarily or permanently, for sale or otherwise," was a condition precedent to the right of recovery.

Mead v. *N W. Ins. Co.* 7 N. Y. 530; *Matson* v. *Farm Buildings Ins. Co.* 73 N. Y. 310; *Williams* v. *Peoples' Fire Ins. Co.* 57 N. Y. 274; *Duncan* v. *Sun Fire Ins. Co.* 6 Wend. 488; *Fire Asso. of Phila.* v. *Williamson*, 26 Pa. St. 196; *Loehner* v. *Home Mut. Ins. Co.* 17 Mo. 255.

Being absolute in its terms, the prohibition operated in case of its breach as an avoidance of the policies, irrespective of the intent or purpose for which Walker, the person immediately concerned in the violation, brought the prohibited article upon the premises, the fact being undisputed that Walker was lawfully in charge. The joint possession by Walker and wife of the premises by authority of the insured was his possession.

Diehl v. *Adams Co. Mut. Ins. Co.* 58 Pa. St. 443; *Howell* v. *Baltimore Equitable Society*, 16 Md. 377; *Kelly* v. *Worcester Mut. F. Ins. Co.* 97 Mass. 284.

When the breach of a valid condition of insurance by the tenant is established, the policy is avoided whether the landlord knew of the violation or not.

Duncan v. *Sun Ins. Co.* 6 Wend. 493; *Fire Asso. of Phila.* v. *Williamson*, 26 Pa. St. 196; *Worcester* v. *Worcester Mut. F Ins. Co.* 9 Gray 27, *Brueck* v. *Phœnix Ins. Co.* 21 Hun, 542; *Steinmetz* v. *Franklin F. Ins. Co.* 6 Phila. 21.

Mr. **George H. Forster,** for the defendant in error:

There was no error in the charge of the court on the point of the keeping, use, or allowance of benzine on the insured premises.

The explanation of this part of the charge,—that if benzine was brought by a stranger, or for a strange or entirely outside purpose, not *done* in the course of Walker's management there, as his wife's manager, but for some purpose over which Mr. Gunther had no control, then it would not be by the insured—was entirely proper. The court made this still clearer, by stating that it must be for some entirely outside purpose, and by instructing the jury that they were not to guess at that, but that it must be proved.

See *Gates* v. *Madison Co. Mut. Ins. Co.* 5 N. Y. 469, and cases there cited; *Insurance Co.* v. *McDownnell*, 50 Ill. 120; *Aurora Ins. Co.* v. *Eddey*, 55 Ill. 218; *Mackay* v. *Burlington F.*

Co. 35 Ia. 174; *Daniels* v. *Hudson River F. Ins. Co.* 12 Cush. 417; *Sanford* v. *Mechanics Mut. F. Ins. Co.* 12 Cush. 541; *Hynds* v. *Schenectady Co. Mut. Ins. Co.* 11 N. Y. 554; *White* v. *Mut. Assurance Co.* 8 Gray, 566; *Steinbach* v. *La Fayette F. Ins. Co.* 54 N. Y. 90.

No violation of the policy by the drawing of refined petroleum after daylight was pleaded by the answer; nor was the evidence undisputed of any such violation of the policy as was assumed by this request.

Williams v. *Mechanics and Traders Fire Ins. Co.* 54 N. Y. 577, 579.

Defendant made no application to amend; and as the defense was not pleaded nor made available by amendment or a motion to amend, the question was not in the case whether or not any such defense actually existed.

Hunt v. *Hudson River F. Ins. Co.* 2 Duer, 481: *Dimon* v. *Dunn*, 15 N. Y. 498; *Codd* v. *Rathbone*, 19 N. Y. 37; *Wright* v. *Delafield*, 25 N. Y. 266.

The defendant insured a frame hotel and gave a written privilege to use gasoline gas, gasometer, blower and generator. This permission involved the right to bring gasoline to the premises and store it in a proper place. It was proper for the court to charge the jury as it did, as to what weight was to be given that clause, and what right was given under that privilege as to the storage of gasoline. The court properly construed the policy and the written permission; and that construction is to be based upon what the privilege authorized and not on its exercise or nonexercise, to a greater or less extent, during part of the time after the policy was issued.

Home Ins. Co. v. *Balt. Warehouse Co.* 93 U. S. 542 (Bk. 23, L. ed. 869); *Bayley* v. *London and L. Ins. Co.* 4 Ins. L. J. 503; *Putnam* v. *Commonwealth Ins. Co.* 18 Blatchf. 368.

Mr. Justice **Matthews** delivered the opinion of the court:

The first question to be examined is whether the circuit court erred in withdrawing from the jury the right to consider the facts proven as to the drawing of the oil in the oil room after dark in the vicinity of a lighted lamp, which was the admitted cause of the fire, as constituting a defense to the action under the pleadings.

The tenth paragraph in the answer, setting up a separate and distinct defense, recited two conditions in the policy; the first, that the assured should not keep any burning fluid without written permission in the policy; the second, that kerosene, carbon oils of any description, whether crude or refined, or any other inflammable liquid, "are not to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void." It then alleged a breach of these conditions, in substance, as follows: that without the written permission of the defendants, indorsed on said policies or otherwise, there were stored, used, kept and allowed on the insured premises, benzine or benzole or other inflammable burning fluids or liquids, prohibited by said policies, and that the fire referred to in the complaint originated therefrom and was caused thereby.

It is true that the answer does not specifically set out as part of the defense that kerosene was kept on the premises to be used for lights, but that, in breach of the condition which permitted such use, it was drawn after dark and with a lighted lamp near; but the right to keep it and use it in the manner specified in the condition is an exception from the general prohibition, which forbids the mere keeping of it without written permission; so that, strictly speaking, an averment that the article was kept and used on the premises, in violation of the condition, includes the use of it, otherwise than for lights, and the drawing of it otherwise than by daylight. Under the allegations of the answer, although not so definite and certain as might have been required, upon motion made in due time, it seems to us it was competent for the defendant to prove and rely upon any keeping and use of burning fluid prohibited by the conditions set out.

Whatever obscurity there was in pleading the defense, considered apart from the facts subsequently disclosed in evidence, nevertheless, all the testimony necessary to its establishment was offered and admitted without objection. It was offered and admitted as tending to prove that there had been a breach of the conditions of the policy; and the whole matter of the defense was covered by the testimony, on examination and cross examination of the witnesses, [127]
both on the part of the defendant in chief and on that of the plaintiff in rebuttal. On the conclusion of the testimony on both sides the matter now insisted on was specially called to the attention of the court by a request on the part of the defendant's counsel to direct a verdict for the defendant on that ground alone, when, if it was a matter of surprise to the opposite party, opportunity for meeting it might still have been given; or if the pleadings were considered not to be sufficiently explicit, an amendment might have been required and made. The request was refused, and it does not appear from the record to have been on the ground that the defense was not within the issues; but the refusal was absolute and unqualified. We refer to it, not for the purpose of intimating that the court was bound to grant the request, but because we think the matter ought to have then been either submitted to the jury or put in shape for such submission, if the rights of the adverse party required any change in the pleadings, or opportunity for the production of other evidence. By the course actually taken the defendant was deprived of the benefit of a defense, legitimately arising upon the evidence actually in the case, admitted without objection; and this, we think, was contrary to the practice as established under the laws of New York, as appears from the cases cited of *N. Y. Cent. Ins. Co.* v. *Nat. Protection Ins. Co.* 14 N. Y. 85; *Williams* v. *Mech. & Traders Fire Ins. Co.* 54 N. Y. 577; and *Williams* v. *Peoples Fire Ins. Co.* 57 N. Y. 274.

The New York Civil Code of Procedure, which furnishes the rule of practice in such cases, is explicit on the point. In section 539 it is provided that "A variance between an allegation in a pleading and the proof is not

material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. If a party insists that he has been misled, the fact and the particulars in which he has been misled must be proved to the satisfaction of the court. Thereupon, the court may in its discretion order the pleading to be amended upon such terms as it deems just." And section 540 declares that "When the variance is not material, as prescribed in the last section, the court may [128] direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

There are other errors, however, in the charge to the jury equally fatal to the judgment, which, as the case must be remanded for a new trial, it becomes important to point out.

The circuit court charged the jury, in substance, that it was not a breach of the conditions of the policy if they should find a half barrel of benzine was stored by direction of Walker in the oil room, unless they should also find that he acted by the express or implied authority of the assured; that is, unless in doing so he was acting in the management of the property as the agent of his wife, and within the limits of the authority conferred upon him for the purpose of managing the property according to the terms and purposes of her tenancy; and accordingly the jury was told that if he had brought the prohibited article on the premises, not for the legitimate use of the hotel, but for an outside purpose, it constituted no defense. The outside purpose referred to was suggested by some testimony that the benzine was brought for the purpose of being used in lighting an adjacent grove for a picnic. Whether this use was for the entertainment of the guests of the hotel, or to attract custom, does not appear from the evidence; but, in any view, we think the construction of the policy, on which the charge to the jury was based, was erroneous.

One of the conditions of the policy is, that if the assured shall keep or use any of the prohibited articles without written permission, it shall be void; another is, that the articles named "are not to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on the policy," etc.

A violation of these prohibitions by anyone permitted by the assured to occupy the premises, is a violation by the assured himself. The Company stipulates that it will not assume the risk arising from the presence of the articles prohibited; and if they are brought upon the premises in violation of the policy by one in whose possession and control the latter have been placed by the insured, he assumes the risk which the Company has refused to accept. In our opinion the defendant in error was chargeable with the acts of Walker if he brought upon [129] the insured premises and stored in the oil room any of the prohibited articles, although they were not intended to be used on the premises, but for lighting a neighboring grove for a picnic. Walker was in no sense a stranger or a trespasser. With his wife he was in the lawful occupation of the premises and, with the implied assent of the insured at least, was intrusted with the control and management of them. And under the terms of the conditions in this policy, it must be held that the insured shall suffer the consequences of Walker's acts in doing that which, if done, the Company had stipulated that it would not be liable. The insured engaged that the prohibited thing should not be done; and when he committed the control of the insured premises to another the latter became his representative, for whom he must answer as for himself.

This construction of such a condition is well supported by authority. *Kelley* v. *Worcester Mutual Fire Insurance Company*, 97 Mass. 284. In this case it was held that "A policy of insurance obtained upon a building by the owner, and containing a proviso that it shall be void if the building shall be occupied or used for unlawful purposes, is avoided by a tenant's use of the building for an unlawful purpose, even if without the owner's knowledge." In distinguishing the case from those cited by counsel adversely, the court said: "In some of the cases cited for the plaintiff the prohibited use was not so constant or habitual or of such a nature as to fall within the terms of the provision, and in the others the knowledge or assent of the assured was expressly required in order to avoid the policy."

In New York it has been the settled law since the case of *Duncan* v. *Sun Fire Insurance Company*, 6 Wend. 488. In *Mead* v. *Northwestern Ins. Co.* 7 N. Y. 530, it was said, in such a case: "It is equally unimportant that the respondent was ignorant that such business was carried on; the question whether a warranty has been broken can never depend upon the knowledge or ignorance or intent of the party making it, touching the acts or the fact constituting the breach." *Matson* v. *Farm Buildings Ins. Co.* 78 N. Y. 310.

In *Fire Association* v. *Williamson*, 26 Pa. St. 196, the Supreme Court of Pennsylvania said: "Neither is it material that the landlord did not know that his tenant kept gunpowder. His contract with the insurance company was that it should not be kept without permission, and it was his business to see that his tenants did not violate the contract in this respect." *Diehl* v. *Adams Co. Mutual Ins. Co.* 58 Pa. St. 443; *Howell's Exrs.* v. *Baltimore Equitable Society*, 16 Md. 377.

The circuit court also erred in the charge to the jury that under the circumstances disclosed by the evidence it was no breach of the conditions of the policy to have in the oil room a quantity of gasoline although not intended for use in the gas apparatus, the use of which had in fact been discontinued, if the oil room was a place where such fluid might have been properly stored, when intended for use in the apparatus.

The only direct evidence in the case, as to the usual and suitable place for the keeping of gasoline when used in such an apparatus, was, that it should be deposited at once in the apparatus itself, one part of which is a generator where atmospheric air is carbonized by being forced through the gasoline. But waiving any question on that point, it is clear that the privilege indorsed on the policy, in the following terms: "To use gasoline gas—gasometer, blower and generator being underground about sixty feet from main building, in vault; no heat employed in process," did not sanction the keep-

ing, using or storing of gasoline or its equivalent, burning fluid or oil, except for actual use in that gas apparatus. There is no express permission to keep gasoline given in the words of the privilege. Such permission is implied only when and because the use of gasoline is necessary to the enjoyment of the privilege. Otherwise and for all other purposes and uses, it is expressly prohibited. The implication cannot be extended beyond the necessity for a fair and reasonable exercise of the privilege granted.

But the evidence on the trial was uncontradicted, that at the time of the fire and for nearly a year previously the use of the gas apparatus had been discontinued. The plaintiff below himself testified that it was not used during the season of 1879, and that its use had been purposely discontinued. And the privilege indorsed on one of the policies "to use kerosene oil for lights, lamps to be filled and trimmed by daylight only," and "to keep not exceeding five barrels of kerosene oil on said premises," was dated September 17, 1878, at the time when, according to the testimony of the plaintiff, the use of the apparatus for lighting the premises by means of gas from gasoline ceased at the end of the season of 1878.

It is, of course, not to be denied that this did not supersede the privilege to use the gasoline apparatus, and that this privilege had not been otherwise exhausted or withdrawn. The insured had the right at any time to resume its exercise, and in doing so would have been justified in obtaining, keeping, storing and using, in the accustomed manner, the necessary quantity of gasoline for supplying it. This is implied in the grant of the privilege. But if the privilege itself is not actually exercised, no such implication arises; and the prohibition against gasoline, according to the terms of the condition, must have full effect. It was error, therefore, in the court to instruct the jury that the naked privilege to use a gas apparatus, not actually exercised, nor intended to be exercised, but in fact abandoned, justified the insured in keeping and storing gasoline, in any quantity, in any place, or for any time.

The judgment of the Circuit Court is, therefore, for these reasons reversed; and the cause is remanded, with directions to grant a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ROBERT C. HEWITT, *Appt.*,
v.
LEWIS S. FILBERT *et al.*

(See S. C. Reporter's ed. 142-145.)

Practice—citation necessary to appeal.

A citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the term to which it stands returnable, the appeal becomes inoperative.

[No. 555.]

Submitted Dec. 7, 1885. Decided Dec. 21, 1885.

APPEAL from the Supreme Court of the District of Columbia.

On motion to dismiss for want of a citation.

The case is sufficiently stated by the court.

Messrs. **Wm. F. Mattingly** and **C. C. Cole**, for appellee, in support of motion:

A citation was necessary because the second appeal was not at the same term at which the decree appealed from was entered.

Villabolos v. *U. S.* 6 How. 90 (47 U. S. bk. 12, L. ed. 356); *Dodge* v. *Knowles*, 114 U. S. 430 (Bk. 29, L. ed. 296).

In this case it was also necessary because the security was not offered or approved until after the expiration of the term at which the appeal was granted.

Saje v. *R. R. Co.* 96 U. S. 712 (Bk. 24, L. ed. 641); *Haskins* v. *St. L. etc. R. Co.* 109 U. S. 106 (Bk. 27, L. ed. 873); *R. R. Co.* v. *Blair*, 100 U. S. 662 (Bk. 25, L. ed. 587).

A citation being necessary, the failure to have one signed and served is fatal to the appeal.

Wilson v. *Daniel*, 2 Dall. 401 (3 U. S. bk. 1, L. ed. 654); *Lloyd* v. *Alexander*, 1 Cranch, 365 (5 U. S. bk. 2, L. ed. 137); *Ex parte Crenshaw*, 15 Pet. 119 (40 U. S. bk. 10, L. ed. 682); *Villabolos* v. *U. S.* 6 How. 90 (47 U. S. bk. 12, L. ed. 356); *U. S.* v. *Curry*, 6 How. 106 (47 U. S. bk. 12, L. ed. 363); *Bacon* v. *Hart*, 1 Black, 38 (66 U. S. bk. 17, L. ed. 52); *Castro* v. *U. S.* 3 Wall. 46 (70 U. S. bk. 18, L. ed. 163); *Alviso* v. *U. S.* 5 Wall. 324 (72 U. S. bk. 18, L. ed. 492); *Washington* v. *Dennison*, 6 Wall. 495 (73 U. S. bk. 18, L. ed. 863); *Sage* v. *R. R. Co.* 96 U. S. 712 (Bk. 24, L. ed. 641); *R. R. Co.* v. *Blair*, 100 U. S. 661 (Bk. 25, L. ed. 587); *Haskins* v. *St. L. etc. R. Co.* 109 U. S. 106 (Bk. 27, L. ed. 873); *Dodge* v. *Knowles*, 114 U. S. 430 (Bk. 29, L. ed. 296).

Mr. **S. S. Henkle**, for appellant, *contra:*

The issue and service of a citation in cases where it is required by law is not essential to the jurisdiction of this court.

Edmonson v. *Bloomshire*, 7 Wall. 306 (74 U. S. bk. 19, L. ed. 91); *Pough* v. *Davis*, 110 U. S. 227 (Bk. 28, L. ed. 127).

This court has repeatedly held that the giving of a bond was not essential to the perfecting of an appeal.

Ex parte Milwaukee, etc. R. R. Co. 5 Wall. 188 (72 U. S. bk. 18, L. ed. 676); *Seymour* v. *Freer*, 5 Wall. 822 (72 U. S. bk. 18, L. ed. 564).

Citation is merely notice to the opposite party that an appeal has been taken, and may be waived by the appellee or his counsel; and it is absolutely waived by the appearance of counsel.

U. S. v. *Yates*, 6 How. 608 (47 U. S. bk. 12, L. ed. 576); *Carroll* v. *Dorsey*, 20 How. 204 (61 U. S. bk. 15, L. ed. 803); *Dayton* v. *Lash*, 94 U. S. 112 (Bk. 24, L. ed. 33); *Chic. & Pac. R. R. Co.* v. *Blair*, 100 U. S. 661 (Bk. 25, L. ed. 587).

The purpose of the citation is notice. It is not jurisdictional; and if by accident it be omitted, a motion to dismiss an appeal in open court allowed at the proper term will never be granted until an opportunity to give the requisite notice has been furnished.

Dodge v. *Knowles*, *supra*.

Mr. Chief Justice **Waite** delivered the opinion of the court: [142

This is a motion to dismiss an appeal for want of a citation. The facts are these: A decree was entered by the Supreme Court of the District of Columbia on the 21st of November,

1882, dismissing the bill in a suit between Robert C. Hewitt, complainant, and Lewis S. Filbert and others, defendants. On the same day an appeal was allowed in open court, but that appeal was never docketed in this court by the appellant. It was, however, docketed by the appellee, and dismissed under Rule 9, on the 15th of October, 1883, but the mandate was not sent down until March 25, 1885. In the meantime, on the 26th of June, 1884, Hewitt appeared in the Supreme Court of the District, at general term, and, on his *ex parte* application, an order was entered allowing him a second appeal upon his giving security in the sum of $500. After the close of the term at which this order was made, and on the 18th of August, a bond was approved by one of the justices and filed in the office of the clerk of that court. The case was docketed in this court on the 20th of August, 1884, but no citation has ever been issued or served.

[143]

Except in cases of appeals allowed in open court during the term at which the decree appealed from was rendered, a citation returnable at the same term with the appeal or writ of error is necessary to perfect our jurisdiction of the appeal or the writ, unless it has been in some proper form waived. *The San Pedro*, 2 Wheat. 142 [15 U. S. bk. 4, L. ed. 205]; *Yeaton* v. *Lenox*, 7 Pet. 220 [32 U. S. bk. 8, L. ed. 664]; *Villabolos* v. *United States*, 6 How. 90 [47 U. S. bk. 12, L. ed. 356]; *United States* v. *Curry*, Id. 111 [47 U. S. bk. 12, L. ed. 365]; *Castro* v. *United States*, 3 Wall. 50 [70 U. S. bk. 18, L. ed. 163]; *Alviso* v. *United States*, 5 Wall. 824 [72 U. S. bk. 18, L. ed. 492].

In *Dayton* v. *Lash*, 94 U. S 112 [Bk. 24, L. ed. 33], it was held that if a citation was actually issued but not served before the first day of the term to which it was returnable, leave might be granted to make the service during that term. In this way the language of the court in *Villabolos* v. *United States*, and *United States* v. *Curry*, which seemed to require service as well as issue of the citation before the return day of the appeal or writ of error, was to some extent qualified; but the authority of those cases as to the necessity of an actual issue of the citation and service before the end of the return term was in no way impaired. On the contrary, it was fully recognized. So in *Chic. & Pac. R. R. Co.* v. *Blair*, 100 U. S. 661 [Bk. 25, L. ed. 587], where an appeal was allowed in open court at a term subsequent to that in which the decree appealed from was rendered, but when the solicitors of the appellee were present and had actual notice of what was done, leave was granted to issue a citation and have it served during the return term of the appeal.

Appeals allowed by the court in session and acting judicially at the term when the decree was rendered have always been given a different effect from appeals allowed after the term or writs of error. Thus, in *Reily* v. *Lamar*, 2 Cranch, 349, decided in 1805, only two years after the Act allowing appeals in cases of equity and admiralty and maritime jurisdiction was passed, [2 Stat. at L. 244, chap. 40, sec. 2], it was stated by *Chief Justice* Marshall "to be the opinion of the court that, the appeal having been prayed, pending the court below, a citation was not necessary; and, therefore, the case was properly before the court" without a citation.

[144]

It has since been decided that if the appeal is allowed in open court at the term, but the appeal bond is not accepted until after the term, a citation will be necessary to bring in the parties. *Sage* v. *Cent. R. R. Co* 96 U. S. 715 [Bk. 24, L. ed. 643]. But if an appeal allowed in such a way is docketed in this court at the return term our jurisdiction of the appeal becomes perfect, and what remains to be done to get in the parties is matter of procedure only, and not jurisdictional so far as the bringing of the appeal is concerned. *Hodge* v. *Knowles*, 114 U. S. 438 [Bk. 29, L. ed. 296]. As was said in that case: "The judicial allowance of an appeal in open court at the term in which the decree has been rendered is sufficient notice of the taking of an appeal. Security is only for the due prosecution of the appeal. The citation, if security is taken out of court or after the term, is only necessary to show that the appeal which was allowed in term has not been abandoned by the failure to furnish the security before the adjournment. It is not jurisdictional. Its only purpose is notice. If by accident it has been omitted, a motion to dismiss an appeal, allowed in open court and at the proper term, will never be granted until an opportunity to give the requisite notice has been furnished; and this, whether the motion was made after the expiration of two years from the rendition of the decree or before." The reason of this is that the allowance by the court in session before the end of the term at which the decree was rendered, and when both parties are either actually or constructively present, is in the nature of an adjudication of appeal which, if docketed here in time, gives this court jurisdiction of the subject matter of the appeal, with power to make all such orders, consistent with the practice of courts of equity, as may be appropriate and necessary for the furtherance of justice. In legal effect the judicial allowance of an appeal in this way transfers the cause to this court, if the appellant dockets the appeal here at the proper time. If not docketed, the appeal which has been allowed becomes inoperative for want of due prosecution. *Grigsby* v. *Purcell*, 99 U. S. 506 [Bk. 25, L. ed. 354], and cases there cited.

But a citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the term to which it must be made returnable the appeal becomes inoperative. The rule is thus stated in *Castro* v. *United States*, which was a case of an appeal taken after the term and in which a citation was necessary: "The writ of error, or the allowance of appeal, together with a copy of the record and the citation, when a citation is required, must be returned to the next term of this court after the writ is sued out or the appeal allowed; otherwise the writ of error or the appeal, as the case may be, will become void, and the party desiring to invoke the appellate jurisdiction will be obliged to resort to a new writ of error or a new appeal." There is nothing in any of the cases to the contrary of this. As without a citation or its waiver we cannot take jurisdiction of this appeal, and it is conceded that none has been issued or served, and there is no sufficient evidence of a waiver, *the motion to dismiss is granted.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN F. COYLE, *Appt.*,

v.

HENRY S. DAVIS, ET AL.

(See S. C. Reporter's ed. 108-113.)

Absolute conveyance—when considered a mortgage—parol evidence to fix as.

1. Parol evidence of the existence of a debt and that an absolute conveyance, with a covenant of warranty and without a defeasance, either in the conveyance or in a collateral paper, was intended to secure it and to operate only as a mortgage, must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail.

2. The presumption in favor of the conveyance is strengthened when it appears that there is no considerable disproportion between the price paid and the value of the property.

[No. 86.]

Argued Dec. 9, 1885. Decided Dec. 21, 1885.

APPEAL from the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court.

Messrs. **Benj. F. Butler** and **O. D. Barrett**, for appellant.

Messrs. **Walter D. Davidge** and *Henry E. Davis*, for appellees:

Although a deed absolute on its face may be shown by parol to have been intended as a mortgage, it is necessary to show facts and circumstances *dehors* the instrument, raising an equity superior to its terms.

Pierce v. *Robinson*, 13 Cal. 116.

Something more must be established than an alleged verbal agreement controlling the intent as expressed by the instrument.

Blackwell v. *Overby*, 6 Ired. Eq. 88; *Kelly* v. *Bryan*, 6 Ired. Eq. 283; *Brothers* v. *Harrill*, 2 Jones, Eq. 209; *Glisson* v. *Hill*, 2 Jones, Eq. 234. See also *Todd* v. *Campbell*, 32 Pa. St. 250; *Rhines* v. *Baird*, 41 Pa. St. 263; *Haines* v. *Thomson*, 70 Pa. St. 434; *Sulphen* v. *Cushman*, 35 Ill. 186.

"The burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties."

Haviland v. *Blake*, 97 U. S. 624 (Bk. 24, L. ed. 1027); *N. Mut. Life Insurance Co.* v. *Nelson*, 103 U. S. 544 (Bk. 26, L. ed. 436); *Young* v. *Duvall*, 109 U. S. 573 (Bk. 27, L. ed. 1036).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an appeal from a decree of the Supreme Court of the District of Columbia, made in General Term, July 6, 1880, dismissing the bill of complaint, in a suit in equity brought by John F. Coyle against Henry S. Davis, William E. Spalding and William W. Rapley. The bill was filed May 24, 1869, to redeem a parcel of land in the City of Washington alleged to be covered by a mortgage held by the defendant Davis. The substantial averments of the bill are, that Coyle, Spalding and Rapley, in April, 1863, purchased the land as tenants in common, and it was by their mutual consent deeded to Rapley; that Coyle's share was incumbered by a deed of trust executed as security for a loan made to Coyle by one Riggs; that, in order to pay Riggs, Coyle, in June, 1866, applied to Davis for a loan of $6,000; that Davis had, for a long time, made many professions of warm friendship for Coyle, and of willingness and desire to serve him, and had acquired Coyle's full confidence; and, upon such application, offered to make to Coyle such a loan as would both pay Riggs and settle up all Coyle's accounts with Spalding and Rapley, in respect of the land; and as security for the loan asked a mortgage on Coyle's undivided one third of the land, which would thus be free from all incumbrance and indebtedness; and suggested that a statement of Coyle's accounts with Spalding and Rapley be furnished to him, Davis; that on or about June 12, 1866, Davis was furnished with a written instrument signed by Spalding and Rapley, fully setting forth Coyle's account in respect of the land; that thereupon Davis, well knowing that one third interest in the land [110 was worth about $30,000, and would increase in value, urged Coyle to take a loan from him of about $17,000, in order to settle his account with Spalding and Rapley as well as pay his debt to Riggs, and to give him, Davis, a mortgage on Coyle's interest, as security; that as inducement to this course, Davis represented that the arrangement proposed by him would be freer from complication than any other, and would give him an independent security for the loan; and that his business as well as his desire to serve Coyle would afford him opportunity to effect, for the benefit of Coyle, a highly advantageous sale of said interest in the premises, from the proceeds of which he could retain the balance due on his loan and pay over the residue to Coyle; and that this arrangement would tend to the benefit of both parties; that Coyle acceded to the proposition, and Davis loaned to Coyle $17,659.46, by advancing $6,000 to pay the debt to Riggs, and assuming the payment, to be made as it should fall due, of the unpaid balance on Coyle's one-third interest, viz: $11,659.46; that as security for the loan, Davis took a mortgage on Coyle's undivided one third of the land, in the manner following, to wit: Rapley and Coyle, on or about July 6, 1866, conveyed to Davis, Coyle's undivided one-third interest in the land, by a deed absolute in form, but the force and operation of which were defeated by the understanding, agreement and contract between Coyle and Davis, that the deed was executed as security for the loan; and that between the parties the conveyance should have the operation, force and effect of a mortgage, and none other; and that Davis should enter upon and take possession of the mortgaged property, as security for the loan and subject to an account for its rents and profits, and whenever Coyle should offer to redeem the property an account should be had in respect of the rents

Note.—*Mortgages; construction of absolute conveyance as a mortgage.* See Conway v. Alexander, 11 U. S. (7 Cranch), 218, bk. 3, 221, *note*.

Admissibility of parol evidence in such cases. See Stephens v. Edwards, 22 U. S. (9 Wheat.), 489, bk. 6, 142, *note*.

and profits, received by Davis, on the one hand, and of Coyle's debt, principal and interest, on the other hand, and on proffer of payment of the sum thus found due, if any, from Coyle to Davis, Davis, by conveyance of the property to Coyle, should surrender possession of it to Coyle; and while Davis should continue in possession as mortgagee, if he should have an opportunity to effect an advantageous sale of the [111] property, he should do so for the benefit of Coyle, and should convey title to it and receive the purchase money and deduct the balance, if any, due on the loan, over and above the rents and profits meanwhile received by him, and pay over the residue to Coyle; and that Davis went into possession of the property and had received its rents and profits for three years, and had frequently admitted that the transactions between him and Coyle were as above set forth.

The answer of Davis alleges that Rapley, on taking a conveyance of the land, incumbered it, by a deed of trust, with a debt of $20,000, to secure unpaid purchase money, which was not paid when the deed from Coyle to Davis was made; and that at that time there was a further incumbrance on Coyle's interest of $4,100 as a debt to Riggs, secured by a deed of trust of that interest. It denies the allegations of the bill as to the application for a loan or the offer of a loan or the asking for a mortgage, or the suggesting or furnishing of a statement of account, and all the other allegations of the bill as to the making of a loan or of a mortgage, or of a deed as security for a loan or as a mortgage. It alleges the facts to be that, about six or eight weeks before the making of the deed to Davis, he was applied to by one Winder, acting as agent for Coyle, to make a loan to Coyle, to be secured by a deed in fee of Coyle's interest in the property, which application was rejected, and it was renewed in person by Coyle, with the same result; that when Coyle renewed it, he exhibited to Davis a paper purporting to show the cost of the property and the money value of the one-third interest of Coyle, after deducting the balance due by him on account of such interest, and $6,666.66 as one third of the unpaid purchase money; that, afterwards Coyle proposed to Davis to sell his interest to him for $20,000, but he rejected that proposition and finally, in July, 1866, offered Coyle $18,000 in cash for such interest, which offer Coyle accepted; that Davis insisted that before the purchase money should be paid the account of Coyle in respect of the property should be settled; that thereupon the indebtedness of Coyle to Spalding and Rapley in respect of the property was ascertained, by a settlement dated July 7, 1866, a copy of which is [112] annexed to the answer, to be $6,258.71; that Davis paid the $6,258.71 to Spalding and Rapley, and paid to Riggs what was due to him, and paid the balance in cash to Coyle, less the $6,666.66, which was reserved, with the approbation of Coyle, to pay his share of the unpaid purchase money, and was afterwards paid by Davis; that on July 7, 1866, Davis received from Coyle a deed executed by Coyle and Rapley and their wives, conveying to him in fee simple the one-third interest of Coyle; that he took possession of it and has received its rents and profits, as absolute owner, recognized as such by Coyle and his cotenants; that Coyle's interest at the time Davis purchased it was not worth $30,000, and Coyle never asked from Davis more than $20,000 for it; and that Davis never admitted that he was mortgagee in possession in respect of Coyle's interest.

The volume of proof taken on the issue thus raised is large, and the evidence is contradictory, as is common in such cases, where, admittedly, a loan of some kind was at some time talked about. The conveyance to Davis of the undivided one-third interest of Coyle being to him, his heirs and assigns, forever, with a covenant of warranty and without a defeasance, either in the conveyance or in a collateral paper, the parol evidence that there was a debt, and that the deed was intended to secure it and to operate only as a mortgage, must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail. This well settled rule of equity jurisprudence was applied by this court in *Howland* v. *Blake*, 97 U. S. 624, 626 [Bk. 24, L. ed. 1027, 1028]. The case stated in the bill herein is not supported by the weight of the evidence. On the contrary, it sustains the allegations of the answer. Especially, the force of the letter of Coyle to Davis, of June 11, 1867, is not broken by any satisfactory explanation. It would serve no useful purpose to discuss the testimony at length. There is but one point to which it is needful to refer. Great stress is laid, in cases of this kind, on inadequacy of consideration, where there is a considerable disproportion between the price paid and the real value of the property. *Russell* v. *Southard*, 12 How. 139, 148 [53 U. S. bk. 13, L. ed. 927, 931]. There is testimony on both sides, on the question of disproportion, in this case. But the preponderance is very large on the part of Davis, that the share of Coyle in the property was sold for about its sale value, in view of its condition. There was a poorly built and poorly arranged building on the premises, which was incapable of actual partition; the law did not permit a partition by a sale *in invitum*; and Coyle's interest was a minority interest. These considerations made it difficult of sale at all.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

UNION PACIFIC RAILWAY COMPANY,

Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 154-158.)

Practice—appeal from Court of Claims—what reviewable on—section 5261, R. S.—special findings.

1. An appeal from the Court of Claims brings up for review only the decisions of that court upon questions of law arising in the course of the trial, or in the application of the law to the facts as finally found by it.

2. An appeal under section 5261, R. S., is subject to the general rules regulating appeals from the court of claims.

3. Certain special findings which were requested in the court below were properly refused, as they related to mere incidental facts amounting only to evidence which had performed its entire office when the facts were found.

[No. 1034.]

Argued Dec. 7, 1885. Decided Dec. 21, 1885.

APPEAL from the Court of Claims.

On motion to remand.

The history and facts of the case appear in the opinion of the court.

Messrs. **John F. Dillon,** *J. M. Wilson* and *Sidney Bartlett* for appellant, in support of motion.

Mr. **John Goode,** *Solicitor-Gen.*, for appellee, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court:

[155] This suit was brought by the Union Pacific Railway Company against the United States under sections 5260 and 5261 of the Revised Statutes, to recover among other things the price of the transportation of mails by the Company in accordance with the requirements of its charter. These sections are as follows:

"Sec. 5260. The Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns on account of freights or transportation over their respective roads of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the 5 per centum of net earnings due and unapplied, as provided by law.

"Sec. 5261. Any such company may bring suit in the court of claims to recover the price of such freight and transportation; and in such suit the right of such company to recover the same upon the law and the facts of the case shall be determined, and also the rights of the United States upon the merits of all the points presented by it in answer thereto by them; and either party to such suit may appeal to the supreme court; and both said courts shall give such cause or causes precedence of all other business."

One of the principal controversies in the case was as to what would be "fair and reasonable rates of compensation" for such transportation, not to exceed the amount paid by private parties for the same kind of service." When the case was here on a former appeal, this court, adopting the ruling of the court of claims, said that it would be proper "to look over the entire field of service in determining what was a fair and reasonable charge for a road which was similar to but not identical with any other. For instance, if it should appear that the receipts of passenger cars were less than the receipts of postal cars, and the cost and running expenses no greater, we are inclined to think that that fact might be a proper element in the problem of estimating the amount of fair and reasonable rates of compensation." And we also said that "upon a re-trial, if the parties do not agree upon the amount or upon the rule of computation, the compensation, at fair and reasonable rates, must be determined upon a consideration of all facts material to the issue, not to exceed the amounts paid by private parties for the same kind of service." *Union Pacific R. R. Co.* v. *United States*, 104 U. S. 667. [Bk. 26, L. ed. 885].

Accordingly, when the case went back, evidence was offered to show:

1. What the public paid for express service, and the similarity of this service in its nature and cost to the mail service;

2. The earnings per car of the cars employed in the passenger service;

3. What the Company charged and the public paid per pound for carrying extra baggage;

4. What the Company charged and the public paid for carrying first class freight on passenger trains; and how much more it was worth to carry the same class of matter in passenger trains; and

5. That connecting roads allowed the Company on through business 50 per cent more than they themselves received, and the reason for such allowance.

The motion papers also show that, before the first trial of the cause, a stipulation was entered into by the parties agreeing on the amount due the Company for mail service in case one or another of several proposed rules for estimating the price should be adopted by the court.

Before the trial began the court was requested to find specifically the facts as to the several kinds of service about which evidence had been furnished, and the nature, extent, and character of the mail service. The court did not comply with this request, but found generally that "The amounts allowed and retained by the Treasury Department for transportation of mails * * * are a fair and reasonable compensation for the service, and not in excess of the rates paid by private parties for the same kind of service," and gave judgment accordingly. [157] The case is now here on appeal by both parties, and the Railway Company has moved that the court of claims be directed "to send up to this court the entire record in said case, including the interlocutory rulings, and all the evidence on which the case was heard;" or, if that cannot be done, that the case be remanded with instructions to "specifically pass upon, affirmatively or negatively, each of said requests, or make a finding of facts on the subject embraced in each of said requests;" and that the court be directed to incorporate in the record the stipulation already referred to, and a certain letter mentioned and set out in the motion papers.

So far as the first branch of the motion is concerned, it must be denied on the authority of *McClure* v. *United States*, [*ante*, 572] just decided. There is nothing in the statute under which this suit was brought to show an intention by Congress to allow any other appeal to this court than such an one as is given by the statute conferring general jurisdiction on the court of claims. The suit is to be at law and not in equity. The recovery is to be upon the law and the facts of the case, but that is no more than is required in every suit at law or in equity. Under our rule the facts are to be settled by the court of claims, and an appeal brings up for review only the decisions of that court upon questions of law arising in the course of the trial or in the application of the law to the facts as finally found. There is

nothing unusual in this. In an ordinary suit at law the facts are settled in the trial court, and questions of law are only carried to the appellate court for review. Upon writs of error we hear the case only on findings of fact or exceptions to rulings of the court in the progress of the trial. Generally, in suits at law there is but one trial upon questions of fact.

The second branch of the motion is also covered by the decision in *McClure's Case*. The special findings which were requested and refused related to mere incidental facts which amounted only to evidence, and were therefore inadmissible as part of the record to be sent here. *The Francis Wright*, 105 U. S. 381 [Bk. 26, L. ed. 1100]. They were in reality nothing more than requests for a finding of what the evidence was. The parties seem to have followed the suggestion on the former appeal, and after looking over the entire field of service [158] they brought in everything which, in their opinion, could be of use to the court in determining what would be a reasonable compensation for the service rendered, subject to the requirement of the statute that it should not be more than was paid to private parties for the same kind of service. The question to be determined was one of fact, as much so as the amount of recovery in any action *quantum meruit*. A conclusion could only be reached by considering all the testimony, weighing the facts, and estimating their comparative value as evidence. This presented in no just sense a question of law. Every fact that was proven according to the motion was simply evidence, and as evidence had performed its entire office when the facts were found. It has no place in the record which is to come here for review.

The motion is denied.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[158]

HATTIE A. BURNETT, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 158-161.)

Pension laws—"total disability"—rights of widows—statutes construed.

1. The words "total disability" in pension laws have a technical signification which cannot be disregarded.
2. Under section 4702, R. S. a widow is only entitled to receive the same pension to which her husband would have been entitled for a total disability, although in fact he had received a larger pension because of a permanent specific disability.

[No. 951.]

Submitted Nov. 23, 1885. Decided Dec. 21, 1885.

APPEAL from the Court of Claims.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **A. L. Merriman**, for appellant.

Mr. **John L. Blair**, for appellee.

[158] *Mr. Justice* **Harlan** delivered the opinion of the court:

By an Act of Congress of March 3, 1879, the Secretary of the Interior was directed to place on the pension roll the name of Ward B. Burnett, and pay him a pension of $50 per month in lieu of the pension then received by him. 20 Stat at L. 665, chap. 290. The subsequent Act of June 16, 1880, provides that all soldiers then receiving a pension of $50 per month, under the provisions of the Act of June 18, 1874, entitled "An Act to Increase the Pension of Soldiers and Sailors Who Have Been Totally Disabled" (18 Stat. at L. 78, chap. 298), shall receive, in lieu of all pensions then paid to them by the United States, the sum of $72 per month; those whose pensions were thus increased from $50 to $72 per month, to receive the difference between those sums monthly, from June 17, 1878, to the date when that Act took effect. 21 Stat. at L. 281, chap. 236.

On the 17th of July, 1882, General Burnett received from the Department of the Interior a certificate showing that he was entitled to a pension "for gun-shot wounds of left leg, and rheumatism" at the rate of $30 per month, to commence on the first of August, 1848, and $31.25 per month from June 4, 1872, and $50 per month from June 4, 1874, and $72 per month from June 17, 1878.

By an Act approved July 25, 1882, it is provided that no person then receiving, or who should thereafter receive, a pension under a special Act shall receive, in addition thereto, a pension under the general law, unless the special Act expressly states that the pension granted thereby is in addition to the pension which such person is entitled to receive under the general law. 22 Stat. at L. 176, chap. 349.

Gen. Burnett died on June 24, 1884, from the effect of wounds received in the war with Mexico. The appellant, his widow, claims the same pension, $72 per month, that her husband was receiving at his death. The interior department granted her a certificate for a pension at the rate of only $30 per month, to continue from June 24, 1884, during her widowhood. Her claim for a larger pension having been denied, the matter was referred by the department to the court of claims. The claimant, in her petition in that court, asked for judgment against the United States for $210, that being the difference between $30 per month and $72 per month from the date of her husband's death to the commencement of this action. A demurrer by the Government to the petition having been sustained, the case has been brought to this court.

The only question presented by the parties for our consideration is whether, under existing statutes, the widow of General Burnett is entitled to the same pension that he was receiving at his death.

Section 4692 of the Revised Statutes provides that "Every person specified in the several classes enumerated in section 4693, who has been, since the 4th day of March, 1861, or who is hereafter disabled, under the conditions therein stated, shall * * * be placed on the list of invalid pensioners of the United States, and be entitled to receive for a total disability, or a permanent specific disability such pension as is hereinafter provided in such cases; and for an inferior disability, except in cases of permanent

specific disability, for which the rate of pension is expressly provided, an amount proportionate to that provided for total disability; and such pension shall commence as hereinafter provided and continue during the existence of the disability." 17 Stat. at L. 566; 18 *Id.* 61; 19 *Id.* 403.

Section 4693 specifies who shall be beneficiaries under the preceding section, among whom is "any officer of the army, including regulars, volunteers or militia * * * disabled by reason of any wound or injury received, or disease contracted, while in the service of the United States and in the line of duty." 17 Stat. at L. 566, 567; 19 *Id.* 403.

Section 4695 provides that "The pension for total disability shall be * * * for lieutenant-colonels and officers of higher rank in the military service * * * $30 per month." 17 Stat. at L. 567; 19 *Id.* 264. Other sections fix the amount of pensions in cases of disabilities known as permanent specific disability and inferior disability.

It is then provided, by section 4702, that "If any person embraced within the provisions of sections 4692 and 4693 has died since the 4th day of March, 1861, or hereafter dies by reason of any wound, injury or disease which, under the conditions and limitations of such sections, would have entitled him to an invalid pension had he been disabled, his widow * * * shall be entitled to receive the same pension as the husband or father would have been entitled to had he been totally disabled, to commence from the death of the husband or father, to continue to the widow during her widowhood," etc. Act of March 3, 1873, 17 Stat. at L. p. 569, chap. 234, § 8.

It would seem to be too clear for discussion that the construction which the court placed upon the statutory provisions is correct. It is not to be doubted that the words "total disability" in the pension laws have a technical signification which cannot be disregarded. And when the statute fixes $30 per month as the pension, in case of total disability, of an officer of the rank of General Burnett, and declares that his widow shall receive the same pension as her husband would have received had he been totally disabled, there is no room left for a construction that would give her a pension in excess of that amount. If it is supposed that the law operates unjustly against the officers and soldiers who became totally disabled in the service, or that an unreasonable distinction is made between different kinds of disability, the remedy is with another department of the Government. The courts must give effect to the intention of Congress as manifested by the statute. They cannot make but can only declare the law.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOSIAH FISK, *Plff. in Err.*,
v.
POLICE JURY OF JEFFERSON, LEFT BANK.

STATE OF LOUISIANA, *ex rel.* JOSIAH FISK, *Plff. in Err.*,
v.
POLICE JURY OF JEFFERSON, LEFT BANK.

(See S. C. "*Fisk* v. *Jefferson Police Jury*," Reporter's ed. 131-135.)

Municipal ordinance fixing compensation—La. State Constitution impairs obligation of contract for.

1. After services have been rendered under a municipal law, resolution or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate; and the obligation of such contract cannot be impaired by the State.

2. A provision in a State Constitution may be a law impairing the obligation of a contract as well as one found in an ordinary statute.

[Nos. 69, 70.]

Submitted Nov. 18, 1885. Decided Dec. 21, 1885.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Messrs. **Chas. Louque** and **B. F. Jonas**, for plaintiffs in error. [132]

No counsel appeared for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

These cases are brought before this court by writs of error to the Supreme Court of Louisiana.

As they involve precisely the same questions between the same parties they may be decided together.

Josiah Fisk, who was an attorney at law, brought three suits in the proper court of the Parish of Jefferson to recover for salary and fees due him from the parish as district attorney; and he obtained judgments in each case against the Police Jury, which is the governing body of the parish.

Being unable to obtain the payment of these judgments in any other mode, he first made application for a writ of *mandamus* to compel the assessment and collection of a tax for the payment of two of these judgments, and afterwards for another writ in regard to the third judgment; the two judgments being for his salary and fees under one appointment, and the other under a second appointment.

The inferior court granted the writ in one case and denied it in the other. But on appeal to the supreme court of the State, the writs were denied in both cases.

The ground of the jurisdiction of this court to review these judgments is the assertion by plaintiff in error that they were founded on a law of the State which impaired the obligation of his contract, to wit: the contract on which he procured the judgments already mentioned.

The services for which the judgments were recovered were rendered in the years 1871, 1872, 1873 and 1874. During this period there was in force the Act of the Legislature of 1871, of which section 7 is as follows: [133]

"That no city or other municipal corporation shall levy a tax for any purpose which shall

NOTE.—*Constitutional law; impairment of obligation of contracts.* See Fletcher v. Peck, 10 U. S. (6 Cranch), 87, bk. 3, 162, *note.*

exceed 2 per centum on the assessed cash value of all the property therein listed for taxation; nor shall the police jury of any parish levy a tax for any parish purposes during any year which shall exceed 100 per centum of the state tax for that year, unless such excess shall be first sanctioned by a vote of the majority of the voters." Acts of 1871, p. 109, § 7.

But by the Constitution of the State of 1880 it was declared that no parish or municipal tax, for all purposes whatsoever, shall exceed ten mills on the dollar of valuation. The Police Jury showed that they had exhausted their power when the application for *mandamus* was made by levying the full amount of taxes permissible under this constitutional provision, and the supreme court held they could not be compelled to levy more.

In answer to the argument that as applied to plaintiff's case the constitutional provision impaired the obligation of his contract, the supreme court decided that his employment as attorney for the parish did not constitute a contract, either in reference to his regular salary or to his compensation by fees. And this question is the only one discussed in the opinion, and on that ground the decision rested.

It seems to us that the supreme court confounded two very different things in their discussion of this question.

We do not assert the proposition that a person elected to an office for a definite term has any such contract with the government or with the appointing body as to prevent the Legislature or other proper authority from abolishing the office or diminishing its duration or removing him from office. So, though when appointed the law has provided a fixed compensation for his services, there is no contract which forbids the Legislature or other proper authority to change the rate of compensation for salary or services after the change is made, though this may include a part of the term of the office then unexpired. *Butler* v. *Pennsylvania*, 10 How. 402 [51 U. S. bk. 13, L. ed. 472].

[134] But after the services have been rendered, under a law, resolution or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect and rests on the remedies which the law then gives for its enforcement. The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements; and in rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the State than that arising on a promissory note.

The case of Fisk was of this character. His appointment as district attorney was lawful and was a request made to him by the proper authority to render the services demanded of that office. He did render these services for the parish; and the obligation of the Police Jury to pay for them was complete. Not only were the services requested and rendered, and the obligation to pay for them perfect, but the measure of compensation was also fixed by the previous order of the Police Jury. There was here wanting no element of a contract. The judgment in the court for the recovery of this compensation concluded all these questions. *Hall* v. *Wisconsin*, 103 U. S. 10 [Bk. 26, L. ed. 305]; *Newton* v. *Comrs.* 100 U. S. 559 [Bk. 25, L. ed. 711].

The provision of the Constitution restricting the limit of taxation, so far as it was in conflict with the Act of 1871, and as applied to the contract of plaintiff, impaired its obligation by destroying the remedy *pro tanto*.

It is apparent that if the officers whose duty it is to assess the taxes of this parish were to perform that duty as it is governed by the law of 1871, the plaintiff would get his money. If not by a first year's levy, then by the next. But the constitutional provision has repealed that law, and stands in the way of enforcing the obligation of plaintiff's contract as that obligation stood at the time the contract was made.

It is well settled that a provision in a State Constitution may be a law impairing the obligation of a contract as well as one found in an ordinary statute. We are of opinion, therefore, that as it regards plaintiff's case this restrictive provision of the Constitution of 1880 does impair the obligation of a contract. *Von Hoffman* v. *Quincy*, 4 Wall. 535 [71 U. S. bk. 18, L. ed. 403]; *Nelson* v. *St. Martin's Parish*, 111 U. S. 716 [Bk. 28, L. ed. 574].

The judgments of the Supreme Court of Louisiana are therefore reversed, and the cases are remanded to that court for further proceedings not inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

STATE OF LOUISIANA, *ex rel.* SAMUEL R. STEWART, *Plff. in Err.*,

v.

POLICE JURY OF JEFFERSON, LEFT BANK.

(See S. C. "*Stewart* v. *Jefferson Police Jury*," Reporter's ed. 135-137.)

Construction of state statutes—limit of taxation in Louisiana for indebtedness.

1. The Law of Louisiana, requiring the court when rendering a judgment against a parish to order the levy of a tax to pay it, is properly construed with reference to the tax limit fixed by the Act of 1872.

2. A judgment creditor upon a judgment obtained on a contract made subsequent to the passage of the Act of 1872 is not entitled to a *mandamus* to compel the levy of a tax in excess of the limit fixed by the Act.

[No. 71]

Submitted Nov. 18, 1885. Decided Dec. 21, 1885.

IN ERROR to the Supreme Court of the State of Louisiana.

The history and facts of the case appear in the opinion of the court.

Messrs. **Charles Louque** and **B. F. Jonas**, for plaintiff in error.

No counsel appeared for the defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This, like the two cases just disposed of, is a writ of error to a judgment denying the plaintiff a writ of *mandamus*.

C. W. Besancon was employed as an attorney, by a resolution of the Police Jury, passed December 11, 1874, to defend in certain suits about roads in the parish; and for services in that behalf rendered during the years 1875 and 1876 he recovered against the Police Jury of the parish a judgment for $1,138 on April 7, 1877.

This judgment he afterwards assigned to Stewart, who procured a writ of *mandamus* to compel the Police Jury to levy a tax to pay it. The case came by appeal into the Supreme Court of the State, which at first affirmed this judgment, but on a rehearing finally reversed the order of the inferior court and denied the writ.

The opinion rendered on the first hearing was based upon the proposition that the limit of taxation of the parish for the years 1875 and 1876 was 14½ mills on $100, and that the statute then required that when a court, in a case like this, rendered a judgment against the police jury, it should at the same time order the levy of a tax sufficient to pay it. And though no such order was made in plaintiff's case, the opinion held that the law in this respect became a part of the judgment, and the plaintiff was entitled to the writ to enforce the levy and collect the tax.

On the rehearing the court decided that this Act of 1869, which had permitted a tax on the parish to the extent of 14½ mills, had been repealed by the Act of 1872.

The first section of that Act is as follows:

Section 1. *Be it enacted, etc.*, That section 7 of the Act recited in the above mentioned title and approved March 8, 1871, be so amended and re-enacted as to read as follows: "That no city or other municipal corporation shall levy a tax for any purpose which shall exceed 2½ per centum on the assessed cash value of all the property therein listed for taxation, except the City of New Orleans, which may levy a tax of 2½ per centum; nor shall the police jury of any parish levy a tax for any parish purposes, except to pay indebtedness incurred prior to the passage of this Act, during any year, which shall exceed 100 per centum of the state tax for that year, unless such excess, whether levied by village, city or parochial authorities, shall first be sustained by a vote of the majority of the said voters of said village, city or parish, at an election held for that purpose. No *per capita* tax except the poll tax authorized by the Constitution, shall be assessed or collected in this State."

If this Act was the measure of the taxing power of the parish in 1874, 1875 and 1876, when the contract with Besancon was made and the services rendered, then it is conceded that there is no right to a *mandamus* in this case.

The Supreme Court of Louisiana held this to be so, and we are not prepared to say they are wrong in a construction of their own statutes, both of which were in existence when the contract was made.

It is insisted, however, on the part of the plaintiff, that the law which required the court, when rendering a judgment against the parish, to order the levy of a tax sufficient to pay the judgment, was not repealed by this Act of 1872 and was unaffected by it, and therefore he should now have by writ of *mandamus* what he ought to have had by the order of the court as part of his judgment. To this the court in its opinion replies that the Act of 1872 being an absolute limit to the power of taxation by the parish authorities, any order of the court rendering the judgment should be in subordination to that limit and must have been governed by it. So that, though the power of a court to order a levy sufficient to pay its judgment, as a part of the judgment itself, may have remained, it could levy by that order no tax beyond the limit fixed by law at the time the contract was made, unless that limit had been enlarged instead of diminished by subsequent statutes.

In both these views of the case we concur; and the judgment of the Supreme Court of Louisiana is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

COUNTY OF SAN MATEO, *Plff. in Err.*, [138]
v.
SOUTHERN PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 138-142.)

Practice—dismissal of writ of error on settlement of controversy—costs.

Where it appears that there is no longer an existing cause of action between the parties to a writ of error pending in this court, it will be dismissed.

[No. 106.]

Argued on merits, December 19, 20, 21, 1883. Restored to original position on the docket, October 15, 1883. Motion to dismiss submitted, December 17, 1885. Decided December 21, 1885.

IN ERROR to the Circuit Court of the United States for the District of California.

On motion of plaintiff in error for leave to dismiss.

The history and facts of the case sufficiently appear in the opinion of the court.

The elaborate argument on the merits was by the following counsel:

Messrs. **A. L. Rhodes, A. L. Hart,** *Atty-Gen. of California,* **Benjamin H. Brewster** and **Alfred Barstow,** for plaintiff in error.

Messrs. **Roscoe Conkling, George F. Edmunds, S. W. Sanderson** and **Henry Beard,** for defendant in error.

Mr. **John W. Ross,** special counsel for plaintiff in error, in support of motion.

Messrs. **A. L. Rhodes** and **Alfred Barstow,** counsel of record for plaintiff in error, *contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court: [138

NOTE.—*Parties on appeal or error.* None but parties to the record can be heard on appeal or writ of error. See Harrison v. Nixon, 34 U. S. (9 Pet.), 483, bk. 9, 201 *note*; Owings v. Kincannon, 32 U. S. (7 Pet.), 399, bk. 8, 727, *note.*

This motion was made on the 18th of November last by Mr. John W. Ross, who had been specially appointed by the board of supervisors of the County as counsel for that purpose. Upon suggestion that counsel of record desired to oppose the motion, an order was made that notice be given them to appear and show cause against it if they desired to do so. This they have done, and it now appears that the suit was begun in a state court April 22, 1882. An answer was filed by the Railroad Company May 25, 1882. On the 30th of June the suit was removed to the Circuit Court of the United States. An amended answer was filed August 16, 1882, and on the same day a demurrer was filed to the answer. On the 6th of September the counsel for the County executed to the Railroad Company a receipt, of which the following is a copy.

"County of San Mateo, Plaintiff, v. Southern Pacific Railroad Company, Defendant. } In U. S. Circuit Court, Ninth Circuit. No. 2807.

[139] Received, San Francisco, September 6, 1882, of the Southern Pacific Railroad Company, the sum of seven thousand two hundred and forty-seven $\frac{63}{100}$ dollars ($7,247.63), and the sum of $724.76 dollars attorney's fees, all to be credited upon any judgment that may be obtained by the plaintiff in the above entitled action.

In case judgment shall be rendered in said action in favor of said defendant, then said sum of money, less our fees agreed to be paid by said County, shall be paid into the treasury of the said County of San Mateo as a donation by said defendant in lieu of taxes for the fiscal year 1881-2, declared invalid. But in the event that a law shall be hereafter passed providing for a reassessment of property in said complaint in said action in said County for said year, then said sum of money is to be treated as a part payment for taxes for said fiscal year.

(Signed) Rhodes & Barstow,
Attorneys for San Mateo Co. in said action."

On the 20th of September the following stipulation was filed in the cause:

"The County of San Mateo v. The Southern Pacific Railroad Company. } No. 2807.

It is stipulated in the above entitled actions that each of them be and hereby is submitted upon the plaintiff's demurrer to the first affirmative defense (second defense) in the defendant's answer. And it is further stipulated that judgment final in the action may be rendered upon the demurrer, it being agreed that for the purpose of this proceeding the other defenses are withdrawn from the consideration of the court.

Rhodes & Barstow,
Attys. for plaintiff.
L. D. McKisick,
Atty. for defendant."

On the 25th of September a judgment was rendered upon the demurrer in favor of the defendant and the suit dismissed. The next day a writ of error was brought to this court and docketed here October 13, 1882. The case was elaborately argued before us December 19, 1882; [140] but before a decision was reached a stipulation was entered into between the parties, as follows:

"In the Supreme Court of the United States.
The County of San Mateo v. Southern Pacific Railroad Company. } No. 1063

Whereas, certain actions brought by the People of the State of California, or by certain counties of said State, against said defendant and other railroad companies operating railroads in said State, for the recovery of taxes assessed against said companies for state and county purposes, were, during the month of August last, tried before and submitted to the Circuit Court of the United States, Ninth Circuit, for the District of California, which actions have since been decided against the plaintiffs;

And whereas, the attorneys for the respective parties to said actions against whom judgments have been rendered intend to sue out a writ or writs of error in one or more of said actions, and to prosecute the same with as much diligence as possible, and to move the supreme court that the same be advanced on the calendar for argument;

It is hereby stipulated by and between the parties to the first mentioned action that the further consideration of the said action by the supreme court may be deferred until the argument of one or more of the last mentioned cases.

San Francisco, September 18, 1883.

(Signed) A. L. Rhodes,
Atty. for plff. in error.
(Signed) S. W. Sanderson,
Atty. for defendant."

And thereupon the following order was made:

"The County of San Mateo, Plaintiff in Error v. The Southern Pacific Railroad Company.

The parties having stipulated that the further consideration of this cause may be postponed until certain other cases are disposed of, this cause is restored to its original position on the docket, there to await the further action of the court."

It now appears that, according to the claim of the counsel of record, there is due on account of the taxes sued for, including penalty, attorneys' fees, and interest at the rate of 2 per cent per month, from the time of delinquency until now, the sum of $14,899.07. It also appears that on the 11th of the present month the Railroad Company paid into the treasury of the County the sum of $7,613.30. The County has also had the use of the $7,247.63 paid on the 6th of September, 1882, from the time of such payment until now. The only condition attached to the payment made on the 11th of this month is that, if when the account is finally settled between the County and Rhodes & Barstow upon the basis of the assessment roll, principal, interest, delinquency and attorneys' fees, it shall appear that the payments, including that to Rhodes & Barstow, are more than the actual amount due, the excess shall be returned to the Railroad Company. The payments have been:

To Rhodes & Barstow, taxes	$7,247 63
Attorneys' fees	724 76
To the County	7,613 30
In all	$15,585 69

As this is more than the entire sum estimated

by the counsel for the plaintiff to be due, it is clear that the debt for which the suit was brought has been unconditionally paid and satisfied.

As to the objection that this was by agreement of parties made a test case, and many others are depending on its adjudication, it is sufficient to say that both sides agree that the suit of the County Santa Clara against the same Company presents all the questions that are in this case; and that the parties have stipulated this need not be taken up for decision until that is heard. The interests of the State, therefore, will be as well protected by the determination of that case as of this. *For the reason that there is no longer an existing cause of action in favor of the County against the Railroad Company this writ of error is dismissed, each party to pay its own costs.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WINCHESTER AND PARTRIDGE MANUFACTURING COMPANY, *Plff. in Err.*,

v.

EDWARD CREARY, WILLIAM BRUGGERHOFF, ANDREW NEIL, PAUL PRESSLER, N. R. MORRIS AND JOHN HANCOCK.

(See S. C. Reporter's ed. 161-167.)

Evidence — declarations of vendor or agent of vendee made after transfer of possession—when admissible—fraud.

1. Declarations of the vendor of personal property and of the agent of the vendee, made after the surrender of such property by the vendor to such agent, are inadmissible against the vendee to show the character of the sale when made.

2. Declarations of the vendor after sale are inadmissible against the vendee in support of a charge of combination or conspiracy to defraud creditors, unless the alleged common purpose to defraud is first established by independent evidence, and unless they have such relation to its execution as to constitute a part of the *res gestæ*.

3. Where the vendor, after the surrender of possession, remains merely as a clerk or salesman, he is not in possession within the meaning of the rule allowing in favor of creditors, proof of the declarations of a vendor of personal property, who is allowed to control, manage and dispose of it after sale.

[No. 65.]

Argued Nov. 17, 18, 1885. Decided Dec. 21, 1885.

IN ERROR to the Circuit Court of the United States for the Western District of Texas.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr **M. P. Morris**, for plaintiff in error.

Messrs. **B. D. Lee, Jeff. Chandler** and **Eppa Hunton**, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The Winchester and Partridge Manufacturing Company, a Wisconsin corporation, brought this action to recover damages for the seizure and sale under an attachment sued out, on the 30th day of March, 1882, by J. E. Hayner & Co., against the property of John A. Webb & Co., of certain goods, wares and merchandise, constituting a stock in trade; of which property the plaintiff claims to have been, at the time the attachment was issued and levied, the owner by purchase from the defendants in the attachment suit. The seizure and sale were made by direction of Hayner & Co., who, prior to the levy, executed to the defendant Creary, the officer who received the attachment, an indemnifying bond with sureties. Before the levy the officer was informed, by plaintiff's agent and also by John A. Webb, that the property belonged to plaintiff.

The defense proceeds upon the ground that the alleged sale was fraudulent and void as against the defendants, Hayner & Co., and other creditors of the vendors.

The evidence, so far as competent, tended to establish the following facts: on and prior to the 13th of March, 1882, John A. Webb and Joseph W. Webb were engaged at Austin, Texas, under the firm name of John A. Webb & Co., in selling wagons, agricultural implements, machinery, etc. In the course of business they became largely indebted to various persons, firms and corporations with whom they had dealt; among others, to the plaintiff in the [163] sum of $19,000, and to the defendants, Hayner & Co., in the sum of $16,262. On the day last named they sold, after inventory and by bill of sale, their entire stock in trade and a large amount of unsettled accounts, to the plaintiff for the sum of $48,000, which was at that time the fair value of the property. Of the purchase price, $19,000 was paid by the cancellation of plaintiff's claim against the vendors; and the balance was paid by its promissory notes, of different amounts and payable at different times. These notes were used by Webb & Co. in payment of their debts, no part of them being withheld from creditors. At the time of the sale the vendors were insolvent. That fact was recognized by them, and was known as well to plaintiff as to Hayner & Co., and to other creditors. By the sale of March 13, 1882, the vendee intended to obtain, and the vendors intended to give to it, a preference over all other creditors. Before the sale the plaintiff requested Webb & Co. to transfer to it only so much of their property as was necessary to discharge its claim. This was refused by Webb & Co., who, in view of the character of their stock, insisted upon selling nothing less than the whole of it, together with their unsettled accounts. Plaintiff would not have purchased at all if Webb & Co. had been able to secure them in any way. It made the purchase because there was no other mode of saving its claim. Immediately upon the sale being effected, Webb & Co. surrendered, and the plaintiff by its agent Spaulding took possession of the articles sold; and through him thereafter and until the before mentioned attachment was levied, conducted the business, exercising absolute control over the property. Within a day or two after taking possession, the plaintiff caused such an alteration in the sign of the establishment as showed that the business was being conducted by it as the successor of John A. Webb & Co. After the sale the members

NOTE.—*Sales; fraud; possession retained by vendor.* See Brooks v. Marbury, 24 U. S. (11 Wheat.), 78, bk. 6, 433, note; Smith v. Acker, 23 Wend. 653, *note in L. ed.*

of that firm remained in the employment of plaintiff, as clerks or salesmen, at a fixed monthly compensation. This was in pursuance of an understanding with the plaintiff at the time of the sale; their knowledge of the business and their acquaintance with customers being re-
[164] garded by it as important in the disposition of the property. Plaintiff also retained in its employment others who had been clerks for Webb & Co. While the latter thought they had been unduly pressed by Hayner & Co., and for that reason did not at the time of the sale feel as kindly towards them as towards other creditors, and intended by the sale to give a preference to other creditors over Hayner & Co. (of which fact plaintiff was informed at the time of its purchase), they had no purpose to hinder and delay Hayner & Co. in the collection of their debts, except as that result was involved in their giving preference to the plaintiff; nor had plaintiff any purpose, in the whole transaction, except by means of the purchase to secure its own debt. The evidence discloses a race of diligence between creditors, who knew the failing condition of their common debtors, and knew that the latter had the right to make a preference among them.

The defendants, in their answer, charge that the alleged purchase by plaintiff was pursuant to a combination and conspiracy between it and the firm of John A. Webb & Co., whereby a pretended sale was to be made with a secret reservation of an interest in the vendors beyond what was necessary to discharge plaintiff's claim against them; in other words, that there was a purpose and design on the part of the vendors and the vendee, to put the property of the debtors in such condition that plaintiff would be secured while Webb & Co. held at bay other creditors whom they did not intend to prefer, particularly, Hayner & Co., and thus hinder and delay them in the collection of their demands.

It is contended that the charge of combination and conspiracy was established by various declarations and statements of John A. Webb, and of Spaulding, the plaintiff's agent, made after the sale of the 13th of March, 1882. To the admission of these declarations and statements as evidence the plaintiff objected. Its objection was overruled, and exception was taken in proper form to the action of the court. The competency of that evidence is the principal question to be determined.

[165] We are of opinion that the court below erred in allowing the defendants to introduce proof of these declarations and statements made after the sale. The instruction to the jury upon this point was in these words: "That it is true, as contended by the plaintiff, that if the sale, when made, was not vitiated because of fraud, and the sale was one that passed the title to the plaintiff as against the creditors of Webb & Co., then no act or declaration of the Webbs or that of Spaulding, afterwards made, could affect plaintiff's right to have and hold the property. Evidence of what was said and done afterwards by the person in possession and in charge of the goods has been admitted, with a view to ascertain the true character of the sale when made, and can only be considered with reference thereto." The jury must have understood, from this language, that they were at liberty, in ascertaining the true character of the sale when made, to find that plaintiff participated in the fraud charged, if the statements of John A. Webb and of Spaulding after the sale justified that conclusion. But such is not the law.

Webb & Co. were not in possession, within the meaning of the rule announced in some cases that permits, in favor of creditors, proof of the declarations of a vendor of personal property, who is allowed, after sale, to control, manage and dispose of it just as he had before done. They were not, in any legal sense, in possession after March 13, 1882. The plaintiff was itself in actual possession, exercising by its agent full control. The vendors, it is true, entered plaintiff's service as soon as the sale was made and possession was surrendered; but only as clerks or salesmen, with no authority except such as employees of that character ordinarily exercise. What they might say, not under oath, to others, after possession was surrendered, as to the real nature of the sale, was wholly irrelevant. They were competent to testify under oath, and subject to cross examination, as to any facts immediately connected with the sale, of which they had knowledge; but their statements out of court, they not being parties to the issues to be tried, were mere hearsay. After the sale, their interest in the property was gone. Having become strangers to the title, their admissions are no more binding on the vendee than the admissions of others. It is against all principle that their declarations, made after they had parted with the title and surrendered possession, should be allowed to destroy the title of their vendee.

It is, however, insisted that Webb's declarations after the sale were admissible in support of the charge of combination or conspiracy to defraud the defendants, Hayner & Co., and other creditors. Without extending this opinion by a review of the adjudged cases in which there was proof of concert or collusion between vendor and vendee to defraud creditors, and in which the subsequent declarations of the vendor were offered in evidence against the vendee to prove the true character of the sale, it is sufficient to say that such declarations are not admissible against the vendee, unless the alleged common purpose to defraud is first established by independent evidence, and unless they have such relation to the execution of that purpose that they fairly constitute a part of the *res gestæ*. There was no such independent evidence in this case, and there is no foundation for the charge of a conspiracy between the vendors and the vendee to hinder creditors outside of certain statements which Webb is alleged to have made after his firm had parted with the title and surrendered possession.

It is argued that these subsequent declarations of Webb were competent for the purpose of contradicting him as a witness in behalf of the plaintiff, by showing that he had made statements out of court different from those made as a witness in behalf of the plaintiff. No foundation was laid for any such use of those declarations. Besides, if any such foundation had existed, the court should have instructed the jury that in determining, between the parties to the record, the true character of the sale, the subsequent declarations of Webb

were competent, only as impeaching his credibility as a witness.

It is also contended that the declarations and admissions of Spaulding, the plaintiff's agent, in controlling and disposing of the property, were evidence against the plaintiff. But this position cannot be sustained. What Spaulding and the Webbs did, in and about the management of the property after the sale, could be proven if it served to explain the nature and extent of plaintiff's possession. It was for the jury to say whether there was a real change of possession and control. But nothing that Spaulding said, after the sale, to others, was competent upon the issue as to the character of the sale; that is, whether it was made in good faith, or with the intent on the part of Webb & Co. and the plaintiff to hinder and delay creditors. Spaulding was plaintiff's agent to control and manage the property. It was not within the scope of his agency to make admissions or declarations as to the circumstances under which, and the purpose for which, the plaintiff bought the property. Such admissions or declarations are only recitals of the details or circumstances of a past occurrence, and are not proof of the existence of the occurrence. They constitute, in their essence, hearsay evidence.

We are of opinion, upon the whole case, that the jury were misdirected as to the law of the case, by those portions of the charge which allowed them to consider as evidence the subsequent declarations or admissions of Webb and Spaulding, in respect to the true character or nature of the sale to plaintiff.

The judgment is reversed, with directions to set aside the verdict and award a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

R. W. MOWER, *Plf. in Err.*, *v.* NATHAN FLETCHER AND JOHN D. BICKNELL.

SAME *v.* NATHAN FLETCHER.

(See S. C. Reporter's ed. 380-386.)

Title to lieu school lands in California—preemption—confirmation.

1. If the proper officers of the United States approve a selection of lieu school lands, the school sections being in disputed territory outside the limits of an unsettled survey by the United States of a private claim, and issue the proper certificate thereof, and the purchaser under such a title enters into the possession of the land and improves, cultivates and holds it, no one by forcibly or surreptitiously getting into possession can make a preemption settlement which will defeat his title.

2. The Act of March 1, 1877, confirmed the title of the State of California to the lands in question; and such confirmation inured to the benefit of those holding under the State.

[Nos. 102, 103].

Argued Dec. 17, 18, 1885. Decided Jan. 4, 1886.

IN ERROR to the Supreme Court of the State of California.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **W. J. Johnston, U. J. Baxter** and *Edwin Baxter*, for plaintiff in error.

Messrs. **James K. Reddington,** and **M. D. Brainard,** for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court: [381]

The federal question in each of these cases is the same, and it arises on the following facts: By the Act of March 3, 1853, 10 Stat. at L. 244, chap. 145, "to provide for the survey of the public lands in California, the granting of preemptions therein, and for other purposes," sections 16 and 36 of the public lands in each township, surveyed or unsurveyed, were granted to the State "for the purposes of public schools." By section 7 it was provided that if section 16 or section 36 in any township should be taken by a private claim other lands might be selected in lieu by the proper authorities of the State. A plat of the survey of township 2 south, range 13 west, San Bernardino meridian, was filed in the United States land-office at San Francisco, April 22, 1868, and on the same day the State's locating agent selected S. ½ N. W. ¼ and N. ½ S. W. ¼, sec. 32, in that township, in lieu of S. E. ¼ sec. 36, T. 4 S., R. 4 W., same meridian, "claimed to be within a Mexican or Spanish grant." In the case to which Fletcher alone is defendant in error it is found as a fact "that at the time of making said application and selection the S. E. ¼ of sec. 36 * * * was and has been ever since and is now in place, and is the property of the State of California, and has never been under the claim of any confirmed and finally surveyed Mexican or Spanish grant." In the other case there is no finding on this subject, but it is found "that at the time of said selection and location the owners of the Rancho Sausal Redondo claimed that said (selected) lands were within the limits of said rancho." [382] According to the findings in the last case the dispute between the United States and the claimants of the rancho seems to have continued until about March 22, 1875, when a survey was finally approved that excluded the selected lands from the grant, and a patent was issued according to this survey. The lieu selection as made by the agent was duly certified by the Commissioner of the General Land-Office and the Secretary of the Interior to the State, November 23, 1871, and the land selected was patented by the State to Elmore W. Squiers, October 20, 1875, who had bought from the State a long time before. The title thus acquired by Squiers afterwards passed to the defendant in error Fletcher, who, on the 20th December, 1875, entered into a contract with Mower, the plaintiff in error, for the sale of the W. ½ of the S. W. ¼ of the N. W. ¼, 20 acres, for $1,000, of which $500 was paid in hand, and for the balance Mower gave his note payable eighteen months after date, with interest at the rate of 1 per cent per month, taking back from Fletcher an agreement for a conveyance of the land on payment of the note. Under this contract Mower took possession of the land he bought, and on the 12th of March, 1876, made and filed with the register of the proper land-office a declaratory statement of his intention to claim under the preemption laws the whole of the S. ½ N. W. ¼ and N. ½ S. W. ¼ of the section including the twenty acres he had bought from Fletcher. On the 12th of December, 1876, he tendered to the register and re-

ceiver of the proper land-office proof of his settlement, improvements, and general compliance with the requirements of the preemption laws, and also tendered the price and all legal fees and commissions, and requested to be allowed to enter the lands as a preemptioner. This was refused by the register and receiver, and he thereupon appealed to the Commissioner of the General Land-Office, where the case is now pending undetermined. Mower moved upon the lands outside of the twenty acres in January, 1877. In doing so he took possession of a dwelling-house erected by Squiers. The lands had all been enclosed, and at the time Mower moved on to them the north eighty acres were enclosed on three sides, and there [383] were upon the tract a bearing orchard of about fifteen hundred trees, fifteen years old, and a dwelling-house, corrals, and out houses, all put there by Squiers.

On the first of March, 1877, Congress passed an Act "relating to indemnity school selections in the State of California," 19 Stat. at L. 267, chap. 81. Section 2 of that Act is as follows:

"Sec. 2. That where indemnity school selections have been made and certified to said State, and said selection shall fail by reason of the land, in lieu of which they were taken, not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth and thirty-sixth sections, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States; *Provided*, That if there be no such sixteenth and thirty-sixth sections, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land-office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed 320 acres for any one person; *Provided*, That if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land laws of the United States.

Section 3 declares that the confirmation shall not extend to lands settled upon under the homestead or preemption laws, "*Provided*, That such settlement was made in good faith upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of said lands to the State of California by the Department of the Interior."

Mower having neglected to pay his note when it fell due, Fletcher, on the 2d of August, 1877, after tendering a deed for the land, brought suit for the recovery of the money. Mower answered, setting up a failure of title to the land and therefore a want of consideration for the note. The supreme court held that Fletcher had good title, and gave judgment for the amount of the note and interest. To reverse that judgment the writ of error in the suit of [384] *Mower* v. *Fletcher* was brought.

On the 24th of April, 1879, Fletcher and Bicknell, who held title under the patent to Squiers, brought suit to recover possession and quiet their title to the part of the lands upon which Mower had entered, not included in the twenty acres sold by Fletcher to him. To this Mower set up his preemption claim as a defense, and insisted that the title under the selection by the State was invalid. The supreme court decided that Mower acquired no right to the possession by his atttempt at a preemption settlement, and gave judgment accordingly. To reverse that judgment the writ of error in *Mower* v. *Fletcher & Bicknell* was brought.

All questions of mere irregularity in the selection of lieu lands by the State, and in the grant by the State to Squiers, were conclusively settled, so far as the parties to this suit are concerned, by the issue to the State of the lists, certified by the Commissioner of the Land-Office and the Secretary of the Interior, and by the patent from the State to Squiers. *Frasher* v. *O'Connor*, 115 U. S. 102 [*ante*, 311]. By an Act of August 3, 1854, 10 Stat. at L. 346, chap. 201, it was provided that where a law granting lands to the States or Territories does not convey the fee-simple title, "lists of such lands * * * certified by the Commissioner of the General Land-Office, under the seal of his office, either as originals, or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such Act of Congress, and intended to be granted thereby but where lands embraced in such lists are not of the character embraced by such Acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby." This statute is now section 2449 of the Revised Statutes.

In the argument for the plaintiff in error it was contended that this S. E. ¼ of section 36 was not actually within the limits of any Mexican claim when the lieu selection was made and that consequently the certified list conveyed no title.

It is found as a fact in the case of *Mower* v. *Fletcher* that when the selection was made the S. E. ¼, section 36, "was, and has been ever since, in place, and is the property of the State of California, and has never been under the claim of any confirmed and finally surveyed Mexican or Spanish grant." This is not inconsistent with the fact that when the selection was made the land was within the limits of an unconfirmed Mexican claim, the boundaries of which had not been fixed by a final survey. The finding that the S. E. ¼ of section 36 *is* the property of the State is not, under the circumstances, the equivalent of a finding that it *was* the undisputed property of the State when the lieu selection was made. Such being the case we are at liberty to presume it was as represented, within the claim of a Mexican grant when the selection was made and certified. As in the case of *Mower* v. *Fletcher & Bicknell* there is no finding on the subject, the same presumption arises there.

In *Frasher* v. *O'Connor* it was decided that the survey made in 1868 of the Sausal Ranch Redondo was sufficient to authorize the State to select, under its various grants, lands outside of the then surveyed boundaries, subject, of course, to a defeat of title if in the end the survey as made should be set aside and the boundaries of the grant finally extended so as to in

clude the selections. This was because by section 8 of the Act of July 23, 1866, 14 Stat. at L. 220, chap. 229, it was provided that "all land not included in such grant as so set off shall be subject to the general laws of the United States." As the survey finally made fixed the boundaries so as to exclude the selected lands, the title of the State related back to the selection, and this inured to the benefit of Squiers under his patent from the State.

The question still remains, however, whether, if school selections are found in disputed territory outside the limits of an unsettled survey by the United States, of a private claim, the State must wait until the boundaries are finally fixed before it can get its lieu lands. Without determining whether, if lieu lands are selected and certified under such circumstances, the United States can reassert title when it is finally ascertained that the school sections were not covered by the claim, we have no hesitation in saying that if the proper officers of the United States approve such a selection and issue the proper certified lists, and a purchaser under such a title enters into the possession of the land and improves, cultivates, and holds it, no one by forcibly or surreptitiously getting into possession can make a preemption settlement which will defeat his title. *Atherton* v. *Fowler*, 96 U. S. 513 [Bk. 24, L. ed. 732]. As was said in that case, p. 519, [734] "The generosity by which Congress gave the settler the right of preemption was not intended to give him the benefit of another man's labor and authorize him to turn that man or his family out of his home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling house did not mean to seize some other man's dwelling."

This disposes of the claim of preemption, and that being out of the way it is clear that the Act of March 1, 1877, confirmed the State's title and made that of Fletcher good when the note of Mower to him fell due, and when he was bound to convey under his contract.

The judgment in each of the cases is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN C. WEBB, Admr. of AMANDA A. STERLING, Deceased, ET AL., *Appts.*,

v.

HENRY BARNWALL, ET AL., Assignees in Bankruptcy of CRAWFORD, WALSH, SMITH AND COMPANY as Partners, and of ROBERT W. SMITH ET AL., as Individuals.

(See S. C. Reporter's ed. 193-197.)

Statute of Limitations—Bankruptcy Act—practice.

1. A bill in equity to enjoin a judgment obtained in an action at law on a mere legal title is a continuation of that suit.

2. Such a bill against an assignee in bankruptcy may be filed within the time limited by section 5057, R. S., after the complainant has been evicted or his title held insufficient, where he was in possession under what he supposed to be a good title.

[No. 99.]

Argued Dec. 17, 1885. Decided Jan. 4, 1886.

APPEAL from the Circuit Court of the United States for the Middle District of Alabama.

The history and facts of the case appear in the opinion of the court.

Messrs. **Wm. E. Earle** and *H. A. Herbert*, for appellants.

Messrs. D. S. Troy and *H. C. Tompkins*, for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

The bill of complaint brought by Amanda Sterling and her four sons against Barnwall and Gaynor, as assignees in bankruptcy, was dismissed on demurrer, solely, as appears from the opinion of the circuit judge, because the suit was barred by the limitation of suits by or against assignees in bankruptcy found in section 5057 of the Revised Statutes, to wit: [193]

"No suit, either at law or in equity, shall be maintainable in any court, between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

The bill sets out that on the 5th day of February, 1873, Robert W. Smith was the owner of certain real estate in the Town of Selma, in the bill fully described; and on that day he and his wife Sarah conveyed the same to Cary W. Butt in trust for the use and benefit of said Robert W. Smith and Charles Walsh; that afterwards said Walsh and Smith, being indebted to Edwin A. Glover in the sum of $20,000, caused the trustee Butt to convey this real estate, in which they had the sole beneficial interest, to said Glover, who received the same in satisfaction of the debt August 31, 1873; that Glover thereupon entered into possession of said property, and that he and his devisees have retained such possession ever since; that, by the will of Glover, who died in 1874, the real estate in question was devised to Amanda Sterling and her sons, the complainants.

The bill then alleges that Walsh and Smith were members of a copartnership with others, under the name of Walsh, Smith & Co., which owed the debt to Glover already mentioned as the consideration of the conveyance to him by Butt, the trustee; that said partnership and the individual members thereof, including Walsh and Smith, were declared bankrupts by the proper court on June 12, 1874, and that Henry W. Barnwall and William E. Gaynor were appointed assignees in said proceeding, and all the estate, both real and personal, of said bankrupts, was by the register duly assigned to them. The bill proceeds to show that these assignees instituted an action of ejectment against complainants, who were in possession of the land under the will of Glover, to recover that possession. This suit was begun in the District Court of the United States for the Middle District of Alabama in October, 1876. A judgment was rendered against complainants, which was affirmed on appeal to the cir- [194]

cuit court, December 19, 1877. Complainants allege that the plaintiffs in that suit recovered, on the ground that the legal title, which controls in a court of law, never was in Butt, the trustee, but by the Statute of Uses vested immediately in the said Walsh and Smith.

The bill then alleges that while the complainants may not have had the legal title, and so could not successfully defend the action at law, they have a perfect and just title in equity which, in this suit, they ask the court to protect. They, therefore, pray for a decree to compel defendants to convey to them the strict legal title which they hold, and for an injunction against them in regard to the judgment, which they ask may be perpetual.

This bill was filed August 1, 1881, within fifteen months after final judgment in the action of ejectment.

[196] The circuit court, treating the bill as an original bill and as the commencement of a new and independent suit, held that the period of limitation of such suits against the assignees began to run at the date of their appointment in 1874. The two years had, therefore, long been passed and the claim was barred.

But if we assume, as appellants argue, that the occasion for a suit in equity did not arise until the final judgment at law, then the bill in this case was in time.

We think the latter is the sound rule. Complainants were in possession under what they supposed to be a good title, until they were evicted or their title held to be insufficient; they had no occasion to seek to establish their title by a suit in equity, and such a suit they brought within the time of the statute after they ascertained that it was necessary to protect their possession.

But if this were not so clear, it must be held in the courts of the United States, under previous decisions of this court, that the present bill in equity to enjoin the judgment at law, obtained on the mere legal title, while the equity is in the other party, is a continuation of that suit, and therefore the proceeding was commenced when the action of ejectment was brought.

In the case of *Simms* v. *Guthrie*, 9 Cranch, 19 [13 U. S. bk. 3, L. ed. 642], Simms had obtained judgment in an action of ejectment in the circuit court on a patent from the State of Virginia against Guthrie. Thereupon Guthrie filed his bill in chancery in the same court setting up a superior equitable title by a prior entry to that on which Simms' patent had issued, and asking an injunction and a decree for the legal title. It was urged as an objection to this bill that there were necessary parties who could not be made defendants in the circuit court. But this court said that for omitting to bring in these parties an original bill might be dismissed. That, however, was a bill to enjoin a judgment in the circuit court, and the bill must be

[197] brought in the same court, and the court would dispense with the parties who could not be brought in. In *Dunn* v. *Clarke*, 8 Pet. 1 [33 U. S. bk. 8, L. ed. 845], where an equitable title was set up by bill in chancery against a judgment at law recovered in a circuit court of the United States, the court said: "The injunction bill is not considered an original bill between the same parties as at law." It also said if Graham, the successful party in the judgment at law, had lived, the court might have issued an injunction to his judgment at law without a personal service of process except on his attorney, and it is now the settled practice to order such substituted service on the attorney when the plaintiff in the judgment does not reside within the jurisdiction of the court.

In the case of *Dunlap* v. *Stetson*, 4 Mason, 549, *Mr. Justice* Story said: "I believe the general, if not the universal practice has been to consider bills of injunction upon judgments in the courts of the United States, not as original but auxiliary and dependent suits, and properly sustainable in that court which gave the original judgment, and has it completely under control." This language is cited with approval and the point illustrated in the case of *Jones* v. *Andrews*, 10 Wall. 327 [77 U. S. bk. 19, L. ed. 935], and in *Christmas* v. *Russell*, 14 Wall. 69 [81 U. S. bk. 20, L. ed. 762].

The case before us comes precisely within the principle of these decisions.

The bill in chancery is a continuation of the litigation commenced by the action at law, and its object is to enjoin the judgment in that suit and to correct its injustice by an equity proceeding in the same court.

The bar of the statute as to this relief cannot become perfect until two years of inaction have justified a plea of that kind.

The decree of the Circuit Court is therefore reversed and the case remanded to that court, with directions to overrule the demurrer, and for such further proceedings as to equity belongs.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOSEPH F. FIELD, *Appt.*,

v.

OLIVER DE COMEAU ET AL.

(See S. C. Reporter's ed. 187-190.)

Patent law—construction.

Letters patent, No. 155077, for an improvement in glove fastenings, is not infringed by a spring fastening which acts in a different manner; said patent not being for a combination of springs in every form for closing the wrists of gloves.

[No. 84.]

Submitted Dec. 7, 1885. Decided Jan. 4, 1886.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **Eugene N. Elliot**, for appellant.

No counsel appeared for appellees.

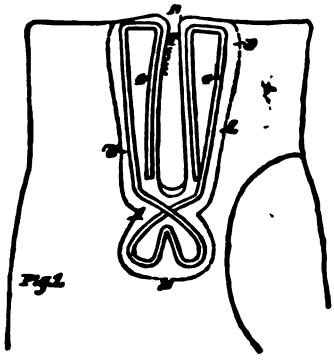
Mr. Justice **Matthews** delivered the opinion of the court:

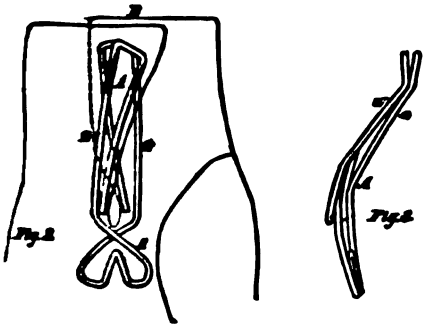
The appellant, who was complainant below, filed his bill in equity to restrain an alleged infringement by the appellees of letters patent No. 155077, for an improvement in glove fastenings issued to him September 15, 1874.

The bill was dismissed at the hearing on the ground that the defendants had not infringed

The material part of the specification forming part of the letters patent is as follows:

"The object of my invention is to cause a glove to fit closely to the hand and wrist of the wearer without the use of buttons or other fastenings; and I attain this object by extending a spring, A, entirely around the split portion B of the glove, in the manner plainly shown in Figure 1 of the accompanying drawing, so that when released the ends *a a* of the said spring shall overlap, as shown in Figure 2, and thus close the glove upon the wrist.





The spring is entirely concealed within the material of the glove, and may be secured to the latter in any suitable manner; but I prefer to simply stitch it in place, as indicated by the dotted lines *x* in Figure 1.

The spring may also be variously shaped; but I prefer to construct it of a single piece of wire, bent to the form shown, as I have ascertained by experiment that a spring of this form is most suitable for the purpose, while it possesses the further advantage of presenting no sharp or abrupt ends, which would be apt to force their way through the material of the glove.

The edge view, Figure 3, shows the method of bending the spring to conform to the shape of the hand of the wearer of the glove.

I am aware that springs have been combined with the wristlets of gloves, but they have always extended entirely around the latter, thus rendering it impossible to fold the glove, which was consequently clumsy and inconvenient to carry in the pocket. This objection, it will be evident, is entirely overcome by my invention.

I claim:

The combination, substantially as described, of a spring, A, with the split portion, B, of a glove, for the purpose specified."

The drawings referred to are annexed.

Judge Wheeler holding the circuit court, in deciding the case, stated the grounds of his action in dismissing the bill, in an opinion contained in the transcript, as follows:

"The orator has a patent, No. 155,077, dated September 15, 1874, for an improvement in glove fastenings, consisting of the combination of a spring inserted in the material of the glove, and extending around the edges of the slit, which permits drawing the wrist of the glove over the hand, and adjusted so as to spring open by the insertion of the hand and to close automatically and overlap itself, and cause the edges of the slit to overlap each other when the glove is on. The defendants deny infringement. They make and sell for use springs for gloves to be inserted into the material, and with arms extending along each edge of the slit, jointed at the apex, working together like the blade and handle of a jack-knife. The only question is, whether the use of such springs is an infringement. The plaintiff stated in the specification of his patent that springs had been combined before with the wrists of gloves, but of a different form. So his patent is not and could not be maintained as a patent for the combination of springs in every form with the wrists of gloves to close them. It proposes to be and is a patent of his style of spring combined with the wrists of gloves for that purpose. The question is, whether the defendants' spring is substantially like his. His is a spring throughout, and pulls constantly upon the parts of the material until they come together and overlap. The defendants' has stiff arms, and pulls the parts together only when closed far enough to have the spring on one arm operate in the opposite direction upon the cam-shaped end of the other, and it pulls the edges apart until the arms are at right angles to each other when opened far enough to cause the spring to act the other way on the cam. When so opened it will not close itself as the orator's will, but has as much tendency to remain open as it has to remain closed after being closed. It is said by an expert called by the orator that if the edge of the cam, which throws the arms apart, was removed, the spring would become more like the orator's in its operation; but he probably failed to notice that the spring operates on the same edge of the cam, although on different sides of its pivot, both in opening and closing the spring; and that if this edge was removed the spring would not move arms together or either way at all. The form of the defendants' spring is different from the orator's; its mode of operation is different, and the result of its operation is somewhat different. It cannot be said to be the same as the orator's, or to be substantially like the orator's. Each got the idea of closing the wrists of gloves by means of springs from others; the orator carries out the idea in his mode and the defendants in theirs, and as neither has control of anything but the particular mode, neither can justly say that the other uses his mode." [190]

For these reasons, which we cannot restate in a more satisfactory manner, the decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[198] JOHN DOE, *ex dem.* State of ALABAMA and *ex dem.* JOHN SWANN and JOHN A. BILLUPS, Trustees, etc., *Plff. in Err.*

v.

VANCE C. LARMORE.

(See S. C. Reporter's ed. 198-200.)

Public lands—railroad grants—statute construed as extension of time—rights of grantees.

1. The Act of April 10, 1869, to renew certain grants of lands to the State of Alabama, previously granted by the Act of June 3, 1856, to aid a certain railroad company, is not to be construed as making a new grant but is to be treated as an extension of the time named in the original grant for the completion of the road.

2. The completion of the road within the time fixed by the new Act perfected the title of the company under the original grant; and this title inured to the benefit of its prior grantees.

[No. 98.]

Submitted Dec. 17, 1885. Decided Jan. 4, 1886.

IN ERROR to the Supreme Court of the State of Alabama.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **Samuel F. Rice**, for plaintiff in error.

Mr. **John T. Morgan**, for defendant in error.

[198] *Mr. Chief Justice* **Waite** delivered the opinion of the court;

This case cannot be distinguished in principle from *St. Louis, Iron Mountain and Southern Railway Company* v. *McGee*, 115 U. S. 469 [*ante*, 446], decided at the present Term. The suit was ejectment to recover the possession of certain tracts of land granted June 3, 1856, by an Act of Congress to the State of Alabama to aid in building a railroad "from Gadsden to connect with the Georgia and Tennessee and Tennessee line of railroad through Chattanooga, Wills, and Lookout Valleys." 11 Stat. at L. 17, chap. 41. Sections 3 and 4 of this Act are identical with sections 4 and 5 of the Act involved in *McGee's Case;* and they provided that if the road was not completed in ten years all unsold land should revert to the United States. On the 30th of January, 1858, the Legislature of Alabama by a joint resolution transferred this grant to the Wills' Valley Railroad Company, "to be used and applied by said company upon the terms, conditions, and under restrictions in said Act of Congress contained." Sess. Laws Ala. 1857-8, p. 431.

[199] On the 29th of June, 1860, the lands involved in this suit were certified to the State by the Commissioner of the General Land-Office under the grant; and on the 20th of February, 1861, they were sold by the company to Larmore, the defendant, and certain other persons, who paid the purchase money and entered into possession. The proceeds of the sale were used in building the road, and, on the 7th of June, 1866, the company conveyed the lands in fee simple to the purchasers "against the claim and title of the said Wills' Valley Railroad Company, and of any person or persons claiming under said company." The other grantees named in the deed have since conveyed all their interest to Larmore, who is now in possession. The road was not completed within ten years after the passage of the Act of Congress; and on the 10th of April, 1869, another Act was passed, entitled "An Act to Renew Certain Grants of Land to the State of Alabama" (16 Stat. at L. 45, chap. 24), by which this grant was revived and renewed.

The name of the Wills' Valley Railroad Company was changed to Alabama and Chattanooga Railroad Company in 1868; and on the second of March, 1870, the company under that name obtained from the State a loan of state bonds to aid in the completion of its road. The road was afterwards finished so as to perfect title under the original grant. On the 8th of February, 1877, the State executed a deed to John A. Billups and John Swann, Trustees, which purported to convey the lands in dispute, under a compromise agreement with the railroad company, to protect the interests of the holders of the state bonds which had been loaned to the company in 1870.

The claim of the plaintiff is, that as the lands in question were not fully earned when the sale was made under which Larmore holds title, and the road was not completed within the ten years fixed by the Act of 1856, these lands, as well as those not sold at the end of the ten years, reverted at the end of that time to the United States and passed again to the State under the Act of 1869, which is to be construed as a new grant. We held otherwise in *McGee's Case;* and under that ruling the Act of 1869 is to be treated as an extension of the time named in the original Act for the completion of the road. As between the company and Larmore the title passed under the deed of 1866, which was executed to give effect to the sale in 1861. The completion of the road within the time fixed by the new Act perfected the title of the company under the original grant, and this title inured at once to the benefit of Larmore.

As the judgment below sustained Larmore's title and dismissed the suit, it was right; and it is consequently affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HENRY C. BROWN, *Appt.*,

v.

JAMES B. GRANT, Governor, WILLIAM H. MEYERS, Lieutenant-Governor, MELVIN EDWARDS, Secretary of STATE, AND D. F. URMY, Attorney-General of the STATE OF COLORADO, ET AL.

(See S. C. Reporter's ed. 207-213.)

Admission of State—property of Territory passes—capitol site—jurisdiction.

1. Unless otherwise declared by Congress, the title of every species of property owned by a Territory passes to the State upon its admission to the Union.

1. Lands conveyed to a Territory "its successors and assigns forever," and duly accepted as the site for its capitol, pass to the State when admitted, although the Territory may not have occupied them, there being no condition requiring the erection of buildings thereon within any specified time.

2. The question whether the grantor has been deprived of his property without due process of law is within the jurisdiction of this court.

[No. 588.]

Argued Dec. 14, 15, 1885. Decided Jan. 4, 1886.

APPEAL from the Circuit Court of the United States for the District of Colorado.

The history and facts of the case appear in the opinion of the court. See, also, the report of the opinion of this court dismissing a writ of error to the Supreme Court of Colorado in a suit between these parties involving the subject matter of this suit. *Brown* v. *Colorado*, Nr. 27, 132; 5 Colo. 496.

Messrs. **James H. Brown, G. C. Bartels** and **J. H. Blood,** for appellant.

Messrs. **Thornton H. Thomas** and *Theodore H. Thomas, Atty-Gen. of Colorado,* for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an appeal from the final decree of the Circuit Court of the United States for the District of Colorado, dismissing, upon demurrer to the bill, a suit in equity instituted in that court by Henry C. Brown against James B. Grant, Governor, William H. Meyers, Lieutenant-Governor, Melvin Edwards, Secretary of State, and D. F. Urmy, Attorney-General of the State of Colorado, and against certain other persons constituting a board of managers for the erection of the capitol building for that State.

The case made by the bill is substantially as follows:

By the third section of an Act of the Council and House of Representatives of the Territory of Colorado, entitled "An Act to Locate the Seat of Government of the Territory of Colorado," approved December 9, 1867, it was, among other things, provided that

"Sec. 3. The persons appointed, as aforesaid, in section 2 of this Act, shall, within sixty days after the date of their appointment, proceed to select a site for the capitol of said Territory, within the said City of Denver, which site shall contain not less than ten acres of land; and if the site so selected shall be conveyed to the Territory of Colorado by the person or persons holding the title thereto, without charge to said Territory, and so as to vest the title to the same, absolutely and in fee simple, in said Territory, the site so selected shall be and remain the property of said Territory, for the purpose of erecting a capitol and other public buildings thereon."

On the 11th of January, 1868, the plaintiff, by deed duly acknowledged, conveyed to the Territory a tract of ten acres of land, part of a larger tract owned by him in the immediate vicinity of Denver. The consideration is stated to be $1,000 paid to the grantor by the Territory, but the land was, in fact, donated by him in the belief that the erection thereon of the capitol and other public buildings would enhance the value of his adjoining lands. The deed contains the following recitals:

"The said land being so conveyed to said Territory in pursuance of the Act entitled 'An Act to Locate the Seat of Government of the Territory of Colorado, approved the 9th day of December, A. D. 1867,' so as to vest the title to the same absolutely and in fee simple in said Territory, for the purpose of erecting a capitol and other public buildings thereon only; to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining; and all the estate, right, title, interest and claim whatever of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever.

And the said party of the first part, the aforesaid parcel of land unto the said party of the second part, its successors and assigns, against the claim or claims of all and every person whatsoever, he, the said Henry C. Brown, does and will warrant and forever defend by these presents."

Contemporaneously with the execution of the deed, the Legislative Assembly of the Territory adopted a memorial to Congress, asking, for reasons therein stated, a liberal appropriation for the erection of suitable capitol buildings for the use of the Territory. By an Act of the Territorial Legislature, approved February 9, 1872, it was directed that proposals be received for the erection of a capitol building, and that it "be erected upon the ground heretofore donated to the Territory for that purpose by Henry C. Brown." On the same day another memorial to Congress was adopted, asking an appropriation of $100,000, collected from internal revenue taxes within the Territory, for the purpose of assisting in the erection of a capitol building at the seat of government of the Territory. Thereafter on 18th of February, 1874, another Act was passed providing for the appointment of capitol commissioners, with authority to have the custody of and expend in the improvement of the capitol grounds, and in the erection of capitol buildings thereon, money appropriated or donated for that purpose; to sell all lands and lots donated for capitol purposes, except capitol site, the money so raised to be used in the erection of a capitol building or buildings, to be completed, paid for and delivered to the Territory on or before January 1, 1876.

[209]

The bill alleges that the Territory of Colorado did on or about the first day of August, 1876, "depart this life," and on the same day, "by proclamation of U. S. Grant, the then President of the United States of America, the State of Colorado was admitted into the Union," the "said Territory never having during its life occupied or made use of said tract of land donated to it by your orator, either for the purpose of erecting capitol or other public buildings thereon, or for any other purpose whatsoever."

The Constitution adopted by the people of Colorado under the Enabling Act of Congress provided that the General Assembly should not change or locate the seat of government of the State, but at its first session, subsequent to the year 1880, should submit the question of its permanent location to the popular vote at a general election, until which vote no expenditure for capitol buildings should be made. The same Constitution provided "that all property, real and personal, belonging to the Territory of

Colorado at the adoption of this Constitution shall be vested in and become the property of the State of Colorado."

On the 9th of May, 1879, the plaintiff took possession of the ten acre tract and constructed around it a substantial board fence. At the [210] same time he executed and put on record a deed revoking and annulling his conveyance of 1868. The reason assigned in that deed for its execution is, that "neither the said Territory nor its successor, the State of Colorado, has ever accepted the said conveyance or located or erected a capitol or other public buildings on said tract of land as in and by said deed (of 1868) provided."

The bill alleges that plaintiff has been in complete possession of said land ever since May 9, 1879; that, at the general election, in 1881, the seat of government was located, by a popular vote, at Denver; and that her officers of state and board of managers for the erection of state capitol buildings at Denver are about to take and, unless restrained, will take possession of said ten acre tract for the purpose of erecting said buildings thereon.

He prays that they be enjoined from disturbing his possession of the premises until he shall receive just compensation therefor.

A demurrer to the bill having been sustained, upon the ground that it did not set forth a cause of action, the suit was dismissed.

As all the parties to this suit are cititzens of the State of Colorado the circuit court was without jurisdiction, unless the suit is one arising under the Constitution or laws of the United States. It is not clear upon what precise ground the plaintiff contends that the suit belongs to that class. We suppose his claim to be that when the Territory became a State, the property he had given to the former became his again, and that the provision in the Constitution of the State, "that all property, real and per- [211] sonal, belonging to the Territory of Colorado" at the adoption of that instrument "shall be vested in and become the property of the State of Colorado," deprived him of his property without due process of law; that is, it was thereby taken from him, for public use, without just compensation being first made, or in some legal mode secured, to him. Assuming that the suit, upon that basis, arises under the Constitution of the United States, it is difficult to conceive of one in which the question has merit.

Before the execution of the deed of January 11, 1868, the Territorial Legislature had located the seat of government at Denver. It was there when the appellant's gift was made. The gift had direct reference to the Territorial enactment authorizing commissioners to accept a conveyance of not less than ten acres of land, without charge to the Territory, and so as to vest in it an absolute fee-simple title. The title was so conveyed by Brown to the Territory, "its successors and assigns forever," for "the purpose of erecting a capitol and other public buildings thereon only." The deed was duly accepted; for, if the Act under the authority of which the land was obtained, and the execution and registration of the deed, are not complete proof of such acceptance, surely the Act of 1872, requiring the capitol building to be erected "upon the ground (t)heretofore donated to the Territory for that purpose by Henry C. Brown," is ample evidence of that fact. It is idle to say that the Territory never accepted the conveyance. Upon what legal ground, then, can the appellant defend his resumption of possession in 1879? His conveyance contained no condition under which he could demand the erection of a capitol building within any specified time, in default of which the property would revert to him. The Territorial Legislature wisely invested commissioners with authority to accept a conveyance of an absolute fee-simple title, and reserved to itself the determination of all questions concerning the time within which the proposed building should be erected. And it cannot be said, in view of the allegations of the bill, that the Territory did not move as rapidly in creating indebtedness for that purpose as the public necessities permitted or the public interests required. If it were conceded that the removal of the seat of government from Denver, or the abandonment of this land as the site of capitol buildings, would, under all the circumstances, entitle Brown to claim the property, or compensation therefor, it is sufficient to say that no such state of facts now exists.

But the appellant contends that he made this gift upon the implied condition that the *Territory*, not the State, should erect the public buildings in question. Apart from the fact that the terms of the deed are inconsistent with such a condition, the supposition cannot be indulged for a moment that the plaintiff did not look forward to the time when the Territory would become one of the States of the Union; an event which would necessarily tend to accomplish the very object that he had, as he avows, in making the donation, viz.: to increase the value of other lands owned by him, of which the ten acres in question formed a part. The reference in the deeds of 1868 and 1879 to the successors of the Territory is persuasive evidence of the fact that the plaintiff contemplated the organization of its people as a State. Now that the State proposes to construct capitol buildings on the land donated for that very purpose, the plaintiff asks the intervention of a court of equity to prevent her agents from entering upon the premises until he receives compensation for what was in law a donation to the public as an organized body, whether under a territorial government or as a State. He is not entitled to such aid.

The suggestion, that the clause of the Constitution providing that the State is the owner of all the property which the Territory held upon its becoming a State deprived him of his property, is not entitled to serious consideration. Unless otherwise declared by Congress, the title to every species of property owned by a Territory passes to the State upon its admission into the Union. The provision in the State Constitution to that effect was only declaratory of what was the law.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U

JOSEPH A. SMITH, *Appt.* and *Plf. in Err.*,

v.

WILLIAM C. WHITNEY, Secretary of the Navy, ET AL.

(See S. C. Reporter's ed. 167-186.)

Writ of prohibition to naval court-martial—jurisdiction of the Supreme Court of the District of Columbia—discretion—jurisdiction of this court—parties—practice—jurisdiction of naval court-martial, of naval officer serving as a chief of bureau and paymaster-general.

1. A final judgment of the Supreme Court of the District of Columbia on a petition for a writ of prohibition to the Secretary of the Navy, and a court-martial convened by his order to try a public officer for offenses punishable with dismissal, may be reviewed by this court, if the salary of which such officer might thereby be deprived exceeds $2,000.

2. Whether the court below should grant or refuse a writ of prohibition is not a matter of discretion where the court whose action is sought to be prohibited is clearly without jurisdiction, and the defendant objected to its jurisdiction at the outset and is without other remedy; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error by this court.

3. If an officer of the navy, while serving by appointment of the President as chief of a bureau and paymaster-general in the navy department, makes contracts or payments in violation of law, to promote the interests of contractors, he may lawfully be tried and convicted of scandalous conduct tending to the destruction of good morals and to the dishonor of the naval service, by a court-martial composed of naval officers; and a writ of prohibition will not issue to prevent such trial and conviction.

4. Where a court-martial has jurisdiction of the subject matter of the principal charge, the addition of another charge, varying in form but for the same or similar acts, affords no ground for issuing a writ of prohibition.

5. A naval court-martial may, at any time before its dissolution by the Secretary of the Navy, be recovened by him to reconsider its proceedings.

6. A writ of prohibition cannot be made to serve the purpose of a writ of error, or *certiorari*.

7. Upon an application for a writ of prohibition to a naval court-martial, the Secretary of the Navy should not be joined as a party defendant.

8. It seems that proceedings upon a petition for a writ of prohibition must be considered as on the common-law side of a court having both common-law and equity powers.

9. Whether the Supreme Court of the District of Columbia has power in any case to issue a writ of prohibition to a court-martial is not decided.

[No. 1145.]

Argued Dec. 11, 1885. Decided Jan. 4, 1886.

APPEAL from and in error to the Supreme Court of the District of Columbia.

Messrs. **Jeff. Chandler** and *Eppa Hunton*, for appellant and plaintiff in error.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for appellees and defendants in error.

Mr Justice **Gray** delivered the opinion of the court:

This was a petition, filed September 21, 1885, praying the Supreme Court of the District of Columbia to issue a writ of prohibition to the Secretary of the Navy, and to a general court-martial of naval officers convened by his order of June 25, 1885, to try the petitioner, a pay inspector in the navy, and, by appointment of the President, confirmed by the Senate of the date of June 27, 1882, "Chief of the Bureau of Provisions and Clothing and Paymaster-General in the Department of the Navy, with the relative rank of Commodore," upon certain charges and specifications, a copy of which was made part of the petition.

The first of those charges was "scandalous conduct tending to the destruction of good morals," under which were fourteen specifications, alleging that "the said Joseph A. Smith, then being a pay inspector in the United States Navy, and having been theretofore, as such officer of the navy, duly appointed Chief of the Bureau of Provisions and Clothing, with the title of Paymaster-General in the Department of the Navy," and being responsible for the proper and reputable administration thereof, and it being his duty to protect the interests of the government in the making of contracts for supplies for the navy, did various acts which [169] were set forth in different forms and with much detail, but the substance of which was that he enlarged existing contracts so as to include at the contract price additional supplies not required by the necessities of the service, without consulting the Secretary of the Navy or the sureties on the contractor's bond or giving any opportunity for competition, and when the market was falling extended the time of delivery of supplies contracted for, thereby necessitating the acceptance of supplies of an inferior quality; falsified a copy of a contract, and thereby enabled the contractor to obtain payment at a place other than that required by the contract; and by directions and instructions to pay officers caused to be paid claims which had been refused by other pay officers and which, as he knew, had been declared illegal by the accounting officials of the Treasury; and by so causing pay officers to pay these claims, and to pay them out of appropriations for years other than those in which the contracts were made, greatly embarrassed those officers in the performance of their duties; and thereby willfully and knowingly, in disregard of his duties and responsibilities as chief of bureau, subordinated the interests of the government to those of the contractors, in violation of law and "to the great scandal and disgrace of the service and the injury of the United States."

The second charge was "culpable inefficiency in the performance of duty," under which were four specifications, alleging that he failed in his duty in not obliging contractors to comply with the terms of their contracts, and in allowing deliveries to be made after the time for delivery had expired; and also in purchasing more supplies than the current needs of the navy required, and in purchasing unfit supplies, and in not affording due opportunity for competition.

In the application for a writ of prohibition, the petitioner alleged that immediately upon the organization of the court-martial he objected that it had no jurisdiction of him or of the charges and specifications against him, or of the subject-matter contained in them, or any [170] part thereof; but the court-martial overruled all his objections to its jurisdiction, and proceeded to hear evidence on the charges, and to try him thereon. He further alleged that none of the charges or specifications in any degree arose out of or were involved in any case arising in the land or naval forces of the United States, or in the militia; but all, as appeared on their face, pertained exclusively to duties re-

quired of and performed by him in the exercise of a purely civil office and under a civil commission; that none of the specifications charged him with the violation of any law of the United States, or of any rule of procedure in the Navy Department, or of any order of the Secretary of the Navy; that each of the acts complained of had been approved by the late Secretary of the Navy in the lawful exercise of his discretionary power over the subject, and that the exercise of his discretion could not be reviewed by his successor or by a court-martial; that throughout the trial the petitioner insisted on his objections to the jurisdiction; that after the conclusion of the testimony and arguments the court-martial went into secret session and excluded him and his counsel from its presence and, as he was informed and believed, rendered some judgment adverse to him and submitted it to the Secretary of the Navy for his approval, but it had not been approved; that all the proceedings at the trial, with the finding and judgment of the court, were made up and signed by the judge advocate, and returned to the exclusive custody of the Secretary of the Navy, and the court discontinued its sessions, and adjourned without day; that afterwards the Secretary of the Navy made an order, the terms of which were unknown to the petitioner, directing the court-martial to reconvene on September 25, 1885, and to take additional action in the matter of the charges and specifications and evidence submitted to it as aforesaid; that it was about to reconvene accordingly and, without permitting the presence of the petitioner or his counsel, to reconsider the evidence and the principles of law involved in his trial, and to re-examine and readjudge his case; that the proceedings about to be taken by the court-martial were not only unauthorized for want of jurisdiction, but would deprive him of the right of trial by jury, and put him twice in jeopardy for the same offense, in violation of the Con-
[171] stitution of the United States; and that he was without remedy, except by the writ of prohibition.

On September 23, the petitioner moved for an order upon the defendants to show cause why a writ of prohibition should not issue as prayed for; and it was ordered that the petition be entertained and certified for hearing in the first instance to the court in General Term.

On September 24 the Secretary of the Navy filed a plea, averring that the court ought not to hear or take further cognizance of the petition and proceedings, because their object and purpose were "to prohibit and restrain him from the exercise of powers and duties appertaining to his said office of Secretary of the Department of the Navy; whereas, it is beyond the jurisdiction of this court and the judicial power of the United States to restrain or otherwise intermeddle with the exercise of the said powers and duties which belong to and form a part of the political powers and duties of the Government of the United States."

On the same day, the members of the court-martial filed a plea and answer, in which they "say that they are advised that this court has no jurisdiction to arrest by writ of prohibition any proceeding they may take in the court-martial referred to in the said petition;" and "not waiving in anywise, but insisting on their jurisdictional exception or plea, answering" admitted that the petitioner pleaded to the jurisdiction of the court-martial, and that his plea was overruled; but alleged that he was subject to its jurisdiction, and that there was nothing in the legislation of Congress, creating the office of Paymaster-General of the Navy, manifesting an intention to withdraw the incumbent of that position from amenability to a court-martial for offenses committed while exercising the same; that the first charge and the specifications pursuant thereto were founded on the twenty-second of the Articles for the Government of the Navy, contained in section 1624 of the Revised Statutes, and on section 127 of the Orders, Regulations and Instructions for the administration of Law and Justice in the United States Navy, which prescribes that "When the offense is a disorder or neglect not specially provided for, it should be charged as scandalous conduct tending to the destruction of good morals;" and the second charge and the specifications pursuant thereto were founded on the ninth paragraph of the eighth Article for the Government of the Navy; that the question whether the acts and omissions charged against the petitioner were offenses was a matter for the exclusive decision of the court-martial; and that the court-martial did not and could not adjourn itself without day, but, as appeared by orders, copies of which were produced, was by order of the Secretary of the Navy of August 11 "adjourned until further orders," and by his order of September 16 directed to reassemble on September 25; and concluded by praying to be dismissed with costs.

On September 25 the petitioner filed a replication, in which he "joins issue with the defendants upon the return and answer filed to the petition for the writ of prohibition;" and upon a hearing in general term the court entered the following judgment: "The court being of opinion that it has not jurisdiction of the matter complained of, it is therefore considered that the petition be and it is hereby dismissed, with costs, to be taxed by the clerk."

The petitioner in open court prayed and was allowed an appeal from that judgment, and also sued out a writ of error to reverse it.

The final judgment or decree of the Supreme Court of the District of Columbia in any case in which the matter in dispute, exclusive of costs, exceeds the sum of $5,000 may be reviewed and reversed or affirmed in this court upon writ of error, if the judgment is at law, or upon appeal, if the decree is in equity. R. S. §§ 691, 692, 705; R. S. D. C. §§ 846, 847; Act of March 3, 1885, chap. 355, 23 Stat. at L. 443.

The objection, founded on *Kurtz* v. *Moffitt*, 115 U. S. 487 [*ante* 458], and cases there cited, that this court has no appellate jurisdiction of the present case, because there is nothing in dispute the value of which can be estimated in money, cannot be sustained. The matter in dispute is whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service and depriving him of a salary as Paymaster-General during the residue of his term as such, and as Pay Inspector afterwards, which in less than two years would exceed the sum of $5,000. R. S.

§ 1556, 1565, 1624, arts. 8, 22, 48, 53. The case cannot be distinguished in principle from those in which it has been held that a judgment awarding a peremptory writ of *mandamus* to admit one to an office, or a judgment of ouster from an office, might be reviewed by this court upon writ of error, if the salary during the term of the office would exceed the sum named in the statute defining its appellate jurisdiction. *Columbian Ins. Co.* v. *Wheelright*, 7 Wheat. 534 [20 U. S. bk. 5, L. ed. 516] *United States* v. *Addison*, 22 How. 174 [63 U. S. bk. 16, L. ed. 304].

It is often said that the granting or refusal of a writ of prohibition is discretionary, and therefore not the subject of a writ of error. That may be true where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful or depends on facts which are not made matter of record; or where a stranger, as he may in England, applies for the writ of prohibition. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset and has no other remedy, he is entitled to a writ of prohibition as matter of right; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error. This is the clear result of the modern English decisions, in which the law concerning writs of prohibition has been more fully discussed and explained than in the older authorities. *Re Forster*, 4 B. & S. 187, 199; *Mayor, etc. of London* v. *Cox*, L. R. 2 H. L. 239, 280; *Worthington* v. *Jeffries*, L. R. 10 C. P. 379, 380; *Chambers* v. *Green*, L. R. 20, Eq. 552, 555. See also *Weston* v. *City Council of Charleston*, 2 Pet. 449 [27 U. S. bk. 7, L. ed. 481], reversing on error *S. C.*, Harper, 340.

The petitioner in the present case objected at the very beginning of the proceedings before the court-martial that it had no jurisdiction to try him on the charges laid before it; and the facts upon which his objection to its jurisdiction are based, as well as the final judgment dismissing his petition for a writ of prohibition, appear of record. The case is therefore within the appellate jurisdiction of this court.

The Supreme Court of the District of Columbia having both common-law and equity powers, it would seem that the proceedings in this case must be considered as on the common-law side of that court, and that the proper mode of invoking the appellate jurisdiction of this court is by writ of error. In England, from long before the Declaration of Independence, writs of prohibition have usually issued from the courts of common law, and do not appear to have issued from a court of chancery in any case in which a court of law might issue them, except during vacation, when the courts of common law were not open. 2 Hale, P. C. 147; *Lord* Holt, in *Blackborough* v. *Davis*, 1 P. Wms. 41, 43; *Anon.* 1 P. Wms. 476; *Montgomery* v. *Blair*, 2 Sch. & Lef. 136; *Re Foster*, 24 Beav. 428; *Re Bateman*, L. R. 9 Eq. 660. And in this country, so far as we are informed, such writs have never been issued but by a court of common-law jurisdiction. But as the petitioner has both taken an appeal and sued out a writ of error, it is immaterial which is the proper form of bringing up the case.

The hearing below was upon a rule to show cause why a writ of prohibition should not issue as prayed for. The question at that hearing was the general question whether the court should issue a writ of prohibition. That question could not, at that stage of the case, be narrowed or divided by the pleadings filed by the defendants. The judgment, as recorded, although it contains a statement of the court's "opinion that it has no jurisdiction of the matter complained of," is a general judgment dismissing the petition, with costs, which could [175] not have been awarded upon a judgment of dismissal for want of jurisdiction. *Mayor* v. *Cooper*, 6 Wall. 247 [73 U. S. bk. 18, L. ed. 851]; *Elk* v. *Wilkins*, 112 U. S. 94, 98 [Bk. 28, L. ed. 643, 644]. The writ of error brings in question the judgment, not the opinion, of the court below. If the petition was rightly dismissed for any reason, whether because that court had no jurisdiction to issue a writ of prohibition to a court-martial or because the court-martial had jurisdiction of the charges against the petitioner, the judgment must be affirmed.

It is argued in behalf of the petitioner that the Supreme Court of the District of Columbia is authorized to issue writs of prohibition, on the same grounds on which it was held in *United States* v. *Schurz*, 102 U. S. 378 [Bk. 26, L. ed. 167], to be authorized to issue writs of *mandamus*, namely: because by the Act of February 27, 1877, chap. 69, § 2, 19 Stat. at L. 253, that court has cognizance of "all cases in law and equity between parties, both or either of which shall be resident or be found within said District;" as well as because it has all the powers formerly exercised by the courts of Maryland, which, as declared by the Court of Appeals of that State in *Price* v. *State*, 8 Gill, 295, 310, included "all the powers exercised in England by the Court of King's Bench, so far as these powers are derived from rules and principles of the common law, and so far as the same are suited to the change in our political institutions, and are not modified by our constitutional or statutory enactments." On the other side, it is contended that neither the Supreme Court of the District of Columbia nor any other court of the United States is empowered to issue writs of prohibition to a court-martial.

Whether the Supreme Court of the District of Columbia has power in any case to issue a writ of prohibition to a court-martial is a question of great importance not heretofore adjudged by this court; and we are not inclined, in the present case, either to assert or to deny the existence of the power, because upon settled principles, assuming the power to exist, no case is shown for the exercise of it. In deciding the case upon the facts before us, and expressing no opinion upon the broader question, because the determination of the case does not require it, we take the same course that has [176] been followed by eminent English judges in disposing of applications for writs of prohibition under similar circumstances. *Ex parte Smyth*, Tyrwh. & Gr. 222, 225; *S. C.* 2 Cr. M. & R. 748, 753; 1 Gale, 274, 277; *Re Foster*, 4 B. & S. 187, 198.

The object of a writ of prohibition is to prevent a court of peculiar, limited or inferior jurisdiction from assuming jurisdiction of a matter beyond its legal cognizance. It can only be issued to restrain the exercise of judicial functions. When the suit complained of is brought by a private person, he may be joined as a defendant. But when it is a suit or prosecution on behalf of the Government, the writ of prohibition can go to the court only. 3 Bl. Com. 112; *Ex parte Braudlacht*, 2 Hill (N. Y.), 367; *Thompson* v. *Tracy*, 60 N. Y. 31; *Connecticut River Railroad* v. *Franklin County Comrs.* 127 Mass. 50, 59, 60.

The Secretary of the Navy being an executive officer and not a member of the court-martial sought to be prohibited, it is quite clear that his acts concerning the petitioner cannot be the subject of a writ of prohibition. The reasons against issuing a writ of prohibition to the court-martial require fuller statement.

A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. It cannot be made to serve the purpose of a writ of error or *certiorari*, to correct mistakes of that court in deciding any question of law or fact within its jurisdiction. These rules have been always adhered to by this court, in the exercise of the power expressly conferred upon it by Congress to issue writs of prohibition to the district courts sitting as courts of admiralty; *United States* v. *Peters*, 3 Dall. 121 [3 U. S. bk. 1, L. ed. 535]; *Ex parte Easton*, 95 U. S. 68 [Bk. 24, L. ed. 373]; *Ex parte Gordon* and *Ex parte Ferry Co.* 104 U. S. 515, 519 [Bk. 26, L. ed. 814, 815]; *Ex parte Pennsylvania*, 109 U. S. 174 [Bk. 27, L. ed, 894], as well as by the courts of England and of the several States, in the exercise of their inherent jurisdiction to issue writs of prohibition to courts-martial *Grant* v. *Gould*, 2 H. Bl. 69; [177] *State* v. *Wakely*, 2 Nott & McCord, 410; *State* v. *Stevens*, 2 McCord, 32; *Washburn* v. *Phillips*, 2 Met. 296. And this court, although the question of issuing a writ of prohibition to a court-martial has not come before it for direct adjudication, has repeatedly recognized the general rule that the acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts, by writ of prohibition or otherwise. *Dynes* v. *Hoover*, 20 How. 65, 82, 83 [61 U. S. bk. 15, L. ed. 838, 845]; *Ex parte Reed*. 100 U. S. 13 [Bk. 25, L. ed. 588]; *Ex parte Mason*, 105 U. S. 696 [Bk. 26, L. ed. 1213]; *Keys* v. *United States*, 109 U. S. 336 [Bk. 27, L. ed. 954]; *Wales* v. *Whitney*, and *Kurtz* v. *Moffitt*, [*ante*, 277, 458.] See also *Wise* v. *Withers*, 3 Cranch, 331 [7 U. S. bk. 2, L. ed. 457]; *Meade* v. *Deputy Marshal of Virginia*, 1 Brock. 324; *Re Bogart*, 2 Sawyer, 396; *Re White*, 9 Sawyer, 49; *Barrett* v. *Hopkins*, 2 McCrary, 129.

In the leading case of *Grant* v. *Gould*, 2 H. Bl. 69, under an article of war subjecting to punishment at the discretion of a court-martial any officer or soldier convicted of "having advised or persuaded any other officer or soldier to desert His Majesty's service," the petitioner for a writ of prohibition had been charged with "having advised and persuaded" two soldiers in the Coldstream Regiment of foot guards "to desert His Majesty's service, and to enlist into the service of the East India Company, knowing them at the same time to belong to the said regiment of foot guards." The sentence did not in terms find him guilty of having advised or persuaded them to desert the King's service; but merely stated that the court-martial was of opinion that he was "guilty of having promoted and having been instrumental towards the enlisting of" the two soldiers "into the service of the East India Company, knowing them at the said time to belong to the said regiment of foot guards; and deeming this crime to be precisely of the same nature with that which is set forth in the charge, and to differ only in this: that it is rather inferior, but in a very slight degree, in point of aggravation," adjudged him to be punished. It was argued for the petitioner that he had not been found guilty of advising or persuading to desert, which was the substance of the offense charged, but, at the utmost, of promoting and aiding in the enlistment into the service of the East India Company, which of itself was no offense under the Articles of War or the Mutiny Act. But *Lord* Loughborough, delivering the judgment of the court of common pleas, discharging the rule for a writ of prohibition, said: "Taking the whole of the case together, it is clear that there is ground to suppose that they meant to convict him of the charge. But if, by the nicety which they used in penning the sentence, that sentence were to be invalidated, it could not be by a prohibition, whatever it might be by a review, or by an appeal. The most that can be made of it is an error in the proceedings; but we cannot prohibit upon that account. The sentence in the case of an unfortunate admiral * was certainly an inaccurate one. The question there was whether the court had not mistaken the law, yet a prohibition was not thought of. But it is unnecessary to discuss the sentence further; it would be extremely absurd to comment upon it as if it was a conviction before magistrates, which was to be discussed in a court where that conviction could be reviewed." 2 H. Bl. 107.

Of questions, not depending upon the construction of the statutes, but upon unwritten military law or usage within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law. This is nowhere better stated than by *Mr. Justice* Perry in the Supreme Court of Bombay, saying: "And the principle of the noninterference of the courts of law with the procedure of courts-martial is clear and obvious. The groundwork of the jurisdiction and the extent of the powers of courts-martial are to be found in the Mutiny Act and the Articles of War; and upon all questions arising upon these Her Majesty's judges are competent to decide; but the Mutiny Act and Articles of War do not alone constitute the Military Code, for they are, for the most part, silent upon all that relates to the procedure of the military tribunals to be erected under them. Now this procedure is founded upon the usages and customs of war, upon the regulations issued by the Sovereign, and upon old practice in the army, as to all which points common-law judges have no opportunity, either from their law

* See Admiral Byng's Trial (official ed. fol. London, 1757), 3, 4, 125-130; 1 McArthur on Courts-Martial, 4th ed. 103, 328; 2 *Id.* 274, 387-398.

[179] books or from the course of their experience, to inform themselves. It would therefore be most illogical, to say nothing of the impediments to military discipline which would thereby be interposed, to apply to the procedure of courts-martial those rules which are applicable to another and different course of practice." *Perrit's Case*, Perry's Oriental Cases, 414, 419. So in *Martin* v. *Mott*, 12 Wheat. 19, 35 [25 U. S. bk. 6, L. ed. 537, 542], *Mr. Justice* Story, delivering the opinion of this court, said that the law by which courts-martial were bound to execute their duties and to regulate their mode of proceeding, in the absence of positive enactments, was "the general usage of the military service, or what may not unfitly be called the customary military law." The same view, as regarding naval courts-martial, was asserted and acted on by this court in *Dynes* v. *Hoover*, 20 How. 65, 82 [61 U. S. bk. 15, L. ed. 838, 845.]

The material provisions of the Revised Statutes and of the Navy Regulations, affecting the nature of the office and duties of the petitioner, and the jurisdiction of the court-martial over him, are as follows:

By section 415 of the Revised Statutes "There shall be at the seat of Government an Executive Department, to be known as the Department of the Navy, and a Secretary of the Navy who shall be the head thereof." By section 419 "The business of the Department of the Navy shall be distributed in such manner as the Secretary of the Navy shall judge to be expedient and proper among the following bureaus," one of which is "Seventh. A Bureau of Provisions and Clothing." And by section 420 "All of the duties of the bureaus shall be performed under the authority of the Secretary of the Navy, and their orders shall be considered as emanating from him and shall have force and effect as such."

By section 421 "The chiefs of the several bureaus in the Department of the Navy shall be appointed by the President, by and with the advice and consent of the Senate, from the classes of officers mentioned in the next five sections respectively, or from officers having the relative rank of captain in the staff corps of the navy, on the active list, and shall hold their offices for the term of four years." By section 425 "The Chief of the Bureau of Provisions and Clothing shall be appointed from the list of paymasters of the Navy of not less than ten years standing." By sections 1471, 1472, he "shall have the relative rank of commodore while holding said position," and the title of Paymaster-General; and by section 1473, upon being retired from that position by reason of age or length of service, he shall have the relative rank of commodore.

By section 178, in case of the death, resignation, absence or sickness of the chief of any bureau, his duties are to be performed by his deputy, or if there be none, by the chief clerk of such bureau, unless the President shall direct them to be performed by some other officer in other department.

Chapter 10 of title 15 of the Revised Statutes, entitled "Articles for the Government of the Navy," contains the following:

"Sec. 1624. The Navy of the United States shall be governed by the following articles:"

"Art. 8. Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy—

"First. Who is guilty of profane swearing, falsehood, drunkenness, gambling, fraud, theft or any other scandalous conduct tending to the destruction of good morals;"

"Ninth. Or is negligent or careless in obeying orders, or culpably inefficient in the performance of duty."

"Art. 22. All offenses committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished as a court-martial may direct."

"Art. 23. All offenses committed by persons belonging to the navy while on shore shall be punished in the same manner as if they had been committed at sea."

The Orders, Regulations and Instructions for the Administration of Law and Justice in the United States Navy, issued by the Secretary of the Navy under authority of the President in 1870, provide, in section 126, that when a charge "comes directly under any enactment, it should be set forth in the terms used therein;" and in section 127, that "when the offense is a disorder or neglect not specially provided for, it should be charged as 'scandalous conduct tending to the destruction of good morals.'"

By section 1547 of the Revised Statutes, passed since the adoption of the Navy Regulations of 1870, "the orders, regulations and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the Regulations of the Navy, subject to alterations adopted in the same manner." This legislative recognition of the Navy Regulations of 1870 "must," as was said by *Chief Justice* Marshall of a similar recognition of the Army Regulations in the Act of April 24, 1816, chap. 69, § 9, 3 Stat. at L. 298, "be understood as giving to these regulations the sanction of the law." *United States* v. *Maurice*, 2 Brock. 96, 105; *Ex parte Reed*, 100 U. S. 13 [Bk. 25, L. ed. 538]. [181]

It is argued for the petitioner that his office of Paymaster-General and Chief of a Bureau in the Department of the Navy, under a distinct appointment by the President and confirmation by the Senate, is a separate office of a purely civil character; that the duties of that office are not military, but civil only, relating to the business of the Navy Department, performed under the authority of the Secretary of the Navy, who is exclusively a civil officer and, in case of a vacancy in the office of Chief of Bureau, or of his absence, to be performed by a deputy or chief clerk, who is also exclusively a civil officer; and therefore that a violation of those duties can be prosecuted in the civil courts only, and not by court-martial.

On the other hand, it is argued that the petitioner is an officer of the navy; that no one but an officer of the navy of a certain rank can be appointed to the office of Chief of Bureau and Paymaster-General; that the petitioner's appointment to that office gives him the relative rank of commodore in the navy; that the duties of Paymaster-General are naval duties performed by a naval officer; and therefore that any violation of those duties is triable and punishable by naval court-martial.

The charges on which the court-martial was ordered to try the petitioner are drawn up in two aspects. The leading charge is for "scandalous conduct tending to the destruction of good morals," and various acts done by the petitioner as Paymaster-General are set forth in fourteen specifications under that charge. The other charge is for "culpable inefficiency in the performance of duty," with four specifications, some of which, at least, allege, though in different forms, acts set forth in the specifications [182] under the first charge.

If the court-martial has jurisdiction of the principal charge and of some or all of the specifications under it, the addition of the second charge with its specifications affords no ground for issuing a writ of prohibition. The evidence taken before the court-martial is not produced or relied upon by the petitioner. The question presented by the record before us is whether the court-martial should be prohibited from trying him on the charges and specifications laid before it; and the case comes within the rule stated by *Chief Justice* Shaw in *Washburn* v. *Phillips*, already cited: "Unless it appears upon the face of the proceedings that the court has no jurisdiction of any part of the subject matter of these charges, it is not a case for a prohibition." 2 Met. 299. There may indeed be cases in which two matters before the inferior court are so distinct that a writ of prohibition may go as to the one and not as to the other. But when the leading charge is within its jurisdiction, and the other charge, though varying in form, is for the same or similar acts, like a second count in an indictment, and the same sentence may be awarded on the first charge as upon both, a writ of prohibition should not issue. *Enraght* v. *Penzance*, 7 App. Cas. 240.

The essential point to be determined, therefore, is whether the court-martial has jurisdiction of the first charge; and whether it would have jurisdiction of the second, if that were the only one, is immaterial.

In *Dynes* v. *Hoover*, above cited, this court held that the jurisdiction of courts-martial, under the Articles for the Government of the Navy established by Congress, was not limited to the crimes defined or specified in those articles, but extended to any offense which, by a fair deduction from the definition, Congress meant to subject to punishment, being "one of a minor degree, of kindred character, which has already been recognized to be such by the practice of courts-martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts-martial;" or which, though not included, in [183] terms or by construction, within the definition, came within "a comprehensive enactment, such as the 32d article of the Rules for the Government of the Navy; which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea." 20 How. 82 [61 U. S. bk. 15, L. ed. 845].

The 32d of the Articles for the Government of the Navy, established by the Act of April 23, 1800, chap. 33, 2 Stat. at L. 49, in force at the time of that decision, has been retained in the existing article 22, before cited, substituting only, at the beginning, the word "offenses" for "crimes," and, in describing the mode of punishment, the words "as a court-martial may direct," instead of "according to the laws and customs in such cases at sea." As the article in its new form still applies only to offenses "not specified in the foregoing articles," the alteration was evidently intended to change only the rule of punishment, leaving within the jurisdiction of courts-martial cases not so specified, but recognized as military offenses by the usages of the naval service.

It does not, therefore, appear to us important to inquire whether, by the rules that govern military courts, the first charge should be considered as made under the concluding words of the first clause of article 8, punishing "profane swearing, falsehood, drunkenness, gambling, theft or any other scandalous conduct tending to the destruction of good morals;" or under article 22, punishing "all offenses committed by persons belonging to the Navy, which are not specified in the foregoing articles;" for in either view, as we have already seen, it should, under the Regulations of 1870, recognized and sanctioned by Congress, be charged as "scandalous conduct tending to the destruction of good morals."

Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business.

Two cases, often cited in books on military law, show that acts having no relation to the public service, military or civil, except so far as they tend to bring disgrace and reproach upon the former—such as making an unfounded claim for the price of a horse, or attempting to seduce a brother officer's wife during his illness—may properly be prosecuted before a court-martial, under an article of war punishing "scandalous and infamous conduct unbecoming an officer and a gentleman;" for the sole ground on which the sentence was disapproved, by the King in the one case and by the Governor-General of India in the other, was that the court-martial while finding the facts proved, expressly negatived scandalous and infamous conduct, and thereby in effect acquitted the defendant of the charge. 2 McArthur, Courts-Martial, 4th ed. 298; Hough, Precedents in Military Law, 288; Samuel, Military Law, 650–652; Simmons, Courts-Martial, 4th ed. 418–420; De Hart, Courts-Martial, 375–377.

In a third case, a lieutenant in the Army was tried in England by a general court-martial for conduct on board ship while coming home from India as a private passenger on leave of absence from his regiment for two years. The charge was that being a passenger on board the ship Cæsar on her voyage from Calcutta to England, he was accused of stealing property of one Ross, his servant; and that the officers and passengers of the ship, after inquiring into the accusation, expelled him from their table and

society during the rest of the voyage; yet that he, "under circumstances so degrading and disgraceful to him, neither then nor at any time afterwards took any measures as became an officer and a gentleman to vindicate his honor and reputation; all such conduct as aforesaid being to the prejudice of good order and military discipline." Before and at the trial, he objected that the charge against him did not, expressly or constructively, impute any military offense, or infraction of any of the Articles of War, or any positive act of misconduct or neglect, to the prejudice of good order and military discipline; or state any fact which, if true, subjected him to be arraigned and tried as a military officer. But the court-martial proceeded with the trial, found him "guilty of the whole of the charge produced against him, in breach of the Articles of War," and sentenced him to be dismissed the service, and added "that it has considered the charge produced against the prisoner entirely in a military point of view, as affecting the good order and discipline of the Army; and that it does not mean by its sentence to offer any opinion as to the original charge of theft, of which the prisoner was accused by the man Ross." The sentence was approved by the King, and carried into execution, and for that reason the Court of King's Bench denied a writ of prohibition. *Lord* Denman, in delivering judgment, said that the court did not think it necessary to consider whether the charge was so framed as to bring the party within the Articles of War; but that it agreed with *Lord* Loughborough's remark in *Grant* v. *Gould*, above cited, that it would be extremely absurd to expect the same precision in a charge brought before a court-martial as was required to support a conviction by a justice of the peace. *Re Pw*, 5 B. & Ad. 681, 688; *S. C.* 2 Nev. & Man. 632, 644.

Under the sixty-first of the Articles of War for the Government of the Army of the United States, which, omitting the words "scandalous or infamous," provides that "Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service," it is observed in the most recent treatise on military law, and supported by copious references to precedents: "While the act charged will more usually have been committed in a military capacity, or have grown out of some military status or relation, it is by no means essential that this should have been its history. It may equally well have originated in some private transaction of the party (as a member of civil society, or as a man of business), which, while impeaching his personal honor, has involved such notoriety or publicity, or led to such just complaint to superior military authority, as to have seriously compromised his character and position as an officer of the Army and brought scandal or reproach upon the service." 1 Winthrop, Military Law, 1023 *et seq.* See also 4 Opns. Attys-Gen. 413, 417; *Runkle* v. *United States*, 19 C. Cl. 396, 414.

This being the first case of an application to a court of the United States for a writ of prohibition to a court-martial, we have cited the authorities bearing upon the subject more fully than might have been thought fit under other circumstances.

It is hardly necessary to add that by the Navy Regulations of 1870, §§ 260–265, the court-martial could only be dissolved by the Secretary of the Navy, and might, at any time before he had dissolved it, be lawfully reconvened by him to reconsider its proceedings. *Ex parte Reed*, 100 U. S. 13 [Bk. 25, L. ed. 538].

To order a writ of prohibition to issue in the present case would be to declare that an officer of the Navy, who, while serving by appointment of the President as Chief of a Bureau in the Navy Department, makes contracts or payments, in violation of law, in disregard of the interests of the government, and to promote the interests of contractors, cannot lawfully be tried by a court-martial composed of naval officers, and by them convicted of scandalous conduct, tending to the destruction of good morals and to the dishonor of the naval service.

This we are not prepared to do, being clearly of opinion that such conduct of a naval officer is a case arising in the naval forces, and therefore punishable by court-martial under the articles and regulations made or approved by Congress in the exercise of the powers conferred upon it by the Constitution, to provide and maintain a navy and to make rules for the government and regulation of the land and naval forces, without indictment or trial by jury.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

ROBERT W. HEALY ET AL., *Plffs. in Err.*, [191]

v.

JOLIET AND CHICAGO R. R. CO. AND CHICAGO AND ALTON R. R. CO.

(See S. C. Reporter's ed. 191, 192.)

The Healy Slough is not a navigable stream at the point where it is crossed by the bridge maintained by the Chicago and Alton Railroad Company.

[No. 97.]

Argued Dec. 16, 17, 1885. Decided Jan. 4, 1886.

IN ERROR to the Supreme Court of the State of Illinois.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. Samuel F. Rice, for plaintiffs in error.

Mr. **George W. Smith**, for defendants in error.

Mr. Justice **Miller** delivered the opinion of the court: [191]

This is a writ of error to the Supreme Court of Illinois.

The plaintiffs in error, who were plaintiffs below, brought suit in the Circuit Court of Cook County of that State, praying for an abatement, or other appropriate relief, against a railroad bridge across Healy Slough, built by the Joliet and Chicago R. R. Company in 1856, and now kept up and maintained by the Chicago and Alton R. R. Company. This bridge is alleged to be an obstruction to the navigation of the slough, and therefore a nuisance, in re-

NOTE.—*Navigable waters—what are, of the United States.* U. S. v. The Montello, 87 U. S. (20 Wall.), 430, bk. 22, 391, *note.*

gard to which plaintiffs suffer special damage as owners of certain real estate situated above the bridge, which obstructs the access of vessels coming from Lake Michigan or from the Chicago River through that river and through the slough to plaintiffs' lots.

It is alleged that this slough, at the point where the bridge was built, was a navigable water of the United States, in the navigation of which plaintiffs had especial interest, and that it was navigable from the Chicago River up to and beyond the lots of plaintiffs, and that this navigability was seriously impaired by the bridge of defendants.

The answer denied that the slough was a [192] navigable stream, and asserted authority under the charter of the Joliet and Chicago Railroad Company to build the bridge as had been done. Much testimony was taken as to the nature and character of the slough in reference to its navigability; and on hearing, the Circuit Court of Cook County dismissed the bill. An appeal was taken to the Appellate Court of the First Judicial District of the State, which reversed the judgment of the circuit court and granted relief against the bridge as a nuisance.

On further appeal to the supreme court of the State, the judgment of the appellate court was reversed, and the order of the circuit court dismissing the bill was affirmed.

It appears from the opinions delivered in the appellate court and in the supreme court, both of which are found in the record, that there was no difference between them on any question of law, but that they differed on the question whether the slough was in fact a public navigable water at the time the bridge was built over it. The court of appeals says: "Whether the Healy Slough is navigable in such sense as to constitute it a common highway must depend upon its capabilities, in its natural state and ordinary volume of water, of being utilized for purposes of commerce or transportation. This presents a mere question of fact to be determined by the evidence in the record." On this evidence that court held that in its natural state the slough was a navigable highway for the public.

The supreme court says in its opinion: "The question raised may be treated simply as a question of fact, viz: is the body of water spanned by the railroad bridge navigable in the sense of that term as used in the law? We think it is not."

On this question of disputed fact, so far as we have any right to inquire into it under this writ of error, we concur in the opinion held by the supreme court, and by the circuit court, and do not deem it necessary to set out in this opinion a comparison or examination of the evidence, which is voluminous, as it can serve no good purpose.

The decree of the Supreme Court of Illinois is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM G. FORD, Admr. of JOHN G. ROBINSON, Deceased, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 213-218.)

Court of claims—jurisdiction—limitation of actions.

The clause of section 1059, R. S., which invests the court of claims with jurisdiction of claims referred to it by either House of Congress, is subject to other clauses, defining its jurisdiction and fixing the period within which all claims must be asserted against the United States.

[No. 1108.]

Submitted Dec. 18, 1885. Decided Jan. 4, 1886.

APPEAL from the Court of Claims.

The history and facts of the case appear in the opinion of the court.

Messrs. **Gilbert Moyers** and **George S. Boutwell**, for appellant:

The construction which gives effect to the statute must prevail over that which gives no effect and is without force.

Smith, Com. 671, § 527; Dwarris, Stat. 144, § 12, Sedgwick. Stat. 200; *Ogden* v. *Strong*, 2 Paine, 584; *People* v. *Draper*, 15 N. Y. 532; *Commonwealth* v. *Alger*, 7 Cush. 53; *People* v. *Burnes*, 5 Mich. 114.

This statute was designed to revive a jurisdiction which by the lapse of time had ceased to exist. A remedial statute must be so construed as not to defeat the object for which it was enacted.

Sedg. Stat. 193; *Cook* v. *Hamilton Co.* 6 McL. 112; *United States* v. *Coombs*, 12 Pet. 72 (37 U. S. bk. 9, L. ed. 1004); *Whitney* v. *Emmett*, 1 Baldw. 303; *United States* v. *Morris*, 14 Pet. 464 (39 U. S. bk. 10, L. ed. 543).

Mr. **A. H. Garland**, *Atty-Gen.*, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

By resolution of the Senate of the United States adopted on the 23d of February, 1885, a bill pending before that body for the relief of William G. Ford, administrator of John G. Robinson, deceased, was referred "in accordance with the provisions of article 1 of section 1059 of the Revised Statutes, to the Court of Claims, together with the vouchers, papers, proofs and documents appertaining thereto."

The bill to which the resolution referred was as follows:

"A bill for the relief of William G. Ford, administrator of John G. Robinson, deceased.

"*Be it enacted*, by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of William G. Ford, administrator of John G. Robinson, deceased, for the interests of the American legatees of the said Robinson, which were not provided for in the award of the mixed commission under the Treaty of Washington of the date of September 24, 1873, be, and the same is hereby, referred to the court of claims, relieved from the bar of the Statute of Limitations; and the said court of claims is authorized to receive as evidence, at its discretion, the testimony already taken by said mixed

commission in the said case, as though taken over again; and either party may take further and additional testimony, under the order and rules of the court, as in other cases; *Provided*, That before final judgment shall be rendered by the said court the said William G. Ford shall duly execute, according to law, a new administration bond, in such penalty and with such sureties as the said court shall seem sufficient and approve."

The petition of the claimant was filed in the court of claims on the 10th of March, 1885. It represented that he is a citizen of the United States, and a resident of the City of New York; that John G. Robinson was born in England, and was a subject of Great Britain, residing during the recent civil war in New Orleans; that on or about March 7, 1863, his intestate purchased of one Robert B. Hurt, of Madison County, Tennessée, 238 bales of cotton, worth about $38,260, which was delivered to said Robinson, at Ponchatoula, Louisiana, on or about the date last named; that the cotton "was seized by the United States military authorities, under command of General Banks; and under the direction of said authorities the same was sold in New Orleans, and the proceeds thereof appropriated to the use and benefit of the United States Government;" that his claim, as administrator of Robinson, for the proceeds of such sale, was, on or about the 25th of March, 1872, presented to the mixed commission on British and American claims, under the 12th article of the Treaty of May 8, 1871, and by that commission was allowed to the extent of only $29,638, in gold, as the value of the interest of Mary G. Barker, the only surviving legatee under the will of Robinson, who was a British subject; that petitioner believed that award to be unjust to the devisees under the will of Robinson, who were citizens of the United States, and petitioned Congress for relief; that his petition, with vouchers, etc., were referred by the Senate to the court of claims, under section 1059 of the Revised Statutes, and that said Robinson died in Biloxi, Mississippi, on or about August 25, 1869, without having given any aid or comfort to the rebellion. He prayed judgment against the United States for $66,195, which was the balance of the proceeds derived from the sale of the cotton.

In the court of claims the United States moved to dismiss the petition, upon the ground that the action was barred by the limitation of six years prescribed by section 1069 of the Revised Statutes. Subsequently, a general demurrer to the petition having been filed, the case was heard upon the motion to dismiss, as well as upon the demurrer. The motion to dismiss was denied; but the action, in the opinion of that court, being barred by the limitation of two years prescribed by the Captured and Abandoned Property Act of March 12, 1863, was dismissed.

By section 1059 of the Revised Statutes the court of claims has jurisdiction to hear and determine the following, among other matters: "First, all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress. * * * Fourth. Of all claims for the proceeds of captured or abandoned property, as provided by the Act of March 12, 1863, chap. 120, entitled 'An Act to Provide for the Collection of Abandoned Property, and for the Prevention of Frauds in Insurrectionary Districts within the United States,' or by the Act of July 2, 1864, chap. 225, being an Act in addition thereto; *Provided*, That the remedy given in cases of seizure under the said Acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property in virtue or under color of said Acts, from suit at common law, or any other mode of redress whatever, before any court other than said court of claims; *Provided, also*, That the jurisdiction of the court of claims shall not extend to any claim against the United States growing out of the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion." 18 Stat. at L. 318, chap. 80.

The Act of March 12, 1863, providing for the collection and disposition of captured or abandoned property, permits any person claiming to have been the owner of any such property, "at any time within two years after the suppression of the rebellion," to "prefer his claim to the proceeds thereof in the court of claims." 12 Stat. at L. 820. [216]

Section 1069 provides that "Every claim against the United States, cognizable by the court of claims, shall be forever barred, unless the petition setting forth a statement thereof is filed in the court or transmitted to it by the secretary of the Senate, or the clerk of the House of Representatives, as provided by law, within six years after the claim first accrues; *Provided*, That the claims of married women first accrued during marriage; of persons under the age of twenty-one years first accrued during minority; and of idiots, lunatics, insane persons and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred, if the petition be filed in the court, or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively." 12 Stat. at L. 767, chap. 92.

The assignments of error assume that the reference by the Senate to the court of claims, of the bill before that body for the relief of claimant, had the effect to invest that court with full jurisdiction to hear and determine his claim, relieved from any bar arising from limitation, whether the limitation of six years prescribed by section 1069 of the Revised Statutes (which is brought forward from the Act of March 3, 1863, amendatory of the Act of 1855, establishing the Court of Claims), or that of two years, established by the Captured and Abandoned Property Act of March 12, 1863.

The statutes regulating the jurisdiction of the court of claims do not sustain this position. It is undoubtedly within the power of Congress to place claims referred to that court by the Senate or by the House of Representatives, on a better footing than other claims, by providing that they may be determined upon their merits,

without reference to lapse of time, or any previous bar by limitation. But Congress had no purpose by its general legislation to establish such [217] a policy. It has, in special cases, invested the court of claims with jurisdiction to determine a claim, relieved of the bar of limitation. Such was *Erwin's Case*, arising under the Captured and Abandoned Property Act, the purpose of the statute which referred it being construed as manifesting the intention of Congress, in respect of that particular claim, to remove the bar of limitation, and, without otherwise changing the claimant's position from what it would have been had he instituted suit in proper time, to permit an adjudication of the claim upon its merits. *Erwin* v. *United States*, 97 U. S. 392 [Bk. 24, L. ed. 1065]. No such result can be reached in this case, because Congress has not referred the demand of the claimant to the court of claims for determination. The clause of the statute investing that court with jurisdiction to hear and determine all claims referred to it "by either House of Congress," must be interpreted in the light of other clauses defining its jurisdiction, and fixing, in respect of all claims, the period within which they must be asserted against the United States. Congress, by statute, which has received the approval of the President, has declared that all claims specifically for the proceeds of captured or abandoned property, must be brought within two years after the suppression of the rebellion: that the jurisdiction of the court of claims shall not extend to claims growing out of the destruction or appropriation of, or damage to, property by the army or navy engaged in the suppression of the rebellion; and that, except where the claimant is laboring under certain disabilities, that have no application here, every claim against the United States, cognizable by the court of claims, shall be forever barred, unless filed in that court, or transmitted to it by certain officers, within six years after the claim first accrued. The argument here is that these statutory provisions are suspended in their operation as to every claim belonging to either of these classes, which one branch of Congress chooses to refer to the court of claims. Any such interpretation must be rejected. It is unreasonable to suppose that Congress intended to invest one of its branches with authority to suspend a general Statute of Limita- [218] tion. Every claim cognizable by the court of claims must be determined with reference to the limitation prescribed for claims of the class to which it belongs, unless Congress, by statute, otherwise directs. The court of claims has jurisdiction to hear and determine a claim referred to it by either House of Congress because, and only because, the law-making power has so declared; but, unless Congress otherwise prescribes, that reference will not itself entitle the claimant to a judgment, if his claim is not well founded in law, or, when so referred, was barred by limitation. He acquires no new right by the reference, except to demand that his claim be heard and determined by the court, just as would have been done had it been one of which the court could have taken cognizance by the voluntary suit of the claimant. Had he chosen, before going to Congress, to sue in the court of claims he would have been confronted with the Statute of Limitations. He cannot avoid that obstacle by procuring from one branch of Congress a reference of his claim to that court.

This construction of the statutes requires an affirmance of the judgment; for, if it was intended by the petition to present a claim under the Captured and Abandoned Property Act of 1868, it is barred by the limitation of two years prescribed for all claims under that statute; if it was intended to present a claim growing out of the appropriation of property by the Army engaged in the suppression of the rebellion, the Act of February 18, 1875, 18 Stat. at L. 318, now the last proviso in subdivision 4 of section 1059 of the Revised Statutes, excludes all jurisdiction to hear and determine it; and, if his claim is of the class defined in section 1069, it is barred by the limitation of six years.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

GEORGE E. CONEY AND PETER R. CARLL, *Appts.*

v.

ALVRED E. WINCHELL.

(See S. C. Reporter's ed. 227-231.)

Removal of causes—foreclosure of mortgages under Connecticut Statute—parties.

In a suit to foreclose a mortgage under the Connecticut Statute, brought against the grantee of the mortgagor, the latter is an indispensable party where it is sought to charge him with any insufficiency in the appraised value of the property to discharge the debt; and if he and the mortgagee are citizens of the same State, the cause cannot be removed.

[No. 1016.]

Submitted Dec. 18, 1885. Decided Jan. 4, 1886.

APPEAL from the Circuit Court of the United States for the District of Connecticut.

The history and facts of the case appear in the opinion of the court.

Messrs. **Simeon E. Baldwin** and **John H. Whiting**, for appellants.

Mr. **John W. Alling**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court.

This is an appeal under section 5 of the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137, from an order of the circuit court remanding a case which had been removed from a state court. The facts are these:

On the 10th of May, 1881, Peter R. Carll, a citizen of Connecticut, gave his three notes to Alvred E. Winchell for $10,000, $6,000 and $5,000 respectively, all payable five years from that date, with interest at 6 per cent per annum. To secure the payment he executed to Winchell a mortgage on certain property in New Haven, Connecticut. He afterwards conveyed his "title, right and interest" in the mortgaged property to George E. Coney, a citizen of New York.

A statute of Connecticut, passed in 1878 and still in force, is as follows:

"Sec. 1. The foreclosure of a mortgage shall

be a bar to any further suit or action upon the mortgage debt, note or obligation, unless the person or persons who are liable for the payment thereof are made parties to such foreclosure.

[228] "Sec. 2. Upon the motion of any party to a foreclosure, the court shall appoint three disinterested appraisers, who shall, under oath, appraise the mortgaged property within ten days after the time limited for redemption shall have expired, and shall make written report of their appraisal to the clerk of the court where said foreclosure was had, which report shall be a part of the files of such foreclosure suit, and such appraisal shall be final and conclusive as to the value of said mortgaged property; and the mortgage creditor in any further suit or action upon the mortgage debt, note, or obligation, shall recover only the difference between the value of the mortgaged property as fixed by such appraisal and the amount of his claim."

On the 16th of January, 1885, Winchell brought this suit against both Carll and Coney in the Superior Court of New Haven County, Connecticut, for: (1) "a foreclosure of said mortgage" and, (2) "possession of the mortgaged premises." In his bill he sets out the making of the notes and mortgage by Carll; the conveyance of the mortgaged property by Carll to Coney; a claim for $4,120 interest unpaid, and that Coney "with the said Carll, is now in possession of the" property. Carll and Coney filed separate demurrers to the bill, and on the 9th of May, 1885, which was in time, Coney petitioned for the removal of the cause to the Circuit Court of the United States under the second clause of section 2 of the Act of 1875, on the ground that there was in the suit a controversy wholly between himself, a citizen of New York, and Winchell, a citizen of Connecticut, which could be fully determined between them, and as to which Carll was only a nominal party. On the presentation of this petition, the state court declined to proceed further in the suit, but the circuit court, when the case was docketed there, ordered it to be remanded. From that order this appeal was taken.

In *Ayres* v. *Wiswall*, 112 U. S. 187 [Bk. 28, L. ed. 693], it was decided that in a suit for the foreclosure of a mortgage by sale, in which it was sought to charge the mortgage debtor with the payment of any balance of the mortgage debt that might remain due after the security was exhausted, the debtor was a necessary party, and that, if his citizenship stood in the way, the suit could not be removed, even though, were he not a party, the persons with whom he had been joined and to whom he had conveyed the property after the mortgage would be entitled to a removal. Such a case we held did not fall within either the first or second clause of section 2 of the Act of 1875.

The principle of that case governs this. In Connecticut, mortgages are not foreclosed by a sale of the mortgaged property, but by strict foreclosure. If there is a failure to redeem within the time limited in the decree, the mortgage debtor remains liable for the debt after deducting the value of the property foreclosed. Under the old practice this value was ascertained in the suit to collect the deficiency. In this connection counsel for the appellants say:

"In ordinary cases this suit might not be brought for four or five years after the foreclosure, and, in case of non-negotiable notes, for ten or fifteen years. It was therefore often difficult, in such suit, to ascertain the value of the property at the time of foreclosure. To meet this difficulty the Statute of 1878 was passed. It furnishes a way in which the value of the mortgaged premises can be ascertained at the time the title becomes absolute; provides that such value so found shall be conclusive in any further suit upon the note; authorizes the joining of the maker of the note as a party, so that he can have an opportunity to obtain such appraisal and be heard as to such value; and bars any further suit against the maker unless he is so made a party."

And again:

"Before the statute, as now, the foreclosure of the property reduced the obligation by the value of the property. By the statute this value is to be ascertained by an appraisal, and it is conclusively presumed to equal the obligation, unless the maker of the note is given an opportunity to be heard as to this appraisal. This gives him no interest in the property, no equity of redemption to be extinguished, no right whatever except the right to have an appraisal. And the appraisal, and only the appraisal, is made final and conclusive in the future action on the obligation."

This is a suit brought to foreclose under the statute; that is, to get the property without releasing the debtor from liability for the debt over the value of the property, and in so doing to fix the value. It is true there is not in the bill a prayer for appraisal, but that is not necessary. Any party to the suit can call for an appraisement by simply making a motion to that effect. The appraisement is one of the incidents of a suit for foreclosure when the person liable for the payment of the debt is a party. As in this case Carll, the mortgagor, conveyed the land to Coney after the mortgage was made, Winchell in foreclosing had his election to sue Coney alone, or Coney and Carll together. If he sued Coney alone, he would get the land, in case it should not be redeemed, but Carll, upon the foreclosure, would be discharged from all liability for the debt. If, however, he sued both Coney and Carll he would not only get the land, but hold Carll for the full amount of the debt over its value. He did elect to sue both. He has but a single cause of action and that his mortgage. The relief he seeks is a decree which shall give the foreclosure, and at the same time save the liability of Carll for what may remain due on the debt. This he cannot do unless he makes Carll a party, because in such a suit the mortgage debtor has the right to have it determined to what extent the mortgage debt is paid by the foreclosure. To use again the argument of counsel: he is entitled to an opportunity to obtain an appraisal and to be heard as to the value of the foreclosed property. True, there can be no recovery against him in the foreclosure suit for the balance that may remain due, but the value of the mortgaged property can be determined in a way that will conclude him when he is sued for the debt. This being the case, he is not only a necessary but an indispensable party to a suit for the relief which is asked in this case. The mere fact that he is made a party determines the character

[230]

of the suit to be for foreclosure and the saving of his liability for the debt. An adjudication of value binding on him is within the scope of the bill, and as it may be had upon mere motion as an incident to the decree of foreclosure which is prayed for, the suit is to be looked upon as brought for that purpose with the rest. We can see no difference, so far as a right to removal is concerned, between a suit for foreclosure which seeks a money decree against the [231] mortgagor for a balance of the mortgage debt, and one in which his liability for the debt is to be saved, and the value of the mortgaged property applied in payment to be conclusively settled against him.

The order remanding the suit is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[219]

CITY OF MILWAUKEE, *Appt.*,

v.

CHARLES A. KŒFFLER.

(See S. C. Reporter's ed. 219-226.)

Illegal tax—equity jurisdiction—injunction.

A bill in equity to set aside and restrain the collection of a tax levied on personal property by a municipal corporation cannot be maintained upon the sole ground of the illegality of the tax by reason of the nonresidence, within the limits of such municipality, of the person against whom the tax is levied.

[No. 1054.]

Submitted Dec. 18, 1885. Decided Jan. 4, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

The case is stated by the court.

Mr. **Joshua Stark**, for appellant:

The mere illegality of a tax is not sufficient ground for the interposition of a court of equity to enjoin its collection.

This is true, especially of those denominated "personal."

State Railroad Tax Cases, 92 U. S. 575 (Bk. 23, L. ed. 663); *Dows* v. *Chicago*, 11 Wall. 108 (78 U. S. bk. 20, L. ed. 65); *Hannewinkle* v. *Georgetown*, 15 Wall. 548 (82 U. S. bk. 21, L. ed. 232).

The same doctrine is held by the Supreme Court of Wisconsin, and by the courts of many other States.

Van Cott v. *Supervisors*, 18 Wis. 247; *Chicago & N. W. R. Co.* v. *Fort Howard*, 21 Wis. 44; *Quinney* v. *Town of Stockbridge*, 33 Wis. 505; *Williams* v. *Detroit*, 2 Mich. 560; *Henry* v. *Gregory*, 29 Mich. 68; *Youngblood* v. *Sexton*, 32 Mich. 406; *Brewer* v. *Springfield*, 97 Mass. 152; *Loud* v. *Charlestown*, 99 Mass. 208; *Hunnewell* v. *Charlestown*, 106 Mass. 350; *Rockingham Sav. Bk.* v. *Portsmouth*, 52 N. H. 17; *Dodd* v. *Hartford*, 25 Conn. 232; *Green* v. *Mumford*, 5 R. I. 472; *McCoy* v. *Chillicothe*, 3 Ohio, 370; *Brooklyn* v. *Meserole*, 26 Wend. 132; *Moores* v. *Smedley*, 6 Johns. Ch. 28; *Susquehanna Bk.* v. *Supervisors*, 25 N. Y. 312; *Heywood* v. *Buffalo*, 14 N. Y. 534; *Wilson* v. *Mayor, etc. of New York*, 4 E. D. Smith, 675; *Messeck* v. *Columbia Co.* 50 Barb. 190; *Ritter* v. *Patch*, 12 Cal. 298; *Conley* v. *Chedic*, 6 Nev. 222; *Sayre* v. *Tompkins*, 23 Mo. 443; *McPike* v. *Pew*, 48 Mo. 525; *Barrow* v. *Davis*, 46 Mo. 394.

It is suggested in the opinion in the *State Railroad Tax Cases, supra*, that the rule denying equitable relief against taxes might not be so rigidly applied to taxes levied by counties, towns and cities, as to those levied for the use of the State; and it has since been held in *Bridge Co.* v. *District of Columbia*, 1 Mackey, D. C. 217, that a sale for municipal taxes would be enjoined, on the mere ground that the tax was illegal, although the rule would be otherwise as to taxes imposed by the Sovereign.

The suggestion referred to can hardly have been intended to apply to those general taxes levied by cities and other municipal corporations, to be expended in the support of government.

The revenues of the municipality and its ability to discharge its high governmental functions, as an integral part of the State, depend upon the prompt payment of the taxes levied by the municipality.

It is a significant fact that *Dows* v. *Chicago*, *Hannewinkle* v. *Georgetown*, and most of the cases cited in which relief in equity against taxes on the mere ground of illegality was denied, affected only the revenues of cities or other municipal corporations.

Courts of equity do, it is true, often interfere at the suit of taxpayers to restrain municipal corporations from entering into contracts and incurring obligations which are not authorized by law, and to set aside and annul the illegal and unauthorized acts of such corporations.

Suits to enjoin the collection of an unconstitutional tax, or a tax levied in violation of an Act of Congress, or of some contract of exemption, or one creating a cloud upon the title to real property, or seriously interfering with a corporate franchise, are cases of this class. See *Allen* v. *B. & O. R. R. Co.* 114 U. S. 311 (Bk. 29, L. ed. 200); *Cummings* v. *National Bk.* 101 U. S. 153 (Bk. 25, L. ed. 903); *Poindexter* v. *Greenhow*, 114 U. S. 270 (Bk. 29, L. ed. 185). But they rest upon other grounds than mere illegality. Courts of equity will always interfere at the suit of taxpayers to prevent acts of a municipal corporation *ultra vires*, the effect of which will be to impose unauthorized burdens upon persons or their property.

Mr. **James G. Jenkins**, for appellee:

The case is a proper subject of equitable cognizance.

West v. *Ballard*, 32 Wis. 172.

In some of the cases the rule proceeds upon the ground that the taxes went to make up the revenue of the State; and the broad distinction is asserted between the restraining of taxes going to the State and those going to a municipality. In the latter case courts have exercised equitable jurisdiction and restrained the collection of the tax.

Worth v. *Fayetteville*, 1 Winst. (N. C.) 70; *Parmley* v. *Railroad Cos.* 3 Dill. 32; *Bridge Co.* v. *District of Columbia*, 1 Mackey, 217.

This distinction is broadly taken by *Mr. Justice* Miller in *State R. R. Tax Cases*, 92 U. S. 615 (Bk. 23, L. ed. 674); *Cummings* v. *National Bank*, 101 U. S. 153 (Bk. 25, L. ed. 903); *Allen* v. *B. & O. R. R. Co.* 114 U. S. 311 (Bk. 29, L. ed. 200).

In the case at bar the injunction may rightly

issue and equitable relief be rightly granted within the recognized principles of equity, because here the complainant was not a resident of the city nor subject to taxation therein. His personal property was not by law subject to be taxed by the municipality; he was a resident of and assessed in and paid taxes to the Town of Wauwatosa, and there discharged all the burdens which the law imposed upon him and upon his property with respect to the State, with respect to the county, with respect to the town, and with respect to the public schools. The officers of the municipal corporation of Milwaukee had absolutely no jurisdiction over him or his property, because they had lawful jurisdiction only as to personal property owned by residents of the city. Under such circumstances equity will intervene to prevent the enforcement of the unauthorized and illegal proceeding.

Barber v. *Furr*, 54 Iowa, 57 and cases cited. *Brandirff* v. *Harrison Co.* 50 Iowa, 164; *Beverly* v. *Sabin*, 20 Ill. 357; *Ottawa* v. *Walker*, 21 Ill. 610; *Darling* v. *Gunn*, 50 Ill. 424; *Munson* v. *Miller*, 66 Ill. 380; *Lebanon* v. *Ohio & M. R. R. Co.* 77 Ill. 539; *Kimball* v. *Merchants Ser. L. & T. Co.* 89 Ill. 611; *Union Trust Co.* v. *Weber*, 96 Ill. 357; *Commissioners* v. *Markle*, 46 Ind. 96; *Knight* v. *Turnpike Co.* 45 Ind. 139; *Shoemaker* v. *Grant Co.* 36 Ind. 175; *Riley* v. *W. U. Tel. Co.* 47 Ind. 511; *School Board App.* 74 Pa. St. 252; *Dodge* v. *Woolsey*, 18 How. 331 (59 U. S. bk. 15, L. ed. 401); *Dorn* v. *Fox*, 61 N. Y. 264; *Mohawk & H. R. R. R. Co.* v. *Clute*, 4 Paige, Ch. 384; *Gould* v. *Atlanta*, 55 Ga. 678; *R. R. Co.* v. *Wyoming*, 1 Wyoming, 96; *Home* v. *Green*, 52 Miss. 452; *Blakeslee* v. *Murphy*, 44 Conn. 188; *Lapene* v. *McCan*, 28 La. Ann. 749; *Robinson* v. *Reid*, 50 Ala. 69; *Grass* v. *Hess*, 37 Ind. 198; *Earl* v. *Matheney Co.* 60 Ind. 202; *Smith* v. *Pearce*, 6 Baxter, (Tenn.) 72.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from the Circuit Court for the Eastern District of Wisconsin.

The bill, originally filed in a state court and afterwards removed into the Circuit Court of the United States, prayed for an injunction to restrain the collection of a tax assessed by the City of Milwaukee against Kœffler. The tax was assessed against him as a resident of that City on account of his personal property; and his complaint alleges that he did not reside in Milwaukee in the year for which the tax was levied against him, nor for some years before or since, and that the assessment is therefore void.

The answer of defendant, filed in the state court before the removal of the case, denies complainant's allegation as to nonresidence and, averring his citizenship and residence there, adds:

"And for a further and separate answer and defense, the defendant alleges and shows unto the court that the plaintiff, if he is able to prove the allegations of his complaint herein, has a complete and sufficient remedy at law; and that for this reason this court, as a court of equity, should not and will not interfere, assume or take jurisdiction of this action, and the defendant objects for that reason to any and all interference of this court, as a court of equity, in the matter of which plaintiff complains, and asks that this action be dismissed."

Replication being filed, the case was heard on these issues, and on a considerable mass of testimony as to the question of residence in Milwaukee.

On the hearing it appears that the judges of [220] the circuit court, assuming that complainant was not a resident of that City, were divided in opinion on the question of the jurisdiction of the court as a court of equity, to grant relief. This question they present to us in the following certificate:

"The case coming on to be heard at this term upon the pleadings and proofs, it occurred as a question whether a bill in equity to set aside and restrain the collection of a personal tax or a tax levied upon personal property by a municipal corporation can be maintained on the sole ground of the illegality of the tax by reason of the nonresidence within the limits of such municipality of the person against whom the tax is levied.

On which question the opinions of the judges were opposed.

Whereupon, on motion of the plaintiff, by his counsel, that the point on which the disagreement hath happened may during the term be stated under the direction of the judges and certified under the seal of the court to the supreme court to be finally decided, it is ordered that the foregoing state of the pleadings and the following statement of facts, which is made under the direction of the judges, be certified according to the request of the plaintiff by his counsel, and the law in that case made and provided, to wit:

That Charles A. Kœffler, the plaintiff, in 1882, when the assessment and levy of tax against him on account of personal property were made, was not and for several years prior thereto had not been a resident of the City of Milwaukee, but was and had been a resident of the Town of Wauwatosa, in the County of Milwaukee, Wisconsin."

In accordance with the opinion of the presid- [222] ing justice, a decree was made setting aside the assessment of the tax and enjoining the City and its officers from collecting it.

We are of opinion that both this court and the Supreme Court of Wisconsin are committed to a contrary doctrine.

The case of *Dows* v. *Chicago*, 11 Wall. 108 [78 U. S. bk. 20, L. ed. 65], was a bill in equity in the Circuit Court for the Northern District of Illinois, brought by Dows, a citizen of New York, to restrain the City of Chicago from collecting a tax upon the shares of stock which he owned in a national bank located in that city. He alleged that the tax was illegal because his shares were assessed at a higher rate than other moneyed capital in the city, and because, not being a resident of Chicago, but of New York, his personal property belonged to his domicil, and any tax levied on it by the City of Chicago was void.

The bill was dismissed on demurrer, on the ground that a court of equity had no jurisdiction to give relief, for the reasons stated in the bill. It will be observed that in that case, as in this, the tax was resisted as a tax on the person on account of personal property, upon the

ground that the party assessed did not reside within the city, and the corporation, therefore, had no power to tax him.

The property for which the tax was assessed was in each case intangible property. In the first case it was bank shares, the certificates of which were undoubtedly held at the residence of Dows in New York; and in the present case it was for money loaned on mortgages.

Looking at the case then made by the bill, one in which the assessment of the tax was not only irregular but void, the court, in the language of *Mr. Justice* Field, said:

[223] "Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments; and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will therefore allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived."

The opinion contains an examination of the adjudged cases, by which the proposition is sustained, in one of which, that of *Cook County* v. *Chicago, etc. R. R. Co.* 35 Ill. 465, the general principle is well stated by the Supreme Court of Illinois, namely: "that while a court of equity would never entertain a bill to restrain the collection of a tax, except in cases where the tax was unauthorized by law, or where it was assessed on property not subject to taxation, it had never held that jurisdiction would be taken in those excepted cases, without special circumstances showing that the collection of [224] the tax would be likely to produce irreparable injury or cause a multiplicity of suits."

In the case of *Hannewinkle* v. *Georgetown*, 15 Wall. 547 [82 U. S. bk. 21, L. ed. 231], the principle is thus stated: "It has been the settled law of the country for a great many years that an injunction bill to restrain the collection of a tax, on the sole ground of illegality of the tax, cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction. This was decided as early as the days of *Chancellor* Kent, in *Moores* v. *Smedly*, 6 Johns. Ch. 28, and has been so held from that time onward."

In the *State Railroad Tax Cases*, 92 U. S. 575, 613 [Bk. 23, L. ed. 663, 673], these decisions are reviewed with others, and the whole question very fully considered, as the importance of the cases and the ability of the counsel who argued them required; and after citing the language in *Dows* v. *Chicago*, and *Hannewinkle* v *Georgetown*, the court adds: "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of taxes; but we may say that in addition to illegality, hardship or irregularity the case must be brought within some of the recognized foundations of equitable jurisprudence, and that mere errors or excess in valuation or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of the taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

An intimation in the opinion in that case to the effect that, in cases of taxes assessed by counties, towns or cities, a more liberal use of the control of courts of equity may be necessary, has been cited in the brief in the present case as affording ground for sustaining the injunction here. But no class of cases was there mentioned as justifying this interference, and it is evident that the mere facts that the tax was levied by a local corporate body, and was also illegal, were not in themselves supposed to be sufficient; for the cases cited in the sentences preceding that remark, of *Dows* v. *Chicago* and *Hannewinkle* v. *Georgetown*, were both cases of taxes by towns, to which the doctrine of the restricted powers of a court of equity was applied.

The rule against the interference of a court of equity, and the exceptions to the rule are restated with careful accuracy in the very recent case in this court of the *Union Pacific Railway Co.* v. *Cheyenne*, 113 U. S. 525 [Bk. 28, L. ed. 1101].

As to the decisions of the Supreme Court of Wisconsin, its language, in the case of *Quinney* v. *Stockbridge*, 33 Wis. 505, is as emphatic as that of this court. "The complaint," says the court, "charges the seizure of certain personal property belonging to plaintiffs by the treasurer, under and by virtue of the warrant for the collection of the taxes, and asks an injunction to prevent the treasurer from selling the same. It is well settled, in this court at least, that the writ of injunction will not be granted for such a purpose, and that the illegal seizure and threat of the officer to sell the goods and chattels of the plaintiff constitute no ground for equitable interference." In the case of *Van Cott* v. *Supervisors of Milwaukee County*, 18 Wis. 247, which, like the present case, was a bill to enjoin the collection of a tax on personal property, and in nearly every other respect is like this, except that the County of Milwaukee was defendant there, and here it is the City, the same court gave the reasons for the rule adopted by it in

the following language: "Our reasons, in brief, are, that by the wrong such as is complained of here no irreparable mischief is threatened, no cloud is thrown over the title to real estate, which a court of equity may be called upon to remove, and the plaintiff has an ample remedy at law. To say nothing of the special remedies given by statute, which with diligence and attention on the part of the taxpayer will always prove effectual, and nothing of the remedies by *certiorari*, *mandamus*, prohibition, etc., as heretofore applied in such cases, it seems to us that the remedy by action against the assessors in cases where they exceed their jurisdiction, and the right which the party always has to recover back the money paid for taxes illegally imposed, if collected by distress and sale of his goods, or if, upon levying a warrant, he pays to save his property, constitute a complete answer to the application of a court of equity to restrain or prevent the collection." It is then shown that the corporation being liable in an action to recover back the tax wrongfully exacted, the return of this sum is, both in law and equity, full compensation.

There is nothing to take the case before us out of the principle here laid down; and the decision of the highest court of Wisconsin, that the remedy at law is ample, must command our respect.

In the latest case in Michigan, *Youngblood* v. *Sexton*, 32 Mich. 407, Cooley, *Justice*, says: "It was decided at an early day in this State that equity had no jurisdiction to restrain the collection of a personal tax, even conceding it to be illegal, the ordinary legal remedies being ample for the party's protection," citing *Williams* v. *Detroit*, 2 Mich. 560, and *Henry* v. *Gregory*, 29 Mich. 68. He also shows by additional citations that the same principle has been asserted in the courts of Massachusetts, New Hampshire, Connecticut, California, North Carolina, Rhode Island, Ohio, Missouri, New York and Maryland.

In the case before us we see no reason for departing from the settled doctrine both of this court and of the Supreme Court of Wisconsin.

There is nothing here presented which brings the case under any of the recognized heads of equity jurisdiction, and the mischiefs which must attend the exercise of the right to contest in the courts of equity every tax which is asserted to be illegal or unauthorized, are too serious to justify any such departure.

The question on which the judges of the Circuit Court divided is, therefore, answered in the negative; and as that court has no equitable jurisdiction in the case, its decree is reversed and the case remanded, with directions to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HERMAN PRESSER, *Plff. in Err.*, [252]

v.

PEOPLE OF THE STATE OF ILLINOIS.

(See S. C. Reporter's ed. 252-269.)

Constitutional law—validity of the Military Code of Illinois—construction of.

1. Statutes must be interpreted, if possible, so as to make them consistent with the Constitution and the paramount law.
2. Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the parts are separable.
3. The States have the power to control and regulate the organization, drilling and parading of military bodies and associations, except when they are authorized by the militia laws of the United States.
4. The Second Amendment to the Constitution is a limitation only upon the power of Congress and the National Government, and not upon that of the States.
5. Citizens of the United States have no right to associate together to drill or parade with arms, independent of any Act of Congress or State law, within the protection of the first section of the Fourteenth Amendment to the Constitution.
6. The fifth and sixth sections of article XI. of the Military Code of Illinois, which forbids bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, are not in conflict with the Constitution of the United States.

[No. 78.]

Argued Nov. 23, 24, 1885. Decided Jan. 4, 1886.

IN ERROR to the Supreme Court of the State of Illinois.

The history and facts of the case appear in the opinion of the court.

Messrs. **Allen C. Story** and *Lyman Trumbull*, for plaintiff in error:

The Act in question is in direct conflict with subdivisions 12, 14, 15, 16 and 18 of section 8, article 1 of the Federal Constitution, and the various Acts of Congress upon the subject of "militia."

Houston v. *Moore*, 5 Wheat. 1 (18 U. S. bk. 5, L. ed. 19); *Gibbons* v. *Ogden*, 9 Wheat. 209 (22 U. S. bk. 6, L. ed. 78) *Passenger Cases*, 7 How. 283 (48 U. S. bk. 12, L. ed. 702); *Hannibal & St. J. R. R. Co.* v. *Husen*, 95 U. S. 465 (Bk. 24, L. ed. 527); *McCulloch* v. *Maryland*, 4 Wheat. 316 (17 U. S. bk. 4, L. ed. 579); *Sturges* v. *Crowninshield*, 4 Wheat. 122 (17 U. S. bk. 4, L. ed. 529); Story, Const. sec. 1208; Opinions of Justices, 14 Gray, 614; *McCall's Case*, 5 Phil. Rep. 259; Cooley, Const. Lim. 177, n., 178, 179; *U. S.* v. *Cruikshank*, 92 U. S. 552 (Bk. 23, L. ed. 591); *People* v. *Cooper*, 83 Ill. 585; *Livingston* v. *Van Ingen*, 9 Johns. 507; *Gilman* v. *Philadelphia*, 3 Wall. 713 (70 U. S. bk. 18, L. ed. 96); *Martin* v. *Mott*, 12 Wheat. 19 (25 U. S. bk. 6, L. ed. 537).

It is also in conflict with subdivision 3, section 10, art. 1, Federal Constitution.

Cases above cited; *Luther* v. *Borden*, 7 How. 1 (48 U. S. bk. 12, L. ed. 581); *Mills* v. *Martin*, 10 Johns. 7; *Crandall* v. *Nevada*, 6 Wall. 35 (73 U. S. bk. 18, L. ed. 745); *Texas* v. *White*, 7 Wall. 700 (74 U. S. bk. 19, L. ed. 227); *Green* v. *Biddle*, 8 Wheat. 1 (21 U. S. bk. 5, L. ed. 547); *Poole* v. *Fleeger*, 11 Pet. 185 (36 U. S. bk. 9, L. ed. 680).

It is also in conflict with article II, amendments to Federal Constitution.

See authorities first above cited.

It is also in conflict with the Fourteenth Amendment to the Federal Constitution.

Slaughter-House Cases, 16 Wall. 74 (83 U. S. bk. 21, L. ed. 408); *U. S.* v. *Cruikshank*, 92 U. S. 543 (Bk. 23, L. ed. 588); *Ward* v. *Maryland*, 12 Wall. 430 (79 U. S. bk. 20, L. ed. 452); *Crandall* v. *Nevada*, 6 Wall. 49 (73 U. S. bk. 18, L. ed. 749); *Lemmon* v. *People*, 20 N. Y. 607; *Willard* v. *People*, 4 Scam. 461; *Dred Scott* v. *Sandford*, 19 How. 580 (60 U. S. bk. 15, L. ed. 773).

It is also in conflict with subdivision 3, § 9, art. 1, Fed. Const.

Calder v. *Bull*, 3 Dall. 390 (1 U. S. bk. 1, L. ed. 650); *Fletcher* v. *Peck*, 6 Cranch, 87 (10 U. S. bk. 3, L. ed. 162); *Cummings* v. *Missouri*, 4 Wall. 277 (71 U. S. bk. 18, L. ed. 356); *Sheppard* v. *People*, 25 N. Y. 406; *Lapeyre* v. *U. S.* 17 Wall. 206 (84 U. S. bk. 21, L. ed. 610); *Carpenter* v. *Pennsylvania*, 17 How. 456 (58 U. S. bk. 15, L. ed. 127); *Ex Parte Garland*, 4 Wall. 333 (71 U. S. bk. 18, L. ed. 366).

The power of arming, organizing and disciplining the militia, being confided by the Constitution to Congress, when Congress acts upon the subject and passes a law to carry into effect the constitutional provision, such action excludes the power of legislation by the States on the same subject. Congress has exercised its functions and covered, so far as it deemed expedient, the ground assigned to it by the Constitution.

Act of May 8, 1792, 1 Stat. at L. 271, R. S. § 1625 *et seq.*; *Houston* v. *Moore*, 5 Wheat. 24 (18 U. S. bk. 5, L. ed. 24). There is nothing in the case of *Sturges* v. *Crowninshield*, in conflict with this doctrine.

The Fourteenth Amendment makes all persons born or naturalized in the United States citizens of the United States and of the State wherein they reside, and then declares that no State shall make any law which shall abridge the privileges and immunities of citizens of the United States. The citizen has secured to him the right to keep and bear arms as part of the militia which Congress has the right to organize, and to arm and drill in companies.

U. S. v. *Cruikshank*, 92 U. S. 552 (Bk. 23, L. ed. 591).

The organization of the Illinois National Guard, provided for by the Illinois Code, does not conform to the Act of Congress. It does not constitute any part of the militia upon which the president may call to enforce the laws of the United States, when resisted by combinations too powerful to be overcome by the ordinary course of judicial proceedings.

Act, Feb. 28, 1795; 1 Stat. at L. 424; R. S. §§ 5298, 5299

It is purely a state force, sworn to serve the State in its military service, subject at all times to the orders of the Governor, prohibited from leaving the State without his consent under a penalty; and, so far from being a part of the militia organized in pursuance of the Act of Congress, the Illinois National Guard, in its organization, arming, and the purpose for which it is organized, contravenes the spirit and intent of the national Act, and if permitted to stand, it prevents the organization, arming and disciplining of all the male citizens of the State as Congress has prescribed.

Mr. **George Hunt**, *Atty-Gen. of Illinois*, for defendants in error:

The Federal Constitution does not take from a State its right to call out the militia for any or all lawful purposes for its own protection and preservation. Without depriving a State of any rights, it vests in Congress the power to provide for using the militia for the purposes therein enumerated and none other.

The power of the State to provide for the organization of its own militia is not derived from the Constitution of the United States. The power existed and was exercised before the adoption of the Constitution; and its exercise by the States is not prohibited by that instrument. It is only such legislation as is repugnant to the authority of Congress that must give way, even when the authority conferred upon Congress is being exercised.

Gilman v. *Philadelphia*, 3 Wall. 713 (70 U. S. bk. 18, L. ed. 96); *Livingston* v. *Van Ingen*, 9 Johns. 566; *Sturges* v. *Crowninshield*, 4 Wheat. 122 (17 U. S. bk. 4, L. ed. 529); *Blanchard* v. *Russell*, 13 Mass. 1.

The right of the people to assemble even for a lawful purpose is not such a right as it is the duty of the general government to enforce.

U. S. v. *Cruikshank*, 92 U. S. 542 (Bk. 23, L. ed. 588). See *Dunne* v. *People*, 94 Ill. 120.

The Act is purely a police regulation enacted in the interest of the public peace and good order. The right of a State to provide against unlawful assemblies has never been questioned.

N. W. Fertilizing Co. v. *Hyde Park*, 70 Ill. 634; *Lakeview* v. *Rose Hill Cem. Co.* 70 Ill. 191; *Galena & C. U. R. R. Co.* v. *Dill*, 22 Ill. 264; *Same* v. *Appleby*, 28 Ill. 283.

Mr. Justice **Woods** delivered the opinion of the court:

Herman Presser, the plaintiff in error, was indicted on September 24, 1879, in the Criminal Court of Cook County, Illinois, for a violation of the following sections of article XI. of the Military Code of that State:

"Sec. 5. It shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this State, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town of this State, without the license of the Governor thereof, which license may at any time be revoked; *And provided further*, that students in educational institutions, where military science is a part of the course of instruction, may, with the consent of the Governor, drill and parade with arms in public, under the superintendence of their instructors, and may take part in any regimental or brigade encampment, under command of their military instructor; and while so encamped shall be governed by the provisions of this Act. They shall be entitled only to transportation and subsistence, and shall report and be subject to the commandant of such encampment; *Provided*, That nothing herein contained shall be construed so as to prevent benevolent or social organizations from wearing swords.

Sec. 6. Whoever offends against the provisions of the preceding section, or belongs to or parades with any such unauthorized body

of men with arms shall be punished by a fine not exceeding the sum of $10, or by imprisonment in the common jail for a term not exceeding six months, or both." Laws of 1879, page 203.

The indictment charged in substance that Presser, on September 24, 1879, in the county of Cook, in the State of Illinois, "did unlawfully belong to, and did parade and drill in the City of Chicago with an unauthorized body of men with arms, who had associated themselves together as a military company and organization, without having a license from the governor, and not being a part of, or belonging to, 'the regular organized volunteer militia' of the State of Illinois, or the troops of the United States."

A motion to quash the indictment was overruled. Presser then pleaded not guilty, and both parties having waived a jury the case was tried by the court, which found Presser guilty and sentenced him to pay a fine of $10.

The bill of exceptions taken upon the trial set out all the evidence, from which it appeared that Presser was thirty-one years old, a citizen of the United States and of the State of Illinois, and a voter; that he belonged to a society called the *Lehr und Wehr Verein*, a corporation organized April 16, 1875, in due form, under chapter 32, Revised Statutes of Illinois, called the General Incorporation Laws of Illinois, "for the purpose," as expressed by its certificate of association, "of improving the mental and bodily condition of its members, so as to qualify them for the duties of citizens of a republic. Its members shall therefore obtain, in the meetings of the association, a knowledge of our laws and political economy, and shall also be instructed in military and gymnastic exercises;" that Presser, in December, 1879, marched at the head of said company, about four hundred in number, in the streets of the City of Chicago, he riding on horseback and in command; that the company was armed with rifles and Presser with a cavalry sword; that the company had no license from the Governor of Illinois to drill or parade as a part of the militia of the State, and was not a part of the regular organized militia of the State, nor a part of the troops of the United States, and had no organization under the militia law of the United States. The evidence showed no other facts. Exceptions were reserved to the ruling of the court upon the motion to quash the indictment, to the finding of guilty, and to the judgment thereon. The case was taken to the Supreme Court of Illinois, where the judgment was affirmed. Thereupon Presser brought the present writ of error for a review of the judgment of affirmance.

The position of the plaintiff in error in this court was, that the entire statute under which he was convicted was invalid and void, because its enactment was the exercise of a power by the Legislature of Illinois forbidden to the States by the Constitution of the United States.

The clauses of the Constitution of the United States referred to in the assignments of error, were as follows:

Art. I. sec. 8. "The Congress shall have power * * * To raise and support armies. * * * To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers and the authority of training the militia, according to the discipline prescribed by Congress. To make all laws which shall be necessary and proper, for carrying into execution the foregoing powers," etc.

Art. I. sec. 10. "No State shall, without the consent of Congress, keep troops * * * in time of peace."

Art. II. of Amendments. "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

The plaintiff in error also contended that the enactment of the fifth and sixth sections of article XI. of the Military Code was forbidden by subdivision 3 of section 9, art. I, which declares "No bill of attainder or *ex post facto* law shall be passed," and by article XIV. of Amendments, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.' [261]

The first contention of counsel for plaintiff in error is that the Congress of the United States having, by virtue of the provisions of article I, section 8, above quoted, passed the Act of May 8, 1792, entitled "An Act More Effectually to Provide for the National Defense by Establishing an Uniform Militia Throughout the United States," (1 Stat. at L. 271,) the Act of February 28, 1795, "To Provide for Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions," (1 Stat. at L. 424,) and the Act of July 22, 1861, "To Authorize The Employment of Volunteers to Aid in Enforcing the Laws and Protecting Public Property," (12 Stat. at L. 268,) and other subsequent Acts, now forming "Title XVI., The Militia," of the Revised Statutes of the United States, the Legislature of Illinois had no power to pass the Act approved May 28, 1879, "To Provide for the Organization of the State Militia, entitled the Military Code of Illinois," under the provisions of which (sections 5 and 6 of article XI.) the plaintiff in error was indicted.

The argument in support of this contention is that the power of organizing, arming and disciplining the militia being confided by the Constitution to Congress, when it acts upon the subject and passes a law to carry into effect the constitutional provision, such action excludes the power of legislation by the State on the same subject.

It is further argued that the whole scope and object of the Military Code of Illinois is in conflict with that of the law of Congress. It is said that the object of the Act of Congress is to provide for organizing, arming and disciplining all the able-bodied male citizens of the States respectively, between certain ages, that they may be ready at all times to respond to the call of the nation to enforce its laws, suppress insurrection and repel invasion and thereby avoid the necessity for maintaining a large [262] standing army, with which liberty can never

be safe; and that on the other hand, the effect if not object of the Illinois Statute is to prevent such organizing, arming and disciplining of the militia.

The plaintiff in error insists that the Act of Congress requires absolutely all able bodied citizens of the State, between certain ages, to be enrolled in the militia; that the Act of Illinois makes the enrollment dependent on the necessity for the use of troops to execute the laws and suppress insurrections, and then leaves it discretionary with the Governor by proclamation to require such enrollment; that the Act of Congress requires the entire enrolled militia of the State, with a few exemptions made by it and which may be made by state laws, to be formed into companies, battalions, regiments, brigades and divisions; that every man shall be armed and supplied with ammunition; provides a system of discipline and field exercises for companies, regiments, etc., and subjects the entire militia of the State to the call of the President to enforce the laws, suppress insurrection, or repel invasion; and provides for the punishment of the militia officers and men who refuse obedience to his orders. On the other hand, it is said that the state law makes it unlawful for any of its able bodied citizens, except eight thousand, called the Illinois National Guard, to associate themselves together as a military company, or to drill or parade with arms without the license of the Governor, and declares that no military company shall leave the State with arms and equipments without his consent; that even the eight thousand men styled the Illinois National Guard are not enrolled or organized as required by the Act of Congress, nor are they subject to the call of the President, but they constitute a military force, sworn to serve in the military service of the State, to obey the orders of the Governor, and not to leave the State without his consent; and that, if the state Act is valid, the national Act providing for organizing, arming and disciplining the militia is of no force in the State of Illinois, for the Illinois Act, so far from being in harmony with the Act of Congress, is an insurmountable obstacle to its execution.

[263] We have not found it necessary to consider or decide the question thus raised, as to the validity of the entire Military Code of Illinois; for, in our opinion, the sections under which the plaintiff in error was convicted may be valid, even if the other sections of the Act were invalid. For it is a settled rule "that statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are separable." *Packet Co.* v. *Keokuk*, 95 U. S. 80 [Bk. 24, L. ed. 377]; *Penniman's Case*, and *Unity* v. *Burrage*, 103 U. S. 717, 459 [Bk. 26, L. ed. 604, 409]. See also *Trade-Mark Cases*, 100 U. S. 82 [Bk. 25, L. ed. 550].

We are of opinion that this rule is applicable in this case. The first two sections of article I. of the Military Code provide that all able bodied male citizens of the State between the ages of eighteen and forty-five years, except those exempted, shall be subject to military duty, and be designated the "Illinois State Militia," and declare how they shall be enrolled and under what circumstances. The residue of the Code, except the two sections on which the indictment against the plaintiff in error is based, provides for a volunteer active militia, to consist of not more than eight thousand officers and men; declares how it shall be enlisted and brigaded, and the term of service of its officers and men; provides for brigade generals and their staffs, for the organization of the requisite battalions and companies and the election of company officers; provides for inspections, parades, and encampments, arms and armories, rifle practice and courts-martial; provides for the pay of the officers and men, for medical service, regimental bands, books of instruction and maps; contains provisions for levying and collecting a military fund by taxation, and directs how it shall be expended; and appropriates $25,000 out of the treasury, in advance of the collection of the military fund, to be used for the purposes specified in the Military Code.

It is plain from this statement of the substance of the Military Code that the two sections upon which the indictment against the plaintiff in error is based may be separated from the residue of the Code and stand upon their own independent provisions. These sections might have been left out of the Military Code and put in an Act by themselves, and the Act thus constituted, and the residue of the Military Code, would have been coherent and sensible Acts. If it be conceded that the entire Military Code, except these sections, is unconstitutional and invalid, for the reasons stated by the plaintiff in error, these sections are separable and, put in an Act by themselves, could not be considered as forbidden by the clauses of the Constitution having reference to the militia, or to the clause forbidding the States, without the consent of Congress, to keep troops in time of peace. There is no such connection between the sections which prohibit any body of men, other than the organized militia of the State and the troops of the United States, from associating as a military company and drilling with arms in any city or town of the State, and the sections which provide for the enrollment and organization of the State militia, as makes it impossible to declare one without declaring both invalid.

This view disposes of the objection to the judgment of the Supreme Court of Illinois, which judgment was in effect that the legislation on which the indictment is based is not invalid by reason of the provisions of the Constitution of the United States, which vest Congress with power to raise and support armies, and to provide for calling out, organizing, arming and disciplining the militia, and governing such part of them as may be employed in the service of the United States, and that provision which declares that "no State shall without the consent of Congress * * * keep troops * * * in time of peace."

We are next to inquire whether the 5th and 6th sections of article XI. of the Military Code are in violation of the other provisions of the Constitution of the United States relied on by the plaintiff in error. The first of these is the Second Amendment, which declares: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

We think it clear that the sections under con

sideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National Government, and not upon that of the States. It was so held by this court in the case of *United States* v. *Cruikshank*, 92 U. S. 542 [Bk. 23, L. ed. 588], in which the *Chief Justice*, in delivering the judgment of the court, said, that the right of the people to keep and bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument. The Second Amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the Amendments that has no other effect than to restrict the powers of the National Government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes to what is called in *New York* v. *Miln*, 11 Pet. 139 [36 U. S. bk. 9, L. ed. 662], the 'powers which relate to merely municipal legislation, or what was perhaps more properly called internal police,' 'not surrendered or restrained' by the Constitution of the United States." See also *Barron* v. *Baltimore*, 7 Pet. 243 [32 U. S. bk. 8, L. ed. 672]; *Fox* v. *Ohio*, 5 How. 410 [46 U. S. bk. 12, L. ed. 212]; *Twitchell* v. *Commonwealth*, 7 Wall. 327 [74 U. S. bk. 19, L. ed. 224]; *Jackson* v. *Wood*, 2 Cow. 819; *Commonwealth* v. *Purchase*, 2 Pick. 521; *United States* v. *Cruikshank*, 1 Woods, 308; *North Carolina* v. *Newsom*, 5 Ired. 250; *Andrews* v. *State*, 3 Heisk. 165; *Fife* v. *State*, 31 Ark. 455.

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States; and, in view of this prerogative of the General Government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government. But, as already stated, we think it clear that the sections under consideration do not have this effect.

The plaintiff in error next insists that the sections of the Military Code of Illinois, under which he was indicted, are an invasion of that clause of the first section of the Fourteenth Amendment to the Constitution of the United States which declares: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect. A State may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States. The inquiry is therefore pertinent: What privilege or immunity of a citizen of the United States is abridged by sections 5 and 6 of article XI. of the Military Code of Illinois?

The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offense for which he was convicted and sentenced. The question is, therefore: Had he a right as a citizen of the United States, in disobedience of the state law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred. For, as was said by this court in *United States* v. *Cruikshank*, 92 U. S. 542 [Bk. 23, L. ed. 588], "The Government of the United States, although it is within the scope of its powers supreme and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or so secured are left to the exclusive protection of the State."

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We have not been referred to any statute of the United States which confers upon the plaintiff in error the privilege which he asserts. The only clause in the Constitution which, upon any pretense, could be said to have any relation whatever to his right to associate with others as a military company is found in the First Amendment, which declares that "Congress shall make no law * * * abridging * * * the right of the people peaceably to assemble and to petition the government for a redress of grievances." This is a right which it was held in *United States* v. *Cruikshank*, [*supra*], was an attribute of national citizenship and, as such, under the protection of and guaranteed by the United States. But it was held in the same case that the right peaceably to assemble was not protected by the clause referred to, unless the purpose of the assembly was to petition the government for a redress of grievances.

The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without and independent of an Act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal Governments, acting in due regard to their respective prerogatives and powers. The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.

It cannot be successfully questioned that the State Governments, unless restrained by their own constitutions, have the power to regulate

or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States; and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies [268] or associations are authorized by the militia laws of the United States. The exercise of this power by the States is necessary to the public peace, safety and good order. To deny the power would be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine.

In the case of *New York* v. *Miln*, 11 Pet. 102 [36 U. S. bk. 9, L. ed. 648], this court said: "We choose rather to plant ourselves on what we consider impregnable positions. These are, that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, when that jurisdiction is not surrendered or restrained by the Constitution of the United States; that by virtue of this it is not only the right but the bounden duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every Act of legislation which it may deem to be conducive to these ends, where the power over that particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated," namely: by the Constitution and laws of the United States. See also *Gibbons* v. *Ogden*, 9 Wheat. 203 [22 U. S. bk. 6, L. ed. 71]; *Gilman* v. *Philadelphia*, 3 Wall. 713 [70 U. S. bk. 18, L. ed. 96]; *License Tax Cases*, 5 Wall. 462 [72 U. S. bk. 18, L. ed. 497]; *United States* v. *Dewitt*, 9 Wall. 41 [76 U. S. bk. 19, L. ed. 593]; *United States* v. *Cruikshank*, 92 U. S. 542 [Bk. 23, L. ed. 588]. These considerations and authorities sustain the power exercised by the Legislature of Illinois in the enactment of sections 5 and 6 of article XI. of the Military Code.

The argument of the plaintiff in error that the legislation mentioned deprives him of either life, liberty or property without due process of law, or that it is a bill of attainder or *ex post facto* law, is so clearly untenable as to require no discussion.

It is next contended by the plaintiff in error that sections 5 and 6 of article XI. of the Military Code, under which he was indicted, are in conflict with the Acts of Congress for the organization of the militia But this position is based on what seems to us to be an unwarranted construction of the sections referred to. It is clear that their object was to forbid voluntary military associations, unauthorized by law, from [269] organizing or drilling and parading with arms in the cities or towns of the State, and not to interfere with the organization, arming and drilling of the militia under the authority of the Acts of Congress. If the object and effect of the sections were in irreconcilable conflict with the Acts of Congress they would of course be invalid. But it is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the Constitution and the paramount law. *Parsons* v. *Bedford*, 3 Pet. 433 [28 U.S. bk. 7, L. ed. 732]; *Grenada County Supervisors* v. *Brogden*, 112 U. S. 261 [Bk. 28, L. ed. 704]; *Marshall* v. *Grimes*, 41 Miss. 27. If we yielded to this contention of the plaintiff in error we should render the sections invalid by giving them a strained construction, which would make them antagonistic to the law of Congress. We cannot attribute to the Legislature, unless compelled to do so by its plain words, a purpose to pass an Act in conflict with an Act of Congress on a subject over which Congress is given authority by the Constitution of the United States. We are therefore of opinion that fairly construed the sections of the Military Code referred to do not conflict with the laws of Congress on the subject of the militia.

The plaintiff in error further insists that the organization of the *Lehr und Wehr Verein* as a corporate body, under the general corporation law of the State of Illinois, was in effect a license from the Governor, within the meaning of section 5 of article XI. of the Military Code, and that such corporate body fell within the exception of the same section "of students in educational institutions where military science is a part of the course of instruction."

In respect to these points we have to say that they present no federal question. It is not, therefore, our province to consider or decide them. *Murdock* v. *Memphis*, 20 Wall. 590 [87 U. S. bk. 22, L. ed. 429].

All the federal questions presented by the record were rightly decided by the Supreme Court of Illinois.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

PORT OF MOBILE, *Plff. in Err.*,

v.

HENRY WATSON.

PORT OF MOBILE, *Plff. in Err.*,

v.

UNITED STATES, *ex rel.* HENRY WATSON.

(See S. C. Reporter's ed. 289-306.)

Constitutional law—municipal corporations—dissolution—liability of successors for debts—impairment of remedies—mandamus.

1. Where a municipal corporation is dissolved and a new corporation is created, composed of substantially the same community, including substantially the same taxable property, within reduced territorial limits organized for the same general purposes and holding by transfer, without consideration, the public property of the former, it is the successor of the old corporation and is liable for its debts.

2. The obligations of municipal corporations, upon bonds duly issued by them, are secured by all the guarantees which protect the engagements of private individuals.

3. Any legislative enactment which withdraws or limits the remedies for the enforcement of obligations assumed by a municipal corporation, where no substantial equivalent is provided, is forbidden by the Constitution of the United States.

[Nos. 93, 94.]

Argued Dec. 10, 11, 1885. Decided Jan. 4, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of Alabama.

Statement of the case by *Mr. Justice Woods*:

The object of the first of these suits was the recovery of a judgment for money and of the second the enforcement, by the writ of *mandamus*, of the judgment recovered in the first. They were argued as one case. In the first case Henry Watson, the defendant in error, was the plaintiff in the circuit court. He brought his action against the Port of Mobile to recover the principal money due on certain bonds issued by the City of Mobile, under its corporate name: "The Mayor, Aldermen and Common Council of the City of Mobile," and the interest on the same shown to be due by certain coupons thereto appended. The bonds were issued December 31, 1859, were for $1,000 each and were payable to the order of the Mobile and Great Northern Railroad Company on the first day of January, 1879, with interest at the rate of 8 per cent per annum. Upon the margin of each bond was the following recital: "In pursuance of the terms of the contract between the corporate authorities of the City of Mobile and the Mobile and Great Northern Railroad Company, an ordinance approved on the 30th December instant, provides for the sum of $95,000 by a special tax annually to be applied to the payment of $1,000,000 of bonds to be issued by the City of Mobile to aid in the construction of the Mobile and Great Northern Railroad."

The declaration averred that the defendant, the Port of Mobile, was "the legal successor of the said, the Mayor, Aldermen and Common Council of the City of Mobile, and bounden for its debts and for the payment of the said bonds and coupons."

The defendant pleaded "that the said alleged bonds and coupons were issued by the Mayor, Aldermen and Common Council of the City of Mobile, a different municipal corporation, and not by this defendant, nor by anyone authorized to bind this defendant in the premises; that this defendant is not the successor in law nor in fact of the said the Mayor, Alderman and Common Council of the City of Mobile; nor is this defendant legally bounden to pay the said debt."

In the record there was a paper, entitled "Agreement of Facts," signed by the counsel for the parties. By this paper it was admitted that the contract between the City of Mobile and the Mobile and Great Northern Railroad Company, recited in the margin of the bonds, had been made and the ordinance therein referred to had been passed, and that the plaintiff became the legal holder of the bonds and coupons for value before maturity by the assignment of the railroad company. It was further agreed that two Acts were passed by the Legislature of Alabama on the 11th day of February, A. D. 1879; one entitled "An Act to Vacate and Annul the Charter and Dissolve the Corporation of the City of Mobile, and to Provide for the Application of the Assets Thereof in Discharge of the Debts of said Corporation;" and the other, "An Act to Incorporate the Port of Mobile and to Provide for the Government Thereof"; said Acts were referred to and made part of the agreement. It was further agreed that all the territory now embraced in the Port of Mobile was formerly embraced in the City of Mobile; that the territorial extent of the City of Mobile was about seventeen square miles, and of the Port of Mobile about eight square miles; that the Port of Mobile covered all the thickly settled and closely built portion of the City of Mobile; that the taxable property within the latter, according to the last assessment made by it prior to the passage of the Acts of February 11, 1879, was $16,255,093, and that all of said taxable property was embraced within the limits of the Port of Mobile, except about $900,000, and that about fourteen fifteenths of the resident inhabitants of the City of Mobile were resident inhabitants of the Port of Mobile. It was further admitted that the total indebtedness of the City of Mobile on February 11, 1879, was about $2,500,000, and that it had nominal assets of $775,000, which were largely reduced for the general creditor by prior liens and exemption from levy by execution.

It appeared by the record that the case was submitted to the jury on June 29, 1880, which, on that day, returned a general verdict for the plaintiff, and assessed his damages at $7,308.80, upon which the court at once rendered judgment in his favor. A writ of error sued out by the Port of Mobile brings this judgment under review.

The only question raised upon the trial was, whether, as matter of law, upon the statutes of the State of Alabama, the Port of Mobile was the legal successor of the City of Mobile, and bound for the payment of the bonds and coupons sued on. The validity of the judgment in the case of the Port of Mobile, plaintiff in error, against Watson, will therefore depend upon the answer to that question.

The plaintiff having obtained his judgment against the Port of Mobile, sued out, May 27, 1881, execution thereon, which on the same day was returned by the marshal—"no property found." Afterwards, on the 19th day of January, 1882, he filed in the circuit court his petition, in which he prayed for the writ of *mandamus*, and charged that the police board of the Port of Mobile had the right and it was their duty to assess and levy a special tax for the satisfaction of his judgment. He therefore, prayed for the writ to compel the Port of Mobile and its officers charged with the levying and collection of taxes to assess, levy and collect a special tax for the payment of his judgment. [292]

In order to understand the questions raised by this petition, it will be necessary to state more fully the contract made by the City of Mobile with the Mobile and Great Northern Railroad Company in reference to the issue of the series of bonds in question, and the legislation of the State of Alabama in reference to the City of Mobile and the Port of Mobile.

By the Act of the Legislature, approved February 29, 1859, the City of Mobile was authorized to aid the construction of the railroad of said company by an issue to the company of bonds of the City to the amount of $1,000,000, under such contract as the City might make with the railroad company, and was vested with power to adopt the ordinances necessary to carry out such contract. In pursuance of this authority the City of Mobile, on December 30, 1859, entered into a contract with the railroad company, in which, among other things, it was

provided that the City should issue to the railroad company, on or before January 2, 1860, its bonds to the amount of $1,000,000, and that the City should annually, after January 1, 1860, provide the sum of $95,000, to be applied to the payment of the bonds and coupons thereto attached as they become due, by a special tax to be levied and collected by the City for that purpose, and that the City should pass the by-laws and ordinances necessary to that end. In pursuance of this contract the City of Mobile, on December 30, 1859, passed an ordinance which provided that for the year 1860, and annually thereafter, there should be levied and collected a special tax upon the assessed value of all the taxable property in the City of Mobile sufficient to produce the said sum of $95,000, and that the money so raised should be pledged to the payment of said bonds and the interest [293] coupons. Upon the faith of the Act of the Legislature referred to, and the contract and ordinance of the City of Mobile, bonds of the City to the amount of $1,000,000 were issued to the railroad company and by it assigned and sold.

The City of Mobile having, in the year 1878, made default in the payment of the interest on its debt, which then exceeded $2,500,000, the Legislature, on February 11, 1879, passed "An Act to vacate and annul the charter and dissolve the corporation of the City of Mobile, and to provide for the application of the assets thereof in discharge of the debts of said corporation."

This Act, by its first section, repealed the charter of the City of Mobile, and declared that the corporation of the City of Mobile, known as "The Mayor, Aldermen and Common Council of the City of Mobile," was thereby dissolved and abolished.

The Act then provided for the appointment, by the Governor of the State, of three commissioners whose duty it should be to take possession of all the property and assets of the City of Mobile, to hold such property and assets upon the same trusts and subject to the same liens and charges that the same were under when in the possession of the City of Mobile; and, under the direction and pursuant to the orders of the Chancery Court of the County of Mobile, collect the debts and taxes due the City and sell its property and apply the taxes and debts collected and the proceeds of the property sold to the payment of the debts of the City, the floating debt to be first paid. The Act declared that the commissioners should have no power to levy any tax or assessment whatever, but that it should be their duty to treat with the holders of the funded debt of the City of Mobile with a view to its adjustment and settlement, and to report to the Governor the result of their negotiations, together with the draft of such Act as might be proper to carry into effect any scheme of adjustment that might result from such negotiations; all of which it was made the duty of the Governor to submit to the Legislature.

On the same day, to wit: February 11, 1879, the Legislature passed "An Act to incorporate the Port of Mobile, and provide for the government thereof."

[294] This Act incorporated, under the name of the Port of Mobile, the inhabitants residing within certain specified boundaries, which included no territory not embraced within the limits prescribed by the charter of the City of Mobile. The Act provided for the election of eight persons to be styled the Mobile Police Board, for a tax collector and other officers, and made it the duty of the tax collector to collect all taxes and license charges, and to perform and discharge all such other duties as might be required of him by the police board. It empowered the police board to levy and collect, for each year of its existence, upon the assessed value of all property and subjects of state taxation within the Port of Mobile, a tax of six tenths of 1 per centum for the purpose of defraying the expenses of carrying out the provisions of the Act, and made the assessment returned by the assessor of Mobile County for the preceding year that on which the tax should be levied and collected. The Act further provided that the police board should have and exercise the powers thereby conferred on them and no other, and repealed all conflicting Acts and parts of Acts.

After the recovery by the plaintiff of his judgment against the Port of Mobile, on June 29, 1880, the Legislature of Alabama, on December 8, 1880, passed an Act which declared that the Police Board should not levy any other tax than the six tenths of one mill on the dollar authorized by the seventeenth section of the Act of February 11, 1879, "to incorporate the Port of Mobile and provide for the government thereof," and the license taxes authorized by section 30 of that Act.

The Legislature, on December 8, 1880, also passed "An Act to adopt and carry into effect the plans for the adjustment and settlement of the existing indebtedness of the late Corporation," the City of Mobile, etc. This Act was subsequently, on February 24, 1881, re-enacted with material amendments.

The amended Act provided for an issue of $2,500,000 of the bonds of the City of Mobile, to be dated January 1, 1881, and to be payable in twenty-five years, with interest at 3 per cent for five years, 4 per cent for fifteen years, and five per cent for the remaining five years. These bonds were to be used by exchanging them for the bonds of the City of Mobile of the issue of May 1, 1875; but no available provision was made in the Act for the payment or satisfaction of the issue of which the plaintiff's bonds formed a part. The Act further required the commissioners of the City of Mobile, immediately after its passage, to turn over to the Police Board of the Port of Mobile "all the real and personal property which was formerly held and owned" by the City of Mobile "for public use and governmental purposes," such as public buildings, markets, squares, parks, fire engines, engine houses, hose and hose carriages, engineering instruments, and all other property of like character and use, except only the wharves.

Such was the legislation of Alabama in reference to the City of Mobile and the Port of Mobile when the plaintiff filed his petition for the writ of *mandamus*. The defendants to the petition, namely: the Port of Mobile and the Police Board of the Port of Mobile, filed a demurrer and also an answer to the petition. In the latter they denied that the Port of Mobile was the successor of the City of Mobile, bounden for its debts and the performance of its du-

ties in reference to said judgment; and denied that the Port of Mobile or its police board had any power, or that it was their legal duty to assess, levy or collect the special tax for the purpose of paying said judgment.

The plaintiff demurred to this answer, and upon final hearing upon the demurrer to the petition and the demurrer to the answer, the circuit court ordered "that the respondents, the Port of Mobile, the Mobile Police Board, Richard B. Owen, president, James W. Monette, Robert Adams, Sylvester J. Russell, Daniel McNeill, Patrick J. Hanlon, John Henry, Frank P. Andrews and William Paton, Commissioners of the Port of Mobile and members of said Police Board, do forthwith assess, levy and cause to be collected a special tax upon the property, real and personal, subject to tax by them, the said Port of Mobile and Mobile Police Board, sufficient to pay and satisfy the said judgment of the relator against the Port of Mobile for the debts of the said relator, with interest thereon; and the same to cause to be collected in lawful money; and as collected, in whole or in part, the same to pay over or cause to be paid over to said Henry Watson or his lawful attorney, to satisfy the said judgment, with interest thereon."

This judgment is also brought up for review by the writ of error sued out by the Port of Mobile.

Messrs. **Hannis Taylor, J. Little Smith** and *Braxton Bragg*, for plaintiff in error:

"Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the Legislature may confer, and these may be enlarged, abridged or entirely withdrawn at its pleasure."

Meriwether v. *Garrett*, 102 U. S. 472 (Bk. 26, L. ed. 197).

There is no contract between the State and the public, that the charter of a city shall not at all times be subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the Legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them.

U. S. v. *Railroad Co.* 17 Wall. 322 (84 U. S. bk. 21, L. ed. 597); *Commissioners* v. *Lucas*, 93 U. S. 108 (Bk. 23, L. ed. 822); *People* v. *Morris*, 13 Wend. 325; *Philadelphia* v. *Fox*, 64 Pa. St. 169; *Montpelier* v. *East Montpelier*, 29 Vt. 12; Ang. & Ames, Corp. 10th ed. § 31; Dill. Mun. Corp. § 30; Cooley, Const. Lim. 192, 193.

After the repeal of a municipal charter, a State must deal with the outstanding debts in the same capacity in which it deals with its own direct obligations. The obligation clause of the Constitution ceases to operate on the subject matter the moment the State sees fit to repeal the charter and to take back to itself the taxing power once vested by it in the municipality. From that moment the responsibility and the power of the federal judiciary ceases; from that moment the responsibility of the State becomes exclusive. Every holder of municipal bonds acquires no higher guaranty than he would have if he purchased the direct obligations of the State itself.

Hulme v. *Board of Levee Comrs.* 19 Wall. 653 (86 U. S. bk. 22, L. ed. 223)

The Port of Mobile is not the legal successor of the dissolved corporation, and liable for its obligations.

The power of the State to make this change of local government is uncontrovertible.

Meriwether v. *Garrett*, *supra*.

The mere fact that a new corporation thus created by a State occupies, in whole or in part, the territory occupied by a preceding corporation has in itself no legal significance. The question of successorship depends alone upon the legislative intent.

Broughton v. *Pensacola*, 93 U. S. 266 (Bk. 23, L. ed. 896); *Bellows* v. *Bank*, 2 Mas. C. C. 44; *Wyman* v. *Bank*, 14 Mass. 62; Ang. & Ames, Corp. 780; Dill. Mun. Corp. 55; Grant, Corp. 304, 305. See also *Morgan* v. *Beloit*, 7 Wall. 613 (74 U. S. bk. 19, L. ed. 203).

In aid of judgment creditors of a municipal corporation by *mandamus*, federal courts cannot levy a tax or improvise machinery for its collection.

Rees v. *Watertown*, 19 Wall. 107 (86 U. S. bk. 22, L. ed. 72); *Barkley* v. *Levee Comrs.* 93 U. S. 258 (Bk. 23, L. ed. 893); *Meriwether* v. *Garrett*, *supra*.

A part of a State cannot be taxed for the debt of the whole State; a part of a county cannot be taxed for the debt of the whole county; a part of a city cannot be taxed for the debt of the whole city.

Knowlton v. *Supervisors of Rock Co.* 9 Wis. 410; *State* v. *Merchants' Ins. Co.* 12 La. Ann. 802; *Adams* v. *Summerville*, 2 Head, 363; *Atty-Gen.* v. *Winnebago L. & F. R. R. Co.* 11 Wis. 35; *Weeks* v. *Milwaukee*, 10 Wis. 242; *Philadelphia Asso.* v. *Wood*, 39 Pa. St. 73.

Messrs. **James E. Webb** and **Gaylord B. Clark**, for defendants in error:

The power of the Legislature over a municipal corporation as a mere political agent is unlimited. But a municipal corporation as a legal person, authorized to incur valid obligations to third persons, is beyond the reach of arbitrary legislative action, as to the rights of such third persons.

Dill. Mun. Corp. §§ 54, 63, 65, 66, 69; *Waring* v. *Mobile*, 24 Ala. 701; *University* v. *Williams*, 9 Gill. & J. 365; *U. S.* v. *R. R. Co.* 17 Wall. 322 (84 U. S. bk. 21, L. ed. 597); *Broughton* v. *Pensacola*, 93 U. S. 266 (Bk. 23, L. ed. 896); *Murray* v. *Charleston*, 96 U. S. 432; (Bk. 24, L. ed. 760; *Police Jury* v. *Shreveport*, 5 La. Ann. 661; *State* v. *Miller*, 67 Mo. 604; *Slaughter* v. *Mobile Co.* 73 Ala. 184; *Oliver* v. *Worcester*, 102 Mass. 489; *Richland* v. *Lawrence Co.* 12 Ill. 1.

The Legislature cannot impair the remedy for the enforcement of corporate contracts by taxation.

Von Hoffman v. *City of Quincy*, 4 Wall. 535 (71 U. S. bk. 18, L. ed. 403); *Broughton* v. *Pensacola*, *supra*; *Ralls Co. Court* v. *U. S.* and *Louisiana* v. *Pilsbury*, 105 U. S. 733, 278 (Bk. 26, L. ed. 1220, 1090; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514 (Bk. 25, L. ed. 699); *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285 (Bk. 27, L. ed. 936.

Where such legislation is attempted, *mandamus* to compel the exercise of the power, to the extent it was previously possessed, will lie in the absence of any other adequate remedy.

Wolff v. *New Orleans*, 103 U. S. 358 (Bk. 26, L. ed. 395); *Ralls Co. Court* v. *U. S. supra; Scaine* v. *Bellville*, 39 N. J. L. 526; *Comrs. Court of Limestone Co.* v. *Rather*, 48 Ala. 433; *Edwards* v. *Williamson*, 70 Ala. 145; *Amy* v. *Selma*, decided at the last term of the Supreme Court of Alabama.

There being no express negation, at the time of its incorporation, on the power of the Port to levy this special tax, the power and duty arose in view of its successorship; and the subsequent amendment restricting this power is void.

Slaughter v. *Mobile Co.* 73 Ala. 134; *Comrs. Court of Limestone Co.* v. *Rather*, and *Wolff* v. *New Orleans, supra.*

[299] *Mr. Justice* **Woods** delivered the opinion of the court:

It is not disputed that the bonds issued by the City of Mobile upon which the plaintiff brought suit and recovered judgment against the Port of Mobile, were the valid obligations of the City of Mobile, which was bound by its contract to levy and collect annually a tax of $95,000, to be applied to the payment of the principal and interest of the issue of bonds of which those held by the plaintiff formed part. It is apparent from the statement of the case that the Act of February 11, 1879, "to vacate and annul the charter of the City of Mobile and provide for the application of the assets thereof in discharge of the debts of said Corporation," and the Act of the same date, "to incorporate the Port of Mobile and provide for the government thereof," and the several Acts subsequent thereto on the same general subject, make no adequate provision for the payment of the bonds held by the plaintiff, and other bonds of the same issue, of which, according to the answer of the Port of Mobile to the petition for the writ of *mandamus*, there still remain unsatisfied bonds to the amount of $323,914. The effect of this legislation is to take from the officers of the City of Mobile all power to lay a tax for their payment, and to leave no means for their satisfaction. The assets of the City of Mobile turned over to the commissioners appointed by authority of the Act to vacate its charter, being largely reduced for the general creditor by prior liens and exemptions from levy by execution, and their proceeds being first required to be applied to the floating debt of the city, have afforded no satisfaction to the plaintiff, and it is not pretended that payment could or would be made to him out of the proceeds of such assets. If, therefore, the plaintiff cannot exact payment from the Port of Mobile, the effect of the legislation referred to is to deprive him of all remedy upon the bonds issued by the City of Mobile and the contract providing for their payment, valid when made, and valid still. It is, [300] therefore, a vital question in the case whether the Port of Mobile is the legal successor of the City of Mobile and bound for its debts. The agreement of facts made in the suit upon the bonds is conceded to be a true statement of the facts therein recited. From this paper and other admissions made in the answer of the Port of Mobile to the rule to show cause, and the legislation of the State of Alabama made a part of the record, it appears that on the day when the Act was passed vacating and annulling the charter and dissolving the corporation of the City of Mobile, another Act was passed to incorporate the Port of Mobile; that all the territory embraced within the limits of the Port of Mobile was formed of part of the territory and included all the thickly settled and closely built portion of the City of Mobile; that out of more than $16,000,000 of taxable property of the City of Mobile all but $900,000 was included within the limits of the Port of Mobile, and that fourteen fifteenths of the inhabitants of the City of Mobile were inhabitants of the Port of Mobile. While, therefore, the area of territory of the Port of Mobile was little more than half that of the City of Mobile, it is apparent that the former included substantially the same taxable property and the same body of people as the City of Mobile. It further appears that all the property, except its wharves, of the City of Mobile, used by it for public and governmental purposes, was by the authority of the Act of February 24, 1881, turned over and delivered to the Port of Mobile for its use without compensation to be paid therefor.

We are of opinion, upon this state of the statutes and facts, that the Port of Mobile is the legal successor of the City of Mobile and liable for its debts. The two corporations were composed of substantially the same community, included within their limits substantially the same taxable property, and were organized for the same general purposes.

Where the Legislature of a State has given a local community, living within designated boundaries, a municipal organization, and by a subsequent Act or series of Acts repeals its charter and dissolves the corporation and incorporates substantially the same people as a municipal body under a new name for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former and liable for its debts, and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new. In illustration and support of this proposition, the following cases are in point:

In *Girard* v. *Philadelphia*, 7 Wall. 1 [74 U. S. bk. 19, L. ed. 53], it was held by this court that the annexation to the City of Philadelphia, having a territory of only two square miles, of twenty-eight other municipalities with all their inhabitants, comprising districts, boroughs and townships of various territorial extent, and the changing of its name, did not destroy its identity or impair its right to hold property devised to it.

So in *Broughton* v. *Pensacola*, 93 U. S. 266 [Bk. 23, L. ed. 896], it was said by *Mr. Justice* Field, in delivering judgment, that "When a new form is given to an old corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the Legislature intended a

continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer its affairs; and in the absence of express provision for their payment it will also be presumed that the Legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization."

In *O'Connor* v. *Memphis*, 6 Lea, 730, the Supreme Court of Tennessee went so far as to say "that neither the repeal of the charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in its mode of government, nor all of these combined, will destroy the identity, continuity or succession of the corporation if the people or territory reincorporated constitute an integral part of the corporation abolished. * * * The corporators and the territory are the essential constituents of the corporation, and rights and liabilities naturally adhere to them."

In *Mount Pleasant* v. *Beckwith*, 100 U. S. 514 [Bk. 25, L. ed. 699], a municipal corporation had been dissolved and its territory divided between and annexed to three adjacent corporations. Upon this state of facts the court held that unless the Legislature otherwise provided, the corporations to which the territory and the inhabitants of the divided corporation had been transferred, were severally liable for their proportionate share of its debts, and were vested with its power to raise revenue wherewith to pay them by levying taxes upon the property transferred and the persons residing therein. See also *Colchester* v. *Seaber*, 3 Burr. 1866; *Cudden* v. *Eastwick*, 1 Salk. 192; *People* v. *Morris*, 13 Wend. 325; *New Orleans R. R. Co.* v. *City of New Orleans*, 26 La. Ann. 476.

In the case of *Amy* v. *Selma*, recently decided by the Supreme Court of Alabama and not yet reported, a question almost identical with the one now in hand was considered. The Legislature of Alabama had passed an Act, approved December 11, 1882, entitled "An Act to Vacate and Annul the Charter and Dissolve the Corporation of the City of Selma, and to Provide for the Application of the Assets Thereof to the Payment of the Debts Thereof." That Act repealed the charter of the City of Selma and all Acts amendatory thereof, and declared the corporation dissolved and all offices held under any of said Acts, except for the purposes and during the period provided by the repealing Act, abolished; and that all powers of taxation given to the City of Selma by Acts of the Legislature were resumed by and lodged in the Legislature. It transferred to the custody and control of the State of Alabama all property, real and personal, held and used by the corporation for governmental or other public purposes, and declared that the inhabitants and territory within the territorial limits and jurisdiction of said corporation were resolved into the body of the State. The residue of the Act was substantially similar to the Act of February 11, 1879, "to vacate and annul the charter and dissolve the corporation of the City of Mobile," etc.

This was followed by an Act approved February 17, 1883, "to incorporate the inhabitants and territory formerly embraced within the corporate limits of the municipal corporation, since dissolved, styled the City of Selma, and to establish a local government therefor."

This Act, after reciting the dissolution of the City of Selma and the repeal of its charter, among many other provisions, formed the inhabitants residing within the territory formerly covered by the City of Selma into a municipal corporation under the name and style of "Selma;" provided for officers of the municipality and prescribed their duties; authorized them to levy taxes, but declared that no funds derived by the corporation thereby created from taxes or any other source should be used for the payment of any of the debts of the City of Selma; and transferred and made over to Selma the property which had been held and used by the City of Selma, to be held and used for the same uses and trusts to which it had been devoted while in the possession of the City of Selma.

This Act was followed by an Act approved February 19, 1883, to carry into effect any plan or scheme for the compromise, adjustment and settlement of the existing indebtedness of the late corporation, known as the City of Selma, which might be agreed upon between the creditors of the said City of Selma and commissioners appointed under and by virtue of the Act * * * of December 11, 1882. With this series of Acts in force, the Supreme Court of Alabama, in the case mentioned, was called on to construe the Act "to vacate and amend the charter and dissolve the corporation of the City of Selma, and to provide for the application of the assets thereof to the payment of the debts thereof." It held that this Act was without operation upon the debts and liabilities of the City of Selma lawfully contracted; that the Act of February 19, 1883, to incorporate the inhabitants and territory formerly embraced within the limits of the City of Selma was a reorganization, under the corporate name of Selma, of the same corporators, and embraced substantially the same territory as the City of Selma; that the corporation called Selma was the [304] successor of the City of Selma and bound for the payment of its debts; and that a suit at law, founded on a judgment against the City of Selma, was maintainable against its successor, Selma.

This construction of these statutes of the State of Alabama by its highest court being in accord with our own views and in harmony with former decisions of this court on the same general subject, is decisive of the question in hand, unless there is some material difference between the legislation concerning the City of Selma and that concerning the City of Mobile. The only difference that can be supposed to have any bearing upon the question under discussion is that the Act incorporating Selma embraced the same territory as that covered by the City of Selma; whereas, the Port of Mobile covered little more than half the territory embraced by the City of Mobile. We think this difference between the two cases is an immaterial one. The Supreme Court of Alabama, in the case of the *Mobile, etc. Railroad Co.* v. *Kennedy*, 74 Ala. 566, assumed that the City of Mobile and the Port of Mobile had substantially the same corporators and the same boundaries. And we are of opinion that the exclu-

sion from the limits of the Port of Mobile of the sparsely settled suburbs of the City of Mobile, a territory of little value, as fairly appears by the record, and consisting, as stated by the counsel for plaintiff, without contradiction, largely of fields, swamps and land covered with water, will not serve to distinguish this case from the case of *Amy* v. *Selma*. We repeat, therefore, that in our judgment the Port of Mobile is the legal successor of the City of Mobile and bound for its debts.

It follows from this proposition that the remedies necessary to the collection of his debt, which the law gave the creditor of the City of Mobile, remain in force against the Port of Mobile. The laws which establish local municipal corporations cannot be altered or repealed so as to invade the constitutional rights of creditors. So far as such corporations are invested with subordinate legislative powers for [305] local purposes, they are the mere instrumentalities of the States, for the convenient administration of their affairs, and are subject to legislative control. But when empowered to take stock in or otherwise aid a railroad company, and they issue their bonds in payment of the stock taken, or to carry out any other authorized contract in aid of the railroad company, they are to that extent to be deemed private corporations, and their obligations are secured by all the guarantees which protect the engagements of private individuals. *Broughton* v. *Pensacola* and *Mount Pleasant* v. *Beckwith*, *supra*.

Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the Legislature, or if they are changed a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void. *Von Hoffman* v. *Quincy*, 4 Wall. 535 [71 U. S. bk. 18, L. ed. 403]; *Edwards* v. *Kearzey*, 96 U. S. 595 [Bk. 24, L. ed. 793]; *Ralls County Court* v. *United States*, and *Louisiana* v. *Pilsbury*, 105 U. S. 733, 278 [Bk. 26, L. ed. 1220, 1090]; *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285 [Bk. 28, L. ed. 936]. These propositions receive strong support from the decisions of the Supreme Court of Alabama. *Comrs. of Limestone County* v. *Rather*, 48 Ala. 433; *Edwards* v. *Williamson*, 70 Ala. 145; *Slaughter* v. *Mobile County*, 73 Ala. 134.

It follows that the contract by which, under authority of the Legislature, the City of Mobile agreed to levy a special tax for the payment of the principal and interest of the class of bonds to which those held by the plaintiff belong is still in force, and its obligation rests upon its legal successor, the Port of Mobile.

All laws passed since the making of the contract, whose purpose or effect is to take from the City of Mobile or its successor, the power to levy the tax and pay the bonds, are invalid and ineffectual and will be disregarded. *Mr. Justice* Field, when delivering the judgment of this court in *Wolff* v. *New Orleans*, 103 U. S. 358 [Bk. 26, L. ed. 395], said: "The courts, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the municipality, upon the faith of which contracts were made with her and upon the continuance of which alone they can be enforced, can proceed, and by *mandamus* compel, at the instance of the parties interested, the exercise of that power, as if no such legislation had ever been attempted." And so in *Ralls County Court* v. *United States*, 105 U. S. 733 [Bk. 26, L. ed. 1220], it was said by the *Chief Justice*, speaking for the court, that "All laws of the State which have been passed since the bonds in question were issued, purporting to take away from the county courts the power to levy taxes necessary to meet the payments, are invalid; and under the well settled rule of decision in this court the circuit court had authority, by *mandamus*, to require the county court to do all the law, when the bonds were issued, required it to do to raise the means to pay the judgment, or something substantially equivalent."

The Port of Mobile has the machinery and officers requisite for the assessment of property and for the levy and collection of taxes to carry on the city government. There is no reason why the taxes necessary to pay the judgment of the plaintiff cannot be levied and collected by the same officers. There is no obstacle to the full and complete performance by the Port of Mobile and the Mobile Police Board of the duties required by the peremptory writ of *mandamus* issued by the circuit court.

It follows from the views we have expressed that the judgment of the circuit court in favor of the plaintiff for $7,808.80 and costs against the Port of Mobile, and the judgment directing the peremptory writ of *mandamus* to be issued against the Port of Mobile and the Mobile Police Board for the satisfaction of such judgment, are both warranted by law.

Judgments affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

SOUTHWESTERN RAILROAD COMPANY, *Plff. in Err.*,

v.

WILLIAM A. WRIGHT, Comptroller-General of the STATE OF GEORGIA, GEORGE F. CHERRY, Sheriff of the COUNTY OF BIBB, and F. M. BUTNER, Sheriff of the COUNTY OF HOUSTON.

SAME

v.

STATE OF GEORGIA.

(See S. C. Reporter's ed. 231-237.)

Railroads—exemption from taxation—effect of consolidation.

1. The surrender of the power to tax will never be presumed but must be shown by clear and un-

NOTE.—*Taxation; surrender of the power to tax never presumed.* See Tucker v. Ferguson, 89 U. S. (22 Wall.), 527, bk. 22, 805, *note*.

ambiguous language which will admit of no other reasonable construction.

2. The limited exemption from taxation contained in the original charter of the Southwestern Railroad Company of Georgia applies only to such parts of its road as were built under that charter.

[Nos. 96, 471.]

Argued Dec. 16, 1885. Decided Jan. 4, 1886.

IN ERROR to the Supreme Court of the State of Georgia.

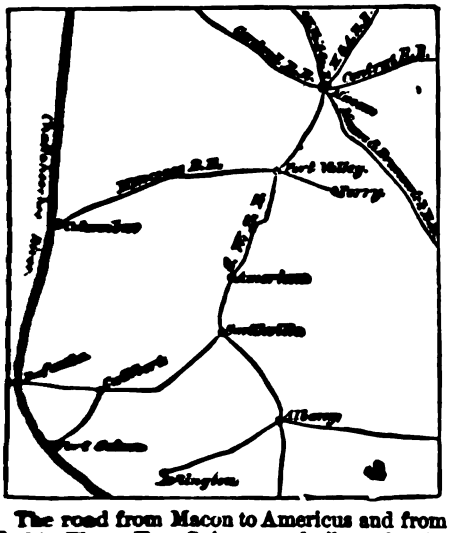
The history and facts of the case sufficiently appear in the opinion of the court

Messrs. **A. R. Lawton, R. F. Lyon** and **T. B. Cresham,** for the plaintiff in error.

Messrs. **Clifford Anderson, Samuel Barnett** and *R. Toombs,* for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The suits relate to the liability of the Southwestern Railroad Company, a Georgia corporation, for taxes on different parts of its railroad, and the federal question involved arises under a claim of a charter contract of exemption from all taxation beyond "a tax of one half of 1 per cent upon its annual net income." The Company owns and operates: 1, a road from Macon through Fort Valley, Americus, Smithville, and Cuthbert to Fort Gaines; 2, a road from Smithville to Albany; 3, a road from Albany to Arlington; 4, a road from Cuthbert to Eufaula; and, 5, a road from Fort Valley to Columbus. The line of all these roads is shown on the following plat:



The road from Macon to Americus and from Smithville to Fort Gaines was built under the original charter of the Company, granted December 14, 1845. Section 14 of this charter is as follows:

"§ 14. That the said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher than one half of 1 per cent upon its annual net income."

From Americus through Smithville to Albany the building was done by the Georgia and Florida Railroad Company, under a charter granted January 22, 1852. § 2 of this charter is as follows:

"§ 2. That the Georgia and Florida Railroad Company may, at any time, incorporate their stock with the stock of any other company, on such terms as may be mutually agreed upon by such companies; *Provided,* That the road and other property of this company shall be subject to such taxation as the Legislature may deem equitable and just."

After this part of the road was finished the Georgia and Florida Company agreed with the Southwestern Company to consolidate its stock with that of the Southwestern, and thereupon it delivered its road, then running from Americus to Albany, into the possession of the Southwestern Company. This having been done the General Assembly of Georgia, on the 19th of December, 1859, passed an Act which recited what had been done, and then enacted:

"§ 2. *Be it further enacted,* That the said railroad from Americus to Albany shall be considered part and parcel of the road of the Southwestern Railroad Company, and be liable to pay the State the same tax that the rest of the Southwestern Railroad Company is liable to pay, and such additional tax as the Legislature may hereafter impose."

The Southwestern Company now holds this part of its road under this transfer.

The road from Albany to Arlington was built under an Act of the General Assembly passed December 18, 1860, as follows:

"An Act to Amend the Several Acts of the General Assembly Relating to the South western Railroad Company, and to Author ize the Said Company to Construct a Branch Railroad, and for Other Purposes.

"§ 1. *Be it enacted, etc.,* That the South western Railroad Company, of this State, are hereby authorized to construct a branch railroad from Albany, or Dawson, or any point west of Dawson, on their line of road, to such place on the Chattahoochee River, or on the Florida line, as the said Company may select; and that said Company shall have for these purposes all the rights, privileges and powers conferred by their charter of incorporation and the Act amendatory thereof. [234]

"§ 2. *Be it further enacted, etc.,* That said Company are hereby empowered and authorized to increase their capital stock $1,000,000 and said additional stock shall be subject and liable to pay the same rates of tax to the State of Georgia that is now required of the said Southwestern Railroad Company, and such additional tax as the Legislature may hereafter impose."

The road from Cuthbert to Eufaula was built under the following Act, passed February 28, 1850:

"An Act to Amend an Act Entitled 'An Act to Incorporate the Southwestern Railroad Company, with Power to Extend Branches to Albany in the County of Baker, and Fort Gaines in the County of Early, and to Points Below Those Places on the Chattahoochee and Flint Rivers, and to Punish Those Who May Willfully Injure the Same, Assented to December 27th, 1845; and for Other Purposes.'

"§ 1. *Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by*

the authority of the same, That from and after the passage of this Act said Railroad Company shall have power and authority to construct a branch of said road from some point on said road to any point on the Chattahoochee River, below the Town of Florence, in the County of Stewart, which said Company may deem most advisable and proper, under the rules and restrictions as they are now authorized to construct said Southwestern Railroad; *Provided*, That if said Company do not build the main trunk of said road to or below Fort Gaines within two years from the time that the same is completed to the point at which the said branch road, if commenced, may intersect, then said Company shall be liable to refund to the stockholders, now residing in Early and Randolph Counties, or their assigns, the amount of stock held by them, with interest from the time the same was paid."

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The road from Fort Valley to Columbus was built by the Muscogee Railroad Company, under a charter granted December 27, 1845, which contained a clause upon the subject of taxation, substantially like section 14 of the charter of the Southwestern Company. The two companies were afterwards consolidated, and, when the the case in which the State of Georgia appears as defendant in error was before this court on a former writ of error, it was decided that this road and that part of the road of the Southwestern Company which was built under the original charter, were exempt from taxation beyond one half of 1 per cent upon their annual net income. *Southwestern R. R. Co.* v. *Georgia*, 92 U. S. 676 [Bk. 23 L. ed. 762.]

The supreme court of the State has decided in both these cases that the roads from Americus to Albany, from Albany to Arlington and from Cuthbert to Eufaula were subject to the general laws of the State for the taxation of railroads, without regard to the exemption in the original charter of the Company. To reverse judgments to this effect these writs of error were brought.

There is no question now as to the exemption from general taxation of that part of the road built under the original charter. That we have already decided, and there is no dispute about it now. The language of the exempting clause is somewhat unusual. It is not that the Company or its stock shall be taxed in a certain way and otherwise exempt; but that the "Said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher," etc. This clearly means the railroad specified in the charter and none other. Possibly, if the Company had acquired the road between Americus and Smithville from the Florida & Georgia Company without any special limitation by the State upon the exemption of its own charter, that part of the Florida & Georgia road might have been brought under the exemption. But this was not done, for the State, while recognizing the transfer of the Florida and Georgia road, was careful to provide that the road should be liable to pay, not only the same tax as the rest of the road of the Southwestern Railroad Company, "but such additional tax as the Legislature may hereafter impose." This is nothing less than an express reservation of power by the State to tax the part of the Southwestern Company's road between Americus and Albany as other railroads in the State are taxed when there is no charter exemption.

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The same is true of the road between Albany and Arlington, for the power to build that line is coupled with a reservation of the right to tax. Such is evidently the meaning of section 2 of the Act authorizing its construction.

The language of the authority to build the road from Cuthbert to Eufaula is somewhat different. There nothing is said about taxation; but that the original charter of the Company did not give the right to build this part of the road is shown by the fact that this amendment was deemed necessary. In building this extension or branch the company was placed under the rules and restrictions they were subjected to in building the original road; but that did not necessarily imply an exemption of this line from taxation to the same extent the old road was. That exemption was only for that road; and as the amending Act does not in terms or by fair implication apply the exemption to the additional road which was to be built under it, we must presume that nothing of the kind was intended and that the State was left free to tax that road like other property. No rule is better settled than that a contract of exemption from taxation is never to be presumed. A surrender of the power to tax when claimed "must be shown by clear and unambiguous language which will admit of no reasonable construction consistent with the reservation of the power." *Delaware Railroad Tax*, 18 Wall. 207 [85 U. S. bk. 21, L. ed. 888.]

This disposes of all the federal questions in the two cases; and as they were rightly decided in the court below, it follows that the judgments must be affirmed without an examination of the other errors assigned which involve questions of state law only. *Murdock* v. *Memphis*, 20 Wall. 590 [87 U. S. bk. 22, L. ed. 429.] If the roads are not exempt under their charters from the operation of the general laws of the State for the taxation of railroads, the errors, if any, of the court below in fixing the value and ascertaining the amount of tax under the law are not reviewable here. No complaint is made of the law itself, if it applies to this Company, so far as the disputed portions of its road are concerned. The administration of the law by the officers or the courts of the State involves no questions of which we can take jurisdiction. The law being valid the courts of the State have exclusive jurisdiction, appellate or otherwise, of all cases brought before them involving proceedings for its enforcement.

The judgment in each of the cases is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[277] WILLIAM H. RENAUD, Substituted for ISAAC L. WILBUR, Deceased, *Plff. in Err.*,

v.

EDWARD A. ABBOTT, Admr. of JOSEPH S. ABBOTT, Deceased.

(See S. C. Reporter's ed. 277-288.)

Practice—objection to service of citation—death of plaintiff—substitution—writ of error to state court—judicial notice of laws of other States—judgments of courts of other States.

1. An objection to the service of a citation to a writ of error to a state court in another State, by the marshal of a district therein, can only be taken advantage of by a motion to dismiss made promptly, on appearance limited to that special purpose.

2. The substitution, by the state court, of the plaintiff in error, upon the death of the plaintiff after judgment, was a question which that court had the exclusive right to determine.

3. Upon writ of error to the highest court of a State, this court takes judicial notice of the law of another State, only where that court takes judicial notice of it by the local law.

4. Under section 905, R. S., if a joint judgment recovered in a state court against two, of whom but one was served, is enforceable within that State against him severally, it will sustain an action against him in another State, whatever rule may there prevail as to similar domestic judgments.

[No. 23.]

Argued Apr. 7, 8, 1885. Decided Jan. 4, 1886.

IN ERROR to the Supreme Court of the State of New Hampshire.

The history and facts of the case sufficiently appear in the opinion of the court.

Mesrs. **William A. Maury,** *Thomas J. Semmes* and *Robert Mott,* for plaintiff in error:

The Supreme Court of New Hampshire refuses to enforce a judgment which, if rendered there, would be invalid, however valid it may be in the state courts of the State which tried and determined the cause.

The judgment of a state court should have the same credit, validity and effect in every other court of the United States which it had in the state court where it was pronounced.

Hampton v. *McConnel,* 3 Wheat. 234 (16 U. S. bk. 4, L. ed. 378); *Breedlove* v. *Nicolet,* 7 Pet. 499 (32 U. S. bk. 8, L. ed. 787).

A Louisiana court would not listen for one moment to the defendant in error when he says that the judgment rendered in New Orleans, as to him, was void, because it was pronounced jointly against him who was cited and his partner who was not cited.

Guiennie v. *Akin,* 17 La. 44; *Montague* v. *Well,* 30 La. Ann. 55.

Mr. **Samuel C. Eastman,** for defendant in error:

The Supreme Court of New Hampshire decided the judgment invalid for want of jurisdiction. Whether the state court made or did not make a mistake as to the particular reason for want of jurisdiction, still, if the want of jurisdiction plainly appears from the record there is no federal question, for the state court could and properly should have decided as it did.

Murdock v. *Memphis,* 20 Wall. 590 (87 U. S. bk. 23, L. ed. 429); *Brown* v. *Atwell,* 92 U. S. 329 (Bk. 23, L. ed. 512); *Citizens Bank* v. *Board of Liquidation,* 98 U. S. 140 (Bk. 25, L. ed. 114).

The failure of the plaintiff to join E. A. Abbott could have been taken advantage of in a motion on arrest of judgment, if the judgment had been against the defendant.

Gilman v. *Rives,* 10 Pet. 298 (35 U. S. bk. 9, L. ed. 432).

There is therefore no occasion to reverse the judgment of the state court, whether right or wrong.

To maintain a suit on a judgment in any other State than that where rendered, when there was no appearance, the record must show service on the defendants within the limits of the State whose court is claiming the jurisdiction.

Harris v. *Hardeman,* 14 How. 334 (55 U. S. bk. 14, L. ed. 444); *Hart* v. *Sanson,* 110 U. S. 151 (Bk. 28, L. ed. 101).

There was no service on E. A. Abbott. The judgment as to him is therefore a nullity.

D'Arcy v. *Ketchum,* 11 How. 165 (52 U. S. bk. 13, L. ed. 648); *Public Works* v. *Columbia College,* 17 Wall. 521 (84 U. S. bk. 21, L. ed. 687); *Hall* v. *Lanning,* 91 U. S. 167 (Bk. 23, L. ed. 278).

The judgment declared on being void as to one of the defendants is void as to both, and cannot be the foundation of an action in any other State.

Hall v. *Williams,* 6 Pick. 232; *Holbrook* v. *Murray,* 5 Wend. 161; *Richards* v. *Walton,* 12 Johns. 434; *Rangely* v. *Webster,* 11 N. H. 299; *Smith* v. *Smith,* 17 Ill. 482; *Ruffum* v. *Ramsdell,* 55 Me. 252; *Knapp* v. *Abell,* 10 Allen, 485; *Mackey* v. *Gordon,* 34 N. J. L. 286; *Hanley* v. *Donoghue,* 59 Md. 239; Freem. Judg. § 136.

This court has impliedly, if not expressly, adopted the principle of these cases.

Gilman v. *Rives,* 10 Pet. 298 (35 U. S. bk. 9, L. ed. 432); *Thompson* v. *Whitman,* 18 Wall. 469 (85 U. S. bk. 21, L. ed. 901).

Mere error makes a judgment voidable. Want of jurisdiction makes it void.

Eaton v. *Badger,* 33 N. H. 237; *Carlton* v. *Washington Ins. Co.* 35 N. H. 162; *Judkins* v. *Union Mut. F. Ins. Co.* 37 N. H. 470; *Conery* v. *Rotchford,* 34 La. Ann. 520; *Boswell's Lessee* v. *Otis,* 9 How. 336 (50 U. S. bk. 13, L. ed. 164); *Bischoff* v. *Wethered,* 9 Wall. 812 (76 U. S. bk. 19, L. ed. 829); *Laurent* v. *Beelman,* 30 La. Ann. 363.

It has been uniformly held by this court that a writ of error sued out by one of two persons, against whom a joint judgment is rendered, without a summons and severance or equivalent proceeding must be dismissed.

Feibelman v. *Packard,* 108 U. S. 14 (Bk. 27, L. ed. 634).

This is the rule of the common law.

Comyn, Dig. pl. 3, B. 9.

The New Hampshire court is not estopped to so far examine the facts and the record as to inquire whether the court in Louisiana actually had jurisdiction to pronounce the judgment it did.

Hall v. *Lanning,* 91 U. S. 160 (Bk. 23, L. ed. 271); *Pennoyer* v. *Neff,* 95 U. S. 714 (Bk. 24, L. ed. 565); *Ins. Co.* v. *Bangs,* 103 U. S. 435 (Bk. 26, L. ed. 580); *St. Clair* v. *Cox,* 106 U. S. 353, and *Pana* v. *Bowler,* 107 U. S. 545 (Bk. 27, L. ed. 228, 430).

"The court of the State may perhaps feel bound to give effect to the service made as directed by its statutes. But no court, deriving

its authority from another government, will recognize a merely constructive service as bringing a person within the jurisdiction of the court, and the judgment would be allowed no force in the courts of any other State."

Hart v. *Sanson*, 110 U. S. 151 (Bk. 28, L. ed. 101).

The objection, where there is any substantial defect in the writ of error, may be taken at any time before judgment.

Wilson v. *L. & F. Ins. Co.* 12 Pet. 140 (37 U. S. bk. 9, L. ed. 1032).

At common law, by the death of one of the parties, the action abated, and the court had no further jurisdiction. This is the law in New Hampshire.

Pettingill v. *Butterfield*, 45 N. H. 195.

[280] *Mr. Justice* **Matthews** delivered the opinion of the court:

The writ of error in this case was sued out and allowed by the *Chief Justice* of the Supreme Court of New Hampshire on June 13, 1882, returnable to October Term, 1882, of this court. The transcript of the record was filed here July 14, 1882, and the defendant in error entered his appearance, through counsel, on July 28, 1882, which, although special in terms, was not limited to any particular purpose.

[281] At October Term, 1883, a motion was filed to dismiss the cause on two grounds: 1, because the citation had been served on the defendant in error in Massachusetts by the marshall of that district; and 2, because the present plaintiff in error had been improperly substituted as successor to the plaintiff in the judgment sought to be reviewed. This motion to dismiss, although submitted to the court at that term, was postponed until the hearing on the merits. So far as the first ground is involved it comes too late. The alleged irregularity in the service of the citation could, at any rate, only have been taken advantage of by a motion to dismiss, made promptly, on an appearance limited to that special purpose, and was cured by such an appearance as was entered in this case. *U. S.* v. *Yates*, 6 How. 608 [47 U. S. bk. 12, L. ed. 576]; *Buckingham* v. *McLean*, 13 How. 150 [54 U. S. bk. 14, L. ed. 90].

The judgment sought to be reviewed was rendered in favor of the defendant, in a suit brought by Isaac L. Wilbur upon a judgment rendered in his favor as syndic of his creditors under the laws of Louisiana, in the Fifth District Court of New Orleans, in that State. Wilbur having died in July, 1881, after the judgment against him in the Supreme Court of New Hampshire, William H. Renaud thereupon, on June 12, 1882, on his petition, showing that he had been appointed under the laws of Louisiana to succeed Wilbur as syndic of his creditors, was substituted as plaintiff in the judgment and allowed to prosecute a writ of error to this court. It was the province of the Supreme Court of New Hampshire to permit this substitution, and its action in doing so is not open to objection by the defendant in error in this court. We receive the transcript of the record in the cause as it is certified to us by that court in answer to the precept of the writ of error allowed and issued to that end. When brought here it is open to examination only for the purpose of deciding whether it contains a federal question within our jurisdiction; and if so, whether there is error in the decision of that question by the supreme court of the State. Whether the present plaintiff in error ought to have been substituted for the deceased plaintiff in the judgment to be reviewed was a question of practice under the laws of New Hampshire, which the Supreme Court of that State had the exclusive right to determine. It is not open to any inquiry on our part under the present writ.

The action was in debt brought by Wilbur upon a judgment alleged to have been recovered by him in the Fifth District Court of the City of New Orleans, in the State of Louisiana, against Joseph S. Abbott, then in full life, and one Edward A. Abbott, for the sum of $23,383.69, with interest thereon from November 1, 1862, as damages in a certain cause then pending in said court between the said plaintiff and the said Joseph S. Abbott and Edward A. Abbott, as copartners under the name of J. S. & E. A. Abbott, and for costs of suit. Edward A. Abbott, as administrator of Joseph S. Abbott, alone was sued. The plea was *nul tiel record*.

The plaintiff offered in evidence a duly certified transcript of the record of the judgment sued on. From that it appeared that the citation and copy of the petition was returned by the sheriff, served on J. S. Abbott, one of the defendants, personally, on December 28, 1866. No service on the other defendant appears to have been made. Judgment was afterwards entered therein as follows:

"I. L. Wilbur, Syndic, etc., *v.* J. S. & E. A. Abbott. } No. 16,987.

On motion of E. C. Mix, of counsel for plaintiff, and on introducing due proof of the claim of said plaintiff,

It is ordered and adjudged that the default herein entered on the eleventh of January, 1867, be now confirmed and made final; and that plaintiff, I. L. Wilbur, in his capacity as syndic of his creditors and of the creditors of Wilbur and Borge, recover of the defendants, Joseph S. and Edward A. Abbott, who reside in Concord, in the State of New Hampshire, are commercial partners there, doing business under the style and firm of J. S. & E. A. Abbott, *in solido*, the sum of twenty-three thousand three hundred and eighty-three $\frac{44}{100}$ dollars, with legal interest from the first of November, 1862, until paid, and costs of suit.

Judgment rendered 19th January, 1867. Signed 24th January, 1867.

(Signed) Chas. Leaumont, Judge."

The defendant objected to this transcript as evidence, on the ground that the record disclosed a judgment that was void because it was a joint judgment against two with service process upon one only.

But the plaintiff supplemented the proof by offering in evidence the transcript of another judgment rendered in the same court, in a proceeding numbered 17,608, in which Joseph S. Abbott and Edward A. Abbott were plaintiffs and the said Isaac L. Wilbur was defendant, being a suit in which the plaintiffs sought to obtain a decree of nullity of the judgment against them in the former action numbered 16,987.

The petition in this suit of nullity set forth

the judgment it sought to annul, recited the proceedings in which it was rendered, and averred "that no service of a copy of the petition or citation in said suit was ever made on them, either individually or collectively, personally or otherwise," and "that the return of the sheriff that personal service of a copy of the petition and citation was made on J. S. Abbott, one of your petitioners and defendant in said suit, is not true." The prayer was that for this reason the said judgment be declared to be absolutely null and void and of no effect.

To this petition Wilbur, the defendant therein, answered as follows:

"Now comes the defendant, I. L. Wilbur, syndic, etc., of his creditors and the creditors of Wilbur & Co., Wilbur & Arnot, and Wilbur & Borge, and for answer to the petition of the plaintiffs denies all and singular the allegations therein contained, and avers that the judgment in suit No. 16,987 on the docket of this court, sought to be annulled, is a valid judgment rendered on citation of proper parties, and cannot be impeached.

This respondent further pleads that the plaintiffs have judicially admitted that they were properly cited in said suit No. 16,987, and are estopped to deny citation in said suit for this: that said plaintiffs after the institution of said suit against them in this court, and after judgment rendered in said suit No. 16,987, did institute a suit in the Third District Court of New Orleans against Frank Borge, as a partner of the firm of Wilbur & Borge, said suit being entitled J. S. & E. A. Abbott v. Frank Borge, and numbered 21,876 on the docket of said third district court, and the said Frank Borge, to protect himself as a partner, as aforesaid, from the unjust demand of the plaintiffs, set up and made in said suit in the third district court a reconventional claim or demand against the plaintiffs for the matters and things and for the same cause of action which constituted the basis of the judgment now sought to be annulled; and this respondent intervened and made himself, as syndic, a party to said reconventional demand, and the said plaintiffs in this suit and the plaintiffs in said suit No. 21,876, in the third district court aforesaid, being the same parties, did, for the purpose of defeating and causing the dismissal of said reconventional demand in the third district court aforesaid, plead to the same the judgment aforesaid rendered against them by this court in said suit No. 16,987, now sought to be annulled, and set the same up and made use thereof as a defense to said reconventional demand as in the nature of a plea of *lis pendens*, and the said third district court recognized said plea of *lis pendens*, and refused to hear any evidence as to the reconventional demand of said Borge as partner, as aforesaid, and dismissed the same and gave judgment in favor of plaintiffs for their original demand.

Wherefore, this respondent avers that plaintiffs, having used the said suit No. 16,987 and the judgment therein rendered in manner aforesaid, are precluded from alleging that no such suit was pending and no such judgment was rendered, as in point of law there is no suit and no judgment without citation; and hence respondent avers that plaintiffs have judicially confessed they were parties defendants to said suit No. 16,987, and to the judgment therein rendered, and that said suit and judgment were valid."

This action of nullity resulted in a judgment, signed May 7, 1868, as follows: "This cause came on to-day for trial, when, after hearing pleadings, evidence and counsel, and for the reasons orally assigned, it is adjudged and decreed that this suit be dismissed with judgment in favor of defendant, I. L. Wilbur." From this judgment a devolutive appeal was granted and taken to the Supreme Court of Louisiana, by which court it was affirmed for reasons set out in an opinion forming part of the record put in evidence in the present case, and thus embodied in the record before us. The following extract from that opinion sufficiently shows the ground of the judgment: [285]

"Returning to the facts of this case, we find the plaintiffs in the Third District Court defeating a large demand of defendant by the plea that there was then pending in the Fifth District Court a suit against them for the same demand by same party. They thus declared judicially that they had been cited in the Fifth District Court, and they made this assertion to their own benefit and to the injury of the opposite party; and they cannot be heard now to say that their assertion was false and that the person on whom service of citation was made was not of the commercial firm." *Abbot* v. *Wilbur*, 22 La. Ann. 368.

There was no evidence in the present case, except the foregoing two transcripts, and it is upon them that the questions of law decided by the Supreme Court of New Hampshire have arisen.

That court, whose opinion is certified to us in the record, in affirming the judgment of the court of original jurisdiction in New Hampshire in favor of the defendant, proceeded on the ground that, by the common law in force in New Hampshire, a joint judgment against two defendants is void as to both where only one is served with process; and although valid by the law of Louisiana where it was rendered, can have no other effect when sued on in New Hampshire than if it had been rendered in the latter State. This court, upon writ of error to the highest court of a State, does not take judicial notice of the law of another State, not proved in that court and made part of the record sent up, unless by the local law that court takes judicial notice of it. *Hanley* v. *Donoghue*, [*ante*, 585]. But the Supreme Court of New Hampshire took judicial notice, and rightfully, we are bound to assume, under the law and practice of that State, of the law of Louisiana on the point, citing article 182 of the Code of Practice of 1853, as follows: "Nevertheless, if the defendants are husband and wife, or minors interdicted, or absent persons having the same curator, or persons represented by the same attorney in fact, or partners of the same firm or members of the same corporation, it will be sufficient to deliver one citation and one single copy of the petition to the person representing such defendants." It thereupon says: "This statute sustains the plaintiffs' contention on this point, and shows that the judgment on which this suit is brought is valid in Louisiana. But it is nevertheless invalid in New Hampshire because it is invalid by New [286]

Hampshire law, would be invalid if it had been rendered in New Hampshire, and because the Constitution and laws gave it no more force or effect than it would have if it had been rendered here."

So the judgment in the action of nullity, in which both the Abbotts were actors and by which they were both bound, is a direct adjudication by the Supreme Court of Louisiana that the original judgment now sued on, although process was served upon one defendant only, was a valid judgment by the laws of that State. And on the point of the estoppel, based on the judgment in the action of nullity, the Supreme Court of New Hampshire said: "The *res adjudicata* is the Louisiana decision that these defendants asserted that the first judgment was valid in Louisiana by the law of that State, and were by Louisiana law estopped to assert the contrary. The defendants do not now assert the contrary. They assert that if in Louisiana, by the law of that State, the first judgment is valid, with notice given to one of the defendants, it is not valid here, and that if they are estopped to assert that it is invalid in Louisiana upon the law of Louisiana, they are not estopped to assert that it is invalid in New Hampshire by the law of New Hampshire."

But the Act of Congress of May 26, 1790, chap. 11, 1 Stat. at L. 122, now section 905 of the Revised Statutes, passed in pursuance of the express authority of the first section of the fourth article of the Constitution of the United States, prescribes the manner in which the records and judicial proceedings of the courts of any State shall be authenticated and proved, and enacts that "The said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." In *Hanley* v. *Donoghue*, *ubi supra*, it was said: "By the settled construction of these provisions of the Constitution and Statutes of the United States a judgment of a state court, in a cause within its jurisdiction and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another State, as it has in the State in which it was rendered."

[287]

The Act of Congress has been restricted in its application by a series of decisions of this court to judgments of state courts, when they had jurisdiction of the cause and of the parties; and in actions brought on such judgments in other States it has always been held that it was open to a defendant, whether sued alone or jointly with others, to show by plea and proof that he had not been served with process or had not voluntarily appeared. *D'Arcy* v. *Ketchum*, 11 How. 165 [52 U. S. bk. 13, L. ed. 648]; *Thompson* v. *Whitman*, 18 Wall. 457 [85 U. S. bk. 21, L. ed. 897]; *Knowles* v. *Gas Light Co.* 19 Wall. 58 [86 U. S. bk. 22, L. ed. 70]; *Hall* v. *Lanning*, 91 U. S. 160 [Bk. 23, L. ed. 271]. On the other hand, it has never been denied, that, as was said in *Hanley* v. *Donoghue*, *ubi supra*; "It is within the power of the Legislature of a State to enact that judgments which shall be rendered in its courts in actions against joint defendants, one of whom has not been duly served with process, shall be valid as to those who have been so served, or who have appeared in the action." In *Hall* v. *Lanning*, *ubi supra*, it was said: "Various effects and consequences are attributed to such judgments in the States in which they are rendered. They are generally held to bind the common property of the joint debtors, as well as the separate property of those served with process, when such property is situated within the State, but not the separate property of those not served; and whilst they are binding personally on the former, they are regarded as either not personally binding at all, or only *prima facie* binding on the latter."

It is not material in the present case to inquire into or to know what effect the laws of Louisiana purport to give to the judgment sued on in respect to Edward A. Abbott, one of the defendants not served with process and who did not appear in the action, because he is not sued in the present action. If he had been joined in this action, the record itself showing that he was not subject to the jurisdiction of the court rendering the judgment, his defense would have been apparent and perfect; and the judgment in the action of nullity might perhaps be restrained as an estoppel, to prevent him only from asserting the invalidity of the judgment, to the extent and for the purposes merely for which he had used and enforced it judicially in Louisiana. However that may be, it is not and cannot be denied that the judgment in Louisiana here sued on is effective and conclusive as a personal obligation against Joseph S. Abbott, who was within the jurisdiction of the court by personal service of process, and enforceable within that State against him severally, notwithstanding it was a joint judgment against two, of whom he alone was served. The same effect should have been given to it when the administrator of Joseph S. Abbott was sued upon it in New Hampshire, for such is the requirement of the Act of Congress. The principle which protects a person against the operation of judicial proceedings to which he is not a party is one of universal jurisprudence, because it is the dictate of common justice. *Pennoyer* v. *Neff*, 95 U. S. 714 [Bk. 24. L. ed. 565]. But the rule that exonerates a defendant actually served with process from the obligation of a judgment, because rendered also against another who has not been served and therefore is not bound, is purely technical; and when by the local law, according to which such a judgment has been rendered, a different rule has been established, which enforces the personal obligation of the defendant who has been served or who has appeared in the action, the Act of Congress requires that the same effect shall be given to it in every other State in which it may be sued on, whatever may be the rule that there prevails in respect to its domestic judgments. Such was the ground of decision in *Burt* v. *Delano*, 4 Cliff. 618, and in *Stockwell* v. *McCracken*, 109 Mass. 84, as well as in the case of *Hanley* v. *Donoghue*, already referred to.

The judgment of the Supreme Court of New Hampshire is accordingly reversed, and the cause

is remanded, with instructions to take such further proceedings therein as are not inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[356] JOHN S. ANDERSON, EXR. of JAMES ANDERSON, Deceased, *Plff. in Errr.*,
v.
TOWNSHIP OF SANTA ANNA, in DEWITT COUNTY, ILLINOIS.

(See S. C. Reporter's ed. 356-366.)

Municipal bonds—retroactive statutes—federal courts, how far bound by construction of State Constitutions and statutes by state courts.

1. While the courts of the United States accept and apply the construction of the courts of a State of its Constitution or statutes, it is the settled doctrine of this court that rights accruing under one construction will not be lost, merely by a change of opinion in the state court.

2. Where such rights have accrued before the state court has announced its construction, the federal courts, although leaning to an agreement with the state court, must determine the question upon their own independent judgment.

3. Where the liability of a municipal corporation upon negotiable securities depends upon a local statute, the rights of the parties are to be determined according to the law as declared by the state courts at the time such securities were issued.

4. Upon a review of the decisions of the Supreme Court of Illinois, as well as upon its independent judgment, this court holds that the Act of the Legislature of that State of February 28, 1867, was valid, being within the principle that the Legislature, when not restricted by the Constitution, may, by retroactive statutes, legalize the unauthorized acts and proceedings of subordinate municipal agencies where such acts and proceedings might have been previously authorized by the Legislature.

[No. 76.]

Argued Nov. 25, 1885. Decided Jan. 4, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Messrs. **Lawrence Maxwell, Jr.,** *George W. Gere* and *W. M. Ramsey*, for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an action to recover from the Township of Santa Anna, established under the general township organization laws of Illinois, the amount of certain negotiable bonds, with interest coupons attached, signed by its supervisor and clerk and purporting to have been issued by it on the first day of October, 1867, under and by virtue of a law of the State of Illinois, entitled "An Act to Amend the Articles of Association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and to Extend the Powers of and Confer a Charter upon the Same," approved February 28, 1867, and in accordance with the vote of the electors of said township, at the special election held July 21, 1866, in accordance with said Act. Each bond also recites that the faith of the Township is pledged for the payment of said principal sum and interest.

The circuit court sustained a demurrer to the declaration and amended declaration and gave judgment for the township.

The Act of February 28, 1867, empowered the railroad company to locate and construct a railroad from Pekin, in Tazewell County, through, or as near as practicable, certain named towns to the eastern boundary of the State of Illinois. For the purpose of aiding in its construction, authority was given to incorporated towns or townships in counties acting under the township organization law, along the route of the road, to subscribe to the capital stock of the company in any sum not exceeding $250,000.

By the 13th section of the Act it is provided: "§ 13. No such subscription shall be made until the question has been submitted to the legal voters of such incorporation, town or township in which the subscription is proposed to be made; and the clerk of each of said towns or townships is hereby required, upon the presentation of a petition signed by at least ten citizens, who are legal voters and taxpayers of such town or township for which he is clerk, and in which petition the amount proposed to be subscribed shall be stated, to post up notices in at least three public places in each town or township; which notice shall be posted not less than thirty days before the day of holding such [358] election, notifying the legal voters of such town or township to meet at the usual place of holding elections in such town or township, or some other convenient place named in such notice, for the purpose of voting for or against such subscription; *Provided*, That where elections may have already been held, and the majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, then and in that case no other election need be had, and the amount so voted for shall be subscribed as in this Act provided. And such elections are hereby declared to be legal and valid, as though this Act had been in force at the time thereof and all the provisions hereof had been complied with."

The pleadings allege that on the 21st of July, 1866, the Township of Santa Anna, through which the road passed, held a special election upon the question of subscribing the sum of $50,000 to the capital stock of said Danville, Urbana, Bloomington and Pekin Railroad Company, at which said election a majority of the legal voters of said Township voted for and were in favor of a subscription to the capital stock of said railroad company, by the said Township, of the said sum; that on the first of October, 1867, in pursuance of said vote, and of said Act of February 28, 1867, the then supervisor of the Township subscribed, in its name, the sum of $50,000, receiving from the railroad company, for the Township, proper certificates of stock; and in connection with the township clerk and in payment for such stock, executing and delivering to the company the

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NOTE.—*Municipal bonds; how affected by change in construction of statutes by state courts, or by constitutional changes.* See Mitchell v. Burlington, 77 U. S., 14 Wall.), 270, bk. 22, 350, *note.*

Power of state courts to construe state statutes. See Jackson v. Lamphire, 28 U. S. (3 Pet.), 280, bk. 7, 679, *note.*

When this court will review their decisions. See Commercial Bank v. Buckingham, 46 U. S. (5 How.), 317, bk. 12, 169, *note.*

Hampshire law, would be invalid if it had been rendered in New Hampshire, and because the Constitution and laws gave it no more force or effect than it would have if it had been rendered here."

So the judgment in the action of nullity, in which both the Abbotts were actors and by which they were both bound, is a direct adjudication by the Supreme Court of Louisiana that the original judgment now sued on, although process was served upon one defendant only, was a valid judgment by the laws of that State. And on the point of the estoppel, based on the judgment in the action of nullity, the Supreme Court of New Hampshire said: "The *res adjudicata* is the Louisiana decision that these defendants asserted that the first judgment was valid in Louisiana by the law of that State, and were by Louisiana law estopped to assert the contrary. The defendants do not now assert the contrary. They assert that if in Louisiana, by the law of that State, the first judgment is valid, with notice given to one of the defendants, it is not valid here, and that if they are estopped to assert that it is invalid in Louisiana upon the law of Louisiana, they are not estopped to assert that it is invalid in New Hampshire by the law of New Hampshire."

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The Act of Congress has been restricted in its application by a series of decisions of this court to judgments of state courts, when they had jurisdiction of the cause and of the parties; and in actions brought on such judgments in other States it has always been held that it was open to a defendant, whether sued alone or jointly with others, to show by plea and proof that he had not been served with process or had not voluntarily appeared. *D'Arcy* v. *Ketchum*, 11 How. 165 [52 U. S. bk. 13, L. ed. 648]; *Thompson* v. *Whitman*, 18 Wall. 457 [85 U. S. bk. 21, L. ed. 897]; *Knowles* v. *Gas Light Co.* 19 Wall. 58 [86 U. S. bk. 22, L. ed. 70]; *Hall* v. *Lanning*, 91 U. S. 160 [Bk. 23, L. ed. 271]. On the other hand, it has never been denied, that, as was said in *Hanley* v. *Donoghue, ubi supra;* "It is within the power of the Legislature of a State to enact that judgments which shall be rendered in its courts in actions against joint defendants, one of whom has not been duly served with process, shall be valid as to those who have been so served, or who have appeared in the action." In *Hall* v. *Lanning, ubi supra*, it was said: "Various effects and consequences are attributed to such judgments in the States in which they are rendered. They are generally held to bind the common property of the joint debtors, as well as the separate property of those served with process, when such property is situated within the State, but not the separate property of those not served; and whilst they are binding personally on the former, they are regarded as either not personally binding at all, or only *prima facie* binding on the latter."

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The judgment of the Supreme Court of New Hampshire is accordingly reversed, and the cause

is remanded, with instructions to take such further proceedings therein as are not inconsistent with this opinion.

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(See S. C. Reporter's ed. 356–366.)

Municipal bonds—retroactive statutes—federal courts, how far bound by construction of State Constitutions and statutes by state courts.

1. While the courts of the United States accept and apply the construction of the courts of a State of its Constitution or statutes, it is the settled doctrine of this court that rights accruing under one Construction will not be lost, merely by a change of opinion in the state court.

2. Where such rights have accrued before the state court has announced its construction, the federal courts, although leaning to an agreement with the state court, must determine the question upon their own independent judgment.

3. Where the liability of a municipal corporation upon negotiable securities depends upon a local statute, the rights of the parties are to be determined according to the law as declared by the state courts at the time such securities were issued.

4. Upon a review of the decisions of the Supreme Court of Illinois, as well as upon its independent judgment, this court holds that the Act of the Legislature of that State of February 28, 1867, was valid, being within the principle that the Legislature, when not restricted by the Constitution, may, by retroactive statutes, legalize the unauthorized acts and proceedings of subordinate municipal agencies where such acts and proceedings might have been previously authorized by the Legislature.

[No. 76.]

Argued Nov. 25, 1885. Decided Jan. 4, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Mssrs. **Lawrence Maxwell, Jr.,** *George W. Gere* and *W. M. Ramsey*, for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an action to recover from the Township of Santa Anna, established under the general township organization laws of Illinois, the amount of certain negotiable bonds, with interest coupons attached, signed by its supervisor and clerk and purporting to have been issued by it on the first day of October, 1867, under and by virtue of a law of the State of Illinois, entitled "An Act to Amend the Articles of Association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and to Extend the Powers of and Confer a Charter upon the Same," approved February 28, 1867, and in accordance with the vote of the electors of said township, at the special election held July 21, 1866, in accordance with said Act. Each bond also recites that the faith of the Township is pledged for the payment of said principal sum and interest.

The circuit court sustained a demurrer to the declaration and amended declaration and gave judgment for the township.

The Act of February 28, 1867, empowered the railroad company to locate and construct a railroad from Pekin, in Tazewell County, through, or as near as practicable, certain named towns to the eastern boundary of the State of Illinois. For the purpose of aiding in its construction, authority was given to incorporated towns or townships in counties acting under the township organization law, along the route of the road, to subscribe to the capital stock of the company in any sum not exceeding $250,000.

By the 13th section of the Act it is provided:

"§ 13. No such subscription shall be made until the question has been submitted to the legal voters of such incorporation, town or township in which the subscription is proposed to be made; and the clerk of each of said towns or townships is hereby required, upon the presentation of a petition signed by at least ten citizens, who are legal voters and taxpayers of such town or township for which he is clerk, and in which petition the amount proposed to be subscribed shall be stated, to post up notices in at least three public places in each town or township; which notice shall be posted not less than thirty days before the day of holding such [358] election, notifying the legal voters of such town or township to meet at the usual place of holding elections in such town or township, or some other convenient place named in such notice, for the purpose of voting for or against such subscription; *Provided*, That where elections may have already been held, and the majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, then and in that case no other election need be had, and the amount so voted for shall be subscribed as in this Act provided. And such elections are hereby declared to be legal and valid, as though this Act had been in force at the time thereof and all the provisions hereof had been complied with."

The pleadings allege that on the 21st of July, 1866, the Township of Santa Anna, through which the road passed, held a special election upon the question of subscribing the sum of $50,000 to the capital stock of said Danville, Urbana, Bloomington and Pekin Railroad Company, at which said election a majority of the legal voters of said Township voted for and were in favor of a subscription to the capital stock of said railroad company, by the said Township, of the said sum; that on the first of October, 1867, in pursuance of said vote, and of said Act of February 28, 1867, the then supervisor of the Township subscribed, in its name, the sum of $50,000, receiving from the railroad company, for the Township, proper certificates of stock; and in connection with the township clerk and in payment for such stock, executing and delivering to the company the

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NOTE.—*Municipal bonds; how affected by change in construction of statutes by state courts, or by constitutional changes.* See Mitchell v. Burlington, 71 U. S., 14 Wall.), 270, bk. 22, 350, *note.*

Power of state courts to construe state statutes. See Jackson v. Lamphire, 28 U. S. (3 Pet.), 280, bk. 7, 672, *note.*

When this court will review their decisions. See Commercial Bank v. Buckingham, 46 U. S. (5 How.), 317, bk. 12, 169, *note.*

bonds and coupons in suit; that the Township, for nine consecutive years, regularly and annually assessed taxes to meet the interest on said bonds, and paid the same over without objection; that on the first day of December, 1868, the plaintiff purchased the bonds in suit at their par value from one Tiernan, to whom they had been sold by the company; that on the first Monday of September, 1869, and subsequently, the Township, by its proper officers, participated, as a stockholder, in sundry meetings of the company's stockholders; that on the 28th of October, 1871, its then supervisor caused [359] the bonds to be registered in the office of the auditor of public accounts of Illinois, who endorsed on each bond his certificate to the effect that it had been registered in his office pursuant to the Act of April 16, 1869, to fund and provide for paying the railroad debts of counties, townships, cities and towns; and that on the first day of July, 1874, the Township exchanged this stock for a like amount of stock in another corporation, the Indianapolis, Bloomington and Western Railroad Company, which latter stock, during the time the Township has held and owned it, has been worth as much as 50 per cent of its par value.

The record does not disclose the particular ground upon which the circuit court sustained the demurrer, and gave judgment for the Township. But we cannot understand how that result was possible, except upon the hypothesis that the Act of February 28, 1867, legalizing elections previously held, at which a majority of legal voters of a township declared in favor of a subscription to the stock of this company, was unconstitutional. But the constitutionality of that very statute, in respect of the clause now before us, was directly sustained by this court in *St. Joseph Township* v. *Rogers*, 16 Wall. 644, 663 [83 U. S. Bk, 21, L. ed. 328, 338]. The question there was as to the validity of bonds issued by a township on the first of October, 1867, to the Danville, Urbana, Bloomington and Pekin Railroad Company, under the authority of the before mentioned Act of February 28, 1867, and in accordance with a popular vote at an election held in August, 1866. It was there contended that the Act was unconstitutional and void, as creating a debt for a municipality, against its will expressed in a legal manner. There, as here, the election referred to in the bonds was held without authority of law. But the court, speaking by *Mr. Justice* Clifford, said that, according to repeated decisions of the Supreme Court of Illinois and of this court, defective subscriptions of the kind there made "may, in all cases, be ratified where the Legislature could have originally conferred the power;" citing, among other cases, *Cowgill* v. *Long*, 15 Ill. 208 and *Keithsburg* v. *Frick*, 34 Id. 405.

[360] In *Cowgill* v. *Long*, 15 Ill. 202, it appears that a statute of Illinois authorized the legal voters of any school district to meet together at a certain time in any year and determine by vote whether a tax should be levied for the support of common schools, for building and repairing schoolhouses, or for other school purposes. The inhabitants of a district held an election and voted a tax for the purpose of erecting a schoolhouse. The tax was assessed and steps were taken for its collection. But as the election was not held at the time directed by the statute, certain taxpayers, whose property was levied on and was about to be sold, instituted a suit to enjoin the sale. Pending that suit, the Legislature passed an Act declaring the vote and tax to be good, valid and effectual in law and in equity, and legalized what had been done by the local officers in reference to the assessment of the tax. The court held that although the tax was voted at a time not authorized by law, and was not so certified as to become a valid tax, "it was clearly competent for the Legislature to remedy those defects, while the tax remained uncollected." "Laws of this character," said *Chief Justice* Treat, delivering the unanimous opinion of the court, "are often passed to secure the collection of taxes defectively levied, and there can be no serious objections to their validity."

In *Keithsburg* v. *Frick*, 34 Ill. 421, one of the questions presented was as to the validity of an Act of 1857, giving a special charter to the Town of Keithsburg, and conferring upon it authority to subscribe stock to a certain railroad company, and at the same time legalizing and confirming a previous subscription to the stock of the same corporation by the town while acting under the general incorporation law for towns and cities. The court, speaking by *Mr. Justice* Breese, said: "If the subscription was made under the organization allowed by the general incorporation law of 1849, the 17th section of the Act of 1857 legalizes and confirms it. The subscription, therefore, was good if made under the Act of 1849, confirmed as it is by the 17th section of the Act of 1857. The bonds may be regarded as issued by the old corporation, confirmed by the new Act, or as a new issue under the second section of the Act of 1857."

In *Scholfield* v. *Watkins*, 22 Ill. 72, one of the questions was as to the constitutionality of a statute which legalized the acts and proceedings of certain school district trustees in uniting districts and levying and collecting taxes for building houses, and for the support of schools therein, and provided that all proceedings may be had in the same manner as if those proceedings had been strictly regular and legal. The court, said by Walker, *J.*, that there could be no doubt that "the Legislature have the power to form a school district, or may legalize the acts of officers in attempting to form a district, so as to render such district legal. * * * And the power to cure irregularities in the manner of levying a tax is equally undoubted, and, so far as this tax was levied for the purposes specified in the Act, there is no doubt that the levy is thereby made valid."

These cases were all determined before the bonds in suit were issued. While they are not analogous in every respect to the one before us, they seem to rest upon the principle that the Legislature, when not restricted by the Constitution, may, by retroactive statutes, legalize the unauthorized acts and proceedings of subordinate municipal agencies, where such acts and proceedings would have been valid if done under legislative sanction previously given. The decision in *St. Joseph Township* v. *Rogers* only gave effect to principles announced by the state court prior to the issuing of the bonds. If, according to the law of Illinois, as declared

by its highest court at the time the bonds in suit were issued, the Act of February 28, 1867 was a valid exercise of legislative power, the rights of the purchasers or holders, could not be affected merely by subsequent change of decision. For it is the long established doctrine of this court—from which, as said recently in *Green County* v. *Conness*, 109 U. S. 105 [Bk. 27, L. ed. 872], we are not disposed to swerve—that where the liability of a municipal corporation upon negotiable securities depends upon a local statute, the rights of the parties are to be determined according to the law as declared by the state courts at the time such securities were issued. In *Douglass* v. *County of Pike*, 101 U. S. 677 [Bk. 25, L. ed. 968], the *Chief Justice* said: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of a legislative enactment." See also *County of Bath* v. *Douglass*, 105 U. S. 732 [Bk. 26, L. ed. 898]; *Olcott* v. *Supervisors*, 16 Wall. 678 [83 U. S. Bk. 21, L. ed. 382]; *City* v. *Lamson*, 9 Wall. 477, 485 [76 U. S. Bk. 19, L. ed. 725, 729]; *Boyd* v. *Alabama*, 94 U. S. 645 [Bk. 24, L. ed. 302]; *Taylor* v. *Ypsilanti*, 105 U. S. 71 [Bk. 26, L. ed. 1012]; *Thompson* v. *Lee County*, 3 Wall. 330 [70 U. S. Bk. 18, L. ed. 178]; *Brown* v. *Mayor*, 63 N. Y. 244; Cooley, Const. Lim. 474,477, 4th ed.; Dill. Mun. Corp. § 46.

If, however, we are in error in our interpretations of the decisions in *Cowgill* v. *Long*, *Scholfield* v. *Watkins* and *Kelchsburg* v. *Frick*, it results that when the bonds were executed there was no decision of the state court in reference to the power of the Legislature to enact the statute of February 28, 1867. In that case the duty of this court is to determine, upon its independent judgment, what was the law of Illinois when the rights of the parties accrued. In *Burgess* v. *Seligman*, 107 U. S. 33 [Bk. 27, L. ed. 365], the court had occasion to re-examine all its prior adjudications concerning the obligation of the federal courts to follow the decisions of the state courts upon questions of local law. *Mr. Justice Bradley*, speaking for the whole court, after observing that the federal courts had an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of these laws, said: "So, when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or where there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean to an agreement of views with the state courts if the question seems to be balanced with doubt." Any other rule, it was further said, would defeat the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States."

Assuming, then, for the purposes of this case, that the question of legislative power as here presented had not, when the bonds in suit were issued, been finally determined by the state court, we perceive no reason to doubt the correctness of the decision upon this point in *St. Joseph Township* v. *Rogers*. It is not claimed that the Constitution of Illinois, in terms, forbade retrospective legislation. But the statute in question is supposed to be obnoxious to that clause which provides that "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes." Numerous decisions of the state court, to which our attention was called in other cases, construe that provision as defining not simply the class of municipal officers upon whom the power of taxation, for local purposes, may be conferred, but the purposes for which that power may be exerted. Those decisions are to the effect that, within the meaning of the Constitution, the corporate authorities of a township like Santa Anna are the electors; and that while the construction of a railroad, through or near the township, would be a corporate purpose within the meaning of that instrument, a debt for that object could not be imposed upon it without the consent of its corporate authorities, that is, without the consent of the electors. These principles fall far short of sustaining the proposition that the curative clause of the Act of February 28, 1867, was unconstitutional; for, the Legislature did not, in any just sense, impose a debt upon Santa Anna Township against the will of its corporate authorities, the electors. The Act embraces only townships which, by a majority of their legal voters, at an election previously held, had declared for a subscription. That such majority was given at an election held by the Township in the customary form is averred in the declaration and is admitted by the demurrer. The curative Act only gave effect to the declared will of the electors. As the Constitution of the State did not provide any particular mode in which the corporate authorities of a township should manifest their willingness or desire to incur a municipal debt for railroad purposes, we perceive no reason why the action of the majority of legal voters, at an election held in advance of legislative action, might not be recognized by the Legislature and constitute the basis of its subsequent assent to the creation of such indebtedness, and its ratification of what had been done. In *Grenada Co. etc.* v. *Brogden*, 112 U. S. 271 [Bk. 28, L. ed. 707], where somewhat the same question was involved, we said: "Since what was done in this case by the constitutional majority of qualified electors and by the board of supervisors of the county would have been legal and binding upon the county had it been done under legislative authority previously conferred, it is not perceived why subsequent legislative ratification is not, in the absence of constitutional restrictions upon such legislation, equivalent to original authority." See also *Thompson* v. *Perrine*, 103 U. S. 815 [Bk. 26, L. ed. 616]; *Ritchie* v. *Franklin Co.* 22 Wall. 67 [89 U. S. bk. 22, L. ed. [364]

825]; *Thomson* v. *Lee County*, 3 Wall. 327 [70 U. S. bk. 18, L. ed. 177]; *City* v. *Lamson*, 9 Wall. 477, 485 [76 U. S. bk. 19, L. ed. 725, 729]; *Campbell* v. *City of Kenosha*, 5 Wall. 194 [72 U. S. bk. 18, L. ed. 610]; *Otoe County* v. *Baldwin*, 111 U. S. 15 [Bk. 28, L. ed. 336]. The same principle was announced by the Supreme Court of Illinois in a very recent case, *U. S. Mortgage Co.* v. *Gross*, 93 Ill. 494, involving the constitutionality of a statute of Illinois which was retrospective in its operation. "Unless," said the court in that case, "there be a constitutional inhibition, a Legislature has power, when it interferes with no vested right, to enact retrospective statutes to validate invalid contracts or to ratify and confirm any act it might lawfully have authorized in the first instance." It cannot be denied that the Legislature could lawfully have authorized a subscription by Santa Anna Township to the stock of this road, upon the assent, in some proper form, of a majority of its legal voters. The Act of 1867 interfered with no vested right of the township; for, as an organization entirely for public purposes, it had no privileges or powers which were not subject, under the Constitution, to legislative control. The statute did nothing more than to ratify and confirm Acts which the Legislature might lawfully have authorized in the first instance.

We infer from the arguments before us that the circuit court felt obliged by the decision in *Township of Elmwood* v. *Marcy*, 92 U. S. 289 [365] [Bk. 23, L. ed. 710], to hold the Act of February 28, 1867, to be unconstitutional. In that case, the main question was as to the liability of Elmwood Township upon bonds issued in its name by its supervisor and town clerk, under the authority, not of that Act, but of one passed April 17, 1869, which legalized and confirmed and declared to be binding upon the township an additional subscription to the stock of the Dixon, Peoria and Hannibal Railroad Company, pursuant to the vote of a majority of legal voters of the township at an election held at a time when the town had exhausted its power to subscribe. The bonds then in suit were issued on the 27th of April, 1869. The majority of the court, in that case, held the Act of April 17, 1869, to be unconstitutional, entirely upon the authority of *Harward* v *St. Clair Drainage Co.* 51 Ill. 130; *People* v. *Mayor*, 51 Ill. 17; *Hessler* v. *Drainage Co.* 53 Ill. 105, *Lovingston* v. *Wilder*, Id. 302; *Marshall* v. *Silliman*, 61 Ill. 218; and *Wiley* v. *Silliman*, 63 Ill. 170. We have already seen that *St. Joseph* v. *Rogers*, *ubi supra*, maintained the validity of the very Act now before us, upon the authority, as well as of the then existing law of the State as declared by its highest court, as of our own decisions upon the general question of the power of the Legislature to legalize that which it might have originally authorized. Although the decision in that case was cited by counsel in *Elmwood* v. *Marcy*, the court, in the latter case, did not refer to it or overrule it, but applied to the Elmwood bonds the principles announced in the later decisions of the state court. While the courts of the United States accept and apply the construction of a State Constitution or of a local statute, upon which the rights of parties depend, which has been fixed by the course of decisions in the state court, it is the settled doctrine of this court, that rights accruing under one construction will not be lost merely by a change of opinion in the state court; and where such rights have accrued before the state court has announced its construction, the federal courts, although leaning to an agreement with the state court, must determine the question upon their own independent judgment. If the decisions of the state court, commencing with *Harward* v *St. Clair Drainage Co.* would, if applied here, require an affirmance, we cannot depart from the long established doctrine which makes it our duty to determine the rights of parties, where those rights depend upon the local law, according to that law as judicially declared at the time such rights accrued, or, in the absence of any such declaration, according to the law as, in our judgment, it then was.

We are of opinion that the demurrer should have been overruled. The judgment is reversed, with directions for further proceedings in conformity with this opinion.

Cited—117 U. S., 509.

JOHN CONFARR, *Plf. in Err.*,
v.
TOWNSHIP OF SANTA ANNA.
[No. 77.]

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The judgment in this case is reversed upon the authority of Anderson v. Township of Santa Anna, just decided, and the cause is remanded for further proceedings in conformity with the opinion in that case.

True copy: Test.
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN M. STONE ET AL, Composing the Railroad Commission of MISSISSIPPI, *Appts.*,
v.
FARMERS LOAN AND TRUST COMPANY.

(See S. C. Reporter's ed. "*Railroad Commission Cases*," 307-347.)

Constitutional law—railroads—State has power to limit charges—obligation of charter contracts—impairment of—jurisdiction of States over interstate railroads—validity of the Railroad Supervision Act of Mississippi.

1. A State has power to limit railroad charges for transportation within its own jurisdiction, unless restrained by contract, or the power of Congress to regulate foreign or interstate commerce; and this power can only be bargained away, if at all, by words of positive grant or their equivalent.

2. The grant of power to the directors of a railroad company to make by-laws, rules and regulations for the management of its affairs, subject to the laws of the State, does not exempt the company from the operation of laws subsequently enacted, within the scope of legislative power, for the regulation of the business in which it is authorized to engage.

3. The grant to a railroad company, of power "from time to time to fix, regulate and receive the toll and charges" to be received by it for transportation, confers merely the power to fix reasonable charges leaving the State free, within the limits of its general authority, to declare what shall be deemed reasonable.

NOTE.—*Constitutional law; railroads; extent of state control over.* B. & O. R. R. Co. v. Maryland, 88 U. S. (21 Wall.), 456, bk. 22, 678, *note*.

Same—interstate commerce; regulation of; power of Congress; how far exclusive. For a full discussion, see Gloucester Ferry Co. v. Pa., *ante*, 158, *note*

4. The charter of the Mobile and Ohio Railroad Company contains no contract the obligation of which is in any way impaired by the Mississippi Statute of March 11, 1884, creating a commission to provide for the regulation of freight and passenger rates, prevent unjust discrimination, and enforce certain police regulations affecting railroad companies doing business in that State.

5. A railroad company chartered by and carrying on its business in two or more States is, for all purposes of local government, a domestic corporation in each State and, within each State, subject to its laws as to all matters not within the exclusive control of Congress.

6. The Act in question does not deny to the company the equal protection of the laws nor deprive it of its property without due process of law, within the meaning of the Fourteenth Amendment.

7. This court agrees with the Supreme Court of Mississippi, that said Act is not repugnant to the Constitution of that State.

8. This court also holds that said Act is not so inconsistent and uncertain as to be absolutely void upon its face.

[No. 722.]

Argued Oct. 13, 14, 15, 1885. Decided Jan. 4, 1886.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The history and facts of the case fully appear in the opinion of the court. See also the following and related cases of *Stone* v. *Illinois Central R. R. Co.* and *Stone* v. *New Orleans and Northeastern R. R. Co. post*, 650, 651.

Mr. **Jno. W. C. Watson**, for appellants:

A state law necessarily embarrassing, encumbering or obstructing commerce would be unconstitutional; but the law in question was designed for no such purpose and need have no such effect. It is its object to encourage and promote commerce by protecting it against unreasonable charges and unjust discriminations.

It is difficult to comprehend how a railroad corporation can, under the authority of the State, regulate its charges, if it is unconstitutional for the State itself to exercise this power. It would certainly be no more dangerous in the hands of the State than in the hands of a corporation.

State regulation of railroad charges is not in conflict with the power of Congress.

Munn v. *Ill.* 94 U. S. 113; and *Shields* v. *Ohio*, 95 U. S. 319 (Bk. 24, L. ed. 77, 357); *Ruggles* v *Ill.* and *Ill. Cent. R. R. Co.* v. *Ill.* 108 U. S. 526, 541 (Bk. 27, L. ed. 812, 818).

The Mobile and Ohio Railroad Company can derive no benefit from the fact that its road runs continuously through several States under the same name and management. It has no legal existence in any State, except by the law of that State. Neither State could confer on it a corporate existence in another, nor add to or diminish the powers to be there exercised. All of the railroads of Mississippi are local and domestic and as much subject to the legislative power of the State as if they had no connections outside of the State.

Railway Co. v. *Whitton*, 13 Wall. 270 (80 U. S. bk. 20, L. ed. 571); *O. & M. R. R. Co.* v. *Wheeler*, 1 Black, 286 (66 U. S. bk. 17, L. ed. 130); *R. R. Co.* v. *Md.* 21 Wall. 456 (88 U. S. bk. 22, L. ed. 678).

The regulation of railroad charges falls within the police power of the States.

Boyd v *Ala.* 94 U. S. 645 (Bk. 24, L. ed. 302); *Vapor, etc. of New York* v. *Miln*, 11 Pet. 102 (36 U. S. bk. 9, L. ed. 648); *Fertilizing Co.* v. *Hyde Park* and *Patterson* v. *Ky.* 97 U. S. 667, 508 (Bk. 24, L. ed. 1038, 1116); *Frankfort & P. P. R. R. Co.* v. *Philadelphia*, 58 Pa. St. 119; *R. R. Co.* v. *Fuller*, 17 Wall. 560 (84 U. S. bk. 21, L. ed. 710).

The charter contains no provision which was intended to create a contract. Law making is the peculiar and exclusive function of the legislative department of the government; and its acts are only laws unless a different intent is plainly shown.

Fertilizing Co. v. *Hyde Park, supra; Charles River Bridge* v. *Warren Bridge*, 11 Pet. 547 (36 U. S. bk. 9, L. ed. 824); *Newton* v. *Comrs.* 100 U. S. 561 (Bk. 25, L. ed. 712).

There must have been a deliberate intention to grant what is claimed, clearly manifested on the part of the State. Such a purpose cannot be inferred from equivocal language.

Providence Bank v. *Billings*, 4 Pet. 514 (29 U. S. bk. 7, L. ed. 939); *Gilman* v. *Sheboygan*, 2 Black, 510 (67 U. S. bk. 17, L. ed. 305); *Ruggles* v. *Ill.* 108 U. S. 531 (Bk. 27, L. ed. 815).

State legislative regulation of railroad charges has been sustained in the following cases:

Chicago, M. & St. P. R. R. Co. v. *Ackley*, 94 U. S. 179 (Bk. 24, L. ed. 99); *Ruggles* v. *Ill.* and *Ill. Cent. R. R. Co.* v. *Ill. supra.*

Messrs. **E. L. Russell, John A. Campbell** and *P. Hamilton*, for appellee:

The Act of Mississippi is an intrusion upon the possession, and a diminution of the enjoyment and a violation of the rights of this company. It amounts to a seizure and usurpation of its franchises.

Perrine v. *Chesapeake Co.* 9 How. 184 (50 U. S. bk. 13, L. ed. 97); *Md.* v. *Balt. & O. R. R. Co.* 3 How. 534 (44 U. S. bk. 11, L. ed. 714); *Olcott* v. *Supervisors*, 16 Wall. 694 (83 U. S. bk. 21, L. ed. 388); *Comrs.* v. *Farmers Bank*, 21 Pick. 542; *Chicago etc. R. Co.* v. *Iowa*, 94 U. S. 155 (Bk. 24, L. ed. 94); *Wilmington R. R. Co.* v. *Reid*, 13 Wall. 264 (80 U. S. bk. 20, L. ed. 568).

The adoption of this charter resulted from the concurrent Act of four States. The result of this co-operative adoption of the company by different States, with the same powers of administration for transportation through each, is to establish a community of interest and right which neither of them can separately and partially derange or transform.

P. & W. R. R. Co. v. *Md.* 10 How. 376 (51 U. S. bk. 13, L. ed. 461); *State* v. *Northern Cent. R. Co.* 18 Md. 193; *Sprague* v. *Hartford P. & F. R. R. Co.* 5 R. I. 233; *Brockett* v. *Ohio & P. R. R. Co.* 14 Pa. St. 244; *Cleveland & P. R. R. Co.* v. *Speer*, 56 Pa. St. 325.

An Act of incorporation is a contract between the government proposing it and the subject accepting it; and it becomes binding on both parties, without power in either to modify it in any particular, unless some power to that effect is in some manner reserved.

Dartmouth College v. *Woodward*, 4 Wheat. 700 (17 U. S. bk. 4, L. ed. 674); *Pa. College Cases*, 13 Wall. 212 (80 U. S. bk 20, L. ed. 552).

The power to fix, regulate and collect tolls and charges for transportation on this railroad vests a legal right, which is not subject to repeal or control.

Lowden v. *Hierons*, 2 Moore, 102; *Gard* v. *Callard*, 6 M. & S. 70; *Atty-Gen.* v. *Railroad Cos.* 35 Wis. 586; *Jenkins* v. *Harvey*, 5 Tyrw. 871; *Chicago, etc. R. R. Co.* v. *Iowa*, 94 U. S. 155 (Bk. 24, L. ed. 94); *R. R. Co.* v. *Md.* 21 Wall. 470 (68 U. S. bk. 22, L. ed. 683).

Transportation of freight and persons from one State to another is commerce among the States.

State Freight Tax Cases, 15 Wall. 232 (82 U. S. bk. 21, L. ed. 146); *Brown* v. *Md.* 12 Wheat. 448 (25 U. S. bk. 6, L. ed. 688); *Cooley* v. *Port Wardens*, 12 How. 299 (53 U. S. bk. 13, L. ed. 996); *Walton* v. *Mo.* 91 U. S. 275 (Bk. 23, L. ed. 347).

The police power of the States must yield to the higher power of Congress to regulate commerce.

R. R. Co. v. *Husen*, 95 U. S. 465 (Bk. 24, L. ed. 527); *Sinnot* v. *Davenport*, 22 How. 242 (63 U. S. bk. 16, L. ed. 247).

Mr. Chief Justice **Waite** delivered the opinion of the court:

[307] This is a suit brought by the Farmers' Loan and Trust Company, a New York corporation, to enjoin the Railroad Commission of Mississippi from enforcing against the Mobile and Ohio Railroad Company the provisions of the Statute of Mississippi passed March 11, 1884, entitled "An Act to Provide for the Regulation of Freight and Passenger Rates on Railroads in this State, and to Create a Commission to Supervise the Same, and for Other Purposes." [308] That Act is as follows:

"Sec. 1. *Be it enacted, by the Legislature of the State of Mississippi*, That the track of every railroad in this State is a public highway, over which all persons have equal rights of transportation for passengers and freights on the payment of just compensation to the owner of the railroad for such transportation; and any person or corporation engaged in transporting passengers or freights over any railroad in this State, who shall exact, receive or demand more than the rate specified in any bill of lading issued by such person or corporation, or who, for his or its advantage or for the advantage of any connecting line or for any person or locality, shall make any discrimination in transportation against any individual, locality or corporation shall be guilty of extortion."

Sections 2 and 3 relate to the punishment of those so guilty and their liability in double damages to parties injured.

Sections 4 and 5 provide for the appointment of three commissioners, to be known as the Railroad Commission of the State of Mississippi, prescribe their qualifications and tenure of office, fix their salaries, and subject them to penalties and punishment for violation of duty.

Section 6 is as follows:

"Sec. 6. *Be it further enacted*, That it shall be the duty of all persons or corporations who shall own or operate a railroad in this State, within thirty days after the passage of this Act to furnish the Commission with its tariff of charges for transportation of every kind; and it shall be the duty of said Commission to revise said tariff of charges so furnished, and determine whether or not, and in what particular, if any, said charges are more than just compensation for the services to be rendered, and whether or not unjust discrimination is made in such tariff of charges against any person, locality or corporation; and when said charges are corrected, as approved by said Commission, the Commission shall then append a certificate of its approval to said tariff of charges; but in revising or establishing any and every tariff of charges it shall be the duty of said Commission to take into consideration the character and nature of the service to be performed and the entire business of such railroad, together with its earnings from the passenger and other traffic; and shall so revise such tariffs as to allow a fair and just return on the value of such railroad, its appurtenances and equipments; and it shall be the duty of said Commission to exercise a watchful and careful supervision over every such tariff of charges, and continue such tariff of charges from time to time as justice to the public and each of said railroad companies may require, and to increase or reduce any of said rates according as experience and business operations may show to be just; and said Commission shall accordingly fix tariffs of charges for those railroads failing to furnish tariffs as above required. And it shall be the duty of said railroad companies or persons operating any railroad in this State to post at each of its depots all rates, schedules and tariffs for the transportation of passengers and freights, made or approved by said Railroad Commission, with said certificate of approval, within ten days after said approval, in some conspicuous place at such depot; and it shall be unlawful for any such person or corporation to make any rebate or reduction from such tariff in favor of any person, locality or corporation which shall not be made in favor of all other persons, localities or corporations by a change in such published rates, except as may be allowed by the Commission; and when any change is contemplated to be made in the schedule of passenger or freight rates of any railroad by the Commission, said Commission shall give the person or corporation operating or managing said railroad notice in writing, at least ten days before such change of the time and place at which such change will be considered."

Section 7 makes it unlawful for a company to grant reductions or rebates prohibited by the Act, and fixes a penalty for so doing.

Section 8 allows reduced rates for certain kinds of transportation.

Section 9 is as follows:

"Sec. 9. *Be it further enacted*, That it shall be the duty of said Commission to hear all complaints made by any person against any such tariff of rates so approved, on the ground that the same in any respect is for more than just compensation, or that such charges or any of them amount to or operate so as to effect unjust discrimination; such complaint must be in writing, and specify the items in the tariff against which complaint is made; and if it appears to the Commission that there may be justice in the complaint, or that the matter ought to be investigated, the Commission shall forthwith furnish to the person or corporation operating the railroad a copy of the complaint, together with notice (which said notice shall be served as other legal process is now required by law to be served on railroad companies) that at a time and place stated in the notice the tariff as to said items will be revised by the Commission,

and at such time and place it shall be the duty of the Commission to hear the parties to the controversy in person or by counsel, or both, and such evidence as may be offered, oral or in writing, and may examine witnesses on oath, conforming to the mode of proceedings, as nearly as may be convenient, to that required of arbitrators, giving such time and latitude to each side and regulating the opening and conclusion of any argument as the Commission may consider best adapted to arrive at the truth; and when the hearing is concluded the Commission shall give notice of any change deemed proper by them to be made, to the person or corporation operating the railroad; *Provided*, In no instance shall any corporation, railroad or person be criminally or civilly liable for the making of any charge or discrimination whatever, if the same is not in violation of the tariff of charges or rules and regulations prescribed by the Commission."

Sections 10 and 11 are unimportant in this case.

The remainder of the statute is as follows:

"Sec. 12. *Be it further enacted*, That every person or corporation operating a railroad in this State shall furnish the said Commission with all the information required relative to the management of their respective lines, and particularly with copies of all leases, contracts and agreements for transportation with express, sleeping-car or other companies to which they are parties.

"Sec. 13. *Be it further enacted*, That every railroad company shall, within twenty-four hours after the occurrence of any accident to a train, attended with serious personal injury on any portion of its line within the limits of this State, give notice of the same to the railroad commissioners who, upon information of such accident, may repair or dispatch one or more of their number to the scene of said accident, and inquire into the facts and circumstances thereof, which shall be recorded in the minutes of their proceedings and embraced in their annual report.

"Sec. 14. *Be it further enacted*, That the Commission shall make annual reports to the Governor on or before the first day of January in each year, for transmission to the Legislature, of their doings for the year ending on the 30th day of September next preceding, containing such facts as will disclose the actual working of the railway system in this State, and such suggestions as to the general railroad policy of the State as may seem to them appropriate.

Sec. 15. *Be it further enacted*. That it shall be the duty of every railroad company or person operating a railroad in this State to make quarterly returns of the business of said railroad to the Railroad Commission of Mississippi, which returns shall embrace all the receipts and expenditures of said railroad, and be made according to forms furnished by the said railroad commissioners for that purpose.

"Sec. 16. *Be it further enacted*, That the quarterly returns herein provided shall be made as aforesaid within thirty days after the end of each quarter to which they relate; and any railroad company or persons operating any railroad in this State which shall fail or refuse to make the quarterly returns, as provided for in this Act, shall forfeit to the State of Mississippi $50 for every day of such refusal or neglect.

"Sec. 17. *Be it further enacted*, That the said quarterly returns shall be sworn to by one or more officers of said company or of the persons operating the said railroad, who has knowledge of their truth; and any person knowingly swearing falsely to any statement in any of said quarterly reports shall be guilty of perjury. [312]

"Sec. 18. *Be it further enacted*, That it shall be the duty of the commissioners to inspect the depots of the railroads operated in this State, and see that at least one comfortable and suitable reception room is provided at each depot for the use and accommodation of persons desiring and awaiting transportation over their line; and any railroad company failing or refusing to provide such room, after sixty days' notice from the commissioners to provide the same, shall be liable to a penalty of not less than $50 for each day they so fail or refuse to provide such room; and said railroad company shall keep at all times in such reception rooms a bulletin board which shall show the time of the arrival and departure of trains; and when any passenger train or other train for transporting passengers is delayed, notice of same shall be made on said bulletin board for the information of passengers, stating as nearly as can be ascertained the extent of the delay and probable time of arrival.

"Sec. 19. *Be it further enacted*, That the determination of every matter of said Commission shall be in writing; and proof thereof shall be made by a copy of the same, duly certified to by the clerk of said Commission; and whenever any matter has been determined by said Commission, in the course of any proceeding before it relating to the regulation or supervision of any railroad in this State, and coming within the jurisdiction of such Commission, proof of the fact of such determination, duly certified as aforesaid, shall be received in all the courts of this State, or before any officers thereof, in all civil cases, as *prima facie* evidence that such determination was right and proper; and the record of the proceedings of said Commission shall be deemed a public record and shall at all reasonable times be subject to the inspection of the public.

"Sec. 20. *Be it further enacted*, That said Commission or any one of said commissioners may, in the discharge of any of the duties imposed upon them by this Act, administer oaths, take affidavits and summon and examine witnesses under oath, in all matters coming before them; and if any person shall testify or make any false affidavit or oath before said Commission or before any of said commissioners or before any officers, to any matter coming before said Commission, he shall be deemed guilty of perjury, and upon conviction thereof shall be punished according to law. [313]

"Sec. 21. *Be it further enacted*, That all summonses for witnesses to appear before said Commission or before any one or more of said commissioners, and notice to persons or corporations, shall be issued by one of said commissioners, and be directed to any sheriff, constable or marshal, of any city or town, who shall execute the same in his bailiwick and

make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court; and if any person duly summoned to appear and testify before said Commission or before any one or more of said commissioners shall fail or refuse to appear and testify without a lawful excuse, or shall refuse to answer any proper question propounded to him by said Commission or any of said commissioners, or if any person shall obstruct said Commission or one or more of said commissioners in the discharge of duty, or shall conduct himself in a rude, disrespectful or disorderly manner before said Commission or any of them deliberating in the discharge of duty, such person shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $50 nor more than $1,000.

"Sec. 22. *Be it further enacted*, That witnesses summoned to appear before said Commission shall be entitled to the same per diem and milage as witnesses attending circuit court; and witnesses summoned by said Commission on its behalf shall be paid out of the state treasury on warrants, to be drawn by the auditor upon the certificate of the Commission, showing the amount and items thereof to which such witness may be entitled; and witnesses summoned for any railroad shall be paid by such railroad.

"Sec. 23. *Be it further enacted*, That if any railroad company or person or corporation operating any railroad in this State, shall violate any of the provisions of this Act, or the tariff [314] of charges as fixed by such Commission, such company, person or corporation shall be liable to a penalty of $500 for each violation not otherwise provided for; and such penalty may be recovered by an action to be brought in the name of the State of Mississippi in any county where such violation may occur, or injury or wrong be done. The Commission shall institute such action through the district attorney of the proper district; and no such suit shall be dismissed without the consent of the court and of said Commission; and if any district attorney shall neglect, for thirty days after notice, to bring any such suit, the Commission may direct some attorney at law to bring the same; and his fee therefor shall be fixed by the court, and shall not exceed 50 per cent of the amount collected; and the district attorney shall not interfere in such suit, and the same shall not be dismissed without consent as aforesaid; *Provided*, That in all trials of cases brought for a violation of any tariff of charges, as fixed by the Commission, it may be shown in defense that such tariff so fixed was unjust.

"Sec. 24. *Be it further enacted*, That the remedies hereby given shall be regarded as cumulative to the remedies now given by law against railroad corporations; and this Act shall not be construed as repealing any statute giving such remedies.

"Sec. 25. *Be it further enacted*, That the provisions of this Act shall apply to and include all persons, firms and companies, and all associations of persons, whether incorporated or otherwise, that shall operate a railroad in this State, street railways excepted.

"Sec. 26. *Be it further enacted*, That hereafter the election of railroad commissioners shall be at such time, in such manner and for such term as may be determined by the Legislature.

"Sec. 27. *Be it further enacted*, That the schedules adopted by the Commission for charges for transportation of persons and freight shall not be enforced against any railroad in this State before the first day of May, A. D. 1884.

"Sec. 28. *Be it further enacted*, That this Act shall take effect and be in force from and after its passage."

On the 15th of March, 1884, the following supplemental Act was passed:

"Sec. 1. *Be it enacted by the Legislature of the State of Mississippi*, That the Act entitled 'An Act to Provide for the Regulation of Freight and Passenger Rates on Railroads in this State, and to Create a Commission to Supervise the Same, and for Other Purposes,' approved March 11, 1884, shall not be so construed as to authorize said commissioners to require bulletin boards to denote the delay of trains noted thereon, or to require the erection of station houses in any case where in their judgment the public travel does not make it necessary; nor shall said Act be so construed as to require said Commission to investigate or call upon any railroad company for rates of charges in transportation or travel from any point outside of this State to points outside of this State, or in any way interfere with such rates of charges."

On the third of February, 1848, the Legislature of Alabama passed an Act to incorporate the Mobile and Ohio Railroad Company, with power to locate, construct and finally complete a single, double or treble railroad or way from some suitable point in the City of Mobile, in a westerly or northwesterly direction, to the west line of this State, towards the mouth of the Ohio River, in such route as shall be deemed most expedient; and to transport, take and carry property and persons upon said railroad or way by the power and force of steam, of animals or of any other mechanical or other power, or any combination of them which said company may choose to apply; and with permission to make any lawful contract with any other railroad corporation in relation to the business of said company, and also to make joint stock with any other railroad corporation.

The immediate government and direction of the affairs of the company was vested in a board of directors to be chosen by the stockholders, and by section 7 it was provided: "That the directors shall have full power to make and prescribe such by-laws, rules and regulations as they shall deem needful and proper, touching the disposition and management of the stock, property, estate and effects of said company, not contrary to this charter or the laws of this State or of the United States; the transfer of shares, the duties and conduct of their officers and servants, touching the election of and meeting of the directors; and all matters whatsoever which may appertain to the concerns of said company."

Section 12 is as follows:

"Sec. 12. *And be it further enacted*, That it shall be lawful for the company hereby incorporated from time to time to fix, regulate and

receive the toll and charges by them to be received for transportation of persons or property on their railroad or way aforesaid, hereby authorized to be constructed, erected, built or used, or upon any part thereof."

On the 17th of February, 1848, the Legislature of Mississippi passed "An Act to incorporate the Mobile and Ohio Railroad Company." This Act, after reciting the incorporation of the company in Alabama, and setting out that Act of incorporation in full, "the same as printed in Alabama," and also reciting that Mississippi was desirous to aid in accomplishing the object of the said Act, proceeded as follows:

"Sec. 1. *Be it enacted by the Legislature of the State of Mississippi*, That the railroad described in the above recited Act be extended in the State of Mississippi, from the Alabama line to the State of Tennessee, in such direction and on such a route as shall be deemed most expedient; and that as to said extension there is granted to the said Mobile and Ohio Railroad Company, when organized, the same rights, powers and privileges as are granted to it within the State of Alabama by the said Act; subject, however, to the same and similar conditions, restrictions, modifications and provisions as are in said Act above recited, contained and set forth, excepting the provision contained in section 15 of said Act; and the said Act is hereby concurred in and adopted within the State of Mississippi in reference to the said railroad as extended, and in reference to the said Mobile and Ohio Railroad Company, with the exception of that portion contained in section 15, as before stated: *Provided*, That in case of persons absent or unknown, whose lands may be condemned pursuant to sections 7, 8 and 9 of said recited Act, the placing of the amount of the damages assessed to the credit of the owner, in the hands of the state treasurer, shall be taken as payment, and on such owner appearing or rendering satisfactory evidence of his claim thereto, such damages shall be paid him by the treasurer on the warrant of the auditor of public accounts."

The excepted section related to taxation, and as to this a different provision was made in Mississippi from that in the Alabama charter. Power was also given the company to cross the tracks of other railroads in Mississippi; and some slight changes were made in the provisions for depositing the amount of damages assessed upon the condemnation of property for the use of the company. Otherwise the charters of the company in these two States were substantially identical.

On the same day, February 28, 1848, the Legislature of Tennessee passed "An Act to incorporate the Mobile and Ohio Railroad Company and the Tennessee Central Railroad Company." This Act began as follows:

"*Whereas*, It appears to this General Assembly, from the memorial of Jonathan Emanuel, President, and George N. Stewart, Sidney Smith, Moses Waring, Charles Le Baron, and S. Griffith Fisher, directors of the Mobile and Ohio Railroad Association, that a company has been organized at Mobile, in the State of Alabama, for the purpose of constructing a railroad from Mobile to the Tennessee River, and thence to a suitable point near the mouth of the Ohio River, for which purpose said board of president and directors have applied to this General Assembly for the passage of such a law as may be necessary to authorize the construction of said road through the State of Tennessee;

"*And whereas*, it is deemed a matter of vital importance to this State that a direct communication by railroad to the Gulf of Mexico be established: Therefore,

"Sec. 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the said Jonathan Emanuel, President, and the said George N. Stewart, Sidney Smith, Moses Waring, Charles Le Baron, and S. Griffith Fisher, directors, and their associates, who shall be the stockholders of said company, and their successors, under the name and style of 'The Mobile and Ohio Railroad Company,' are hereby declared to be a body corporate and politic under the laws of Tennessee, with succession for five hundred years, and a common seal, with capacity to have, receive and enjoy, to them and their successors, property and estate of whatsoever nature and quality; and the same to alien, transfer and dispose of, so far as may be necessary to carry into effect the main object of this charter, which is hereby declared to be the construction, use and maintenance of a railroad from Mobile, in the State of Alabama, to some point on the Mississippi or Ohio River, near the mouth of the Ohio, passing through the State of Tennessee."

The remainder of the Act relates to the powers and privileges of the company in Tennessee.

On the 26th of February, 1848, the General Assembly of Kentucky passed an Act "to authorize the Mobile and Ohio Railroad Company to extend their railroad from the south boundary line of the State of Kentucky to the Mississippi or Ohio Rivers," as follows:

"Sec. 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That the Mobile and Ohio Railroad Company, when formed under the Act of the General Assembly of the State of Alabama, approved February 3, 1848, entitled 'An Act to Incorporate the Mobile and Ohio Railroad Company,' shall be allowed the privilege of making any necessary reconnaissance and survey for the purpose of ascertaining the most eligible route for extending the Mobile and Ohio Railroad to any point upon the Mississippi or Ohio Rivers in this State.

"Sec. 2. *Be it further enacted*, That as soon as said route and point shall be ascertained, the said Mobile and Ohio Railroad Company shall be allowed the right of way for the extension and construction of their said railroad from the Tennessee line to the Mississippi or Ohio Rivers and that they shall be entitled to all the privileges, rights and immunities, and subject to all such restrictions, as are granted, made and prescribed for the benefit, government and direction of said Mobile and Ohio Railroad Company within the State of Alabama by the Act above described."

On the 20th of September, 1850, Congress passed "An Act granting the right of way and making a grant of land to the States of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile."

This Act provided "that the said railroad and branches shall be and remain a public highway for the use of the Government of the United States, free from toll or other charges," and "that the United States mail shall at all times be transported on the said railroad, under the direction of the Post Office Department at such price as the Congress may by law direct."

These lands were transferred by Alabama and Mississippi to the Mobile and Ohio Railroad Company in 1850 and 1851; and in 1859 Congress ratified and confirmed the grants and extended the time for building the road.

The case was heard on demurrer to the bill. The circuit court rendered a decree allowing the injunction, and from that decree this appeal was taken.

The argument in support of the decree below is:

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1. That the statute under which the commissioners are to act impairs the obligation of the charter contract of the Mobile and Ohio Railroad Company;

2. That it is, so far as that company is concerned, a regulation of commerce among the States;

3. That it denies the company the equal protection of the laws and deprives it of its property without due process of law;

4. That it confers both legislative and judicial powers on the Commission, and is thus repugnant to the Constitution of Mississippi; and,

5. That it is void on its face by reason of its inconsistencies and uncertainties.

These several positions will be considered in their order.

1. The provisions of the charter on which the claim of contract rests are found in sections 1, 7 and 12, as follows:

"Sec. 1. And the said company is hereby authorized and empowered * * * to transport, take and carry property and persons upon said railroad or way, by the power and force of steam, of animals or of any other mechanical or other power, or any combination of them which the company may choose to apply."

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"Sec. 7. That the directors shall have full power to make and prescribe such by-laws, rules and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate and effects of said company, not contrary to this charter or the laws of this State or of the United States; the transfer of shares, the duties and conduct of their officers and servants, touching the election of, and the meeting of the directors; and all matters whatsoever which may appertain to the concerns of said company."

"Sec. 12. That it shall be lawful for the company hereby incorporated from time to time to fix, regulate and receive the toll and charges by them to be received for transportation of persons or property on their railroad or way aforesaid, hereby authorized to be constructed, erected, built or used, or upon any part thereof."

From this it is claimed that the State granted to the company for the full term of its corporate existence, that is to say, forever, the right of managing its own affairs and regulating its charges for the transportation of persons and property free of all legislative control.

It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce. *Baltimore & Ohio R. R. Co.* v. *Maryland*, 21 Wall. 456 [88 U. S. bk. 22. L. ed. 678]; *Chicago, Burlington & Quincy R. R. Co.* v. *Iowa*, *Peik* v. *Chicago & N. W. R. Co.* and *Winona and St. Peter R. R. Co.* v. *Blake*, 94 U. S. 155, 164, and 180 [Bk. 24, L. ed. 94, 97 and 99]; *Ruggles* v. *Illinois*, 108 U. S. 531 [Bk. 27, L. ed. 815]. This power of regulation is a power of government, continuing in its nature; and if it can be bargained away at all it can only be by words of positive grant or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of *Chief Justice* Marshall, in *Providence Bank* v. *Billings*, 4 Pet. 560 [29 U. S. bk. 7, L. ed. 955], "Its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." This rule is elementary, and the cases in our reports where it has been considered and applied are numerous. Thus, in *Providence Bank* v. *Billings* it was held that the incorporation of a bank without any special provision for taxation did not imply a contract on the part of the State not to tax at all. In *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 419 [36 U. S. bk. 9, L. ed. 773], the court said this rule of construction was not confined to the taxing power, and accordingly it held that the charter of a toll-bridge company did not imply a contract not to allow the building of another bridge in the immediate vicinity which would materially interfere with its revenues. In delivering the opinion of the court, *Chief Justice* Taney used this language, p. 548 [824]: "This Act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation for the purpose of building the bridge, and establishes certain rates of toll which the company are authorized to take; this is the whole grant. There is no exclusive privilege given to them over the waters of Charles River, above or below the bridge; no right to erect another bridge themselves nor to prevent other persons from erecting one; no engagement from the State that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish its income." In *Minott* v. *P. W. & B. R. R. Co.*, known as the *Delaware Railroad Tax Case*, 18 Wall. 206 [85 U. S. bk. 21, L. ed. 888], it was held that a provision in the charter that the railroad company "should pay annually into the treasury of the State a tax of one quarter of 1 per cent on its capital stock of $400,000," without any words "indicating the intent of the Legislature that no further or different tax should be subsequently levied," was not sufficient to show a contract binding the State not to make such a levy; the court remarking that "The surrender, when claimed, must be shown by clear and unambigous language which will admit of no reasonable construction consistent

with the reservation of the power." So, in *Bailey* v. *Magwire*, 22 Wall. 215 [89 U. S. bk. 22, L. ed. 850], it was held that a clause in a charter which subjected a corporation to taxation at the rate assessed by the State on other real or personal property of like value, did not relieve the company from taxation for other than state purposes. And here the court said: "Silence on such a subject," that is to say, taxation for other purposes, "cannot be construed as a waiver of the right of the State in this regard. There must be something said which is broad enough to show clearly that the Legislature intended to relieve the corporation from a part of the burdens borne by other real or personal property." In *Fertilizing Company* v. *Hyde Park*, 97 U. S. 660 [Bk. 24, L. ed. 1086], it appeared that a company had been incorporated with authority to establish and maintain for fifty years, "chemical and other works at the place designated * * * for the purpose of manufacturing and converting dead animals and other animal matter into an agricultural fertilizer, or into other chemical products, by means of chemical or other processes;" but this court held that the State was not thereby prevented from causing the works to be abated in case they should, within the time of the charter, become a public nuisance because of the growth of population in the neighborhood; and among the reasons assigned was the absence from the charter of any express exemption of the company from the operation of the powers of the State, applicable to its existing condition for the time being. In *Seaton* v. *Comrs.* 100 U. S. 548 [Bk. 25, L. ed. 716], the seat of justice of a county had been fixed at Canfield, but the statute by which this was done provided "that before the seat of justice shall be considered permanently established at Canfield," the citizens should donate a lot and make certain provisions for the erection of public buildings thereon. The citizens complied with all the requirements of the law, and the seat of justice remained undisturbed at the place where it had been "permanently established" until 1874, when a law was passed for its removal to another town. The citizens of Canfield then caused a bill to be filed for an injunction restraining the county commissioners from effecting the removal, on the ground that the original Act and what was done under it constituted an executed contract on the part of the State that the seat of justice should remain forever at Canfield, and the later Act impaired the obligation of that contract; but this court held otherwise, saying, among other things: "If the Legislature had intended to assume an obligation that it should be kept there in perpetuity, it is to be presumed it would have said so. We cannot, certainly not in this case, interpolate into the statute a thing so important which it does not contain."

The cases in which it has been held that a contract was entered into are equally instructive. Thus in *Gordon* v. *Appeal Tax Court*, 3 How. 133 [44 U. S. bk. 11, L. ed. 529], the statute was: "That upon any of the banks in this State complying with the conditions of this Act, the faith of the State is hereby pledged not to impose any future tax or bonus on the said banks during the continuance of their charters under this Act." In *State Bank of Ohio* v. *Knoop*, 16 How. 369 [57 U. S. bk. 14, L. ed. 977], the provision was that each bank organized under the Act should semi-annually, on the days designated for declaring dividends, set off to the State 6 per cent on the profits, deducting therefrom the expenses and ascertained losses for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject, and from the judgment that this was a contract of exemption from any further exercise of the power of taxation three justices dissented. In *Bridge Proprietors* v. *Hoboken Co.* 1 Wall. 116 [68 U. S. bk. 17, L. ed. 571], the words of exclusion were "that it should not be lawful for any person or persons whatsoever to erect, or cause to be erected (within certain specified limits), any other bridge or bridges over or across the said river." In *Home of the Friendless* v. *Rouse*, 8 Wall. 430 [75 U. S. bk. 19, L. ed. 495], the provision was that all property of said corporation shall be exempt from taxation, and that a certain existing statute to the effect that every Act of incorporation should be subject to alteration and repeal "shall not apply to this corporation."

Such being the rule and such its practical operation, we return to the special provisions of the charter on which this case depends, and [329]
find: first, the authority given the corporation to carry persons and property. This of itself implies authority to charge a reasonable sum for the carriage. In this way the corporation was put in the same position a natural person would occupy if engaged in the same or like business. Its rights and its privileges in its business of transportation are just what those of a natural person would be under like circumstances; no more, no less. The natural person would be subject to legislative control as to the amount of his charges. So must the corporation be. That was decided in *Baltimore & Ohio R. R. Co.* v. *Maryland; Chicago, Burlington & Quincy R. R. Co.* v. *Iowa; Peik* v. *Chicago & Northwestern Railway Co.; Winona & St. Peter R. R. Co.* v. *Blake;* and *Ruggles* v. *Illinois, supra.*

Next follows the power of the directors to make by-laws, rules and regulations for the management of the affairs of the company, but it is expressly provided that such by-laws, rules and regulations shall not be contrary to the laws of the State. This we held, in *Ruggles* v. *Illinois*, included laws in force when the charter was granted and those which came into operation afterwards as well. It is true that the clause which thus limits the power of the directors is found in the middle of the sentence which confers the power, but it clearly was intended to refer to everything that might be done in this way "touching * * * all matters whatsoever that may appertain to the concerns of said company." There is nothing here, therefore, which in any manner implies a contract on the part of the State to exempt the company from the operation of laws enacted within the scope of legislative power for the regulation of the business in which it is authorized to engage.

The case turns consequently on section 12, which is "that it shall be lawful for the company * ** from time to time to fix, regulate

and receive the toll and charges by them to be received for transportation," etc. This would have been implied from the rest of the charter if there had been no such provision; and it is argued that unless it had been intended to surrender the power of control over fares and freights, this section would not have been inserted. The argument concedes that the power [330] of the company under this section is limited by the rule of the common law which requires all charges to be reasonable. In *Munn* v. *Illinois*, and *Chicago, Burlington & Quincy R. R. Co.* v. *Iowa* this court decided that as to natural persons and corporations subject to legislative control, the State could, in cases like this, fix a maximum beyond which any charge would be unreasonable; and that such maximum when fixed would be binding on the courts in their adjudications, as well as on the parties in their dealings. The claim now is that by section 12 the State has surrendered the power to fix a maximum for this company, and has declared that the courts shall be left to determine what is reasonable, free of all legislative control. We see no evidence of any such intention. Power is granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. There is no rate specified nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently, all the power which the State had in the matter before the charter, it retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the State is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power it would have been easy to say so. Not having said so, the conclusive presumption is there was no such intention.

This is not in conflict with the judgment of the Supreme Court of Mississippi in *Railroad Commission* v. *Yazoo & Mississippi Railroad Co.*, in which it was decided that the power had been surrendered in favor of that company because in that charter a maximum of rates was fixed. In the opinion, a copy of which has been furnished us in advance of its publication in the regular series of reports, the court says distinctly that "A grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely [331] a purpose to confer power to exact compensation which shall be just and reasonable. It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the Legislature afterwards to interfere can be denied." In *Railroad Commission* v. *Natchez, Jackson and Columbia R. R. Co.* it was held by the same court that the charter authority for the company "from to time to fix, regulate and receive tolls and charges by them to be received for transportation of persons and property" did not amount to a contract of exemption, and the commission was allowed to proceed under the law.

From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the Commission, and the statute of Mississippi expressly provides "that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defense that such tariff so fixed is unjust."

It is also claimed that the charter contains a contract binding the State to allow the company, at all times and in all ways, to manage its own affairs through its own board of directors; and that the obligation of this contract will be impaired if the provisions of the statute are enforced by the commissioners. As has already been seen, the power of the directors is coupled with a condition that their management shall be in accordance with the laws of the State. This undoubtedly means with such laws as may be constitutionally enacted touching the administration of the affairs of the company. The present statute requires the company: 1, to furnish the commissioners with copies of its tariffs for all kinds of transportation; 2, to post in some conspicuous place at each of its depots the tariff approved by the commissioners, with the certificate of approval attached; 3, to conform to the tariff as approved without discrimination in favor of or against persons or localities; 4, to furnish the commissioners with all the information they require relative to the management of its line, and particularly with copies of all leases, contracts and agreements for transportation with express, sleeping-car or other companies to which they are parties; 5, to report all accidents within the limits of the State attended with any serious personal injury; 6, to make quarterly returns of its business to the commissioners, which returns shall embrace all the receipts and expenditures of its railroad; 7, to provide at least one comfortable and suitable reception room at each depot for the use and accommodation of persons desiring or awaiting transportation over its road; and 8, to keep at all times in such reception rooms a bulletin board which shall show the time of the arrival and departure of trains; and when any passenger or other train for transporting passengers is delayed, notice of the extent of the delay and the probable time of arrival as near as it can be ascertained.

The second and third of these requirements relate only to the duty of the company to keep its charges within the limit of the tariff approved by the commissioners without discrimination in favor of or against persons or localities. The first, fourth and sixth are clearly intended as a means of furnishing the commissioners with the information necessary to enable them to act understandingly in fixing the tariff. Whether under these provisions the company can be required to make report of or give

information about its business outside of Mississippi is a question we do not now undertake to decide. The second, fifth, seventh and eighth are nothing more than reasonable police regulations for the comfort, convenience and safety of those traveling upon the road or doing business with the company in the State.

The commissioners have power: 1, to approve and if need be to fix the tariff of charges for transportation, both of persons and property, by which the company must be governed, and to exercise a watchful and careful supervision over such tariff; 2, to notify the company of the times and places when and where the propriety of a change in existing tariffs will be considered; 3, to entertain complaints made by any person against a tariff which has been approved, on the ground that the same is in any respect for more than a just compensation, or that the charges amount to or operate so as to effect unjust discrimination and, after due notice to the company and proper inquiry had, to make any changes that may be deemed proper; 4. to repair to the scene of an accident within the State attended with serious personal injury, and inquire into the facts and circumstances thereof, to be recorded in the minutes of their proceedings and embraced in the annual report they are required to make to the Governor for transmission to the Legislature; 5, to inspect the depots of all railroads operated in the State and to see that comfortable and suitable reception rooms are provided; and 6, to institute all necessary suits for the recovery of the penalties prescribed by the statute for a violation of its provisions. The first three of these relate entirely to proceedings for fixing charges and supervising the tariff, and the rest, like the correlative requirements of the company, are mere police regulations which the commissioners are to enforce. All this comes clearly within the supervising power of the State in the administration of the affairs of its domestic corporations.

We conclude, therefore, that the charter of the company contains no contract the obligation of which is in any way impaired by the statute under which the commissioners are to act.

2. There can be no doubt that each of the States through which the Mobile and Ohio Railroad passes incorporated the company for the purpose of securing the construction of a railroad from Mobile, through Alabama, Mississippi, Tennessee and Kentucky, to some point near the mouth of the Ohio River, where it would connect with another railroad to the lakes, and thus form a continuous line of interstate communication between the Gulf of Mexico in the south, and the Great Lakes in the north. It is equally certain that Congress aided in the construction of parts of this line of road so as to establish such a route of travel and transportation. But it is none the less true that the corporation created by each State is, for all the purposes of local government, a domestic corporation, and that its railroad within the State is a matter of domestic concern. Every person, every corporation, everything within the territorial limits of a State is, while there, subject to the constitutional authority of the State Government. Clearly, under this rule Mississippi may govern this corporation, as it does all domestic corporations, in respect to every act and everything within the State which is the lawful subject of State Government. It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the State; to stop its trains at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time tables at proper places; and other things of a kindred character affecting the comfort, the convenience, or the safety of those who are entitled to look to the State for protection against the wrongful or negligent conduct of others. This company is not relieved entirely from state regulation or state control in Mississippi, simply because it has been incorporated by and is carrying on business in the other States through which its road runs. While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the Constitution of the United States within the exclusive jurisdiction of Congress; that is to say, using the language of this court in *Cardwell* v. *Bridge Co.* 113 U. S. 210 [Bk. 28, L. ed. 961], "when the subjects on which it is exerted are national in their character, and admit and require uniformity of regulations affecting all States alike." Under this rule nothing can be done by the government of Mississippi which will operate as a burden on the interstate business of the company or impair the usefulness of its facilities for interstate traffic. It is not enough to prevent the State from acting, that the road in Mississippi is used in aid of interstate commerce. Legislation of this [335] kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the State as well as within.

The Commission is in express terms prohibited by the Act of March 15, 1884, from interfering with the charges of the company for the transportation of persons or property through Mississippi from one State to another. The statute makes no mention of persons or property taken up without the State and delivered within, nor of such as may be taken up within and carried without. As to this, the only limit on the power of the commissioners is the constitutional authority of the State over the subject. Precisely all that may be done, or all that may not be done, it is not easy to say in advance. The line between the exclusive power of Congress and the general powers of the State in this particular is not everywhere distinctly marked; and it is always easier to determine when a case arises whether it falls on one side or the other than to settle in advance the boundary, so that it may be in all respects strictly accurate. As yet the commissioners have done nothing. There is certainly much they may do in regulating charges within the State which will not be in conflict with the Constitution of

the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond.

3. General statutes regulating the use of railroads in a State, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive the corporation owning or operating a railroad within the State of its property, without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States, nor take away from the corporation the equal protection of the laws. *Munn* v. *Ill.* 94 U. S. 134, 135 and *Railroad Co.* v. *Richmond*, 96 U. S. 529 [Bk. 24, L. ed. 87, 787]; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 354 [Bk. 28, L. ed. 176]. The great purpose of the statute now under consideration is to fix a maximum of charges and to regulate in some matters of a police nature, the use of [336] railroads in the State. In its general scope it is constitutional and it applies equally to all persons or corporations owning or operating railroads in the State. No preference is given to one over another, but all are treated alike. Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the commissioners from giving it any effect whatever as against this company.

4. The Supreme Court of Mississippi has decided in the cases of *Railroad Commission* v. *Yazoo and Mississippi Railroad Company*, and *Railroad Commission* v. *Natchez, Jackson and Columbia Railroad Company*, not yet officially reported, that the statute is not repugnant to the Constitution of the State "in that it creates a commission and charges it with the duty of supervising railroads." To this we agree, and that it is all that need be decided in this case. As was said by the Supreme Court of Mississippi, in the case first referred to above: "Many questions may arise under it not necessary to be disposed of now, and we leave them for consideration when presented."

5. It is difficult to understand precisely on what ground we are expected to decide that this statute is so inconsistent and uncertain as to render it absolutely void on its face. The statute of Tennessee which was under consideration in *Louisville & N. R. R. Co.* v. *Railroad Commission of Tennessee*, 19 Fed. Rep. 679, is materially different from this in many respects. That case was decided before this statute was passed, and it is not at all unlikely that the Legislature of Mississippi made use of the decision in framing their bill so as to avoid some, if not all, of the objections which, in the opinion of the court, were fatal to what had been done in Tennessee. The argument on this branch of the controversy contains much that might have been useful if addressed to the Legislature while considering the bill before its final enactment; but we find nothing in it to show that the statute as it now stands is altogether void and inoperative. When the Commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provis- [337] ions which will be worthy of consideration, but we are unable to say that, as a whole, the statute is invalid.

The decree of the Circuit Court is reversed and the cause remanded with instructions to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Blatchford** did not sit in this case nor take any part in its decision.

Mr. Justice **Harlan** dissenting:

These cases are unlike that of *Chicago, Burlington & Quincy Railroad Co.* v. *Iowa*, where the charter of the company was granted expressly subject to such rules and regulations as the Legislature might, from time to time, enact and provide; or of *Peik* v. *Chicago & Northwestern Railway Co.*, where, at the time the railroad charter was granted, the State Constitution provided that all charters of corporations may be altered or repealed by the Legislature at any time after their passage; or of *Winona & St. Peter Railroad Co.* v. *Blake*, 94 U. S. 160, 175, 180 [Bk. 24, L. ed. 94, 98 and 99], where the charter prescribed no limit upon the legislative power to fix rates for transportation, and conferred no express power upon the company to fix or establish such rates as it might deem proper. Different questions from any of these are now presented.

The Mobile and Ohio Railroad Company was chartered on the third of February, 1848, by the State of Alabama, with authority to construct and maintain a railroad from the City of Mobile to the west line of that State, towards the mouth of the Ohio River, and to transport and carry property and persons, under such regulations as to time and manner as its board of directors might establish. It was also invested by its charter with power, "from time to time, *to fix*, regulate and *receive* the toll and charges by them to be received for the transportation of persons and property over the line of railroad hereby authorized to be constructed and completed, or any part thereof." § 12. The Legislature of Mississippi, in the same month, approved of the Alabama charter (except in certain particulars not important to be here mentioned) and consented to the extension of the road through that State to the Tennessee line; conferring upon the company, when organized, "the same rights, powers, and privileges" that were granted to it within the State of Alabama. Like consent was given, and similar action was taken, by the States of Tennessee and Kentucky, with reference to the proposed road within their respective limits.

The Illinois Central Railroad Company is the lessee of the Chicago, St. Louis and New Orleans Railroad Company. By an Act of the Legislature of Mississippi, of April 18, 1873, the New Orleans, Jackson and Great Northern Railroad Company, owning a line of railroad from New Orleans, Louisiana, to Canton, Mississippi, and the Mississippi Central Railroad Company, owning a line running from the latter place northward to Jackson, Tennessee, were authorized to consolidate into one corporation; the latter to have all the rights, powers, privileges, immunities and franchises in perpetuity, then conferred upon the constituent

companies, or upon either of them. Such consolidation took place under the name of the Chicago, St. Louis and New Orleans Railroad Company; and by an Act of February 28, 1878, was ratified. But the same Act provided that it should be of no force or effect until the debt due the State from the Mississippi Central Railroad Company was adjusted by the Chicago, St. Louis and New Orleans Railroad Company. Subsequently, by an Act approved March 1, 1882, the payment of this debt by the latter company to the State was acknowledged; and the Chicago, St. Louis and New Orleans Railroad Company was declared to be a corporation of Mississippi "with perpetual succession and, as such, is invested with all the rights, powers, privileges, liberties, and franchises conferred by the Act to which this is a supplement, and *especially* the rights and powers * * * of section 10 of an Act entitled 'An Act to Incorporate the Mississippi Railroad Company,' approved March 10, 1852."

The tenth section of the Act last named, to the rights and powers conferred by which particular reference was made, is in these words: "That the president and directors be and they are hereby authorized to adopt and establish such a tariff of charges for the transportation of persons and property *as they may think proper, and the same to alter and change at pleasure.*"

The amount paid to the State by the Chicago, St. Louis and New Orleans Railroad Company on account of the debt due from the Mississippi Central Railroad Company was $158,978.82.

It is thus seen that the Mobile and Ohio Railroad Company, and the Chicago, St. Louis and New Orleans Railroad Company, were given by their charters the power to fix and regulate rates for transportation of persons and property upon their respective roads. This power was of course not without limit; for the general grant of the franchises, rights and privileges enumerated in these charters was attended by the condition which the law always implies in such cases, that the charges for transportation established by the companies shall be reasonable.

The Mississippi Statute of 1884 provides for the appointment of three commissioners, and invests them with the power of establishing upon the basis of just compensation, and the protection of persons, localities or corporations against unjust discrimination) a tariff of charges for the transportation of persons and property on any railroad owned or operated in that State. The commissioners so appointed are required, in ascertaining such compensation, to take into consideration the character and nature of the service to be performed, and the entire business of such railroad, together with its earnings from the passenger and other traffic; to so revise these tariffs as to allow a fair and just return on the *value* of such railroad, its appurtenances and equipments; and to increase or reduce the rates so established as justice to the public and each of said railroad companies may require, and as experience and business operations may show to be just. Any person, company or corporation operating a railroad in Mississippi who fails to conform to the tariff of charges established by the commission is made liable to a penalty of $500 for each violation, recoverable in the name of the State.

I am of opinion that this statute impairs the obligation of the contract which the State made with these companies, in this: that it takes [341] from each of them the power conferred by its charter, of fixing and regulating rates for transportation within the limit of reasonableness; and confers upon a commission authority to establish, from time to time, such rates as will give a fair and just return on the *value* of such railroad, its appurtenances and equipments, and as experience and business operations may show to be just. In short, the companies are placed by the statute in the same condition they would occupy if their charter had not conferred upon them the power to fix and regulate rates for transportation. The whole subject of transportation rates is thus remitted to the judgment of commissioners who have no pecuniary interest whatever in the management of these vast properties, and who, if they had any such interest, would be disqualified under the statute from serving; and who are required to fix rates, according to the value of the property, without any reference to what it originally cost or what it had cost to maintain it in fit condition for public use.

It is hardly necessary to discuss the proposition that the right to fix and regulate rates for transportation within the limit of reasonableness was and is one of great practical value to these companies; for the rates so fixed would have governed the conduct of parties interested in them, unless it was made to appear, affirmatively and in some legal mode, that they were unreasonable. The object of the construction of the roads operated by these companies was, as the bill avers and the opinion of the court admits, to establish a continuous line of interstate communication between the Gulf of Mexico and the Great Lakes of the North. In the accomplishment of that object the entire country took a deep interest; for Congress, by grants of land and otherwise, gave those enterprises every possible encouragement. Does anyone believe that private capitalists would have supplied the money necessary to establish and maintain these lines of interstate communication had they supposed that the States through which the roads were extended reserved the right, by commissioners, to take charge of the whole matter of rates and abrogate, at their pleasure, such tariffs of charges as might be established by the companies under the power, [340] expressly conferred, of fixing and regulating rates? Would they have risked the immense sums invested in these enterprises had the charters of the companies contained a provision making rates to depend, not on the capabilities, wants and interests of the territory to be supplied with railroad service, or on the amount expended in constructing and maintaining these roads, but on their *value* as estimated by commissioners, and on such basis as the latter, from time to time, might deem to be justified by experience and business operations? Their value, upon what basis, or at what period of their existence? When they were constructed? Or what they would bring at a sale under a decree of court? In the place of charter provisions, under which rates fixed by the companies would be deemed legal until the contrary was made to

appear, the statute substitutes a system under which rates established by a Commission, and by it increased or diminished from time to time, must be observed by the companies, unless it is made to appear, affirmatively, that such rates are unjust, officers and agents of the companies, acting in conformity with express provisions of their charters, being made liable to heavy penalties, unless they prove that the Commission has established an unjust tariff of charges.

The court concedes that the power which the State asserts, by the Statute of 1884, of limiting and regulating rates, does not involve the power to destroy or to confiscate the property of these companies; and, consequently, it is said the State cannot compel them to carry persons or property without reward, nor do that which in law would amount to a taking of private property for public use without just compensation. And reference is made to that clause of the statute which provides "that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defense that such tariff so fixed is unjust." But if I do not misapprehend the effect of the opinion, it means to declare that where the tariff of charges fixed by the commissioners does not certainly work the destruction or confiscation of these properties, or amount in law to taking them for public use without just compensation, the charges so established must be accepted by the courts, as well as by the companies, as reasonable, and therefore not be held or treated as unjust in any prosecution under the Act for disregarding such tariff. I cannot otherwise interpret the observation that the Legislature may establish a maximum, any charge in excess of which must be deemed by the courts and the parties to be unreasonable.

[342]

In expressing the foregoing views I would not be understood as denying the power of the State to establish a Railroad Commission, or to enforce regulations (not inconsistent with the essential charter rights of the companies) in reference to the general conduct of their merely local business. My only purpose is to express the conviction that each of these companies has a contract with the State, whereby it is exempted from absolute legislative control as to rates, and under which it may, through its directors, from time to time, within the limit of reasonableness, establish such rates of toll for the transportation of persons and property as they deem proper; such rates to be respected by the courts and by the public, unless they are shown affirmatively to be unreasonable.

The bill, in my judgment, makes a case that justifies a court of equity in interfering to prevent the commissioners from imposing upon the defendants any such tariff of charges as the statute in question authorizes them to establish in reference to their business exclusively within the State of Mississippi. As the court withholds any expression of opinion as to the validity of the statute when applied to interstate commerce, that is, to the transportation of persons and property, taken up out of the State and put down in the State, or taken up in the State and put down out of the State, I have no occasion to discuss that question.

For the reasons stated, I dissent from the opinion and judgment of the court in these cases.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Field** dissenting:

I concur with *Mr. Justice* Harlan that the Act of Mississippi impairs the obligation of the contract contained in the charter originally granted to the Mobile and Ohio Railroad Company by Alabama, and soon afterwards adopted by Mississippi. At that time it was a matter of great public interest to have railway communication between the Gulf of Mexico and the Ohio River, passing through Alabama, Mississippi, Tennessee and Kentucky; and to secure it these States, by legislative Acts passed in February, 1848, incorporated the company, to construct, equip and operate a railroad from Mobile in Alabama, to a point opposite Cairo in Illinois, at the junction of the Mississippi and Ohio Rivers. The road was to run, as thus seen, many hundred miles; part of which was in a country sparsely settled and in some places covered by almost irreclaimable swamps. It would require several years and the expenditure of many millions for its construction. The return for the heavy investment was to be in the distant future when the country should become more densely populated, and its resources better developed. It was a difficult matter to secure the necessary capital for an enterprise so costly in its character, so remote in its completion, and so uncertain in its returns. To effect this the several Acts of incorporation authorized the president and directors of the company to adopt and establish such a tariff of charges for the transportation of persons and property as they might think proper, and to alter and change the same at pleasure. The bill alleges, and the allegation must be taken as true on the demurrer, that it was also understood by all parties that when the road was completed it should be managed by officers selected by the stockholders; and adds that this right of selecting its officers and of charging and receiving what it should fix as its tariff was not only a material part of the contract, but was the sole inducement or consideration upon which it was entered into by the company.

Certainly no one will deny that the right to adopt a rate of charges, subject, as such rate always is, to the condition that they shall be reasonable, was of vital importance to the company. Without that concession no one acquainted with the difficulties, expenses and hazards of the projected enterprise can believe that it would have been undertaken. It was certainly the expectation of the constructors of the road that they should be allowed to receive compensation having some relation to its cost. But the Act of Mississippi allows only such compensation as parties appointed by the Legislature, not interested in the property nor required to possess any knowledge of the intricacies and difficulties of the business, shall determine to be a fair return on the *value* of the road and its appurtenances, though that may be much less than the original cost. Within the last few years such have been the improvements in machinery, and such the decline in the cost of materials, that it is probably less expensive by one third to build and equip the road now than it was when the

constructors completed it. Does anybody believe that they would have undertaken the work or proceeded with it, had they been informed that, notwithstanding their vast outlays, they should only be allowed, when it was finished, to receive a fair return upon its value, however much less than cost that might be?

Under the charter the company could make such reasonable discriminations in its charges dependent upon the amount of business done, the character of the material transported, the existence of competitive lines or points, as its interest might suggest, and which to some extent are indispensable to the successful management of the business of every railway company. Differences in the bulk of property of the same weight, differences in value and in liability to breakage or decay, exact different degrees of care and speed in its transportation, and consequently require and justify different charges. And all experience shows that where competition by water or otherwise exists, variations in charges must be made from time to time to secure any portion of the business. These considerations must have had their influence with the stockholders, when they accepted the charter and undertook the construction of the road. The Act of Mississippi, which the court says is the exercise of a lawful right to interfere with the affairs of the company, never relinquished nor qualified by any stipulation, declares that no discrimination shall be made in the charges of the company in any case. Its language is, that "Any person or corporation engaged in transporting passengers or freight over any railroad in this State * * * [345] who for his or its advantage, or for the advantage of any connecting line, or for any person or locality shall make any discrimination against any individual, locality or corporation shall be guilty of extortion." And in such cases the injured party can recover double the amount of damages sustained by him; and the offending party is declared to be guilty of misdemeanor and subject to a fine from $10 to $500. The harshness and impolicy of such legislation are well shown by illustrations mentioned by counsel. If, for instance, where its road touches a navigable stream, the company charges less per pound per mile for transportation to a distant point which can be reached by water than it does to an inland station, it makes a discrimination against the latter station and is guilty of extortion, although the transportation would otherwise not be given to the company. If it charges more per pound per mile for local than through freights, it makes a discrimination and may be punished for extortion. If it charges more per pound per mile for silks than for cotton goods, or for gold bullion than for cast iron, or for tea than for coal, it is guilty of a like discrimination and extortion. If it attempts to encourage the cultivation of fruits or the manufacture of cotton, woollen or silken fabrics, or any other industry along its line of road by a reduction of rates until the business is established, it makes a discrimination; and if higher rates are charged to others the exaction of the difference is to them extortion. As well said by counsel, it makes no difference whether the discrimination be founded on value, volume, distance carried, return haul, competition, regularity of shipment, or whether the article transported is perishable or not, it is prohibited, and if made is extortion; and thus, as he well observes, the Act of Mississippi pays no attention to the common sense of the world, to the laws of commerce or to universal custom. Reductions of rates made in the interests of charity and benevolence, for the poor, sick or infirm, if not also extended to others, would under it be criminal. Indeed under the law no cause can exist which would justify any discrimination.

I am aware that this court has held that, unless restrained by express contract, the Legislature of a State has the right to prescribe a [346] maximum for charges for transportation of persons and freight over railways within her limits; but it has not been generally supposed that different rates, under certain circumstances, may not be made within the maximum in the interest both of the company and of the public. And the right itself must necessarily be subject to the qualification that the prescribed maximum shall at least equal the cost of the service required.

Again; the right of the company to appoint all necessary officers, agents or servants would seem to be essential to secure competent and efficient men for the successful management of its business. Few individuals or companies would undertake an enterprise requiring skill, experience and large expenditures, if those who were to conduct it were not to be selected and controlled by them, but by parties appointed, perhaps, under political influences, and possibly without the requisite knowledge and experience. The efficiency and fidelity of employees would be better assured by leaving their appointment to those interested in the judicious management of the business of the company. Indeed, their usefulness and fidelity would seldom be secured in any other way. No one, therefore, can believe that the original stockholders would have accepted the charter and undertaken the work, if this right of appointing those who were to carry out and manage it when completed was to be withdrawn from them. The Act of Mississippi is so plain an impairment of this essential right, that I should not have supposed there could be any question on the point, did I not find that a majority of my associates are of opinion that it is an entirely constitutional proceeding on the part of the Legislature, in nowise interfering with the contract of the company.

I have no doubt that commissioners may, for many purposes, be appointed by the Legislature; but I am not prepared to say that the direction and control of the business of the company can, unless a cause of forfeiture or repeal of its charter exists, be taken from it and confided to them, any more than its business can be changed from transportation to manufacturing or banking. The right to elect officers to direct and control its affairs, and to pursue the same kind of business for which it was formed, must be maintained in any regula- [347] tions prescribed for its government, or we must admit that the power of the Legislature over the corporation is, in spite of constitutional limitations, as absolute as that of the Parliament of Great Britain. Indeed, the argument which supports the Statute of Mississippi seems to proceed upon the ground that such is

the legitimate outcome of the decisions of this court with respect to the control which the Legislature may exercise over such corporations, irrespective of any stipulation in their charters. If such be the result of the decisions, it is important that it should be known, in order that parties interested in railway property may see that their protection against unreasonable and vindictive measures is not by appeal to the courts, but by efforts to secure wise and intelligent action from the Legislature.

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

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[347] JOHN M. STONE, ET AL., Composing the Railroad Commission of MISSISSIPPI, *Appts.*,

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

(See S. C. Reporter's ed. "*Railroad Commission Cases*" 347-352.)

Constitutional law—power of State to regulate railroad rates—obligation of contracts—rights of lessee of railroad situated in another State.

1. The grant of power to the president and directors of a railroad company to adopt and establish such rates for transportation as they may deem proper and to alter and change them at pleasure leaves the State free, within the limits of its general authority, to act as to the reasonableness of such rates.

2. A corporation of one State, when operating a road in another State as lessee, subjects itself as to that road to such local legislation as would have been applicable to the lessor had no lease been made.

[No. 723.]

Argued Oct. 13, 14, 15, 1885. Decided Jan. 4, 1886.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The bill in this case was filed in the court below by the appellee to restrain the Railroad Commission of Mississippi from enforcing the Railroad Supervision Act of that State. The court overruled separate demurrers filed by the defendants and, upon their refusal to answer over, entered a decree making perpetual an injunction previously granted. Whereupon, the defendants appeal to this court.

Mr. **Jno. W. C. Watson,** for appellants.

Messrs. **James Fentress, W. P. Harris** and *J. B. Harris,* for appellee:

The Act in question impairs the obligation of the charter contract between appellee and the State of Mississippi.

Fletcher v. *Peck,* 6 Cranch, 136; *Terrett* v. *Taylor,* 9 Cranch, 50; *Wilkinson* v. *Leland,* 2 Pet. 657 (27 U. S. bk. 7, L. ed. 553); *Dartmouth College* v. *Woodward,* 4 Wheat. 657 (17 U. S. bk. 4, L. ed. 664); *Stone* v. *Mississippi,* 101 U. S. 816 (Bk. 25, L. ed. 1079); *C. B. & Q. R. R. Co.* v. *Iowa,* 94 U. S. 161 (Bk. 24, L. ed. 95).

It is a usurpation of the power of Congress to regulate commerce.

Hall v. *DeCuir,* 95 U. S. 485 (Bk. 24, L. ed. 547); *Welton* v. *Missouri,* 91 U. S. 275 (Bk. 23, L. ed. 347); *R. R. Co.* v. *Husen,* 95 U. S. 469 (Bk. 24, L. ed. 529); *Kaeiser* v. *Ill. Cent. R. Co.* 18 Fed. Rep. 153.

The Corporation is a carrier on a through line from Cairo to New Orleans. The carriage of passengers and merchandise from one State to another is its principal business. The subject plainly concerns more States than one and requires a uniform rule. No one of the four States which co-operated in the creation of this interstate road has power to enact such rule to bind the others. The subject is therefore within the exclusive power of Congress.

County of Mobile v. *Kimball,* 102 U. S. 691 (Bk. 26, L. ed. 238); *Escanaba Co.* v. *Chicago,* 107 U. S. 678 (Bk. 27, L. ed. 442); *Cardwell* v. *Bridge Co.* 113 U. S. 205 (Bk. 28, L. ed. 960).

The general tenor of the decisions of this court is that the Legislature may relinquish the right to regulate charges of railroads by charter contract.

The Granger Cases, 94 U. S. (Bk. 24, L. ed. 77, 94, 97, 99); *Ruggles* v. *Ill.* 108 U. S. 526 (Bk. 27, L. ed. 812); *Ill. Cent. R. R. Co.* v. *People,* 108 U. S. 541 (Bk. 27, L. ed. 818). See also, *Atty-Gen.* v. *Railroad Companies,* 35 Wis. 425; *Sloan* v. *Pacific R. R. Co.* 61 Mo. 24, *Hamilton* v. *Keith,* 5 Bush. 458; *Middlesex T. Co.* v. *Freeman,* 14 Conn. 85; *Enfield Toll Bridge* v. *Hartford & N. H. R. Co.* 17 Conn. 40.

That each of the States crossed by this line has the power to regulate its charges by law is an inadmissible proposition. To concede it is to promote diverse, embarrassing and hostile legislation by one State against another. A through line intended to be a unit by consolidation of stock, by one corporate government and management, is cut into as many pieces as there are States crossed by it. The action of the State of Mississippi is in the direction of disintegration and diversity. It is the purpose of the Constitution to secure uniformity of regulation, or at least, to prevent diverse and conflicting regulations.

Mobile v. *Kimball,* 102 U. S. 698 (Bk. 26, L. ed. 240). See also, *Kaeiser* v. *Illinois Cent. R. Co.* 18 Fed. Rep. 157; *Pacific C. Steamship Co.* v. *Railroad Comrs.* 18 Fed. Rep. 10; *Council Bluffs* v. *Kansas City, etc. R. R. Co.* 45 Iowa, 338.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit, like that of *Stone* v. *Farmers' Loan and Trust Co.* just decided [*ante,* 636], was brought to restrain the Railroad Commission from enforcing the Railroad Supervision Act of Mississippi against a corporation operating a railroad in that State. The railroad in Mississippi forms part of a line from New Orleans through Louisiana, Mississippi, Tennessee and Kentucky, to a point on the Ohio River opposite Cairo, Illinois, where it connects with the Illinois Central Railroad, extending to Chicago. The entire line is now owned by the New Orleans, St. Louis & Chicago Railroad Company, a corporation formed by the consolidation of the several corporations created by the different States through which the road runs, for the purpose of securing its construction and operation for interstate traffic, as well as for transportation within the limits of the several States.

NOTE.—*Railroads; regulation of by Congress and by the States.* See Stone v. Farmers Loan & Trust Co., *ante,* p. 636, *notes* cited.

The whole road from Cairo to New Orleans has been leased to the Illinois Central Railroad Company, an Illinois corporation, and is now operated by that company, much the largest part of its business being of an interstate character.

The Mississippi charter, under which the road is now owned and operated in that State, provides:

"That the president and directors be and they are hereby authorized to adopt and establish such a tariff of charges for the transportation of persons and property, as they may think proper, and the same to alter and change at pleasure."

This is now part of the charter of the consolidated company in Mississippi. In all other respects the material facts in this case are the same as those in that just decided. Relief is also asked on the same grounds. The court below granted the injunction prayed for, and this appeal was taken for a review of a decree to that effect.

This case comes clearly within the rulings in the other. There is nothing here any more than there to show an intention by Mississippi to exempt the corporation in that State from proper legislative control; and the Illinois corporation, by going into Mississippi to operate a railroad there, subjected itself to such local legislation as would have been applicable to the corporation owning the road, if no lease had been made. As a corporation of another State, it has no other privileges in Mississippi than such as belong to the corporation whose road it runs.

The *decree of the Circuit Court is reversed* on the authority of *Stone* v. *Farmers' Loan and Trust Company* [*supra*], *and the cause is remanded, with directions to dismiss the bill.*

See dissenting opinions of *Mr. Justice* **Harlan** and *Mr. Justice* **Field** in the preceding case.

Mr. Justice **Blatchford** did not sit in this case nor take any part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN M. STONE ET AL., Composing the Railroad Commission of MISSISSIPPI, *Appts.*,

v.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY.

(See S. C. Reporter's ed. "*Railroad Commission Cases*" 352–356.)

Constitutional law—regulation of railroad charges—charter contracts—impairment of obligation.

The provision in the charter of the New Orleans and Northeastern Railroad Company, that in fixing rates there shall be no discrimination in favor of any other road, does not bring into that charter the rate clauses in charters subsequently granted, fixing maximum rates, so as to exempt said Company from the operation of the Railroad Supervision Act of Mississippi.

[No. 724.]

Argued Oct. 13, 14, 15, 1885. Decided Jan. 4, 1886.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **Jno. W. C. Watson**, for appellants.

Messrs. **Edgar M. Johnson**, *George Hoadly*, *Edward Colston* and *W. L. Nugent*, for appellee:

The power of Congress to regulate commerce among the States is exclusive. It is true that there is a class of cases holding that it is competent for the States to regulate such commerce in the absence of regulation by Congress. But all such cases relate to the building of dams and bridges, pilotage laws, quarantine laws and the like, all of which are matters of local concern, over which Congress only needs to exercise a general power of supervision.

Such cases are *Wilson* v. *Black Bird Creek Marsh Co.* 2 Pet. 245 (27 U. S. bk. 7, L. ed. 412); *Cooley* v. *Board of Port Wardens*, 12 How. 299 (53 U. S. bk. 13, L. ed. 996); *Gilman* v. *Philadelphia*, 3 Wall. 713 (70 U. S. bk. 18, L. ed. 96); *Conway* v. *Taylor*, 1 Black, 604, and *Pacific Mail Steamship Co.* v. *Joliffe*, 2 Wall. 450 (66 and 69 U. S. bk. 17, L. ed. 191, 805).

These cases must be carefully distinguished from those in which the power of Congress has been held to be exclusive.

Gibbons v. *Ogden*, 9 Wheat. 1 (22 U. S. bk. 6, L. ed. 23); *Passenger Cases*, 7 How. 283 (48 U. S. bk. 12, L. ed. 702); *Crandall* v. *Nevada*, 6 Wall. 35 (73 U. S. bk. 18, L. ed. 745); *State Freight Tax Case*, 15 Wall. 232 (82 U. S. bk. 21, L. ed. 146); *Ward* v. *Md.* 12 Wall. 418 (79 U. S. bk. 20, L. ed. 449); *Welton* v. *Mo.* 91 U. S. 275 (Bk. 23, L. ed. 347); *Tel. Co.* v. *Texas*, 105 U. S. 465 (Bk. 26, L. ed. 1068); *Pa.* v. *Wheeling, etc. Bridge Co.* 18 How. 421 (59 U. S. bk. 15, L. ed. 435); *Munn* v. *Ill.* 94 U. S. 135, and *Railroad Co.* v. *Husen*, 95 U. S. 465 (Bk. 24, L. ed. 187, 527); *Carton* v. *I. C. R. R. Co.* 6 Am. & Eng. R. R. Cas. 305, *Louisville & N. R. R. Co.* v. *Railroad Com. of Tenn.* 19 Fed. Rep. 679.

Mr. Chief Justice **Waite** delivered the opinion of the court: [354]

This is a suit brought by the New Orleans and Northeastern Railroad Company to enjoin the Railroad Commission from enforcing the Railroad Supervision Law of Mississippi against that Company. It differs from the cases of *Stone* v. *Farmers Loan and Trust Company* and *Stone* v. *Ill. Cent. R. R. Co.* already decided [*ante*, 636, 650], only in the charter provisions on which the claim of a contract exemption from legislative control as to fares and freights is made. These are as follows:

"Sec. 4. *Be it further enacted*, That said Company is hereby authorized and empowered to transport, carry and convey persons and property on said railroad; to build and maintain a line of magnetic telegraph, and to operate the

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Cons.—Railroads; regulation of by Congress and by the States. See Stone v. Farmers Loan & Trust Co., ante, p. 636, notes cited.

same along the line of said railroad; and to receive, for such transportation, carrying, conveying and telegraphing, such tolls and charges as shall be from time to time established, fixed and regulated by the directors of said Railroad Company."

"Sec. 18. *Be it further enacted*, That whenever any number of stockholders, representing three fourths of the stock now subscribed to said Railroad Company, shall accept the powers, privileges and franchises contained in the preceding sections of this Act, the said Company shall avail themselves of the benefit thereof, and that this Act shall be liberally and favorably construed, so as to favor all the purposes and objects of the same and the operation of the provisions thereof; *Provided*, That nothing contained in the charter shall be so construed as to prevent the Legislature from regulating the rate of transportation for passage and freight over the same in this State; *Provided further*, That there shall be no discrimination in favor of any road."

On their face and under the rulings in the other cases these sections show no such contract. It is averred in the bill, however, and admitted by the demurrer, that in 1882 the State granted charters to six other railroad companies, in each of which a maximum of rates was fixed. After setting forth the special provisions of the charters in this particular, the bill proceeds as follows:

[355] "And your orator is therefore advised, believes and charges, that as the said Legislature, by the proviso to the eighteenth section of the said Act of March 30, 1871, reserved to itself the right 'to regulate the rate of transportation for passage and freight' on your orator's road in said State of Mississippi, but only upon condition and with the limitation that in and by such Act of regulation there should be no discrimination in favor of any road in said State and against your orator, the charter clause above referred to becomes and is integrated into and forms part of your orator's said charter; and the Legislature having thus exercised and exhausted its power of regulating tariffs in respect to the several railroad companies above set out, is by the terms of your orator's charter precluded from making any other or different system for regulating your orator's tariff in said State, or devising any other tariff of charges for it, else your orator would be discriminated against contrary to the true intent and meaning of the last proviso to section 18th of said Act of March 30, 1871."

To this we cannot agree. The provision in the charter of the New Orleans and Northeastern Company, that in fixing rates there shall be no discrimination in favor of any other road does not bring into that charter the rate clauses in the charters of the new companies. It will undoubtedly be the duty of the commissioners when fixing the tariff for this Company to see that there is no such discrimination as is provided against. Whether in doing so it will be necessary to have regard to the rates allowed by the later charters is not a question in this case.

The *decree of the Circuit Court is reversed*, on the authority of *Stone* v. *Farmers Loan and Trust Company, and the cause remanded, with instructions to dismiss the bill.*

Mr. Justice **Blatchford** did not sit in this case nor take any part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan** dissenting.

It seems clear that the power reserved to the Legislature of regulating rates of transportation for passengers and freight over the road of the complainant is subject to the condition that there shall be no discrimination against it in favor of any other company. In other words, the complainant has a contract with the State that protects it against such discrimination in the matter of rates. If this were not so, it could not well be the duty of the Railroad Commission, as the court declares, to see that the discrimination provided against by the Company's charter did not exist.

Adhering to the general views expressed by me in the preceding cases, I dissent from the opinion and judgment in this case.

Mr. Justice **Field** concurs in this dissent.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

HENRY S. LITTLE, Receiver of the CENTRAL RAILROAD COMPANY of NEW JERSEY, *Plff. in Err.*

v.

JAMES HACKETT.

(See S. C. Reporter's ed. 366-380.)

Personal injuries—recovery of damages—negligence.

*A person who hires a public hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, nor prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver.

[No. 1172.]

Submitted Nov. 11, 1885. Decided Jan. 4, 1886.

IN ERROR to the Circuit Court of the United States for the District of New Jersey.

The history and facts of the case appear in the opinion of the court.

Messrs. **Robert W. DeForest** and **Frank L. Hall**, for plaintiff in error.

1. If the driver was the agent or servant of the defendant, the negligence of the servant would be attributable to the master.

Thorogood v. *Bryan*, 8 C. B. 115; *Catlin* v. *Hills*, *Id.* 123.

The former of these leading cases was an action against the owner of an omnibus for the negligence of his driver in running over and killing a passenger alighting in the street from another omnibus. The court says: "The negligence that is relied on as an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me that having trusted the party by selecting the particular conveyance, the plaintiff has so

*Head note by *Mr. Justice* FIELD.

far identified himself with the owner and his servants, that if any injury results from their negligence, he must be considered a party to it." This case has been followed in all subsequent English cases.

Bridge v. *Grand Junc. R. Co.* 3 Mees & W. 244; *Waite* v. *Northeastern R. W. Co.* 7 W. R. 311; *Child* v. *Hearn*, 22 W. R. 864; *Armstrong* v. *Lancashire & Y. R. Co.* L. R. 10 Exch. 47.

The English rule has been followed in its entirety in the State of Pennsylvania.

Phila. & R. R. R. Co. v. *Boyer*, 97 Pa. St. 91.

The decisions of the courts of other States show wide differences of opinion. It will, however, be noticed that the authorities agree that where there is the power to control, whether exercised or not, the negligence of third parties is imputable to the plaintiff seeking recovery, and that it is only where such power is wanting that the decisions are to the contrary.

Bennett v. *N. J. R. R. & Trans. Co.* 36 N. J. 225; *Chapman* v. *New Haven R. R. Co.* 19 N. Y. 341; *Brown* v. *N. Y. Cent. R. R. Co.* 32 N. Y. 597; *Mooney* v. *Hudson R. R. R. Co.* 5 Rob. (N. Y.), 548; *Beck* v. *East River Ferry Co.* 6 Rob. (N. Y.), 82; *Webster* v. *Hudson River R. R. Co.* 38 N. Y. 260; *Barrett* v. *Third Ave. R. R. Co.* 45 N. Y. 628; *Robinson* v. *N. Y. Cent. & H. R. R. R. Co.* 66 N. Y. 11; *Dyer* v. *Erie R. Co.* 71 N. Y. 228; *Masterson* v. *N. Y. Cent. & H. R. R. R. Co.* 84 N. Y. 247; *Smith* v. *Smith*, 2 Pick. 621; *Transfer Co.* v. *Kelly*, 36 Ohio, 86; *Town of Albion* v. *Hetrick*, 90 Ind. 545; *Toledo, W. & W. R. Co.* v. *Miller*, 76 Ill. 278; *Cuddy* v. *Horn*, 46 Mich. 596; *Payne* v. *Chicago, R. I. & P. R. R. Co.* 39 Iowa, 523; *Stafford* v. *Oskaloosa*, 57 Iowa, 749; *Prideaux* v. *Mineral Point*, 43 Wis. 513; *Otis* v. *Janesville*, 47 Wis. 422.

The case of *Callahan* v. *Sharp*, 27 Hun, 85, aff'd. in 95 N. Y. 672, was exactly similar to this case.

See also *McGuire* v. *Grant*, 25 N. J. L. (1 Dutch.) 356; *Blake* v. *Ferris*, 5 N. Y. 48.

If the full relationship of master and servant did not exist, there still remained the power to control the driver. The power existing, it was the duty of the defendant in error to exercise that power. He having failed to exercise such power, the negligence of the driver is properly imputable to him.

The evidence showing the negligence of the driver is conclusive upon that point.

Messrs. **Robt. H. Hinckley** and **Peter L. Voorhees**, for defendant in error:

The doctrine of imputed negligence is very fully discussed in Thompson's Carriers of Passengers, chap. 7, p. 273.

The imputing of negligence is said to have originated in England in the case of *Bridge* v. *Grand Junction Railway*, 3 Mees. & W. 244, and was discussed in *Thorogood* v. *Bryan*, 8 C. B. 115.

To identify a passenger, who has no control over the vehicle in which he is riding, with the driver, who drives as he pleases, is veritable fiction.

See *Armstrong* v. *Lancashire & Y. R. Co.* L. R. 10 Exch. 52.

The fallacy of this reasoning was exposed in *Chapman* v. *New Haven R. R. Co.* 19 N. Y. 341.

See also *Bennett* v. *N. J. R. R. & Trans. Co.* 36 N. J. L. (7 Vroom) 225; *New York, L. E. & W. R. R. Co.* v. *Steinbrenner*, 47 N. J. L. (18 Vroom) 161. [366]

Mr. Justice **Field** delivered the opinion of the court:

On the 28th of June, 1879, the plaintiff below, defendant in error here, was injured by the collision of a train of the Central Railroad Company of New Jersey with the carriage in which he was riding; and this action is brought to recover damages for the injury. The railroad was at the time operated by a receiver of the Company, appointed by order of the Court of Chancery of New Jersey. In consequence [367] of his death the defendant was appointed by the court his successor and subjected to his liabilities; and this action is prosecuted by its permission.

It appears from the record that on the day mentioned the plaintiff went on an excursion from Germantown, in Pennsylvania, to Long Branch, in New Jersey, with an association of which he was a member. Whilst there he dined at the West End Hotel, and after dinner hired a public hackney-coach from a stand near the hotel, and taking a companion with him, was driven along the beach to the pier where a steamboat was landing its passengers, and thence to the railroad station at the West End. On arriving there he found he had time before the train left to take a further drive, and directed the driver to go through Hoey's Park which was near by. The driver thereupon turned the horses to go to the park; and in crossing the railroad track near the station for that purpose, the carriage was struck by the engine of a passing train and the plaintiff received the injury complained of. The carriage belonged to a livery stable keeper and was driven by a person in his employ. It was an open carriage, with the seat of the driver about two feet above that of the persons riding. The evidence tended to show that the accident was the result of the concurring negligence of the managers of the train and of the driver of the carriage; of the managers of the train in not giving the usual signals of its approach, by ringing a bell and blowing a whistle, and in not having a flagman on duty; and of the driver of the carriage, in turning the horses upon the track without proper precautions to ascertain whether the train was coming. The defense was contributory negligence in driving on the track, the defendant contending that the driver was thereby negligent and that his negligence was to be imputed to the plaintiff. The court left the question of the negligence of the parties in charge of the train and of the driver of the carriage to the jury; and no exception is taken to [368] its instructions on this head. But with reference to the alleged imputed negligence of the plaintiff, assuming that the driver was negligent, the court instructed them that unless the plaintiff interfered with the driver and controlled the manner of his driving, his negligence could not be imputed to the plaintiff.

"I charge you," said the presiding judge to them, "that where a person hires a public hack or carriage which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be

conveyed and gives no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver; and if he sustains an injury by means of a collision between his carriage and another he may recover damages from any party by whose fault or negligence the injury occurred, whether that of the driver of the carriage in which he is riding or of the driver of the other; he may sue either. The negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver, if he was negligent at the same time." "The passenger in the carriage may direct the driver where to go, to such a park or to such a place that he wishes to see; so far the driver is under his direction; but my charge to you is that as to the manner of driving, the driver of the carriage or the owner of the hack (in other words, he who has charge of it and has charge of the team) is the person responsible for the manner of driving; and the passenger is not responsible for that, unless he interferes and controls the matter by his own commands or requirements. If the passenger requires the driver to drive with great speed through a crowded street, and an injury should occur to foot passengers or to anybody else, why then he might be liable because it was by his own command and direction that it was done; but ordinarily in a public hack the passengers do not control the driver, and therefore I hold that unless you believe Mr. Hackett exercised control over the driver in this case, he is not liable for what the driver did. If you believe he did exercise control, and required the driver to cross at this particular time, then he would be liable because of his interference."

[369]

The plaintiff recovered judgment, and this instruction is alleged as error, for which its reversal is sought.

That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong It would seem that the converse of this doctrine should be accepted as sound; that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrongdoer. And such is the generally received doctrine, unless a contributory cause of the injury has been the negligence or fault of some person towards whom he sustains the relation of superior or master, in which case the negligence is imputed to him, though he may not have personally participated in or had knowledge of it; and he must bear the consequences. The doctrine may also be subject to other exceptions growing out of the relation of parent and child, or guardian and ward, and the like. Such a relation involves considerations which have no bearing upon the question before us.

[371]

To determine, therefore, the correctness of the instruction of the court below, to the effect that if the plaintiff did not exercise control over the conduct of the driver at the time of the accident he is not responsible for the driver's negligence nor precluded thereby from recovering in the action, we have only to consider whether the relation of master and servant existed between them. Plainly, that relation did not exist. The driver was the servant of his employer, the livery stable keeper, who hired him out with horse and carriage, and was responsible for his acts. Upon this point we have a decision of the court of exchequer in *Quarman* v. *Burnett*, 6 M. & W. 499. In that case it appeared that the owners of a chariot were in the habit of hiring, for a day or a drive, horses and a coachman from a job mistress, for which she charged and received a certain sum. She paid the driver by the week and the owners of the chariot gave him a gratuity for each day's service. On one occasion he left the horses unattended and they ran off and against the chaise of the plaintiff, seriously injuring him and the chaise; and he brought an action against the owners of the chariot and obtained a verdict, but it was set aside on the ground that the coachman was the servant of the job mistress, who was responsible for his negligence. In giving the opinion of the court, *Baron* Parke said: "It is undoubtedly true that there may be special circumstances which may render the hirer of job horses and servants responsible for the negligence of the servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at any particular moment, and the like." As none of these circumstances existed it was held that the defendants were not liable, because the relation of master and servant between them and the driver did not exist.

This doctrine was approved and applied by the Queen's Bench Division, in the recent case of *Jones* v. *Corporation of Liverpool*, L. R. 14 Q. B. D. 890. The corporation owned a water cart and contracted with a Mrs. Dean for a horse and driver, that it might be used in watering the streets. The horse belonged to her, and the driver she employed was not under the control of the corporation otherwise than that its inspector directed him what streets or portions of streets to water. Such directions he was required to obey under the contract with Mrs. Dean for his employment. The carriage of the plaintiff was injured by the negligent driving of the cart; and in an action against the corporation for the injury, he recovered a verdict which was set aside, upon the ground that the driver was the servant of Mrs. Dean who had hired both him and the horse to the corporation.

In this country there are many decisions of courts of the highest character to the same effect, to some of which we shall presently refer.

The doctrine resting upon the principle that no one is to be denied a remedy for injuries sustained, without fault by him or by a party under his control and direction, is qualified by cases in the English courts, wherein it is held that a party who trusts himself to a public conveyance is in some way identified with those who have it in charge, and that he can only recover against a wrongdoer when they who are in

charge can recover. In other words, that their contributory negligence is imputable to him, so as to preclude his recovery for an injury when they by reason of such negligence could not recover. The leading case to this effect is *Thorogood* v. *Bryan*, decided by the Court of Common Pleas in 1849, 8 C. B. 114. It there appeared that the husband of the plaintiff, whose administratrix she was, was a passenger in an omnibus. The defendant, Mrs. Bryan, was the proprietress of another omnibus running on the same line of road. Both vehicles had started together and frequently passed each other, as either stopped to take up or set down a passenger. The deceased, wishing to alight, did not wait for the omnibus to draw up to the curb, but got out whilst it was in motion, and far enough from the path to allow another carriage to pass on the near side. The defendant's omnibus coming up at the moment, he was run over, and in a few days afterwards died from the injuries sustained. The court, among other things, instructed the jury that if they were of the opinion that want of care on the part of the driver of the omnibus in which the deceased was a passenger, in not drawing up to the curb to put him down, had been conducive to the injury, the verdict must be for the defendant, although her driver was also guilty of negligence. The jury found for the defendant, and the court discharged a rule for a new trial for misdirection, thus sustaining the instruction. The grounds of its decision were, as stated by *Mr. Justice* Coltman, that the deceased, having trusted the party by selecting the particular conveyance in which he was carried, had so far identified himself with the [374] owner and her servants that if any injury resulted from their negligence, he must be considered a party to it; "in other words," to quote his language, "the passenger is so far identified with the carriage in which he is traveling that want of care on the part of the driver will be a defense of the driver of the carriage which directly caused the injury." *Mr. Justice* Maule, in the same case, said that the passenger "chose his own conveyance and must take the consequences of any default of the driver he thought fit to trust." *Mr. Justice* Cresswell said: "If the driver of the omnibus the deceased was in had, by his negligence or want of due care and skill, contributed to any injury from a collision, his master clearly could maintain no action, and I must confess I see no reason why a passenger who employs the driver to carry him, stands in any different position." *Mr. Justice* Williams added that he was of the same opinion. He said: "I think the passenger must, for this purpose, be consider as identified with the person having the management of the omnibus he was conveyed in."

What is meant by the passenger being "identified with the carriage" or "with the person having its management" is not very clear. In a recent case, in which the court of exchequer applied the same test to a passenger in a railway train which collided with a number of loaded wagons that were being shunted from a siding by the defendant, another railway company, *Baron* Pollock said that he understood it to mean "that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver." *Armstrong* v. *Lancashire & Y. R. R. Co.*, L. R. 10 Exch. 47, 52. Assuming this to be the correct explanation, it is difficult to see upon what principle the passenger can be considered to be in the same position with reference to the negligent act as the driver who committed it, or as his master the owner. Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant [375] does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled to consideration.

The truth is, the decision in *Thorogood* v. *Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world.

Thorogood v. *Bryan* has not escaped criticism in the English courts. In the court of admiralty it has been openly disregarded. In *The Milan*, *Dr.* Lushington, the Judge of the High Court of Admiralty, in speaking of that case, said: "With due respect to the Judges who decided that case, I do not consider that it is necessary for me to dissect the judgment, but I decline to be bound by it, because it is a single case; because I know, upon inquiry, that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law; and, lastly, because it is directly against *Hay* v. *La Nova* and the ordinary practice of the court of admiralty." Lushington, 388, 403.

In this country the doctrine of *Thorogood* v. *Bryan* has not been generally followed. In *Bennett* v. *New Jersey R. R. and Trans. Co.* 36 N. J. L. (7 Vroom) 225, and *New York, L. E. & W. R. R. Co.* v. *Steinbrenner*, 47 N. J. L. (18 Vroom) 161, it was elaborately examined by the Supreme Court and the Court of Errors of New Jersey, in opinions of marked ability and learning, and was disapproved and rejected. In the first case it was held that the driver of a horse car was not the agent of the passenger so as to render the passenger chargeable for the driver's [376] negligence. The car, in crossing the track of the railroad company, was struck by its train, and the passenger was injured, and he brought an action against the company. On the trial the defendant contended that there was evidence tending to show negligence by the driver of the horse car, which was in part productive of the accident, and the presiding judge was requested to charge the jury that if this was so, the plaint-

iff was not entitled to recover; but the court instructed them that the carelessness of the driver would not affect the action or bar the plaintiff's right to recover for the negligence of the defendant. And this instruction was sustained by the court. In speaking of the "identification" of the passenger in the omnibus with the driver, mentioned in *Thorogood* v. *Bryan*, the court, by the *Chief Justice*, said: "Such identification could result only in one way; that is, by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view, it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle. And it is this right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it would be a pure fiction. In reality there is no such agency; and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious, in a suit against the proprietor of the car in which he was the passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. And so, on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor; because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not [377] to be affected by it for other purposes." 7 Vroom, 227, 228.

In the latter case it appeared that the plaintiff had hired a coach and horses, with a driver, to take his family on a particular journey. In the course of the journey, while crossing the track of the railroad, the coach was struck by a passing train and the plaintiff was injured. In an action brought by him against the railroad company, it was held that the relation of master and servant did not exist between him and the driver, and that the negligence of the latter, co-operating with that of persons in charge of the train, which caused the accident, was not imputable to the plaintiff, as contributory negligence, to bar his action.

In New York a similar conclusion has been reached. In *Chapman* v. *New Haven R. R. Co.* 19 N. Y. 341, it appeared that there was a collision between the trains of two railroad companies, by which the plaintiff, a passenger in one of them, was injured. The court of appeals of that State held that a passenger by railroad was not so identified with the proprietors of the train conveying him or with their servants as to be responsible for their negligence; and that he might recover against the proprietors of another train for injuries sustained from a collision through their negligence, although there was such negligence in the management of the train conveying him as would have defeated an action by its owners. In giving the decision the court referred to *Thorogood* v. *Bryan*, and said that it could see no justice in the doctrine in connection with that case; and that to attribute to the passenger the negligence of the agents of the company, and thus bar his right to recover, was not applying any existing exception to the general rule of law but was framing a new exception based on fiction and inconsistent with justice. The case differed from *Thorogood* v. *Bryan* in that the vehicle carrying the plaintiff was a railway train instead of an omnibus; but the doctrine of the English case, if sound, is as applicable to passengers on railway trains as to passengers in an omnibus; and it was so applied, as already stated, by the court of exchequer in the recent case of *Armstrong* v. *Lancashire & Yorkshire R. R. Co.* [37

In *Dyer* v. *Erie R. Co.* 71 N. Y. 228, the plaintiff was injured while crossing the defendant's railroad track on a public thoroughfare. He was riding in a wagon by the permission and invitation of the owner of the horses and wagon. At that time a train standing south of certain buildings, which prevented its being seen, had started to back over the crossing without giving the driver of the wagon any warning of its approach. The horses becoming frightened by the blowing off of steam from engines in the vicinity, became unmanageable, and the plaintiff was thrown or jumped from the wagon and was injured by the train which was backing. It was held that no relation of principal and agent arose between the driver of the wagon and the plaintiff, and although he traveled voluntarily he was not responsible for the negligence of the driver, where he himself was not chargeable with negligence and there was no claim that the driver was not competent to control and manage the horses.

A similar doctrine is maintained by the courts of Ohio. In *Transfer Co.* v. *Kelly*, 38 Ohio St. 86, the plaintiff, a passenger on a car owned by a street railroad company, was injured by its collision with a car of the transfer company. There was evidence tending to show that both companies were negligent, but the court held that the plaintiff, he not being in fault, could recover against the transfer company; and that the concurrent negligence of the company on whose cars he was a passenger could not be imputed to him, so as to charge him with contributory negligence. The *Chief Justice*, in delivering the opinion of the court, said: "It seems to us that the negligence of the company or of its servant should not be imputed to the passenger, where such negligence contributed to his injury jointly with the negligence of a third party, any more than it should be so imputed where the negligence of the company or its servant was the sole cause of the injury." "Indeed," the *Chief Justice* added, "it seems as incredible to my mind that the right of a passenger to redress against a stranger for an injury caused directly or proximately by the latter's negligence should be denied, on the ground that the negligence of his carrier contributed to his injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier, whereby an injury was inflicted upon a stranger. And of the last proposition it is enough to say that it is simply absurd."

In the Supreme Court of Illinois the same doctrine is maintained. In the recent case of the *Wabash, St. L. & Pac. R. Co.* v. *Schacklet*,

195 Ill. 364, the doctrine of *Thorogood's Case* was examined and rejected; the court holding that where a passenger on a railway train is injured by the concurring negligence of servants of the company on whose train he is traveling, and of the servants of another company with whom he has not contracted, there being no fault or negligence on his part, he or his personal representatives may maintain an action against either company in default, and will not be restricted to an action against the company on whose train he was traveling.

Similar decisions have been made in the courts of Kentucky, Michigan and California. *Danville, L. & N. Turnpike Co.* v. *Stewart*, 2 Met. (Ky.) 119; *Louisville, C. & L. R. R. Co.* v. *Case*, 9 Bush, 728; *Cuddy* v. *Horn*, 46 Mich. 596; *Tompkins* v. *Clay Street R. R. Co.* 4 W. Coast Rep. 587.

There is no distinction in principle whether the passengers be on a public conveyance like a railroad train or an omnibus or be on a hack hired from a public stand in the street for a drive. Those on a hack do not become responsible for the negligence of the driver, if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned; and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it. "If the law were otherwise," as said by *Mr. Justice* [illegible] in his elaborate opinion in the latest case in New Jersey, "not only the hirer of the coach but also all the passengers in it would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be, from a coach stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person; and that too, although the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried." 18 [illegible], 171.

In this case it was left to the jury to say whether the plaintiff had exercised any control over the conduct of the driver, further than to indicate the places to which he wished him to drive. The instruction *of the court below*, that unless he did exercise such control and required the driver to cross the track at the time the collision occurred, the negligence of the driver was not imputable to him, so as to bar his right of action against the defendant, *was therefore correct, and the judgment must be affirmed, and it is so ordered.*

True copy. Test:

James H. McKenney, Clerk, Sup. Ct. U. S.

KINGS COUNTY SAVINGS INSTITUTION, *Plff. in Err.*, [200]

v.

BENJAMIN F. BLAIR, as Admr of JAMES FREELAND, Collector of Internal Revenue.

(See S. C. Reporter's ed. 200-206.)

Internal revenue—taxes illegally exacted—limitations to recovery of.

No suit can be maintained against a collector of internal revenue for taxes claimed to have been illegally collected, unless a claim therefor has been presented to the Commissioner of Internal Revenue within two years, the time prescribed by law.

[No. 195.]

Argued Dec. 15, 1885. Decided Jan. 4, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of New York.

The history and facts of the case appear in the opinion of the court.

Messrs. **Lewis Sanders,** *George N. Sanders* and *S. Kaufman*, for plaintiff in error.

Mr. **John Goode,** *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court: [200]

The Kings County Savings Institution, plaintiff in error, was the plaintiff in the circuit court. It brought its action, as for money had and received, against the defendant in error as administrator of the estate of James Freeland, deceased, late Collector of Internal Revenue, to recover the amount of taxes illegally exacted from it, as it alleged, by the intestate of the defendant in error. [201]

The defense relied on was pleaded by the defendant, as follows: "That the plaintiff herein did not present to the Commissioner of Internal Revenue its alleged claim for abatement, or for refunding the amount claimed in said complaint, within two years after the said alleged claim had accrued, as required by section 3228 of the Revised Statutes of the United States."

The bill of exceptions shows that on the trial of the case by the circuit judge and a jury, the plaintiff, to sustain the issue on its part, proved that it made its return for internal revenue taxation for the six months ending May 31, 1878, on the form prescribed by the Commissioner of Internal Revenue, in duplicate, and accompanying the same filed an amended return in duplicate. The prescribed return had the following words written upon its face:

"This return not exempting any part of accounts exceeding $2,000, in the name of any one person, is made under protest by compulsion, to prevent a penalty from being assessed; but the accompanying is claimed to be the true and legal return exempting $2,000 of all deposits made in the name of any one person; and if the assessment and collection are enforced in

accordance with this return, suit will be brought for the excess."

The amended return showed the tax due, according to the construction placed upon the law by the plaintiff, to be $428.75, and had the following words written upon its face:

"In this amended return this Savings Bank, under advice of counsel, disregards as erroneous this printed form heretofore prescribed and enforced by the Commissioner and Collector of Internal Revenue for the United States; and the amended exemption clause, 'less average amount of all deposits not exceeding $2,000, made in the name of any one person,' is construed as exempting 'all deposits made in the name of any one person not exceeding $2,000' of such deposit in his name.

"This bank claims that the tax be assessed according to this return."

[202] It was shown that the prescribed return and amended return were delivered to the Commissioner of Internal Revenue on June 6, 1878, and to the collector of internal revenue, the intestate of the defendant, on or before that date. On June 18, 1878, the Commissioner of Internal Revenue assessed the amount of tax on the face of said prescribed return at $1,796.25, which amount the plaintiff paid to the collector on July 1, 1878, by a check which bore upon its face the words, "Paid under protest to prevent distraint and penalty."

The bill of exceptions recites that the "plaintiff also proved that as a matter of fact the true amount of the tax which should have been assessed against it was the sum of $428.75, as shown by said amended return."

Proof of similar facts in respect to the tax due from the plaintiff for the six months ending November 30, 1878, was made, and that both the prescribed and amended returns for that tax were delivered to the Commissioner of Internal Revenue on December 9, 1878, and to the collector on or before that date. The plaintiff admitted that no other proceedings had been taken than those above detailed.

The defendant, to sustain the issue on his part, "proved," so the bill of exceptions states, "that for two years subsequent to the payments of the amounts assessed against the plaintiff, respectively, no appeal had been taken from such payments or claim made for refund to the Commissioner of Internal Revenue." He also put in evidence the treasury regulations prescribing the forms and procedure for the refunding of taxes in force from January 1, 1871, to December 31, 1878, as follows:

"Preparations of Claims for the Refunding of Taxes and Penalties Claimed to Have Been Erroneously or Illegally Collected.

(Form 46.)

Claims for the refunding of taxes and penalties alleged to have been erroneously or illegally collected must be made out upon form 46 in this case. The burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. The claim should be still further supported by the certificate of the assistant assessor of the proper division, and by the certificate of the assessor and collector. This form and those certificates should be respectively in form as follows:"

[203]

Then follows the form of an affidavit to be made by the claimant which, if observed, required him to state the business in which he was engaged; when and by what assessor he was assessed; the amount of the tax and when he paid it and to what collector; and that in the belief of the claimant the tax was erroneous and improper and for what reasons; and that by reason of the erroneous assessment and payment he was justly entitled to have a certain sum, naming it, refunded; and that he had not theretofore presented any claim for the refunding of said sum or any part of it. Then follows the form of the deputy collector's certificate to be indorsed on the claimant's affidavit, to the effect that he had carefully investigated the facts set out in the affidavit, and believed the statements in all respects to be true. Next follows the form of the collector's certificate, also to be indorsed on the affidavit, to the effect that he had carefully investigated the facts therein set forth and was satisfied that its statements were in all respects just and true; that upon personal examination he found a certain sum, naming the amount, reported against the claimant, giving the page and line of the list and the number and date of the form where it was to be found, and that the same was paid to him on a day named and was included in his aggregate receipts for said list, which receipts amounted to a certain sum, naming it and that the same was delivered to the assessor to be transmitted to the Commissioner of Internal Revenue; and that no claim for the assessment complained of had been theretofore presented.

The certificate of the clerk in charge of records in the office of the Commissioner of Internal Revenue was also required, to the effect that from personal examination he found a certain sum, naming it, reported against the claimant, on a certain page and line, naming them, of the list in form, giving the number and date of the form, on file in the office of the Commissioner; and that the tax was included in the collector's aggregate receipt for said list, transmitted by the assessor to the Commissioner of Internal Revenue.

This was all the evidence. Thereupon the court ordered the jury to return a verdict for the defendant, which was accordingly done. The plaintiff excepted to this ruling of the court. The court entered judgment for the defendant upon the verdict, and to reverse that judgment the plaintiff brought the present writ of error.

The regulations prescribed by the Secretary were made by authority of section 3220 of the Revised Statutes. That section provides that "The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary, is authorized, on appeal to him made, to remit, refund and pay back all taxes erroneously or illegally assessed or collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected."

Section 3228, which the defendant pleads in bar of the suit, declares "that all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner

wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued."

The suit of the plaintiff was to recover back taxes illegally collected. The defense pleaded was that the claim for the refunding of the tax so illegally collected was not presented to the Commissioner of Internal Revenue within two years after the claim had accrued; that is to say, after the payment of the alleged illegal tax. There was no demurrer to this plea, and it is not disputed that it was good in law. The bill of exceptions recites that the defendant proved that for two years subsequent to the payment of the tax no claim for the refunding of the tax had been made by the plaintiff to the Commissioner of Internal Revenue. Upon this state of the pleadings and proof, the direction of the court to the jury to return a verdict for the defendant was right, unless it is held that the facts proven by the plaintiff show a claim made for the refunding of the tax within the meaning of the law.

These facts were the indorsement of a protest on the checks by which the taxes were paid, and the making of the prescribed and the amended return, with the protest and claim written thereon as above stated.

As it does not appear by the record that the protest upon the checks was ever brought in any way to the notice of the Commissioner, that fact may be eliminated from the case. The contention of the plaintiff in error, therefore, amounts to this: that a protest upon its return for taxation against the requirements of the form on which the return is made, accompanied by an amended return, made out according to the plaintiff's construction of the law, is such a claim to the Commissioner of Internal Revenue for the refunding of a tax illegally collected, as is required by the law and the regulations of the Secretary of the Treasury.

We think there is no ground for this contention to rest on. No claim for the refunding of taxes can be made according to law and the regulations until after the taxes have been paid. It is not pretended that since the payment of the tax by the plaintiff any one of the steps required by the law and regulations to make an effectual claim for the refunding of the tax has been taken. All the safeguards prescribed by the Secretary of the Treasury for the protection of the public interests, in his regulations respecting claims for the refunding of taxes, have been disregarded. There has been no claim whatever in the sense of the law.

In our opinion no suit can be maintained for taxes illegally collected unless a claim therefor has been made within the time prescribed by the law. When the law says the claim must be presented within two years, the implication is that unless so presented the right to demand the repayment of the tax is lost, and the commissioner has no authority to refund it; and of course the right of suit is gone. We regard the presentation of the claims to the Commissioner of Internal Revenue for the refunding of a tax alleged to have been illegally exacted as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is clearly not the intent of the statute to allow the collector to be sued unless the taxpayer has first applied for relief to the commissioner within the time and in the manner pointed out by law and relief has been denied him. *Cheatham* v. *United States*, 92 U. S. 85 [Bk. 23, L. ed. 561]; *Railroad Co.* v. *United States*, 101 U. S. 543 [Bk. 25, L. ed. 1068]; *Arnson* v. *Murphy*, [*ante*, 491].

As the making of such a claim was not alleged or proven but, on the contrary, the failure to present the claim was pleaded and was established by the testimony, the plaintiff failed to establish its cause of action.

But the plaintiff insists that the judgment of the circuit court should be reversed because the bill of exceptions recites that the plaintiff "proved that the true amount of the tax which should have been assessed against it was the sum of $428.75, as shown by said amended return," and the defendant having allowed this proof to be made, it is now too late for him to contend that the mere technical preliminaries to establishing this proof were not observed. But the only proof of what the tax should have been, according to the plaintiff's theory, was his amended return; and this raised a question of law which could be presented but could not be concluded by the bill of exceptions. Besides, it was shown by the record that the defendant insisted to the end of the case and proved that no claim had been made to the commissioner within two years after its payment for the refunding of the tax sued for. If, therefore, it be conceded that the tax exacted was illegal, the failure to make claim for its repayment is a bar to the suit.

Upon the whole case, therefore, the Circuit Court was right in directing the verdict for the defendant.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[237]

HIRAM L. BROWN ET AL., *Appts.*,

v.

CHARLES F. DAVIS ET AL., EXRS. of WILLIAM ALLEN, Deceased.

(See S. C. Reporter's ed. 237-262.)

Letters patent construed and limited.

1. Where a lever or its equivalent as a mechanical instrument is made an essential element of a claim in a patent, the use of the human hand instead is not the use of an equivalent, although in the patented machine the lever is worked by hand.

2. Reissued letters patent No. 8589, for an improvement in grain drills, construed and limited, in view of a prior invention and the fact that new matter introduced into the specification of the reissue was put in for the purpose of reaching machines not within the claims of the original patent, and held not to be infringed by the defendants' machine.

[No. 100.]

Argued Dec. 17, 1885. Decided Jan. 11, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

The history and facts of the case fully appear in the opinion of the court.

Messrs. **B. F. Thurston, E. E. Wood** and *F. L. Brown*, for appellants.

Messrs. **Sardius D. Bentley** and *William F. Cogswell*, for appellees:

Under the doctrine of *McCormick* v. *Talcott*, 20 How. 402 (61 U. S. bk. 15, L. ed. 930), and *Railway Co.* v. *Sayles*, 97 U. S. 554 (Bk. 24, L. ed. 1053), the appellees have a right to treat as infringers all who make machines operating on the same principles and performing the same function as Davis' rack bar or push bar, by analogous means or equivalent combinations.

The burden of proof of want of novelty rests upon him who avers it; and as was said by this court in *Coffin* v. *Ogden*, 18 Wall. 124 (85 U. S. bk. 21, L. ed. 823): "Every reasonable doubt should be resolved against him." Novelty can only be negatived by proof which puts the fact beyond a reasonable doubt.

Wood v. *Mill Co.* 4 Fisher, 560; *Hawes* v. *Antisdel*, 2 Ban. & Ard. 10; *Bignall* v. *Harvey*, 5 Ban. & Ard. 636.

Legal cause existed for the surrender and reissue of Davis' patent.

See *Battin* v. *Taggert*, 17 How. 74 (58 U. S. bk. 15, L. ed. 37); *Powder Co.* v. *Powder Works*, 98 U. S. 136 (Bk. 25, L. ed. 81).

Davis' original patent was inoperative, because of a defective or insufficient specification. To cure this defect he surrendered his patent and took the reissue.

Reed v. *Chase*, 25 Fed. Rep. 94.

It is not essential to a valid surrender and reissue that the original patent be wholly inoperative or wholly invalid.

Powder Co. v. *Powder Works, supra; Seymour* v. *Osborne*, 11 Wall. 516 (78 U. S. bk. 20, L. ed. 33); *Wilson* v. *Coon*, 18 Blatchf. 532.

The error arose in the way pointed out by the statute as the lawful condition of granting a reissue, namely: by inadvertence, accident or mistake, and without any fraudulent or deceptive intention on the part of the patentee.

The decision of the commissioner, within the limits of the power conferred on him in this behalf, is final and cannot be attacked collaterally.

Seymour v. *Osborne, supra; Russell* v. *Dodge*, 93 U. S. 460 (Bk. 23, L. ed. 973); *Ball* v. *Langles*, 102 U. S. 128 (Bk. 26, L. ed. 104).

The reissue is not subject to the criticism that it was an expansion of the original patent. It simply points out more clearly and distinctly the invention shown in the original, and claims more conformably to the rights of the patentee what was therein shown.

Powder Co. v. *Powder Works, supra.*

The presumption arising from the decision of the commissioner can only be overcome by clearly showing, from a comparison of the original specification with that of the reissue, that the former does not substantially describe what is described and claimed in the latter.

Smith v. *Goodyear Dental, etc. Co.* 93 U. S. 486 (Bk. 23, L. ed. 952).

The reissue is valid notwithstanding the lapse of time between the date of the original and that of the reissue.

The question was not mooted at the circuit; and as this court has repeatedly said that no precise limit of time can be fixed and laid down for all cases.—*Mahn* v. *Harwood*, 112 U. S. 354 (Bk. 28, L. ed. 665)—each case must be determined upon its own facts.

No such inexcusable and unreasonable delay appears as ought to deprive defendants in error of the benefit of their patent.

Gage v. *Herring*, 107 U. S. 640 (Bk. 27, L. ed. 601); *Smith* v. *Goodyear Dental, etc. Co. supra.*

Should the court hold the reissued patent invalid in any of its claims, the defendants in error may fall back upon the second, fourth and fifth clauses of the reissue, which are substantially the same as the claims of the original, and are each and all infringed by plaintiffs in error.

Gage v. *Herring*, 107 U. S. 640 (Bk. 27, L. ed. 601).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Northern District of New York, on reissued letters patent No. 8589, granted to Charles F. Davis and William Allen, February 18, 1879, for an improvement in grain drills, the original patent, No. 74515, having been granted to said Davis, as inventor, February 18, 1868. The application for the reissue was filed January 24, 1879. The defenses set up in the answer are: want of utility and novelty, invalidity of the reissue and noninfringement. The specifications of the original and reissued patents are here placed side by side, the parts in each not found in the other being in italic:

Original.	*Reissue.*
"Be it known that I, Charles F. Davis, of Auburn, *in the* County of Cayuga, *and* State of New York, have invented certain new and useful improvements in grain drills; *and I do hereby declare* the following *to be* a full, clear and exact description *of the same*, reference being had to the accompanying drawings, making *a* part of this specification, in which Figure 1 represents a *top* plan of the drill, with the seed box removed, but its position shown by *red* lines, to show the parts underneath it. *Figure* 2 represents the crank rod or shaft to which the front ends of the drag bars are attached, *when* detached from the machine. *Figure* 3 represents an end view of the drill, with the wheel removed, to show the parts behind it, and representing, by *black*, dotted *and red* lines, the several operative parts and their positions under the changes of the machine or its parts. Similar letters of reference, *where they occur in the separate figures*, denote *like* parts in all *of* the *drawings*.	"Be it known that I, Charles F. Davis, of Auburn, County of Cayuga, State of New York, have invented certain new and useful improvements in grain drills, *of which* the following is a full, clear and exact description, reference being had to the accompanying drawings, making part of this specification, in which Figure 1 represents a plan *or top view* of the drill, with the seed box removed (but its position shown by *dotted* lines, to show the parts underneath it. *Fig.* 2 represents the crank rod or shaft to which the front ends of the drag bars are attached, detached from the machine. *Fig.* 3 represents an end view of the drill, with the wheel removed to show the parts behind it, and representing, by *full and* dotted lines, the several operative parts, and their positions under the changes of the machine or its parts. Similar letters of reference denote *corresponding* parts in all the *figures*.
The object and purpose of my invention *are* to shift or change the seeding shoes or hoes from a straight to a zigzag line, and *vice versa*, and, further, to so hang the	The object and purpose of my invention is to shift or change the seeding shoes or hoes from a straight to a zigzag line, and *vice versa*, and, fur-

Original.

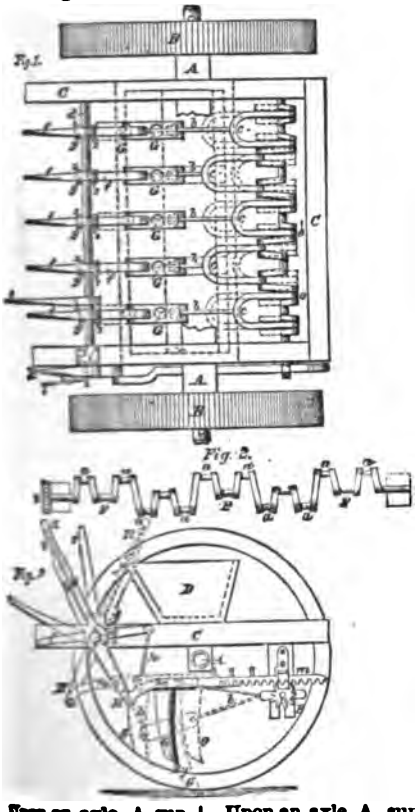
shoes or hoes, as, in addition to the shifting process, to admit of being raised separately, or the whole series together, as may be found necessary.

To enable others skilled in the art to make and use my invention, I will proceed to describe the same with reference to the drawings:

Reissue.

ther, to so hang the shoes or hoes, as, in addition to the shifting process, to admit of being raised separately, or the whole series together, as may be found necessary.

To enable others skilled in the art to make and use my invention, I will proceed to describe the same with reference to the drawings:



Upon an axle, A, supported on the usual carrying wheels, B B, is mounted a main frame, C, and on the main frame a seed box, D, the slides of which may be operated in any of the well known ways. In bearings, E, in the front portion of the main frame, is hung, so as to rock or turn therein, a zigzag or crank shaft, F, (shown detached in Fig. 2,) and to the cranks or wrists, *a a a*, of this shaft are connected, *seriatim*, the drag bars, *b b b*, by means of bows or yokes, *c*, each bow or yoke taking two of said wrists, as shown in Fig. 1. To the rear ends of these drag bars, *b*, are attached the shoes or hoes, G, in any of the usual well known ways. In the projecting rear portion of the main frame C there is hung a shaft, *d*, upon which there is a

Upon an axle, A, supported on the usual carrying wheels, B B, is mounted a main frame, C, and on the main frame a seed box, D, the slides of which may be operated in any of the well known ways. In bearings, E, in the front portion of the main frame, is hung, so as to rock or turn therein, a zigzag or crank shaft, F, (shown detached in Fig. 2,) and to the cranks or wrists, *a a a*, of this shaft are connected, *seriatim*, the drag bars, *b b b*, by means of bows or yokes, *c*, each bow or yoke taking two of said wrists, as shown in Fig. 1. To the rear ends of these drag bars, *b*, are attached the shoes or hoes, G, in any of the usual well known ways. In the projecting rear portion of the main frame C there is hung a shaft, *d*, upon which

Original.

lever, *e*, by which it can be rocked or rolled in its bearings. At suitable distances upon this shaft *d* there is placed a series of levers, *f f*, one for each shoe or hoe, which are kept in their proper positions on the shaft by pins, 1, 1, or other suitable devices, but which can be moved independent of the shaft or of each other, or all together, as will be explained. The levers *f* have a hub or swell, *g*, at their central portions, where they are slipped on to the shaft *d*; and into each one of these hubs is set a pin, 2, which is above the pins 1, 1, in the shaft, so that each lever can be turned upon the shaft; but when the shaft is rocked or turned, then all the levers are worked simultaneously. To the forward ends of these levers *f* the shoes or hoes are respectively connected by a link or hinged rod, *h*, the rearward projecting ends of said levers serving as handles for the operator to seize and work separately, when necessary to do so, or he can raise the whole series by seizing and working the lever *e*. One end of the shaft *d* projects through the timber of the main frame, for convenience of placing the parts, and upon it is a lever, H, and a spring-locking lever, *i*, connected with it, both of which levers the operator may grasp at once, and by pressure first unlock the catch, and then move the main lever H and the shaft *d*, as well as the parts connected with it. The catch or locking lever *i* takes into or against *a* stop plate, *j*, on the main frame, when not otherwise controlled. The upper portion of the lever H serves as a handle to work it by, and to the lower end of it is pivoted a rack bar, *m*, which takes into a pinion, *n*, fastened on the end of the crank or zigzag shaft F, and, when the pinion *n* is turned, the crank shaft is also turned, and, as it is turned, it shifts the shoes or hoes into a zigzag or a straight line, as the case may be. When the lever H, and the zigzag shaft F, and their several connected and operative parts, are in the positions shown by the *black* lines in Figs. 1 and 3, the shoes or hoes G are then in a straight line across the machine; but, when the lever H is shifted into the position shown by the *red* lines in Fig. 3, it turns the shaft and moves the parts connected with them, and the shoes or hoes will

Reissue.

there is a lever, *e*, by which it can be rocked or rolled in its bearings. At suitable distances upon this shaft *d* there is placed a series of levers, *f f*, one for each shoe or hoe, which are kept in their proper positions on the shaft by pins, 1, 1, or other suitable devices, but which can be moved independent of the shaft or of each other, or all together, as will be explained. The levers *f* have a hub or swell, *g*, at their central portions, where they are slipped on to the shaft *d*; and into each one of these hubs is set a pin, 2, which is above the pins 1, 1, in the shaft, so that each lever can be turned upon the shaft; but when the shaft is rocked or turned, then all the levers are worked simultaneously. To the forward ends of these levers *f* the shoes or hoes are respectively connected by a link or hinged rod, *h*, the rearward projecting ends of said levers serving as handles for the operator to seize and work separately, when necessary to do so, or he can raise the whole series by seizing and working the lever *e*. One end of the shaft *d* projects through the timber of the main frame, for convenience of placing the parts, and upon it is a lever, H, and a spring-locking lever, *i*, connected with it, both of which levers the operator may grasp at once, and by pressure first unlock the catch and then move the main lever H and the shaft *d*, as well as the parts connected with it. The catch or locking lever *i* takes into or against *the* stop plate *j* on the main frame, when not otherwise controlled. The upper portion of the lever H serves as a handle to work it by, and to the lower end of it is pivoted a rack bar *or connecting rod*, *m*, which takes into a pinion, *n*, fastened on the end of the crank or zigzag shaft F, and, when the pinion *n* is turned, the crank shaft is also turned, and, as it is turned, it shifts the shoes or hoes into a zigzag or a straight line, as the case may be. When the lever H, and the zigzag shaft F, *and the connecting bar m*, and their several connected and operative parts, are in the positions shown by the *full* lines in Figs. 1 and 3, the shoes or hoes G are then in a straight line across the machine; but, when the lever H is shifted into the position shown by the *dotted* lines in Fig. 3, it turns the shaft and moves the parts con-

[242]

[243]

Original.

then stand in a zigzag line across the machine, as shown by the *red* lines, or in what may be termed two lines, one in advance of the other; and, that the shoes or hoes may be thus moved into one or two lines, and still be susceptible of being raised up separately, or in their series capacity, their connections and attachments must all be hinged or yielding. When there is an odd number of shoes or hoes on the machine, the odd one should be in the rear series, in which case there would be no necessity of locking the lever H when the shoes *were* so
[244] arranged, as the greater resistance on the greater number would always keep them so. But, if an even number of shoes be used, and an equal number in each row, then the lever would have to be locked or fastened in both of its positions.

It is obvious that other mechanical devices may be used for shifting the shoes or hoes from a straight into a zigzag line, or *vice versa*. I have devised several ways of accomplishing this movement, *as, for instance*, a sheave, pulley or chain wheel may be keyed to the end of the crank shaft, and to this sheave or wheel a chain may be attached, and, passing around it, *extend thence to the lever*, so that by *working the lever*, the same effect *would* be attained as by the rack and pinion.

Another plan may be as follows: A crank or cross arms may be placed on the turning shaft, and, by means of con-
[245] necting rods, *which connect the cranks or arms with the levers*, the shaft may be turned, and the shoes thus thrown into a straight or zigzag line, as may be desired; or, instead of the crank shaft *to shift the shoes*, the shoes may be united in sets to different bars, which may be straight, both bars being united to cross bars or heads at their ends. Now, by shifting these two bars, *they will* shift the shoes attached to them, *and change them* into the positions hereinabove described. When the hoes are set in a zigzag line, as

Reissue.

nected with them, and the shoes or hoes will then stand in a zigzag line across the machine, as shown by the *full* lines, or in what may be termed two lines, one in advance of the other; and, *in order* that the shoes or hoes may be thus moved into one or two lines, and still be susceptible of being raised up separately, or in their series capacity, their connections and *the* attachments must all be hinged or yielding. When there is an odd number of shoes or hoes on the machine, the odd one should be in the rear series, in which case there would be no necessity of locking the lever H when the shoes *are* so arranged, as the greater resistance on the greater number would always keep them so. But, if an even number of shoes be used, and an equal number in each row, then the lever would have to be locked or fastened in both of its positions.

It is obvious that other mechanical devices may be used for shiftung the shoes or hoes from a straight into a zigzag line, or *vice versa*. I have devised several ways of accomplishing this movement. *The rack bar or connecting bar m may be used for this purpose, and thereby the shoes or hoes may be shifted from a straight to a zigzag line, or vice versa, said connecting bar m being held in position, if desired, by any of the usual mechanical devices for that purpose; second, by means of* a sheave, pulley or chain wheel, *which* may be keyed to the end of the crank shaft, and to this sheave or wheel a chain may be attached, and, passing around it, so that, by *means thereof*, the same effect *can* be attained as by the rack and pinion.

Another plan may be as follows: A crank or cross arms may be placed on the turning shaft, and, by means of *a* connecting *rod or* rods, the shaft may be turned *by the operator*, and the shoes thus thrown into a straight or zigzag line, as may be desired; or, instead of the crank shaft, the shoes may be united in sets to different bars, which may be straight, both bars being united to cross bars or heads at their ends. Now, by shifting *the relations of* these two bars, *and by the means aforesaid, or by the connecting rod m, the operator can* shift the shoes *or hoes* attached to them into the positions hereinabove described. When the hoes are set in a zigzag line, as above men-

Original.

above mentioned, and are in that position raised up, a pin, 3, in the extreme end of the shaft *d*, will take against a pin, 4, in the lever H, and thereby shifting the hoes into more nearly a straight line, as they rise, or into quite a straight line, depending upon the extent to which they are raised.

Having *thus fully* described my invention, what I claim *therein* as new and desire to secure by letters patent is:

1. *So attaching the shoes or hoes of a seed planter to the main frame, as that, by means of a lever, or its equivalent, said shoes may be shifted from a straight to a zigzag line, or vice versa, at pleasure, substantially as described.*

2. *I also claim, in combination with a series of shoes or hoes that are capable of being changed from a straight to a zigzag line, or vice versa, the so connecting of said shoes, by independent levers, to the lifting-bar, as that they may be raised by the operator individually, or as a whole, substantially as described.*

3. *I also claim hinging the shoe to both its drag bar and its individual lever, so that the shoe may be raised and lowered in either of its changed positions, by a lever that is permanently located substantially as described.*"

Reissue.

tioned, and are in that position raised up, a pin, 3, in the extreme end of the shaft *d*, will take against a pin, 4, in the lever H, and thereby shifting the hoes into more nearly a straight line, as they rise or into quite a straight line, depending upon the extent to which they are raised.

Having *now* described my invention, what I claim as new and desire to secure by letters patent is:

1. *The shoes or hoes of a seed planter, attached to the main frame substantially as described, whereby they may be simultaneously shifted from a straight to a zigzag line, or vice versa, by a single movement.*

2. *The shoes or hoes of a seed planter, attached to the main frame, substantially as described, in combination with a lever or its equivalent, whereby they can be shifted, at the pleasure of the operator, from a straight to a zigzag line, or vice versa.*

3. *The shoes or hoes of a seed planter, attached to the main frame, substantially as described, in combination with a rod or its equivalent, whereby they can be shifted from a straight to a zigzag line, or vice versa.*

4. *A series of shoes or hoes that are capable of being changed from a straight to a zigzag line, or vice versa, in combination with independent levers, connecting said shoes or hoes with the lifting-bar, whereby they can be raised by the operator individually or as a whole, substantially as described.*

5. *The shoe hinged to both its drag bar and its individual lever, so that it can be raised or lowered, in either of its changed positions, by a lever that is permanently located substantially as described.*

6. *In combination with a series of shoes or hoes that are capable of being changed by the operator at the rear of the machine, from a straight to a zigzag line, or vice versa, a shaft and lifting lever connected therewith, whereby the whole series can be raised at once by the operator, to pass obstructions, substantially as described.*"

The case was heard in the circuit court, on pleadings and proofs, and a decision rendered in May, 1881 (*Davis* v. *Brown*, 19 Blatchf. 263), in pursuance of which an interlocutory decree was entered, in June, 1881, declaring the reissued patent to be valid, and to have been infringed as to all its claims, and awarding a recovery of profits and damages and a perpetual injunction. On the report of a master, a final decree was entered in February, 1882, by which the plaintiffs recovered $5,689.91, as damages

and costs. The defendants have appealed to this court.

The specification of the original patent stated the purpose of the invention to be, to change the seeding shoes or hoes from a straight to a zigzag line, and *vice versa;* and also, to so hang the shoes or hoes as, in addition to the shifting process, to allow the shoes or hoes to be raised all together, or any one separately. The mechanical means described in that specification, for shifting the shoes, are these: in the front part of the machine is a rotating shaft with cranks on it so arranged that the shaft does not have a straight continuous axis, but has sets of axes in different lines, alternating, so that, yokes being attached, each to two of the cranks, and each two of the cranks having axes in a different line from the line of the axes of the next two adjoining cranks, the yokes being of substantially equal length, and being connected by drag bars, at the rear ends of the drag bars, to the shoes, a rotating motion given to the crank shaft will shift the shoes, by moving all of them, each alternate shoe moving in an opposite direction from that in which the shoe next to it moves, and thus a space being opened or closed, of double the distance through which any shoe travels. To rotate the crank shaft, there is a cross shaft in the rear of the machine, on the end of which is an upright lever, which extends upwards to form a handle, and has pivoted to it below a bar which extends forward and the forward end of which is formed into a rack, which works into a pinion on the end of the crank shaft. By moving the lever, the rack and pinion are worked and the crank shaft is rotated and the shoes are shifted. The extent of the rotating movement of the crank shaft is about half a circle, back and forth. The original specification says that instead of employing the crank shaft, the shoes may be united in sets to different bars, which may be straight, both bars being united to cross bars or heads, at their ends; and that, by shifting these two bars, the shoes attached to them will be shifted. But there is no more specific description of mechanism for the purpose, nor any drawing of such mechanism.

In the defendant's machine, every alternate shoe is connected with an immovable part of the frame, and every other alternate shoe is connected with a swinging cross bar, which hangs down so as to have a motion back and forth in the arc of a circle, by reason of its being hung in bearings in the side of the frame. A rod extends from near the middle of the width of the swinging cross bar to the rear part of the frame, behind the line from which the shoes are suspended, which rod is supported in the center of its length, and terminates, at its rear end, in a handle, so that an operator can work it and, by pulling it, shift simultaneously all the shoes that are attached to the swinging cross bar. Two coiled springs are so arranged that when the rod is pulled the springs are compressed; and when the rod is released the action of the springs tends to throw the swinging cross bar and the shoes attached to it towards the front of the frame again, restoring them to the position from which the pulling of the rod moved them. Thus, only alternate shoes are shifted, but the positions of the toes of the shoes, relatively to each other, can be simultaneously changed, and a wider space, in a straight line, be opened between any two toes at any time. The shoes are so set that their toes are never in a straight line across, but, when nearest to each other, are somewhat out of a straight line, and the pulling of the rod causes the distance between them to increase. The shoes which move in increasing such distance do so through the rotating motion to and fro of the swinging cross bar to which they are attached, such motion being imparted by the pulling, at the rear of the machine, of the rod attached to the swinging cross bar. In the plaintiffs' machine, the shoes which move, in increasing such distance do so through the rotating motion to and fro of the crank shaft to which they are attached, such motion being imparted by the pushing at the rear of the machine of the rod that carries the rack, the rod being worked by a lever.

An examination of the claims of the original and reissued patents shows that claim 2 of the reissue is substantially the same as claim 1 of the original; that claim 4 of the reissue is substantially the same as claim 2 of the original; and that claim 5 of the reissue is substantially the same as claim 3 of the original.

The circuit court held that claim 2 of the reissued was infringed, although in the defendants' machine there is no lever such as the lever H of the patent, and no equivalent or substitute for it. The view taken was, that claim 2 was infringed, because the defendants use a rod, the end of which is pushed and pulled by the hand of the operator, while in the patent the lever H pulls and pushes the end of the rod. But the lever or its equivalent as a mechanical instrument is made an essential element in claim 2, and dispensing with the lever and using instead the human hand is not the use of an equivalent, although in the plaintiffs' machine the hand is applied to work the lever. *Water Meter Co.* v. *Desper*, 101 U. S. 332, 337 [Bk. 25, L. ed. 1024, 1026]; *Gage* v. *Herring*, 107 U. S. 640, 648 and *Fay* v. *Cordesman*, 109 U. S. 408, 420, 421 [Bk. 27, L. ed. 601, 604 and 979; 984]; *Sargent* v. *Hall Safe and Lock Co.* [*ante*, 67].

In order to determine what construction ought to be given to the other claims of the reissue, it is necessary to consider an invention made by one Powers, at Madison, Wisconsin, in 1862, the invention of Davis being carried back only to September, 1866. During the winter of 1861-2, and the spring of 1862, Powers was selling, at Madison, grain drills, with iron drag bars. During the season of 1862, noticing the working of drills in the field, he conceived the idea that the shoes could be put into single and double ranks by a more easy method than that then used. He worked out a plan and made a model of it and applied for a patent, November 10, 1862. The patent was ordered to issue December 6, 1862, but was never issued. The reason is not stated. The specification filed states that the "invention consists of a device to enable the shovels or plows of a drill to be set in single or double rows or ranks, with greater ease and facility than hitherto." The method [described and shown in the drawings is to have a cross row of stationary shovels; and a cross row of other [250]

shovels, attached to a cross bar which is arranged, at each end of it, so as to slide to the extent of eight inches to and fro, in a groove. Thus, two rows may be made, or the sliding cross bar may be set at a point where all the shovels will be in a line, and one row be formed. The movable cross bar is moved by hand and secured, when set, by bolts. The claim covers "the method of double and single ranking the drill teeth, by the adjustment of the sliding cross bar A, to which are attached the alternate drill teeth or shovels, to different positions between the side pieces of the frame." The description states that "by this device, double or single ranking can be effected in a moment, instead of the more tedious process of other similar machines," and that "double and single ranking is a highly important feature in a drill, to adapt it to different soils and circumstances." Powers put this shifting arrangement "on to two or may be three drills" which he had on hand. He testifies to the use of two of them and says they worked perfectly, so far as changing the rank of the drill was concerned. This was a completed invention. The idea of changing the relative positions of the shoes by having one row of them stationary and moving the other, which is the idea developed in the defendant's machine, was fully embodied in Powers' machine. It had no lever and rod [251] to do the work of the hand in moving the sliding cross bar, and that cross bar was held in position, when set, by bolts.

In view of this invention of Powers, we are of opinion that the invention of the Davis patent must be limited, so far as the shifting apparatus is concerned, to the special arrangement of the rotating crank shaft described, and shown in the drawings. The words "substantially as described," found in each of the first two claims of the original patent, properly confined those claims to the shifting mechanism described. If claim 1 of the reissued is given a construction which includes any arrangement for shifting not substantially using a rotating crank shaft, it becomes a claim which could not lawfully have been granted in the original patent; and, as a claim in a reissued patent, it is invalid, within the defenses set up in the answer, because the application for the reissue was made nearly eleven years after the original patent was granted, and after machines effecting the shifting by other means than a rotating crank shaft had gone into use subsequently to the date of the original patent, and no sufficient excuse is given for the laches and delay. The same remarks apply to claim 3 of the reissue.

In view of the rulings of this court on the subject of reissued patents, made since the decision in this case was made by the court below, in May, 1881, this case must be considered in view of the fact that the new matter introduced into the specification of the reissue was put in for the purpose of reaching machines which the claims of the original patent would not reach, and of laying a foundation for claims 1 and 3 of the reissue. The inventor and patentee, Davis, distinctly says this, in his testimony. The principal interpolation is in these words: "The rack bar or connecting rod *m* may be used for this purpose, and thereby the shoes or hoes may be shifted from a straight to a zigzag line, or *vice versa*, said connecting bar *m* being held in position, if desired, by any of the usual mechanical devices for that purpose." In the original specification *m* is called a "rack bar," because it is pivoted at one end to the lower end of the lever H, and has on its other end a rack taking into a pinion on the end of the crank shaft. But, in the reissue, *m* is called "a rack bar or connecting rod." Again, in the reissue, the reference to the lever H, as connected with and working the chain to be used with the sheave or wheel, in the second suggested alternative means of shifting, is erased so as not to make the use of the lever H necessary. Before these changes, the defendant's machine, which has no lever and no rotating crank shaft, would not have been within the scope of the original claims, but, if the rack bar were to become a connecting rod, it was thought it might cover the rod in the defendant's machine. Claim 3 of the reissue was framed on this view, of shifting by a rod alone, while claim 1 is made so broad as to seem to claim shifting by any means, by a single movement.

As to claims 4, 5 and 6, of the reissue, the shifting mechanism of the patent, with its rotating crank shaft, must, in view of the Powers invention, be considered as an element in each claim; and that mechanism is not used by the defendants.

It follows, from these views, that *the decree of the Circuit Court must be reversed and the case remanded, with a direction to dismiss the bill, with costs.*

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U.

UNITED STATES, *Plff.*,
v.
MORRIS SPIEGEL.

(See S. C. Reporter's ed. 270-277.)

Construction of Internal Revenue Act—offe under.

It is not an offense, under section 12 of the A of March 1, 1879, for one merely to have in his p session a canceled stamp, or a stamp which has be used, or which purports to have been used upo package of imported liquors, unless it has be designedly removed by human agency, withe defacing or destroying it at the time.

[No. 844.]

Submitted Dec. 11, 1885. Decided Jan. 11, 18

ON a certificate of division in opinion betwe the Judges of the Circuit Court of the Uni States for the Southern District of New Yo

Statement of the case by *Mr. Justice M* thews:

The defendant was indicted in the Circ Court of the United States for the South District of New York for an alleged offense out in the first count of the indictment, other three being substantially similar, as lows:

"The jurors of the United States of Ame within and for the district and circuit afores on their oaths, present that Morris Spiegel, of the City and County of New York, in district and circuit aforesaid, yeoman, her fore, to wit: on the eighteenth day of April

the year of our Lord one thousand eight hundred and eighty-three, at the Southern District of New York, and within the jurisdiction of this court, did feloniously, knowingly and fraudulently have in his possession a certain United States stamp of the kind and description provided and required by law to be affixed to packages containing distilled spirits imported into the United States in packages, the said stamp being then and there in form as prescribed by the Secretary of the Treasury, and numbered in figures as follows: '350,460,' a more particular description of which said stamp is to the jurors as yet unknown, which said stamp had been heretofore removed from a certain package which had contained imported spirits, to wit: brandy, and which said stamp had not been defaced and destroyed at the time of such removal, then and there against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such case made and provided."

The indictment is founded upon provisions contained in the Act of March 1, 1879, "to amend the laws relating to internal revenue" (20 Stat. at L. 327, 342), the eleventh section of which provides as follows:

"That all distilled spirits, wines and malt liquors, imported in pipes, hogsheads, tierces, barrels, casks or other similar packages shall be first placed in public store or bonded warehouse, and shall not be removed therefrom until the same shall have been inspected, marked and branded by a United States customs gauger, and a stamp affixed to each package, indicating the date and particulars of such inspection; and the Secretary of the Treasury is hereby authorized to prescribe the form of, and provide, the requisite stamps, and to make all regulations which he may deem necessary and proper for carrying the foreign requirements into effect."

And section 12, so far as relevant, provides:

"Every cask or other package from which the stamp for imported liquors required by this Act to be placed thereon shall not be effaced, obliterated or destroyed, on emptying such package, shall be forfeited, and the same may be seized by any officer of internal revenue wherever found; and all the provisions and penalties of section 3324 of the Revised Statutes of the United States, relating to empty casks or packages from which the marks, brands or stamps have not been effaced or obliterated, and relating to the removal of stamps from packages, and to having in possession any stamps so removed, shall apply to the stamps for imported spirits herein provided for, and to the casks or other packages on which such stamps shall have been used."

Section 3324, R. S., referred to in section 12 of the foregoing Act, is in these words:

"Every person who empties or draws off or causes to be emptied or drawn off any distilled spirits from a cask or package bearing any mark, brand or stamp required by law shall, at the time of emptying such cask or package, efface and obliterate said mark, stamp or brand. Every such cask or package from which said mark, brand or stamp is not effaced and obliterated as herein required shall be forfeited to the United States, and may be seized by any officer of internal revenue wherever found. And every railroad company or other transportation company or person who receives or transports or has in possession with intent to transport or with intent to cause or procure to be transported, any such empty cask or package or any part thereof, having thereon any brand, mark or stamp, required by law to be placed on any cask or package containing distilled spirits, shall forfeit $300 for each such cask or package or any part thereof, so received or transported or had in possession with the intent aforesaid; and every boat, railroad car, cart, dray, wagon or other vehicle, and all horses and other animals used in carrying or transporting the same shall be forfeited to the United States. Every person who fails to efface and obliterate such mark, stamp or brand, at the time of emptying such cask or package, or who receives any such cask or package or any part thereof, with the intent aforesaid, or who transports the same or knowingly aids or assists therein, or who removes any stamp provided by law from any cask or package containing or which had contained distilled spirits, without defacing and destroying the same at the time of such removal, or who aids or assists therein, or who has in his possession any such stamp so removed as aforesaid, or has in his possession any canceled stamp or any stamp which has been used, or which purports to have been used upon any cask or package of distilled spirits, shall be deemed guilty of a felony and shall be fined not less than $500 nor more than $10,000 and imprisoned not less than one year nor more than five years."

The case was brought into this court by the following certificate:

"At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held at the United States court rooms, in the City of New York, on the third Monday of October, in the year of our Lord one thousand eight hundred and eighty-four, [273]

"Present, the *Honorable* William J. Wallace, the *Honorable* Charles L. Benedict, *Judges*.

The United States
v.
Morris Spiegel.

"This case coming on to be heard at this term before judgment upon the verdict of guilty, upon a motion in arrest of judgment and also upon a motion for a new trial, before the two judges above mentioned, at such hearing the the following questions occurred:

"First. Whether the indictment states an offense created by the laws of the United States.

"Second. Whether in a prosecution for having possession of stamps removed from imported liquors, instituted under the laws of 1879 (chap. 125, § 12), it is necessary for the Government, in addition to proving that the stamps in question had been removed from casks containing imported spirits, also to prove that such stamps had been so removed by some person.

"Third. The prosecution on the trial having failed to prove that the stamps named in the indictment were removed by a person, was it or not error for the court to refuse to direct the jury to acquit the defendant on the ground that the prosecution ha not proven an offense under the statute?

"Fourth. Whether or not the offer on the part of the defense to prove that the stamps

named in the indictment fell accidentally from the casks and were not removed by any person was properly overruled.

"Fifth. Whether the exception taken to that portion of the charge to the jury where it was said: 'It is sufficient to make the possession of the stamps unlawful if they came off such casks without being destroyed, whether they came off by accident or design,' was properly overruled.

"Sixth. Whether or not it was error to refuse to charge as requested by the defendant as follows: 'If you believe the Government has [274] failed to prove the stamps named in the indictments were removed by a person or persons from casks containing, or which had contained, imported distilled spirits, your verdict should be for the defendant, as an accidental, or by action of the weather, falling or coming off of these stamps; and possession thereafter by defendant will not constitute an offense under this statute.

"Seventh. Whether, in a prosecution for having in possession stamps removed from casks of imported spirits in violation of the Laws of 1879 (chap. 125, § 12), it is necessary for the prosecution to aver that the stamps so removed had been removed by some person.

"Eighth. Whether the indictment is sufficient to warrant judgment upon the verdict.

"In respect to each of which questions the judges aforesaid were divided in opinion.

"Wherefore, at the same term, upon request of the United States attorney, they have caused the points above stated to be certified, under the seal of this court, together with a copy of the indictment and an abstract of the record, to the Supreme Court of the United States for final decision according to law.

"Wm. J. Wallace,
"Chas. L. Benedict."

[274] *Mr.* **William A. Maury,** *Asst. Atty-Gen.*, for plaintiff.

Messrs. **William P. Fiero** and **Green B. Raum,** for defendant.

Mr. Justice **Matthews** delivered the opinion of the court:

The twelfth section of the Act of March 1, 1879, does not define the offense of removing stamps from packages of imported liquors, or of having in possession stamps so removed, except by adopting the provisions of section 3324, R. S., defining such offenses in relation to stamps upon packages of other distilled spirits, not imported, and applying them in the case of imported liquors. In doing this its language is that of reference merely, and not of definition. For the precise and statutory description of the [275] offense described we must have recourse to the words of section 3324 R. S., in the context there found, there being nothing in the Act of 1879 showing an intention to qualify their original meaning.

Referring for that purpose to the section of the Revised Statutes in question, we find that the felonies therein defined are as follows:

1. The removal by any person of any stamp provided by law from any cask or package containing, or which had contained, distilled spirits without defacing and destroying the same at the time of such removal, or aiding or assisting therein.

2. Having in possession any such stamp so removed as aforesaid.

3. Having in possession any canceled stamp, or any stamp which has been used, or which purports to have been used, upon any cask or package of distilled spirits.

Of these the offenses described in the last division are not adopted by the Act of March 1, 1879, and applied to casks or packages of imported liquors. It is not an offense, therefore, under this Act for one merely to have in his possession any canceled stamp provided by law to be affixed to each package of imported liquors, or any stamp which has been used on such package, or which purports to have been so used. To constitute the offense of unlawfully having in possession any such stamps they must have been removed from the package on which they were once placed without being defaced and destroyed at the time of such removal. But every such stamp, once in use upon such package, to come afterwards into the possession of a person, must in one sense have been removed; that is, must in some way and by some means have ceased to be affixed to the package on which it was used, and have become detached and separated from it. This may have happened without the agency of a human will, by mere accident or as the effect of unintelligent causes and without design on the part of any person.

But it is not in this sense that possession of removed stamps is made an offense in the previous clause of the section; for so to construe it would be to obliterate the statutory distinction between the two crimes—that of having in possession removed stamps, and of having in possession used stamps. A stamp once in use may have accidentally fallen off the package, yet afterwards to have it in possession is an offense under section 3324. But it is not an offense under the Act of March 1, 1879. To have in possession stamps that have been removed, without at the time of removal having been defaced and destroyed, is an offense under both laws; one in the case of domestic distilled spirits, the other in that of imported liquors. The removal, therefore, which describes a removed stamp, possession of which is thus made unlawful, must be a designed removal from the package by human agency, without defacing and destroying it at the time, such removal as by the first division of the described offenses, constitutes the guilty act of the person removing it. It is the possession of such a stamp, "so removed as aforesaid," in the language of the clause defining the offense, that must be shown to constitute guilt; that is, possession of a stamp, not merely once used and afterwards found and taken into possession; but possession of a stamp which some person, although he may be unknown, has removed intentionally and by design and failed, by neglect or otherwise, at the time of removal, to deface and destroy. So to remove such a stamp is one offense; to aid and assist in such a removal is another; the third is to have in possession such a stamp "so removed as aforesaid;" and these are all of that class of offenses embraced by the twelfth section of the Act of March 1, 1879.

It follows, from this view of the law, that the indictment in the present case is substantially defective, because it does not set out an

verse under the statute. It does not describe the crime intended in the language of the Act, inasmuch as it does not charge that the defendant had in his possession a stamp of the kind and description mentioned, which stamp had been theretofore removed in the manner prohibited by the law; that is, by some person, without defacing and destroying the same at the time of such removal. It also follows that whatever presumptions may arise as to the manner of removal, when properly charged, from the circumstances in proof accompanying the fact of possession, it is competent for the defendant to introduce evidence in explanation of those circumstances, and tending to show that the stamp in question was not removed by any person, without defacing and destroying the same at the time of removal, but was in fact detached and removed from the cask or package without human agency and by the accidental intervention of other causes.

Proceeding to dispose of the questions certified specifically, we answer the first, fourth, fifth and eighth questions in the negative, and the seventh in the affirmative. The second, third and sixth questions we decline to answer, because the answers given to the other questions necessarily dispose of the whole case, and because we cannot answer them without a more complete statement of the facts on which they are supposed to have arisen than is furnished by the present record.

The cause is remanded, with directions to take further proceedings therein, not inconsistent with this opinion; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN H. STEBBINS ET AL., *Appts.*,
v.
TOWN OF ST. ANNE ET AL.

(See S. C. Reporter's ed. 386-392.)

Parties in equity—misjoinder of.

Two alternative claims, each belonging to many persons, one of whom has no interest in one claim, and others of whom have no interest in the other claim, cannot be joined in one bill in equity.

[No. 882.]

Submitted Dec. 18, 1885. Decided Jan. 11, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Mess. **Thomas S. McClelland** and **Robert Doyle**, for appellants:

There is no misjoinder of parties complainant. Each complainant is a substantial party, each having an interest in the result; and no decree could be entered without each being in the case.

Russell v. *Clark*, 7 Cranch, 69 (11 U. S. bk. 2, L. ed. 271); *Osborn* v. *Bank of U.S.* 9 Wheat. 738 (22 U. S. bk. 6, L. ed. 204).

Mr. **L. E. Payson**, for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

This was a bill in equity, filed June 25, 1884, [386] by John H. Stebbins, Edward G. Judson, William A. Tenney and Sutherland Tenney, and by William D. Judson and Amos Tenney, lately partners with Joseph E. Young, under the name of Joseph E. Young & Co., against the Town of St. Anne, the Chicago, Danville and Vincennes Railroad Company, and the receiver of that company, to obtain [387] payment of bonds to the amount of $30,000, issued by the Town, under statutes of the State of Illinois, to aid in the construction of the railroad of that company. The facts alleged in the bill, so far as necessary to the understanding of the decision, were as follows:

In February, 1869, the railroad company entered into a contract with Joseph E. Young & Co. to construct its railroad from Danville through St. Anne and other towns to Chicago, and thereby agreed to assign and did assign to the contractors all donations, bonds or aids which might be contributed by municipalities along the line of the railroad. The contractors fulfilled their contract and completed the construction of the road before December 1, 1871.

In June, 1869, the Town voted to raise by tax a subscription of $30,000, to aid in the construction of the railroad, to be paid in bonds of from $1,000 to $5,000 each, payable to bearer in from one to five years, with interest at the rate of 10 per cent. In December, 1870, the bonds were signed by the supervisor of the Town in its behalf, and by direction of the Town authorities, delivered by him to Joseph E. Young & Co., as entitled to the bonds under their contract with the railroad company; and were afterwards redelivered by the contractors to him for the purpose of being registered in the office of the auditor of accounts at Springfield in the State of Illinois.

The supervisor, on his way to Springfield for that purpose, stopped at his home in St. Anne, and while there, on January 5, 1871, certain citizens of the Town filed a bill in equity in the Circuit Court of Kankakee County against him and other officers of the Town, upon which an injunction was granted against the delivery of the bonds, and the bonds were placed by order of the court in the custody of its clerk for safe keeping, and the suit remained in court until April 4, 1876, when the bill was dismissed and the injunction dissolved, after the case had been taken to the Supreme Court of Illinois, and the bonds declared valid by the opinion of that court, reported in *Chicago, Danville & Vincennes Railroad* v. *Coyer*, 79 [388] Ill. 378.

On April 7, 1876, all the bonds except one were taken from the clerk of the court upon a writ of replevin obtained by the then supervisor of the Town from a justice of the peace, who had no jurisdiction of the matter, and on the next day were fraudulently and unlawfully burned and wholly destroyed by the Town authorities, without the knowledge or consent of the contractors or of the railroad company.

The bill further alleged that Stebbins, Edward G. Judson, William A. Tenney and Sutherland Tenney "are the real equitable owners of all and singular the interests, claims and demands of said Joseph E. Young and Company, or said railroad company, or its re-

ceiver, against the said Town of St. Anne, and in and to the bonds herein set forth; and said John H. Stebbins is equitably entitled to one third of the claim of said Joseph E. Young and Company against said railroad company, or the judgment against said railroad company, as herein set forth;" and that Stebbins obtained his interest as follows: in January, 1875, Young being insolvent, the Circuit Court of Cook County, upon a bill filed by Stebbins as one of his creditors, appointed one Luther Pierce receiver of Young's estate, and Young by its order conveyed to Pierce all his property for the benefit of his creditors. In September, 1876, that court, on the application of Pierce, granted an order for the sale of said property, among which were two claims against the railroad company, one for $600,000, and the other for $300,000. Pursuant to that order, said receiver advertised said claims, and in November, 1876, they were sold by him and bought by Stebbins, and a certificate therefor issued to the latter, and the sale reported to and confirmed by the court. The report showed that Young owned one third of said claims against the railroad company. In April, 1876, in the District Court of the United States for the Northern District of Illinois, Young was adjudged a bankrupt, and Pierce appointed assignee of his estate; and in March, 1877, Young was discharged. The bill alleged that "Therefore all the right and claim said Young has to any of said claims against said railroad company or said Town of St. Anne has become vested in said John H. Stebbins."

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The bill then alleged that Edward G. Judson was the equitable owner of all the interest of William D. Judson in all claims of Joseph E. Young & Co. against the Town, by virtue of a written assignment, made by him in February, 1876, to secure the payment of a debt of $14,000, of all his interest, including his interest as a member of the firm of Joseph E. Young & Co., in all claims against the town; that William A. Tenney and Sutherland Tenney obtained their interest in the share of Amos Tenney in the assets of Joseph E. Young & Co., and the demand of that firm against the Town, by virtue of a like assignment made by him to them in March, 1876, to secure the payment of a debt from him to them upon a guardianship account; and that therefore Stebbins, Edward G. Judson, William A. Tenney and Sutherland Tenney were now entitled to all the interest of Joseph E. Young & Co. in the claim against the Town.

The bill further alleged that in November, 1877, the firm of Joseph E. Young & Co., in an action at law upon claims growing out of the construction of the railroad, recovered judgment against the railroad company for the sum of $588,556, and costs; that one third of that judgment equitably belonged to Stebbins, and the other two thirds belonged to William D. Judson and Amos Tenney; that in December, 1877, an execution was issued on that judgment and placed in the hands of a sheriff, and by him returned in no part satisfied; that the railroad company was in the hands of a receiver and was wholly insolvent, and had no property out of which to satisfy that judgment, or any part of it; and that no part of that judgment or of the claim of Joseph E. Young & Co. against the railroad company had been paid.

The bill finally alleged that the Town was indebted as aforesaid to the railroad company, or to Joseph E. Young & Co. under their contract, in the sum of $30,000 and interest from the time of the delivery of the bonds in December, 1870.

The bill prayed for process and discovery; and that Stebbins, Edward G. Judson, William A. Tenney and Sutherland Tenney be decreed to be the legal and equitable owners of the claim of Joseph E. Young & Co. against the Town, and Stebbins be decreed to own one third of the judgment recovered as aforesaid against the railroad company, and William D. Judson and Amos Tenney the other two thirds of that judgment; that Stebbins be subrogated to the rights of Young in all his claims against the railroad company, and Stebbins and Edward G. Judson, William A. Tenney and Sutherland Tenney also be subrogated to all the rights and claims of the railroad company and of Joseph E. Young & Co. against the Town; and that, inasmuch as all the bonds would have been due, and the rights of the plaintiffs and the obligations of the Town were fixed, before the commencement of this suit, and inasmuch as the Town, in equity, was now justly indebted upon its contract to pay the sum of $30,000 with interest, as above set forth, a decree for the amount so due be entered against the Town to be paid to Stebbins, Edward G. Judson, William A. Tenney and Sutherland Tenney, as the equitable assignees of Joseph E. Young & Co.; and for further relief.

A demurrer to the bill, for want of equity, for misjoinder of parties, and for multifariousness, was filed by the defendants, and was sustained for want of equity and the bill dismissed. The plaintiffs appealed to this court.

The object of this bill is to compel the Town of St. Anne to pay the amount of the bonds which the Town issued to aid in the construction of the railroad, and delivered to Joseph E. Young & Co., the contractors for building the road, in accordance with the agreement between those contractors and the railroad company.

Assuming, without deciding, that the bonds were valid obligations of the Town and that there is such a want of adequate remedy at law as to justify a resort to equity, nevertheless this bill cannot be maintained.

The bill, after many specific allegations, mostly of fact, but including some inferences of law not supported by the facts alleged, contains a general allegation that the Town is indebted either to Joseph E. Young & Co. or to the railroad company in the amount of the bonds.

If, as would appear to be the result of all the allegations of the bill, the debt of the Town upon the bonds was to Joseph E. Young & Co., the bill cannot be maintained without bringing before the court the owners of the interests of all the members of that partnership in the debt. This has not been done. The three partners were Joseph E. Young, William D. Judson and Amos Tenney. Said Judson and Tenney, as well as Edward G. Judson, William A. Tenney and Sutherland Tenney, the pledgees of their interests in the claim of the partnership

against the Town, are joined as plaintiffs. But the interest of Young in that claim is not represented. The sale and conveyance to Stebbins (the only other plaintiff) from Pierce, as the receiver of Young's estate under insolvency proceedings in the state court, included only Young's interest in claims against the railroad company. The interest of Young in the claim of the partnership against the Town remained in Pierce, either as such receiver or as assignee under the subsequent proceedings against Young under the Bankrupt Act of the United States; and neither Young nor Pierce is a party to the bill.

If the alternative view is taken, and it is assumed that there is a debt of the Town to the railroad company, and that Stebbins, by his purchase of Young's interest in the claim of the partnership against that company and by the judgment subsequently recovered by the partnership upon that claim, acquired the right, jointly with the two other partners, to compel the application of the sum due from the Town to the railroad company in satisfaction of that judgment, another difficulty arises, namely: that Edward G. Judson, William A. Tenney and Sutherland Tenney, the pledgees of William D. Judson's and Amos Tenney's interests in the claim of the partnership against the Town, acquired no interest in the claim of the partnership against the railroad company, or in the judgment recovered upon that claim, and should not therefore be parties to this bill.

In fine, the whole interest in any claim of the partnership against the Town was in Pierce, either as the receiver of Young's estate in insolvency, or as the assignee of his estate in bankruptcy, and in William D. Judson and his pledgee, Edward G. Judson, and in Amos Tenney and his pledgees, William A. Tenney and Sutherland Tenney; and no part of that interest was in the plaintiff Stebbins. The whole interest in any claim of the partnership against the railroad company was in Stebbins, as assignee of Young's interest in this claim, and in William D. Judson and Amos Tenney; and no part of this interest was in the plaintiffs, Edward G. Judson, William A. Tenney and Sutherland Tenney. Two alternative claims, each belonging to many persons, one of whom has no interest in one claim, and others of whom have no interest in the other claim, cannot be joined in one bill in equity.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JAMES J. O'REILLY ET AL., *Appts.*,
v.
JAMES W. CAMPBELL ET AL.

(See S. C. Reporter's ed. 418-423.)

Mining law—validity of conflicting claims—discovery, appropriation and development necessary—practice.

1. Where the record does not contain more, this court must take the findings of the trial court, as adopted by the court below, and determine the case on their sufficiency, considered in connection with the pleadings, to support the judgment.

2. It is a general rule that an objection to want of proof of a fact which might be met at once, must be taken at the trial or it will be considered as waived, except as to matters going to the jurisdiction.

3. Findings of fact are not construed with the strictness of special pleadings. It is sufficient if, upon a fair construction, enough appears, taken together with the pleadings, to justify the judgment, notwithstanding a want of precision and the occasional intermixture of matters of fact and conclusions of law.

4. Discovery and appropriation are the sources of title to mining claims, and development by working is the condition of continued possession.

5. The location of a vein or lode as running in a certain direction, not marked or developed for years but simply indicated by a notice, is invalid as against a claim subsequently located on ground different from that indicated, after the development of the latter claim without objection, although subsequent explorations by the first locators disclose the fact that their vein in its true course covers the subsequent claim.

[No. 83.]

Argued and submitted Dec. 4, 1885. Decided Jan. 11, 1886.

APPEAL from the Supreme Court of the Territory of Utah.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **J. G. Sutherland** and **John R. McBride**, for appellants.

Messrs. **S. Shellabarger** and **J. M. Wilson**, for appellees.

Mr. Justice **Field** delivered the opinion of the court: [419]

This action was commenced in one of the District Courts of Utah, and arose as follows:

The defendants, the owners of mining land in that Territory known as the Omaha lode, filed in 1877 a survey and plat of it in the land-office at Salt Lake City, and applied for a patent thereof under section 2325 of the Revised Statutes. The plaintiffs are the owners of adjacent mining ground known as the Highland Boy lode, and within the prescribed time after the commencement of proceedings for a patent, they filed an adverse claim to a portion of the land covered by the defendants' survey, embracing nearly three acres. To determine the right thereto this action was instituted. The district court gave judgment in favor of the plaintiffs for the disputed premises, with the exception of a fractional part of an acre; and the Supreme Court of the Territory affirmed the decision.

The district court found certain facts and conclusions of law upon which it based its judgment. The supreme court had before it these findings and also, by stipulation of the parties, a statement of the evidence prepared for a motion for a new trial in the lower court. This statement is not embodied in the record, nor [420] were any findings filed by the supreme court. Under the authority of *Stringfellow* v. *Cain*, 99 U. S. 610 [Bk. 25, L. ed. 421], we must, therefore, take the findings of the lower court as adopted by the supreme court and determine the case on their sufficiency, considered in connection with the pleadings, to support the judgment.

The objections of the appellants, for which they ask a reversal of the judgment, may be reduced to two: first, that the findings do not show that the plaintiffs are citizens of the United States; and second, that the findings of fact are

confused, insufficient and contradictory, and also mingled with conclusions of law, instead of being separately stated as required by the statute of Utah.

It is true that the mineral lands of the United States are open to exploration and purchase only by citizens of the United States, or by those who have declared their intention to become such; and had the objection been taken in the court below that such citizenship of the plaintiffs had not been shown, it might, if not obviated, have been fatal. There is, however, nothing in the record to show that it was raised below. Proof of citizenship, in proceedings of this kind, may consist, in the case of an individual, of his own affidavit thereof, and in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made upon his own knowledge, or upon information and belief. R. S. § 2321. The objection to the want of proof of that fact, if taken below, might have been met at once, if, indeed, the plaintiffs are citizens. The rule is general that an objection which might be thus met must be taken at the trial or it will be considered as waived, except as to matters going to the jurisdiction of the court. The parties to this controversy own adjoining claims, and it is probable that the citizenship of each was known to the other, and, therefore, no proof on the subject was required. Be that, however, as it may, the objection in actions of this kind cannot be taken in this court for the first time.

As to the findings, it is true they are not drawn with skill or precision; they are loose and somewhat confused. Facts and conclusions [421] of law are sometimes mingled together contrary to the direction of the statute, creating the impression that the findings were prepared under the pressure of other duties, and did not receive the necessary care and attention. But findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all, taken together with the pleadings, we can see enough upon a fair construction to justify the judgment of the court, notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law. Defects of form should be called to the attention of the trial court by the objecting party; and the requisite correction of the findings would seldom be denied.

The facts which appear to be sufficiently established are substantially as follows: in March, 1870, the Omaha mining claim was discovered by one M. R. Williams, and some prospecting was then done by him for the vein or lode. Notice of the location was posted at the time by him and eight others associated with him, and on the 24th of June following it was recorded in the records of the mining district. By it they claimed 2,000 feet along the lode, 1,000 feet in an easterly direction, and 1,000 feet in a westerly direction from the point at which they had a shaft. The claim was not marked on the ground until 1877, and until then it was not pretended that the vein or lode ran in any other course than east and west. But when the survey was made preliminary to the application for a patent, it was claimed that the vein ran northeast and southwest from the shaft. The vein or lode did not appear on the surface of the ground, but when its actual course was ascertained to be northeast and southwest, the survey was made to conform to it. The defendants have succeeded to the rights of the original locators; and it is found that in regard to work they and their grantors have complied with the mining laws of the district of the United States so as to entitle them to the ground as originally located and claimed.

In 1878 the plaintiffs and the parties through whom they derive their title discovered a vein or lode on unoccupied land of the United States, which they called the Highland Boy lode. During the year they made an ineffectual attempt to locate it; but it is found that the location "was perfected, made good and marked on the surface in 1874 and a record thereof made." Since then they have been continuously in the possession of it, working and developing it, and have expended upon it in labor and money several thousand dollars. At the time of its discovery and of its location in 1874, the defendants had not asertained the course of the vein or lode which they subsequently claimed to be covered by their Omaha location. When they ascertained it they made their survey in accordance with it, and included in it a portion of the claim taken up and located by the predecessors of the plaintiffs, embracing the premises in controversy. The court found that the plaintiffs or their predecessors in interest had complied with the law of the mining district and of the United States, and gave judgment in their favor.

The question is, therefore, whether the location of a vein or lode as running in a certain direction, but not marked on the surface for years nor developed but simply indicated by a notice, will be allowed to prevail against a claim subsequently located by another party on ground different from that thus indicated, after the latter has been developed by years of labor and large expenditures, without objection by the first locators, because subsequent explorations by them disclose the fact that their vein runs in a different direction from what they supposed, and in its true course covers the subsequent claim. We do not think that the first claimants under these circumstances can appropriate the second claim. It is true the locators of the Omaha claim intended to take the vein or lode, and were ignorant of its true direction. But it was incumbent upon them to make explorations and ascertain its true course, and indicate it in some public and visible manner, so that others might not be excluded from explorations on adjacent ground or be deprived of the benefit of their labor. It is a rule among miners on the public lands, so often brought to our attention and so often declared that we may speak of it as part of our judicial knowledge, that discovery and appropriation are the source of title to mining claims, and that development by working is the condition of their continued possession. *Jennison* v. *Kirk*, 98 U. S. 453-457 [Bk. 25, L. ed. 240, 242]; *Jackson* v. *Roby*, 109 U. S. 441 [Bk. 27, L. ed. 990]. This was the rule before Congress by its legislation sanctioned it. Four years after the defendants had made their location the predecessors of the plaintiffs took up the Highland Boy claim and for three years they or their successors continuously worked and expended money upon it without objection from the defendants or any

indication from them to the public that their own Omaha claim was at all interfered with. It was too late afterwards to raise the objection.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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GEORGE S. WELLS, ET AL., *Plffs. in Errr.*,
v.
JOSEPH WILKINS, Sheriff, etc.

Also five other similar actions against same defendant in error.

(See S. C. Reporter's ed. 393, 394.)

Jurisdiction—practice.

Where it appears only upon examination of affidavits and counter affidavits, filed by the respective parties, that the value of the property in dispute is less than $5,000 the writ of error will be dismissed.

[Nos. 657-662.]

Submitted Jan. 4, 1886. Decided Jan. 11, 1886.

IN ERROR to the Circuit Court of the United States for the Northern District of Florida.

Mr. **J. D. Thompson**, for plaintiffs in error.

Mr. **C. C. Yonge, Sr.**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

These are suits in ejectment, each for a separate and distinct part of a lot in Pensacola. A judgment was rendered in each case for the recovery of the premises sued for in that case. Neither the pleadings nor the evidence found in the records show the value of the property; but on suing out the writs of error the plaintiffs in error in each case filed two affidavits to the effect that the value was more than $5,000. Since the cases were docketed here, however, the defendant in error has filed counter affidavits which prove beyond all doubt that this is a mistake, and that the value in every one of the cases is very much less than our jurisdictional limit.

The writs of error are, consequently, all dismissed for want of jurisdiction.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

JAMES K. JOHNSON, WILLIAM J. CARO, EXR. of E. J. CARO, Deceased, ET AL., *Plffs. in Errr.*,
v.
JOSEPH WILKINS, Sheriff, etc.

(See S. C. Reporter's ed. 393, 394.)

Jurisdiction—practice.

It rests on the plaintiff in error to show the jurisdiction of this court; and where it does not appear, either from the record or by affidavits, that the value of the matter in dispute exceeds $5,000 the writ of error will be dismissed.

[No. 254.]

Submitted Jan. 4, 1886. Decided Jan. 11, 1886.

IN ERROR to the Circuit Court of the United States for the Northern District of Florida.

Mr. **J. D. Thompson**, for plaintiffs in error.

Mr. **C. C. Yonge, Sr.**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court: [393]

There is nothing in this record from which it can fairly be inferred that the value of the matter in dispute exceeds $5,000. The suit was ejectment, begun in a state court and removed to the Circuit Court of the United States, for a lot in Pensacola and the profits thereof since January 1, 1880, of the yearly value of $500. The value of the lot is not stated in any of the pleadings, but in the petition for the removal of the suit it is put at "more than $500." The recovery was of the lot and rent at $15 per month from January 1, 1880, until March 1, 1883, or $570 in all. If this rental is to be taken as an indication of the value of the property, it certainly must be less than our jurisdictional limit.

As it rests on the plaintiffs in error to show our jurisdiction, either from the record or by affidavits, and this has not been done, the writ of error is dismissed for want of jurisdiction.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

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[410]

EUREKA LAKE AND YUBA CANAL COMPANY (Consolidated), *Piff. in Errr.*,
v.
SUPERIOR COURT OF YUBA COUNTY AND PHILIP W. KEYSER, Judge of SAID COURT.

(See S. C. Reporter's ed. 410-418.)

Practice—motion to affirm united with motion to dismiss—service of papers, when on attorney of record.

1. Where, upon a writ of error to a state court, a federal question is raised here, and it is possible that its decision was necessarily involved in the judgment below, a motion to dismiss will not be sustained, although it may not appear affirmatively on the face of the record that such question was raised below.

2. Under the practice authorized by the Code of California, where an agent of a foreign corporation, which is charged with contempt in disobeying a legal order, willfully conceals himself to avoid service of an order to show cause why such corporation should not be adjudged guilty of contempt, service may be made upon its attorney of record.

[No. 907.]

Submitted Dec. 21, 1885. Decided Jan. 18, 1886.

IN ERROR to the Supreme Court of the State of California.

On motion to dismiss, with which is united a motion to affirm.

The history and facts of the case appear in the opinion of the court.

Mr. **A. L. Rhodes**, for defendants in error, in support of motions:

The statute, not the corporation, directs that service shall be made upon some person designated by the corporation. The statute may, with equal validity, declare that service may be made upon the attorney of the corporation.

Pennoyer v. *Neff*, 95 U. S. 714 (Bk. 24. L. ed. 565).

That service of the order to show cause may

be made upon the attorney, see *Golden Gate etc. Co.* v. *Superior Court*, 65 Cal. 187, 2 W. C. Rep. 737; *Pitt* v. *Davidson*, 37 N. Y. 239; *Albany Cy. Bank* v. *Schemmerhorn*, 9 Paige, 372.

Mr. **W. W. Cope**, for plaintiff in error, *contra:*

1. The Supreme Court of California necessarily decided that service upon the attorney of the Corporation was sufficient to give the court jurisdiction. Such service was not due process of law within the meaning of the Constitution of the United States, but was an attempt to deprive the Corporation of its property, in violation of the prohibition of section 1 of the Fourteenth Amendment to the Constitution.

This being so this court has jurisdiction under section 709 R. S.

The Supreme Court of California, in the case on which its decision in this case is based, *Golden Gate Consolidated Hydr. Mining Co.* v. *Superior Court*, 65 Cal. 187, holding that service upon the attorney is sufficient to give the court jurisdiction to punish for a contempt, says: "The defendant in the action had intrusted its attorneys with the protection of its interests and the defense of its rights. We can see no abuse of authority on the part of the court in directing that the order to show cause should be served on an attorney, since it was made to appear that the defendant, by reason of its own acts, could not be served personally. The process was suitable, and the mode adopted by the court conformable to the spirit of the Code."

Golden Gate Consolidated Hydr. M. Co. v. *Superior Court*, 65 Cal. 187-192.

This is unquestionably in violation of the Fourteenth Amendment to the Constitution.

The authority of the attorneys of the Company only extended to the civil case and not to any criminal or quasi criminal proceedings that might arise out of it.

New Orleans v. *Steamship Co.* 20 Wall. 392 (87 U. S. bk. 22, L. ed. 357); *Baltimore etc. R. R. Co.* v. *Wheeling*, 13 Gratt. 57; *Pitt* v. *Davison*, 37 Barb. 109, 110; Wells, Jurisdiction of Courts, § 193.

The offenses for which judgment was rendered in the cases now before the court were, in their nature, criminal contempts, as defined by the authorities.

Rapalje, Contempts, §. 21, citing, *Ex parte Edwards*, 11 Fla. 184; *Matter of Watson*, 3 Lans. (N. Y.) 408; *People* v. *Cowles*, 4 Keyes (N. Y.) 46; *Hawley* v. *Bennett*, 4 Paige, Ch. 163; *People* v. *Spaulding*, 10 Paige, Ch. 284; *Philipps* v. *Welch*, 11 Nev. 187.

In a proceeding to punish for a criminal contempt in violating the injunction, the Superior Court of Yuba County could only obtain jurisdiction of the plaintiff in error by service of the order to show cause, upon some one of its agents or officers. The attorney in the original action is not such agent or officer. His authority extends only to the conduct of the proceedings in the civil case; and he in no respect represents the contemner in the criminal proceeding, which is, as we have seen, wholly different and distinct from the other.

It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights.

Stuart v. *Palmer*, 74 N. Y. 190.

Due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature.

Weimar v. *Brueinburg*, 30 Mich. 201; *Stuart* v. *Palmer*, 74 N. Y. 190.

The court will hardly consider the question a frivolous one; and there being no color of right to a dismissal, the motion to affirm must be denied, under the rule laid down in *Whitney* v. *Cook*, 99 U. S. 607 (Bk. 25, L. ed. 446).

Mr. Chief Justice **Waite** delivered the opinion of the court:

The record in this case shows that the Eureka Lake and Yuba Canal Company (Consolidated) is a New York corporation doing business in California; and that in or about the month of March, 1880, the Company filed in the office of the Secretary of State of California an instrument designating and appointing "David Cahn, of 205 Sansome Street, in the City of San Francisco, * * * as the person upon whom process issued by authority of or under any law of the State of California may be served, and all process served upon said David Cahn will be valid and binding upon said Corporation." This was done in compliance with an Act of the Legislature of California, entitled "An Act in Relation to Foreign Corporations," approved April 1, 1872. On the 3d of October, 1882, the County of Yuba brought suit against the Corporation in the Superior Court of that County to enjoin the Corporation from depositing or suffering to flow into the channel or bed of the Yuba River, or any of its tributaries, "the tailings from its hydraulic mines, or the earth, sand, clay, sediment, stones or other material discharged from its said mines;" and from selling to others any water to be used in hydraulic mining. Immediately upon the bringing of the suit an *ex parte* restraining order was entered by the court in accordance with the prayer of the complaint. Process in the suit and a copy of the restraining order were served on Cahn November 9, 1882. On the 5th of December a motion was made to set aside this service. This motion was denied December 23, and on the 17th of January the Corporation, by James K. Byrne and W. C. Belcher, its attorneys, filed a demurrer to the complaint. On the 20th of January an order was entered requiring the Corporation to show cause, February 2, why it should not be punished for a contempt of court in disobeying the injunction. Service of this order was directed to be made on Bigelow, the managing agent of the Company, or on Cahn, the designated agent for the service of process. This service was not made, on account of the absence of Cahn in the City of New York, where the Company had its principal place of business. Thereupon, the time for showing cause was changed to March 24, and service of an order to this effect was made on Cahn March 5. After this service the Corporation appeared by its attorneys and moved to set aside the order to show cause, on the ground, among others, that Cahn was not on

the 5th of March, "and had not been for more than one month prior thereto," the person designated by the Corporation as its agent for the service of process. Upon the hearing of this motion, it appeared that the appointment of Cahn as process agent had been revoked and Bigelow put in his place. Such being the case, a further order was entered requiring like cause to be shown April 23, and efforts were made to serve this order on Bigelow, who was the only person in the State on whom process against the Corporation could be served. Bigelow resided at the mines, and the record shows clearly that he purposely kept himself out of the way of the officer to avoid service. No service was, therefore, made on him; and upon the return of the facts, supported by affidavits, May 14 was fixed by the court as the time for the hearing, and an order was entered that service be made upon "the attorneys of record herein of said defendant." This service was effected. At the return day the attorneys of the defendant, appearing specially for that purpose, moved to set aside the order to show cause: 1, because the restraining order was void, the court having "no jurisdiction of the person of the defendant at the time the said order was made and issued;" 2, because the "judge who made the same was, at the time the same was made, disqualified by law to make the said order;" 3, because the order "was granted without due notice, or any notice whatever, to the proper officer, or any officer or officers, or to the managing agent, or any agent of said corporation, of the application therefor;" 4, because the restraining order was "never served on the defendant;" and, 5, because the order to show cause was "never served upon the defendant." This motion was overruled; and thereupon the Corporation not appearing, "by attorney or otherwise, to show cause * * * in relation to said contempt," but making default "in said matter of contempt," a hearing was had "upon said order to show cause, and said affidavits and the records and papers in said court and action;" and the Corporation was adjudged to be guilty of contempt, and to "pay a fine to the people of the State of California in the sum of $250 as a punishment for such contempt, and that execution issue in the name of the people of the State of California against said defendant therefor."

On the 20th of July, 1883, the Corporation filed in the Supreme Court of the State a petition for review, on the ground that "In entering said order of injunction, and in assuming thereafter to adjudge the petitioner guilty of contempt for its alleged violation of said order, the said Superior Court of said County of Yuba, and the said Judge thereof, exceeded the jurisdiction thereof." Upon this petition the orders of the Superior Court were affirmed; and to reverse that judgment this writ of error was brought.

It does not appear affirmatively on the face of the record that the orders of the Superior Court were objected to in the supreme court on the ground that in the absence of personal service of the order to show cause on some officer or authorized agent of the Corporation, the judgment in the contempt proceeding was without due process of law and therefore contrary to the Fourteenth Amendment of the Constitution of the United States; yet that point is made here, and it is possible its decision was necessarily involved in the final order that was made. For this reason the motion to dismiss is overruled; but there was sufficient color of right to a dismissal to warrant uniting a motion to affirm with the motion to dismiss; and on consideration of that motion we are entirely clear the case ought not to be retained for further argument. Section 187 of the Code or Civil Procedure in California is as follows:

"When jurisdiction is, by the Constitution of this Code or by any other statute, conferred on a court or judicial officer, all the means to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specially pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

Under this statute the courts of California hold that "when a party charged with contempt in disobeying a legal order willfully conceals himself to avoid service of an order to show cause why he should not be adjudged guilty of contempt, the court is not powerless to proceed or to prevent the continued disregard of its lawful order," but may order, as justice shall require, after due service of an order to show cause, on the attorneys of the party proceeded against. In *Golden Gate Consolidated Hydr. M. Co.* v. *Superior Ct.* 65 Cal. 192, the supreme court said: "The defendant in the action (a corporation) had intrusted its attorneys with the protection of its interests and the defense of its rights. We can see no abuse of authority on the part of the court in directing that the order to show cause should be served on an attorney, since it is made to appear that the defendant by reason of his own acts could not be served personally. The process was 'suitable,' and the mode adopted by the court 'conformable to the Code.'" The good sense of this rule is manifest. A corporation can only be served with process through some officer or agent. It is certainly competent for a State to determine who this officer or agent shall be, or how he shall be designated by the corporation. In California a foreign corporation is required to make such a designation, and to give public notice thereof by filing the instrument of designation in the office of the Secretary of State. After this suit was begun this agency was changed by this Corporation, and the person designated, instead of being located at San Francisco where he could be easily found, was at the mines. This change was made after the service of the injunction on the former agent, and after the court had determined that service upon him was sufficient to bring the Corporation into court. It was also made after the corporation had been guilty, as was alleged, of a violation of the injunction, and after an attempt had been made to serve an order to show cause on Cahn, the old agent. The new agent was to be found only at a place difficult of access, and even there he kept himself concealed from the officer who had been charged with the duty of making the service. As he was the only person in the State on whom process could be served, his concealment to avoid service was in law the concealment of

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the Corporation itself, and the court was left free to act accordingly.

By section 1209 of the Code of Civil Procedure of California "disobedience of any lawful judgment, order, or process of the court" is declared to be a contempt of the authority of the court. As was said by this court in *Re Chiles*, 22 Wall. 168 [89 U. S. bk. 22, L. ed. 822], the exercise of the power to punish for contempt "has a twofold aspect, namely: first, the proper punishment of the guilty party for his disrespect to the court or its order; and second, to compel his performance of some act or duty required of him by the court, which he refuses to perform." This being the case, to deny the court the power of calling on a concealed corporation through its chosen attorney of record in a suit to appear and answer to a charge of contempt for disobeying the orders of the court duly entered in that suit, would be to deny it the power of vindicating its authority and enforcing obedience to its lawful commands against a party personally subjected to its jurisdiction. Although the proceeding may be [418] criminal in its nature, it grows out of the suit to which the person proceeded against is a party and actually represented by an attorney. Ordinarily a corporation has, in such a case, a right to service of an order to show cause upon some officer or agent, but if its officers or agents keep themselves out of the way for the express purpose of avoiding such a service, it cannot justly complain if service on its attorney is made the equivalent of that which its agents by their wrongful acts have made impossible. The same principle applies here that governed this court in *Reynolds* v. *U. S.* 98 U. S. 158 [Bk. 25, L. ed. 247], where it was held that although the Constitution gives an accused person the right to a trial at which he shall be confronted with the witnesses against him, yet, if a witness was absent by his own wrongful procurement, he could not complain if competent evidence was admitted to supply the place of that which he kept away. It was said the Constitution "grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away he cannot insist on his privilege." So here the Corporation was perhaps entitled to service on its officers or agents; but as this was prevented by their wrongful acts, the privilege cannot be insisted upon.

The motion to dismiss is denied, but that to affirm is granted.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[394]

GEORGE P. HUNT, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 394-398.)

Naval officers — promotion — construction of statute.

1. Under the Act of June 16, 1862, if a naval officer is delayed in his promotion because he has not been examined, owing to absence on duty, he is entitled when promoted to the increased pay of the new grade from the time when his examination should have taken place.

2. Under the law and regulations, although a first assistant engineer becomes eligible to examination and promotion when he has served two years at sea, he is not entitled to examination until his turn for promotion has arrived, or nearly so.

[No. 869.]

Submitted Jan. 4, 1886. Decided Jan. 18, 1886.

APPEAL from the Court of Claims.

Statement by *Mr. Justice* **Woods:**

George P. Hunt, the appellant, a chief engineer in the navy, brought this suit in the court of claims to recover a balance of pay due him, as he alleged, from the United States.

The facts were as follows: on October 25, 1868, the appellant was a first assistant engineer in the United States Navy, and had served in that grade two years at sea on board a naval steamer. At the date mentioned there was no vacancy in the grade of chief engineer to which the appellant could be promoted; nor did any such vacancy occur until July 4, 1880. On October 11, 1880, he was ordered to report for examination for promotion to the grade of chief engineer, and upon examination was found qualified, and on December 29, 1880, was promoted to the grade of chief engineer and received the pay of that grade from July 4, 1880. From October 25, 1868, to July 4, 1880, the appellant received the pay and emoluments of a first assistant engineer only. He claimed that for the period between the two dates just named he was entitled to the pay of chief engineer, and brought his suit to recover for that period the difference between the pay and emoluments of a first assistant engineer and of a chief engineer. The court of claims dismissed his petition, and he appealed.

Mr. **Charles F. Benjamin,** for appellant.

Mr. **John Goode,** *Solicitor-Gen.*, for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

It appears from the findings of the court of claims that from October 25, 1868, to July 4, 1880, there was no vacancy in the grade of chief engineer to which the appellant could have been promoted even had he been examined and found qualified. His position in this suit is, therefore, that he is entitled to the pay of an office for a period during which he did not hold and was not entitled to hold it, and did not perform its duties. He insists that as soon as he had performed two years' service at sea he had a right to be examined for promotion; and when examined and promoted nearly eleven years afterwards, was entitled to the pay of the grade to which he was promoted from the time when his two years' service at sea was completed. The law to support such a claim should be clear.

If the appellant is entitled to any of the increased pay claimed, the time for which it should be computed is cut short by the Act of June 22, 1874, the first section of which is as follows: "That on and after the passage of this Act any officer of the navy who may be promoted in course to fill a vacancy in the next higher grade, shall be entitled to the pay of the grade to which promoted from the date he takes rank therein, if it be subsequent to the vacancy he is appointed to fill." This section

clearly cuts off by implication any increase of pay until promotion. So that, if it be conceded that the section could not have any retroactive effect, it at least limits the right of the appellant to any increase of pay to the period between October 25, 1868, when his two years' service at sea was completed, and the passage of the Act.

The claim of the appellant to the increased pay is based on section 16 of the Act of July 16, 1862, entitled "An Act to Establish and Equalize the Grade of Line Officers of the United States Navy," (chap. 183, 12 Stat. at L. 569) which provides: "That whenever any officer of the navy of a class subject by law or regulation to examination before promotion to a higher grade shall have been absent on duty at the time when he should have been examined, and shall have been found qualified at a subsequent examination, the increased rate of pay to which he may be entitled shall be allowed to him from the date when he would have received it had he been found qualified at the time his examination should have taken place."

The Navy Regulations in force in 1867 provided as follows:

"Section 264. Candidates for promotion to the grade of chief engineer must have served at least two years at sea as first assistant engineers on board a naval steamer."

It is clear, upon the face of this statute and regulation, that the appellant has not maintained his suit. He does not aver in his petition, and it is not found by the court of claims, "that he was absent on duty at the time when he should have been examined." Neither does it appear that at any time after the expiration of his two years' service at sea, on October 25, 1868, down to the time of his examination on October 11, 1880, he was absent on duty. Even, therefore, upon his own construction of the statute, he does not bring himself within its terms as one entitled to the pay which he sues to recover.

But we are of opinion that it is an unwarranted construction of the statute and regulation to hold that, as soon as a first assistant engineer has served two years at sea on board a naval steamer, he is entitled as a matter of right to an immediate examination, whether there is a vacancy in the next higher grade to which he could be promoted or not; and if his examination is delayed by his absence on duty he can, when examined and promoted, demand the pay of a chief engineer from the time when he had completed his two years' service at sea. We think the law was properly construed by Mr. Wells, Secretary of the Navy, in his letter of May 12, 1864, to the Fourth Auditor, in which he said: "There may be some obscurity in the wording of the sixteenth section of the Act of July 16, 1862; but the evident and sole purpose of the law is to prevent an officer from being deprived by absence on duty of the increased pay which promotion would have given him." In other words, the meaning of the law is that if an officer is delayed in his promotion because he has not been examined, and his examination has been delayed by his absence on duty, he shall, when promoted, have the increased pay of the new grade, to begin from the time when his examination should have taken place.

Under the law and the regulations a first assistant engineer became eligible to examination for promotion when he had served two years at sea upon a naval steamer. But he was merely eligible. He was not entitled to be examined until his turn for promotion had arrived, or was near at hand. In no event, therefore, could he demand that the increased pay of his new grade should begin until he had a right to be examined for promotion.

It appears that under a misconstruction of the law a practice grew up in the navy department by which promoted officers were allowed the pay of their new grade from the time when they were eligible for examination. But this was corrected by the Secretary of the Navy in 1877, who recommended that the increased pay of a promoted officer should be allowed only from the time when a vacancy occurred to which he could have been promoted if an opportunity for examination had been given him. [398]
In our opinion this recommendation was based on a correct construction of the statute.

We see no reason why a practice unwarranted either by law or the regulations of the navy, and which had been discontinued for eight years, should be revived and given effect in this case.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *Appt.*, [398]
v.
JOHN H. WALLACE.

(See S. C. Reporter's, ed. 398-401.)

Fees of commissioner of circuit court—sections 847 and 828 R. S.

Under section 847 R. S., a commissioner of a circuit court, when required to keep a docket of warrants issued and proceedings thereon, is entitled to the same fees allowed to the clerk under section 828 R. S., the service being like that of the clerk although the entries may differ.

[No. 988.]

Submitted Jan. 4, 1886. Decided Jan. 18, 1886.

APPEAL from the Court of Claims.

Statement by *Mr. Justice* **Matthews**:

The judgment appealed from in this case was rendered in favor of the appellee, who was [398]
plaintiff below, for the sum of $1,032, upon the following finding of facts reported by the court of claims:

I. The claimant, John H. Wallace, was a Commissioner of the Circuit Court of the United States for the Southern District of Alabama, from January 16, 1882, to November 22, 1883.

II. October 4, 1881, the Circuit Court of the United States for said district, in compliance with a request by the Attorney-General, made an order requiring, among other things, that each of the commissioners of said court should keep a docket, in which he should enter on the day the transaction should occur the issuance of each warrant, the name of the person upon whose complaint and request the same was issued, the nature of the offense, and the name of the officer to whom the warrant was delivered for service, together

[399] with the proceedings had under said warrant, that there should also be entered therein the names of the witnesses present and examined and their fees; the name of the guard, if any, and his fees; and also the marshal's and deputy marshal's fees, together with the milage and expenses allowed by law; and the said order was continued of force.

III. From the said January 16, 1882, to November 22, 1883, petitioner, as such commissioner, issued warrants in three hundred and seventy-six cases, in three hundred and twenty-eight of which issue was joined and testimony taken, and in forty-eight of which issue was not joined, the defendant was discharged, and no testimony taken; and he duly made his docket entries in each and in all of said cases as required by said order.

IV. His accounts for fees for keeping said docket were duly verified by oath and presented to the said court, in presence of the district attorney, and approved by the court; and an order approving the same as being in accordance to law and just, duly entered upon the records of the said court. In said accounts, as approved by the court, he was allowed a fee of $3 in each case where issue was joined and testimony taken, and $1 where issue was not joined and the defendant was discharged.

V. His accounts therefor were duly presented for payment to the accounting officers of the Treasury, together with the order of court approving the same, and payment thereof was refused by them.

Mr. **John Goode,** *Solicitor-Gen.*, for appellant.

Messrs. **Charles C. Lancaster** and **Charles E. Mayer,** for appellee.

[390] *Mr. Justice* **Matthews** delivered the opinion of the court:

It is provided in section 847 R. S. regulating the fees of commissioners:

"For issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services."

Section 828 R. S. provides that the clerk be [400] allowed:

"For making dockets and indexes, taxing costs, and all other services on the trial or argument of a cause where issue is joined and testimony given, $3."

And, "For making dockets and indexes, taxing costs and and other services in a cause which is dismissed or discontinued, or where judgment or decree is made without issue, $1."

It was not disputed by the accounting officers of the Treasury Department nor by the Solicitor-General in argument, that the commissioner was legally bound under the order of the circuit court to render the services charged for in keeping the dockets required, nor that he is entitled to compensation therefor. But it is insisted that he ought not to be allowed the compensation demanded, because the services rendered in keeping his docket are not in all particulars like services to those rendered by clerks in keeping dockets, and that, consequently, his compensation is fully covered by paragraph 8 of section 828, which allows for making entries "for each folio, fifteen cents."

This view is met by the court of claims in the following extract from its opinion:

"The phrase 'like services' does not necessarily mean identical with; for by such a construction the compensation allowed to commissioner 'for any other service' would be defeated because of the subject matter of the duties of the commissioner and the clerk being somewhat different; but the statute must receive a reasonable construction, and where the service of the clerk bears a substantial resemblance to the duty performed by the commissioner, then, under section 847, the commissioner would be entitled to the compensation allowed by law to the clerk, it being in legal substance a 'like service.'"

The compensation of fifteen cents for each folio, supposed to embrace this service, is given "for entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond, or making any record certificate, return or report." Clearly, this service has no likeness to that of keeping a docket; while the keeping of a docket by the commissioner is a like service to the keeping of a docket by the clerk, although the docket entries to be made by each may differ.

The judgment of the Court of Claims is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

Ex Parte:

In the Matter of the PETITION of L. D. BROWN AND LEANDER HOLMES, *Petitioners.*

(See S. C. Reporter's ed. 401, 402.)

Mandamus—*jurisdiction.*

1. *Mandamus* lies to compel a court to take jurisdiction in a proper case, but not to control its discretion.

2. A judgment of an inferior court, dismissing a case for want of due prosecution, can only be reviewed by this court by writ of error or appeal.

[Original.]

Submitted Jan. 13, 1886. Decided Jan. 18, 1886.

ON motion for leave to file petition for a writ of *mandamus.*

On July 10, 1884, the petitioners commenced an action of ejectment against one William Rank, in the District Court of the Second Judicial District of Washington Territory, to recover sixty-four acres of land. The court having overruled their demurrer to the defendant's answer, the plaintiffs appealed to the supreme court of the Territory. That court sustained a motion to dismiss the appeal, upon the ground that the action was at law and could only be examined on writ of error upon a proper assignment of errors under the rules of the court.

The petitioners now pray that a peremptory *mandamus* may issue, directed to the Supreme Court of Washington Territory and to the Justices thereof, commanding them to set aside the order dismissing said appeal and to reinstate said appeal and hear and decide said cause on its merits.

Mr. **Leander Holmes,** for petitioners, in support of motion.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. According to the petition, the court entertained jurisdiction of the cause, but dismissed it for want of due prosecution; that is to say, because errors had not been assigned in accordance with the rules of practice applicable to the form of the action. This is a judgment which can only be reviewed by writ of error or appeal, as the case may be. *Mandamus* lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction. This rule is elementary. *Ex parte Morgan, ante* 135, and cases cited.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNION PACIFIC RAILWAY COMPANY, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 402–404.)

Practice—second appeal from court of claims—record.

Upon a second appeal from the court of claims the findings of fact at the first trial and the original petition, an amended petition having been substituted therefor, form no part of the record.

[No. 1034.]

Submitted Jan. 11, 1886. Decided Jan. 18, 1886.

APPEAL from the Court of Claims.

On motion for a writ of *certiorari*.

This case was commenced in the court below by three distinct petitions. This court having, on a former appeal, reversed a judgment against the Company in one of the cases, *Union Pacific R. R. Co.* v. *U. S.*, Bk. 26, 884, they were consolidated and an amended petition filed as a substitute for the original petitions. The original petition in the case, which was here on the former appeal, set forth as an exhibit a certain letter to the Postmaster-General; and the findings of fact on the first trial referred to the letter as forming a part of the petition. The letter was not made a part of the amended petition, nor referred to in the findings of fact on the second trial.

The appellant now prays that the findings of fact on the first trial, and particularly the said letter, be considered a part of the record on this appeal; and that, if necessary, a writ of *certiorari* issue under Rule 14 to the court of claims, requiring the transmission of said findings and letter; and that under Rule 30, the motion, heretofore filed at this term by the appellant for a further finding of facts by said court, and the order of this court thereon, be reheard, if necessary, in order to make said letter a part of the record on this appeal.

Messrs. **John F. Dillon, J. M. Wilson and S. Bartlett,** for appellant.

Mr. **John Goode,** *Solicitor-Gen.*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. The findings of fact [403] on the first trial in the court of claims have not, under our rules, any place in this record. Those findings were set aside when the judgment thereon was reversed and the cause remanded for a new trial. On this appeal we consider only the findings at the second trial.

The original petition filed in the court of claims contained by reference the letter of September 1, 1876. In the amended petition, on [404] which the last trial was had, this letter was omitted. It is not, therefore, any part of the record on this appeal. We decided on the former motion, to send the case back for further findings, that it could not now be brought here as part of the evidence, and that it was not the proper subject of a special finding. We see no reason to reconsider that decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNITED STATES, *ex rel.* ROBERT CARRICK, *Plff. in Err.* [423]
v.
LUCIUS Q. C. LAMAR, Secretary of the Interior.

(See S. C. Reporter's ed. 423–427.)

Mandamus—*control of public officers in matters of discretion.*

1. In matters which require the exercise of judgment and consideration by an executive officer of the government, or which are dependent upon his discretion, no rule for a *mandamus* to control his action will issue.

2. Whether Arsenal Island, situated in the Mississippi River opposite St. Louis, is open to preemption and settlement, and should therefore be surveyed, is a matter of doubt and within executive judgment or discretion.

[No. 1191.]

Argued Jan. 6, 1886. Decided Jan. 18, 1886.

IN ERROR to the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court.

Mr. **W. Willoughby,** for plaintiff in error.

Mr. **John Goode,** *Solicitor-Gen.*, for defendant in error.

[423]

Mr. Justice **Field** delivered the opinion of the court:

This case comes before us on writ of error to the Supreme Court of the District of Columbia. The petitioner applied for a writ of *mandamus* against the Secretary of the Interior to order the survey of Arsenal Island, which is situated in the Mississippi River, opposite the [424] City of St. Louis. He represents that he is the head of a family, over twenty-one years of age, and a citizen of the United States; that on the first of September, 1883, he made a settlement in person on the island; that it contains about 280 acres, is ten feet above high water mark, is not subject to overflow, is suitable for agricultural purposes, and subject to preemption under the laws of the United States; that he inhabited and had improved the land and erected

a dwelling house thereon for the purpose of obtaining a title thereto; that the land is not mineral, has not been reserved by the Government and has never been surveyed; that there are no improvements on it except such as have been placed by him, and that the General Government has constructed certain embankments and walls, so that the island is now fast and anchored, and not liable to be changed by the action of the river.

He further states that in September, 1883, for the purpose of obtaining a survey of the island, in order that he might avail himself of the rights he had acquired as such settler he made application, in writing, according to the rules of the Interior Department, to the Commissioner of the General Land-Office for such survey, stating that the island had never been surveyed by the Government, and that he was desirous that it should be brought into the market according to the laws of Congress and the regulations of the General Land-Office relating to the disposal of lands embraced in fragmentary surveys.

He further states that upon the hearing of the application it was claimed by the City of St. Louis that the island was formerly known as the Quarantine Island, and had been surveyed and set apart to the city under the provisions of Acts of Congress of June 13, 1812, and of May 26, 1824, relating to school lands; but that in fact the survey made was of an island above the place now occupied by Arsenal Island, and that no part of the space embraced by that survey is now covered by the present island; and in support of this averment he states that the report made to the Secretary [425] of the Interior by the engineer of the War Department, in charge of the government works in the vicinity, shows that the island is not embraced within that survey, and is the property, not of the City of St. Louis, but of the United States.

The Commissioner of the General Land-Office rejected the application, but transmitted the papers to the Secretary of the Interior for his examination and instructions. The immediate predecessor of the present secretary concurred with the commission. Upon the defendant's accession to office the application was renewed and rejected. The present petition was then laid before the Supreme Court of the District, which refused the rule upon him. To reverse its judgment and obtain the rule prayed, the case was brought here.

The former secretary in his opinion adverted to the drifting character of the island, it being alleged to have changed 1,700 feet from its position when surveyed; to the works of the Government to stay its drifting and give it permanence; and to the title asserted to it by the City of St. Louis. He said that, even during the time of a survey, what would be a monument and a boundary to-day might require a change to-morrow, and that, therefore, as long as the same causes continued to operate and make the island a mere moving mass of alluvial deposits, it was useless to establish corners and monuments, which would be subject to immediate obliteration.

The application to the present Secretary was accompanied by evidence tending to show that the island was fast and anchored; a review of the previous decision being sought on the alleged ground of error in holding the island to be a moving mass of alluvial deposits. The secretary declined to review the decision, and further held that it would be improper to order a survey, inasmuch as the War Department, under appropriations for the improvement of the river, was operating upon the island, and it was unknown to what extent or for what purpose the Government might require the same in connection with the great public work about which it was engaged.

Without treating the matters set forth in the opinions of the secretaries as established facts, enough appears on the face of the petition to show that a survey could not properly have been ordered, and that there was no error in refusing a rule for a *mandamus*.

It appears that, under Acts of Congress, an island situated some distance above the site of the present island was surveyed and set apart to the City of St. Louis. It is contended that the present island represents the one surveyed; it having been carried down the river by the action of the current. It certainly would be a matter of doubt, requiring for its solution grave consideration, how far the title of the city to the island is affected by this movement. If any doubt may rightfully exist in the mind of the secretary on the subject, an answer is furnished to the application for a *mandamus* directing him to order a survey to facilitate the acquisition of that title by others.

It also appears by the petition and the papers to which it refers, and the legislation of Congress, that the Government is engaged in works, connected with the improvement of the river, to stop the drifting character of the island and give it stability and permanence. Expenditures largely exceeding any possible return from the sale of the island would seem to indicate that the Government designs to appropriate it to special uses, and not to open it to preemption and settlement. In the absence of positive enactment the secretary might, therefore, properly withhold any action tending to encourage a settlement there. This consideration alone is sufficient answer to any rule for a *mandamus*.

It is settled by many decisions of this court that in matters which require judgment and consideration to be exercised by an executive officer of the Government, or which are dependent upon his discretion, no rule for a *mandamus* to control his action will issue. It is only for ministerial acts, in the performance of which no exercise of judgment or discretion is required, that the rule will be granted. *Decatur* v. *Paulding*, 14 Pet. 499 [39 U. S. bk. 10, L. ed. 560]; *United States* v. *Guthrie*, 17 How. 284 [58 U. S. bk. 15, L. ed. 102]; *U. S.* v. *Comr.* 5 Wall. 563 [72 U S. bk. 18, L. ed. 692]; *Litchfield* v. *Register and Receiver*, 9 Wall. 577 [76 U S. bk. 19, L. ed. 682].

Within this principle there can be no question as to the correctness of the action of the Supreme Court of the District. Its judgment is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court. U. S.

JOHN F. FLETCHER AND WILLIAM WESENBERG, *Plffs. in Err.*,

v.

HAMLET, BLISS & ELLIOT.

(See S. C. Reporter's ed. 408-410.)

Practice—construction of rule as to removal of causes.

1. Cases advanced under section 3 of Rule 32 are to be submitted on printed briefs or arguments after service of notice and brief or argument.
2. A joint cause of action cannot be removed by the defendants, unless all join and all are citizens of different States from the plaintiffs. The loss by one of his right of removal affects all.
3. A suit in a State Court of Louisiana, begun by service of process on a firm through one of its members, is not so changed in character as to make it a new suit by the subsequent service of process on another member of the firm.

[No. 1157.]

Submitted Dec. 1, 1885. Decided Jan. 18, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

Motion by defendants in error to dismiss or affirm.

The history and facts of the case appear in the opinion of the court.

Mr. **B. F. Forman**, for defendants in error, in support of motion:

The application to remove was not made at the first term at which the cause could have been tried.

Babbitt v. *Clark*, 103 U. S. 606 (Bk. 26, L. ed. 567); *Pullman Palace Car Co.* v. *Speck*, and *Gregory* v. *Hartley*, 113 U. S. 87, 742 (Bk. 28, L. ed. 926, 1150).

There can be no removal after a hearing on demurrer.

Alley v. *Nott*, 111 U. S. 472 and *Scharff* v. *Levy*, 112 U. S. 711 (Bk. 28, L. ed. 491, 825.)

All of the defendants must join in the removal and remove the whole suit.

Chambers v. *Holland*, 11 Fed. Rep. 209; *Barney* v. *Latham* and *Blake* v. *McKim*, 103 U. S. 205, 206 (Bk. 26, L. ed. 514, 563); *Girardey* v. *Mure*, 3 Woods, 402.

The right of removal is given to plaintiffs or defendants collectively.

Louisville & N. R. R. Co. v. *Ide*, and *Pirie* v. *Tvedt*, (*ante*, 63, 331).

Messrs. **Edgar H. Farrar** and **Ernest B. Kruttschnitt**, for plaintiffs in error, *contra*.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error brought under section 3 of the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137, for the review of an order of the circuit court remanding a case which had been removed from a state court. It has been advanced under Rule 32, and is now for hearing on its merits. In submitting the case the defendants in error treat the rule as though it required a motion to dismiss or affirm. Such is not the proper practice. Cases advanced under section 3 of Rule 32 are to be submitted like motions to dismiss under Rule 6; that is to say, on printed briefs or arguments after service of notice and brief or argument, as required by section 4, Rule 6.

The facts are these: Hamlet, Bliss & Elliot, citizens of Alabama, brought suit in the Civil District Court of the Parish of Orleans, on the 17th of March, 1883, against the commercial firm of Fletcher, Wesenberg & Co., doing business in New Orleans, Louisiana, and composed of John F. Fletcher, Thomas O'Conner, William Wesenberg and George M. Fletcher. Service of citation was made on the firm and William Wesenberg through Wesenberg in person, April 6, 1883. This was good service on the firm, and according to the laws of Louisiana a judgment in the action would bind Wesenberg personally, and the assets of the firm and of the other members of the firm in Louisiana. On the 6th of April Wesenberg appeared and filed exceptions to the petition on his own behalf and on behalf of the firm. These exceptions, which involved the merits of the case, were sustained in the district court April 17, 1883, but on appeal to the supreme court the judgment of the district court was reversed, and the cause remanded for further proceedings. Wesenberg then filed an answer for himself and for the firm, May 22, 1884. On the 4th of June, 1884, process was issued and served on John F. Fletcher. The effect of this was to bring Fletcher into the suit so as to bind him personally by a judgment in the action as well as his property in Louisiana. On the 17th of June Fletcher filed exceptions individually and on behalf of the firm. These exceptions were referred to the merits November 28, 1884, and Fletcher then filed his answer. The case was set down for trial December 4, 1884, but not being reached was ordered to be continued until the next jury term.

A term of the court began on the first Monday in November, 1884, and it continued until the third Monday in July, 1885. For convenience, different weeks in the term were set apart for jury trials. These weeks, occurring at intervals during the term, were often referred to as jury terms.

On the 5th of February, 1885, Wesenberg and John F. Fletcher joined in a petition for the removal of the suit to the Circuit Court of the United States for the Eastern District of Louisiana, on the ground that they were citizens of Tennessee and the plaintiffs citizens of Alabama, and that the suit involved a controversy wholly between citizens of different States. When the case was entered in the circuit court it was remanded. To reverse that order this writ of error was brought. [410]

It is conceded that the suit was not removable when the petition for removal was filed, unless the service of process on Fletcher on the 4th of June so changed the character of the litigation as to make it substantially a new suit begun that day. In our opinion such was not the effect of the new process. The suit was begun when process was served on Wesenberg and the firm. If judgment had been rendered against the defendants at any time after that it could have been enforced against Wesenberg personally and against all the property of the firm and of the individual partners in Louisiana. The cause of action is joint. There is no separable controversy in the case. There can be no removal by the defendants unless they all join and all are citizens of different States from the plaintiffs. Confessedly Wesenberg lost his right to a removal by failing to make the application in time, and as Fletcher cannot take

the case from the state court unless Wesenberg joins with him, it follows that he is subjected to Wesenberg's disability.

The order to remand is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

{404}

JAMES GIBBONS, *Appt.*,
v.
DISTRICT OF COLUMBIA

(See S. C. Reporter's ed. 404-408.)

Church property—exemption of, from taxation in District of Columbia—power of Congress.

1. Lands owned by a religious corporation or society in the District of Columbia, which are neither actually occupied for a church building nor reasonably needed and actually used for the convenient enjoyment of such building as a church, are not exempt from taxation whether used for any other purpose or not.
2. In the exercise of its power to levy taxes in the District of Columbia for District purposes, Congress may exempt certain classes of property from taxation or tax them at different rates.

[No. 1143.]

Submitted Dec. 21, 1885. Decided Jan. 18, 1886.

APPEAL from the Supreme Court of the District of Columbia.

The history and facts of the case appear in the opinion of the court.

Mr. **M. F. Morris**, for appellant:

The property in question was church property, such as was intended to be exempted, and was in fact exempted from taxation by the Act of June 17, 1870. Until 1881 it was necessarily used for church purposes, and could not legally have been used for anything else; and until 1874 the municipality acquiesced in the propriety of that use.

Parker v. *Redfield*, 10 Conn. 491; *New Haven* v. *Sheffield*, 30 Conn. 160; *Byington* v. *Wood*, 12 Ia. 17; *Hoboken* v. *Bergen*, 43 N. J. L. 146; *Mulroy* v. *Churchman*, 52 Ia. 238; *Appeal Tax Court* v. *St. Peters*, 50 Md. 321; *Mass. Hospital* v. *Sommerville*, 101 Mass. 319.

An assessment once made cannot be increased without some notice to the owner of the property.

Cooley, Taxn. 541, 547; *Cleghorn* v. *Postlewaite*, 43 Ill. 428; *Darling* v. *Gunn*, 50 Ill. 424.

A parity of reasoning requires that property exempted from taxation shall not be assessed for taxes without some notice to the owner.

Mr. **A. G. Riddle**, for appellee.

Mr. Justice **Gray** delivered the opinion of the court:

{404} This is an appeal from a decree dismissing a bill in equity by the Roman Catholic Archbishop of the Diocese of Baltimore, of which the District of Columbia is a part, to clear the title of lots numbered 36 to 46 inclusive (being the lots formerly numbered 5, 6 and 7), in square 376 in the City of Washington, from a cloud created by the assessment and sale thereof for taxes amounting, with interest, to more than $5,000.

The case was heard upon the bill, answer, a general replication, and the deposition of the pastor of St. Patrick's Church, from which the facts appeared to be as follows:

The lots in question front south on F Street about 170 feet, and have a depth varying from about 93 feet to about 114 feet. They were conveyed by Anthony Caffray in 1804 to the Roman Catholic Bishop of Baltimore in fee "for the use of the Roman Catholic congregation worshiping in the place called St. Patrick's Church in the City of Washington;" and thenceforward until 1870 were occupied by the old St Patrick's Church. During that period the church enclosure included about one half of square 376, bounded south by F Street, west by Tenth Street, and north by G Street. In 1870 the old church building was found to be unsafe, and in 1872 it was taken down. Since 1870 and pending the completion of a new church, now in process of erection, the congregation has worshiped in Carroll Hall on G Street, within the same half square, and separated from the lots in question by a thirty foot passage way. The new church fronts on Tenth Street, with a strip of open ground about thirty-five feet wide on its south side and in the rear for light and ventilation, all to the north of the lots in question. The reason for so placing the church, instead of putting it in the middle of the inclosure, was to enable a revenue to be derived from the sale or lease of these lots to pay off the church debt incurred in building, and it was not necessary for the enjoyment of the church that these lots should remain vacant. In February, 1881, the plaintiff obtained a decree in equity, authorizing him to sell or otherwise dispose of these lots, and to apply the proceeds to the completion of the new church building; and about that time he made lease thereof for twenty-five years to private persons.

From 1804 until June 30, 1875, no taxes were assessed on these lots. Afterwards until June 30, 1880, they were annually assessed for taxes and sold for nonpayment thereof. The annual taxes since that time have been paid.

The only matter in contest is the validity of the taxes assessed upon the lots on F Street for the five years between June 30, 1875, and June 30, 1880, under the annual Acts of Congress of March 3, 1875, chap. 162, and July 12, 1876, chap. 180, and the permanent Act of March 3, 1877, chap. 117, authorizing the levy of taxes for the support of the government of the District of Columbia, the material provisions of which are as follows:

The eighth section of each of these statutes exempts from taxation houses for the reformation of offenders, almshouses, buildings devoted to art or belonging to institutions of purely public charity, church buildings, and grounds actually occupied by such buildings, houses to improve the condition of seamen or soldiers, free public library buildings, and cemeteries.

The Act of 1875 adds: "The lands or grounds appurtenant to any said house or building, so far as reasonably needed and actually used for

NOTE.—*Taxation—exemption from, of church property.*

Compare St. Mary's Church v. Tripp, 14 R. I., 307; Erie Co. Comrs. v. Bishop, 13 Phila., 509; Enaut v. McGuire, 36 La. Ann., 804; Y. M. C. A. v. Donohugh, 13 Phila., 12; People v. Brooklyn Assessors, 27 Hun, 559; Presbyterian Theo. Sem. v. People, 101 Ill., 578; Fort Des Moines Lodge v. Polk County, 56 Ia., 34.

the convenient enjoyment of any said house or buildings for its legitimate purpose and no other; but if any portion of any said building, house, grounds or cemetery, so in terms excepted, is used to secure a rent or income or for any business purpose, such portion of the same or a sum equal in value to such portion, shall be taxed against the owner of said building or grounds." 18 Stat. at L. 503.

The Acts of 1876 and 1877 substitute for this addition a provision to the same effect, though differing somewhat in form, as follows: "But if any portion of any such building, house, grounds or cemetery, so in terms excepted, is larger than is reasonably needed (in the Act of 1876—"absolutely required," in the Act of 1877) and actually used for its legitimate purpose and none other, or is used to secure a rent or income, or for any business purpose, such portion of the same, or a sum equal in value to such portion, shall be taxed against the owner of said building or grounds." 19 Stat. at L. 85, 299.

Upon the construction most favorable to the appellant, these statutes exempt nothing from taxation beyond church buildings and grounds actually occupied for such buildings, and the lands or grounds appurtenant to any such building, so far as reasonably needed and actually used for its convenient enjoyment for its legitimate purpose. Even parts of the exempted [427] buildings and lands, if used to secure a rent or income, or for any business purpose, are taxable. But land which is neither actually occupied for a church building, nor reasonably needed and actually used for the convenient enjoyment of the building as a church, is not exempt from taxation, whether it is used for any other purpose or not.

We are not disposed to deny that grounds left open around a church, not merely to admit light and air, but also to add to its beauty and attractiveness, may, if not used or intended to be used for any other purpose, be exempt from taxation under these statutes.

But upon the uncontroverted facts of the present case, it was not only unnecessary for the enjoyment of the church that the F Street lots should remain vacant; but the very reason for placing the church to the northward of these lots, instead of putting it in the middle of the whole land controlled by the ecclesiastical authorities, was to enable a revenue to be derived from the lease or sale of these lots. Under such circumstances, these lots were not exempt from taxation, even before they had been actually so leased.

The objection, taken in argument, that the Act of March 3, 1877, is unconstitutional, because it provides that the tax upon all lands within the District of Columbia, outside of the Cities of Washington and Georgetown, and held and used solely for agricultural purposes, shall be a dollar and a quarter on the hundred, and upon all other real and personal property in the District, not expressly exempted, a dollar and a half on the hundred, is founded on a misunderstanding of the case of *Loughborough* v. *Blake*, 3 Wheat. 317 [18 U. S. bk. 5, L. ed. 98].

The point there decided was that an Act of Congress, laying a direct tax throughout the United States in proportion to the census directed to be taken by the Constitution, might comprehend the District of Columbia; and the power of Congress, legislating as a local Legislature for the District, to levy taxes for district purposes only, in like manner as the Legislature of a State may tax the people of a State for state purposes, was expressly admitted, and has never since been doubted. 5 Wheat. 318 [18 U. S. bk. 5, L. ed. 98]; *Welsh* v. *Cook*, and *Mattingly* v. *District of Columbia*, 97 U. S. 541, 687 [Bk. 24, L. ed. 1112, 1098]. In the exer- [408] cise of this power, Congress, like any State Legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOHN W. COFFEY, Claimant, etc. *Plff. in Err.*, [427]

v.

UNITED STATES.

(See S. C. Reporter's ed. 427-435.)

Revenue laws—suits in rem *for forfeitures for violation of—jurisdiction—pleading and practice.*

1. Suits *in rem* for forfeitures for violations of the internal revenue laws are within the original jurisdiction of the circuit court.

2. Upon a writ of error to reverse a judgment of forfeiture for violation of the internal revenue laws, questions arising on certain demurrers, and the question as to the jurisdiction of the circuit court, are subject to review, although no bill of exceptions appears in the record.

3. A general verdict upon an information under the revenue laws for forfeiture of goods only will be upheld if but one of several counts is good.

4. It is not necessary, in an information under section 3257 R. S., to set forth the particular means by which the claimant defrauded and attempted to defraud the United States of the tax, or to specify the particular spirits covered by the tax.

5. The general rules of pleading in admiralty suits *in rem* apply to suits *in rem* for a forfeiture brought by the United States, after a seizure on land.

6. In a proceeding kindred to an admiralty proceeding *in rem*, a plea of former conviction is held to have been put in issue without a reply or replication to the answer, and the issue of fact thus raised is held to have been found against the claimant by the general verdict, there being no demurrer to the answer, or bill of exceptions raising specific questions.

[No. 92.]

Argued and submitted Dec. 10, 1885. Decided Jan. 18, 1886.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

The history and facts of the case appear in the opinion of the court. See also the opinion of this court upon application for a rehearing, *post*, 684.

Messrs. **Samuel McKee, T. T. Alexander** and **G. C. Wharton**, for plaintiff in error.

Messrs. **Wm. A. Maury**, *Asst. Atty-Gen.*, for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

NOTE.—*General verdict; effect of.* See Snyder v. U. S., 112 U. S., bk. 28, 697, *note*.

This is an information filed by the attorney of the United States for the District of Kentucky, on behalf of the United States, in the [428] circuit court for that district, against one copper still and worm and other distilling apparatus, one distillery, with all its appurtenances, consisting of boiler, engine, copper doubler complete, with sixty-five tubs, also twenty-two barrels and two pieces of barrels of apple brandy, estimated at 850 gallons, said to be the property of John W. Coffey, and under seizure on land, by a deputy collector of internal revenue, as being forfeited to the United States. The original information alleges that Coffee "did have said still and worm, and distillery, engine, boiler, and other distilling apparatus, under his control and set up, and was engaged in carrying on the business of a distiller, and did then and there change and alter the stamps, marks and brands on certain casks and packages containing distilled spirits, and did put into certain casks and packages spirits of greater strength than was indicated by the inspection mark thereon, and did fraudulently use casks and packages having inspection marks and stamps thereon, for the purpose of selling other spirits, and spirits of different quantity and quality from the spirits previously inspected therein, and then and there attempted to defraud, and did defraud, the United States of the tax on the spirits distilled by him." Under a monition and attachment the marshal arrested the property and gave the notice required by law. Coffey filed a claim to all the property as owner, and all of it except the apple brandy was released to him on a bond. He answered the information, admitting the seizure and denying the other allegations, except that as to his having under his control and set up the property in that behalf alleged. The notice published stated that the property was seized for a violation of sections 3257 and 3296 of the Revised Statutes.

Afterwards, an amended information was filed by leave of the court. It states that the attorney of the United States "amends his in- [429] formation herein, and gives the said judges further to know," that Coffey was engaged in carrying on the business of a distiller, and did "defraud and attempt to defraud the United States of the tax on part of the spirits distilled by him," and that the said distillery and distillery apparatus were used by him, and that the said twenty-two barrels and two pieces of barrels of apple brandy, to wit: distilled spirits, were found on his distillery premises. It states in a second count that the said distilled spirits were subject to a tax imposed by law, which had not been paid, and were found in the possession, custody and control of said Coffey for the purpose of being removed and sold by him in fraud of the internal revenue laws, and with design of avoiding the payment of said tax. It states in a third count that said Coffey was an authorized distiller, and did "knowingly and willfully omit, neglect and refuse to do or cause to be done certain things required of him by law in the carrying on and conducting of his said business, to wit: did knowingly and willfully omit, neglect and refuse to stamp and brand, and cause and require to be stamped and branded, as required by law, a large number, to wit: two certain packages of distilled spirits, containing more than twenty gallons each, before removing the same from the warehouse where the same were stored and deposited, and before selling and disposing of the same, and did sell and dispose of and remove from said warehouse the said spirits before the tax had been paid thereon or the said packages had been properly branded and stamped," and that he owned and was interested in the said twenty-two barrels and two pieces of barrels of distilled spirits.

The claimant demurred to the first count in the amended information, as insufficient in law and fact. He demurred to the second count, as presenting no cause of forfeiture for either the distillery or distilled spirits, and as insufficient in law. He demurred to the third count, as insufficient in law and not authorized, because a specific penalty other than forfeiture is provided for the act therein charged, to wit: in section 3296 of the Revised Statutes. The court overruled the demurrers.

The claimant then answered the amended information, denying the allegations of the first count; denying the allegations of the second [43 count, except the one that the distilled spirits seized were subject to a tax imposed by law, which tax had not been paid; and denying the allegations of the third count, except the one as to the ownership of the distilled spirits seized.

There was a trial by a jury in October, 1881, in which the jury failed to agree on a verdict. The claimant then filed an amendment to his answer, as follows: "The claimant, John W. Coffey, amends his answer herein to the information and amendments thereto, and states that the custody, possession and control of the articles or objects on which a tax was by law imposed, and complained of in the information of plaintiffs and found in his possession, to wit: twenty-two barrels (22) and two pieces of barrels of brandy, distilled spirits, and charged to have been in his possession for the purpose of selling the same in fraud of the internal revenue laws, and with design to avoid the payment of the taxes thereon, or sold or removed by him in fraud of the internal revenue laws, and the various assignments of breaches and violations of law now considered, are the same goods and wares and objects, or commodities and distilled spirits, named and set out in an information filed against him, the said John W. Coffey, at the February Term of this court, 1881, and prior to the filing of the information herein. That all of the said twenty-two barrels and two pieces of barrels of brandy, distilled spirits, found in his custody, control and possession, are the same found in his control and possession prior to the information filed against him at the February Term, 1881, of this court; and that all the acts complained of in plaintiff's information herein might have been established, if said allegations be true, under the said information, either upon the counts in said information based upon section 3450 or 3452 or 3257. That all the evidence which would be necessary to establish, and competent under, the various assignments of breaches and of intended frauds in plaintiff's information herein, would be competent under and would tend to establish the allegations of said information at said February Term, 1881. That the various assignments (of) frauds and attempts or intents to defraud the United States of the tax imposed

upon said distilled spirits, to wit: the twenty-two barrels and two pieces of barrels of apple brandy, relate to the same subject matter and are based upon the same transaction as the various allegations in said information at the February Term, 1881, contained, so far as they relate to offenses under sections 3452, 3453, and 3257, or either of them, and that at the time when the said information at the February Term, 1881, was drawn, considered, and presented by the attorney for the United States, all the facts which would be competent to sustain the allegations of plaintiff's information herein were known to and within the possession of the representatives of the United States. And the claimant, John W. Coffey, says that the United States ought not to maintain this action for the penalty, punishment and forfeiture, or either of them, claimed in sections 3450, 3453, 3457, or 3257, for, at the February Term, 1881, an information was found, as recited above, in the District of Kentucky, at Louisville, and in this court, against this claimant, John W. Coffey, the claimant named herein, the counts of said information alleging that he had in his possession a large quantity of distilled spirits upon which a tax was by law imposed and had not then been paid, with intent to defraud or for the purpose of defrauding the United States of the tax thereon, and with design to avoid the payment of the tax thereon on a part of said spirits or on the spirits so in his possession. That at said term of said court the defendant pleaded guilty to the charges and counts in said information, and was adjudged and sentenced to pay a fine of $500, which judgment was the full penalty and punishment for the violations of law imposed on him for the alleged offenses charged in said information, which were the same violations and charges, offenses and allegations of fraud, design to avoid the payment of the taxes due and imposed on said spirits, and allegations of intent to sell the same in fraud of the internal revenue laws of the United States; and he pleads and relies on the facts herein set forth as a bar to plaintiff's claim herein, and asks the same to be dismissed, with all proper relief, etc.

Four months after this amendment to the answer was filed, the case was tried by a jury, which rendered a general verdict for the plaintiffs. The claimant thereupon moved for a judgment, notwithstanding the verdict, and at a later day moved to set aside the verdict and in arrest of judgment, on these grounds: "1. The verdict is not authorized by law and the facts in the case. 2. Because the defendant has been tried for the same offense herein charged in a former proceeding, a criminal information, and this court has no jurisdiction in forfeitures. 3. That the information itself is insufficient in law to sustain the action." The court overruled the motions and entered a judgment condemning as forfeited the property attached, "for the reasons and causes in the information and amended information specified," and awarding costs against the claimant. To reverse this judgment the claimant has sued out a writ of error.

There is no bill of exceptions in the record, and no exception to the overruling of the motions; but the questions arising on the demurrer to the counts of the amended information, and the question as to the jurisdiction of the circuit court, are open for consideration.

The objection to the jurisdiction is not well taken. By section 629 of the Revised Statutes, subd. 4, original jurisdiction is given to the circuit courts "of all causes arising under any law providing internal revenue." In title XXXV of the Revised Statutes, concerning "internal revenue," section 3213 provides that "All suits for fines, penalties and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise, before any Circuit or District Court of the United States, for the district within which said fine, penalty or forfeiture may have been incurred, or before any other court of competent jurisdiction." By section 563, subd. 1, jurisdiction is given to the district courts "of all suits for penalties and forfeitures incurred under any law of the United States." By subdivision 8 of section 563 jurisdiction is given to the district courts of all seizures on land; and it is enacted that such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such seizures is given to the circuit courts. By subdivision 4 of section 629, jurisdiction is denied to the circuit courts of suits for penalties and forfeitures arising under any Act providing for revenue from imports and tonnage; but they have it in suits for penalties and forfeitures arising under the internal revenue laws. [433]

Although, in practice, suits *in rem* for forfeitures for violations of the internal revenue laws are more frequently brought in the district courts, yet cases are to be found of such suits originally brought in the circuit courts, where jurisdiction was taken and was not questioned. Such cases are *U. S.* v. *Two Tons of Coal, etc.*, 5 Blatchf. 386, in the Eastern District of New York, in 1867, before *Judge* Benedict; *United States* v. *One Still, etc.*, Id. 403, and *U. S.* v. *508 Barrels of Distilled Spirits*, Id 407, and *U. S.* v. *6 Barrels of Distilled Spirits*, Id. 542, in the same district, in 1867, before *Mr. Justice* Nelson and *Judge* Benedict; *U. S.* v. *7 Barrels of Distilled Oil, etc.*, 6 Blatchf. 174, in the same district, in 1867, before *Judge* Benedict; and *U. S.* v. *200 Barrels of Whiskey*, 2 Woods, 54, in the District of Louisiana, in 1874, before *Mr. Justice* Woods, then circuit judge. Like jurisdiction of a suit *in personam* for a violation of the internal revenue laws was taken, in 1877, by the Circuit Court for the Eastern District of Missouri, held by *Mr. Justice* Miller and *Judge* Dillon in *U. S.* v. *McKee*, 4 Dill. 128.

It has been adjudged by this court that informations under the revenue laws for the forfeiture of goods, which seek no judgment of fine or imprisonment against any person, though civil actions and not strictly criminal cases, are so far in the nature of criminal proceedings as to come within the rule that a general verdict, upon several counts, seeking in different forms one object, must be upheld if one count is good. *Clifton* v. *United States*, 4 How. 242, 250 [45 U. S. bk. 11, L. ed. 957, 961]; *Snyder* v. *U. S.* 112 U. S. 216 [Bk. 28, L. ed. 697]. [434]

In this case, the first count in the amended

information is good. It is founded on section 3257 of the Revised Statutes, which provides as follows: "Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits * * * found in the distillery and on the distillery premises, and shall be fined not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than three years." The counts of the amended information are amendments of and additions to the original information; and the allegations of the latter as to the seizure of the property on land, by the deputy collector, and as to the fact of forfeiture, and the prayer for process, and for a decree of forfeiture, form part of the amended information and apply to the counts therein. The language of the first count of the amended information follows that of section 3257, and is, we think, sufficient, against the general objection taken by the demurrer, that it is insufficient. In *U. S* v. *Simmons*, 96 U. S. 360 [Bk. 24, L. ed. 819], an indictment, founded on section 3281 of the Revised Statutes, alleged that the defendant "did knowingly and unlawfully engage in and carry on the business of a distiller, within the intent and meaning of the internal revenue laws of the United States, with the intent to defraud the United States of the tax on the spirits distilled by him, against the peace," etc. Section 3281 provides that every person who engages in or carries on the business of a distiller, with intent to defraud the United States of the tax on the spirits distilled by him, shall be fined and imprisoned. This court held that the indictment was sufficient to authorize judgment, and that it was not necessary to state the particular means by which the United States were to be defrauded of the tax. So in this case; it was not necessary under section 3257 to set forth the particular means by which the claimant defrauded and attempted to defraud the [435] United States of the tax, or to specify the particular spirits covered by the tax. The first count of the amended information is in substantial compliance with Rule 22 of the Rules in Admiralty. That rule prescribes regulations for the form of informations and libels of information on seizures for the breach of the laws of the United States on land or water; and the general rules of pleading in regard to Admiralty suits *in rem* apply to a suit *in rem* for a forfeiture, brought by the United States, after a seizure on land. *The Sarah*, 8 Wheat. 391 [21 U. S. bk. 5, L. ed. 644]; *Union Ins. Co.* v. *U. S.; Armstrong's Foundry*, 6 Wall. 759, 765, 766, 769 [73 U. S. bk. 18, L. ed. 879, 882, 884]; *Morris' Cotton*, 8 Wall. 507, 511 [75 U. S. bk. 19, L. ed. 481, 482]. It was not necessary to aver in the information that the distilled spirits found on the claimant's distillery premises, and seized, were distilled by him or were the product of his distillery, or that the distillery apparatus was wrongfully used; because section 3257 does not make these facts elements of the causes of forfeiture denounced by it. The only necessary elements are that the person shall be engaged in carrying on the business of a distiller, and that he shall defraud or attempt to defraud the United States of the tax on the spirits distilled by him. The answer admits that the claimant owned the property seized.

As to the plea of a former conviction, the proceedings being kindred to those in a suit in admiralty *in rem*, so far as the pleadings are concerned, no reply or replication to the answer was necessary to raise an issue of fact on the matters averred in it. New matter in an answer is considered as denied by the libelant. Rule 51, in admiralty. The issue of fact as to the former conviction must be held to have been found against the claimant, by the general verdict; and no question in regard to the defense set up can be raised, in the absence of a demurrer to the answer, and of a bill of exceptions raising specific questions.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk Sup. Court, U. S.

Cited—117 U. S. 233.

A. G. COFFEY, Claimant, etc. *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 436-445.)

Internal revenue — forfeitures — pleading and practice—acquittal on criminal prosecution, a bar to an action in rem *—jurisdiction of circuit courts.*

1. Suits *in rem* for forfeitures for violations of the internal revenue laws are within the jurisdiction of the circuit court.
2. Upon a writ of error to reverse a judgment of forfeiture for a violation of the internal revenue laws, questions involving the sufficiency of the information and the regularity of the proceedings, which were not formally raised in the court below, cannot be considered by this court.
3. The claimant, having by answer denied the allegations of the first count of the information, cannot, on the record as presented, be heard to say that he did not know the charge made and could not defend against it.
4. One good count in the information will uphold the judgment after general verdict.
5. A judgment of acquittal in a criminal prosecution for a violation of the internal revenue laws, is conclusive in favor of the defendant, as claimant of the property involved in a subsequent suit in *rem*, when, as against him, the existence of the same act or fact involved in the criminal prosecution is in issue as a cause for the forfeiture of such property.

[No. 91.]

Argued Dec. 10, 1885. Decided Jan. 18, 1886.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

The history and facts of the case appear in the opinion of the court.

Messrs. **Samuel McKee, T. T. Alexander** and **G. C. Wharton**, for plaintiff in error.

Mr. **John Goode**, *Solicitor-Gen.*, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an information filed by the attorney

NOTE.—*General verdict; effect of.* See Snyder v. U. S., 112 U. S., bk. 28, 607, *note.*

of the United States for the District of Kentucky, on behalf of the United States, in the circuit court for that district, against ten barrels of apple brandy, one apple mill, thirty-seven tubs, and two copper stills, said to be the property of A. G. Coffey, and under seizure, on land, by a deputy collector of internal revenue, as being forfeited to the United States. The first count of the information alleges that Coffey, being engaged in carrying on the business of a distiller, defrauded and attempted to defraud the United States of the tax on part of the spirits distilled by him, and that the two copper stills and other distillery apparatus were used by him, and the distilled spirits were found on his distillery premises. The second count alleges that the distilled spirits, in respect of which a tax was imposed by law, and which tax had not been paid, were removed, deposited and concealed with intent to defraud the United States of part of such tax, and that the two stills and other distilling apparatus, vessels and utensils were proper, and intended to be made use of, for and in the making of such distilled spirits. The third count alleges that the distilled spirits, on which a tax was imposed by law, were found in the possession of Coffey for the purpose of being sold and removed by him in fraud of the internal revenue laws, and with the design to avoid the payment of said tax, and that the two copper stills, and other tools and property, so seized, were in the place, yard and enclosure where the distilled spirits were found.

The first count is founded on section 3257 of the Revised Statutes, which provides as follows: "Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits * * * found in the distillery and on the distillery premises, and shall be fined not less than $500, nor more than $5,000, and be imprisoned not less than six months nor more than three years."

The second count is founded on section 3450 of the Revised Statutes, which provides as follows: "Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities, are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax or any part thereof, all such goods and commodities and all such materials, utensils and vessels, respectively, shall be forfeited. * * * And every person who removes, deposits or conceals, or is concerned in removing, depositing or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than $500. * * *"

The third count is founded on section 3453 of the Revised Statutes, which provides as follows: "All goods, wares, merchandise, articles or objects on which taxes are imposed, which shall be found in the possession or custody or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district * * * and shall be forfeited to the United States; * * * and all tools, implements, instruments and personal property whatsoever, in the place or building, or within any yard or enclosure, where such articles * * * are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding *in rem*, in the Circuit Court or District Court of the United States for the district where such seizure is made."

Under a monition and attachment the marshal arrested the property and gave the notice required by law. Coffey filed a claim to all the property except one barrel of the distilled spirits, as owner, and an answer to the information. The answer denied the allegations of the three counts of the information, and in a fourth paragraph set up the following defense: "Fourth. And further answering, the said claimant states, that the alleged removals and concealments of distilled spirits set forth in the various assignments and charges of fraud, and attempts at and intent of fraud, in carrying on and engaging in the business of a distiller, and in removals, depositing, and concealing of distilled spirits, alleged against him and now answered, are the same removals, concealments and depositing, and same carrying on of business of a distiller, as are recited in a criminal information filed against him, at the October Term of this Court, 1881, and that all of said 'removals,' 'concealments,' 'depositing,' and 'intents to defraud,' the same complained of in plaintiffs' information herein, might have been established, if said allegations be true, under sections 3450, 3452, 3296, or 3257, upon which, or some one or more of which the counts in said criminal information were based; that all of the evidence which would be necessary to establish, and competent, under the various assignments and charges of fraud set out in plaintiffs' libel herein, would also be competent and would tend to establish the allegations of said criminal information; that the various charges of fraud and causes of forfeiture alleged by plaintiff herein relate to the same subject matter, and are based on the same transactions, as the various allegations in said criminal information contained, so far as they relate to alleged offenses under sections 3450, 3452, 3453, 3296, or 3257; and that, at the time when said criminal information was drawn by the attorney for the United States, and at the time it was considered by him, all of the facts which would be competent to sustain the allegations of plaintiffs' libel herein were known to and within the possession of the representative of the United States. And he avers and says that the United States ought not to maintain its action herein for the penalty denounced in sections 3257, 3450, and 3453, for, at the October Term, 1881, in this circuit and district and in this court herein, a criminal information, the same above referred to, was found against him, the counts of which were based on sections 3257, 3256, 3450, 3453, and 3296, or on some one or more of them, alleging the carrying on the business of a distiller with intent to defraud the United States, and that he

[439]

was concerned in depositing, concealing and removing a large quantity of distilled spirits, with intent to defraud the United States of the taxes imposed thereon, and having had in his custody a large quantity of distilled spirits, with the design to avoid the payment of the taxes imposed [440] thereon; that the counts in said criminal information contained the same charges, in substance and effect, and are the same allegations of offenses and frauds and attempts at frauds, and are founded on the same sections of the statutes of the United States as the matters and things herein alleged in plaintiffs' libel; and he says that all and singular of said matters at said term and in this court were tried and inquired into and fully heard; and, on the hearing thereof, the jury, duly impaneled and sworn, found this defendant not guilty, and the court rendered a judgment acquitting this defendant of the charges of frauds and attempts at frauds therein alleged; and all of which are the same frauds now set out by plaintiffs and herein answered by this defendant."

The sections referred to in this fourth paragraph of the answer, other than those above set forth, are as follows:

"Sec. 3256. Whenever any person evades or attempts to evade the payment of the tax on any distilled spirits, in any manner whatever, he shall forfeit and pay double the amount of the tax so evaded or attempted to be evaded."

"Sec. 3296. Whenever any person removes or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits, authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than $200, nor more than $5,000, and imprisoned not less than three months, nor more than three years."

"Sec. 3452. Every person who shall have in his custody or possession any goods, wares, merchandise, articles, or objects on which taxes are imposed by law, for the purpose of selling the same in fraud of the internal revenue laws, or with design to avoid payment of the taxes imposed thereon, shall be liable to a penalty of $500, or not less than double the amount of [441] taxes fraudulently attempted to be evaded."

The United States filed a demurrer to the fourth paragraph of the answer, "because it does not state facts sufficient to constitute a defense."

Eight days afterwards the issues of fact were tried by a jury, which found a general verdict for the United States. The claimant then moved the court to set aside the verdict, alleging as grounds, among others, that the court had no jurisdiction and that the information was insufficient. He also moved for judgment on the pleadings, notwithstanding the verdict. The court made an order denying the motions, and entering a judgment condemning the property as forfeited to the United States, and awarding costs against Coffey. There is no bill of exceptions, but the claimant has sued out a writ of error to review the judgment.

The assignment of errors filed in this court asserts these propositions: 1, that the information is not sufficient in law; 2, that the circuit court had no jurisdiction of the subject matter of the action, or of the property seized, or of the person of the claimant; 3, that there was no sufficient monition, attachment or seizure of the property, and no legal publication and notice of the seizure, and no valuation of the goods, as required by law; 4, that it was error to submit the case to the jury before the demurrer to the fourth paragraph of the answer was disposed of; 5, that it was error to overrule said demurrer.

In regard to the first, third and fourth assignments, the questions presented by them were not formally raised in the circuit court and are not presented by a bill of exceptions and cannot be considered here.

As to the first assignment, that respecting the insufficiency of the information, it is supposed by the claimant that his motion for judgment, notwithstanding the verdict, raises that question. But there is no exception to the order of the court denying that motion. There is an exception to the written opinion of the court overruling a motion for a new trial, and to an order made, after judgment, overruling a motion made after judgment, for a new trial. But there is no other exception in the record. Assuming, however, that the point as to the information can be raised here, it is urged that the first count, that founded on section 3257, is insufficient because the count does not set forth facts from which the court can infer that Coffey defrauded or attempted to defraud the United States. It is sufficient answer to this objection to say that the claimant, in his answer, denies the allegations of the first count, specifically, as they are made. After that, he cannot, in a court of error, on such a record as this, be heard to say that he did not know the charge made, and could not defend against it, although, if he had excepted or demurred to the count, the objection might have been presented for consideration. After a general verdict for the United States, one good count in the information is sufficient to uphold the judgment. *Coffey* v. *U. S. ante, p.* [681]

The objection to the jurisdiction of the circuit court is overruled, in accordance with the decision in *Coffey* v. *U. S. ante, p.* [681]

The principal question is as to the effect of the indictment, trial, verdict and judgment of acquittal set up in the fourth paragraph of the answer. The information is founded on sections 3257, 3450 and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit.

The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of opinion that it is.

It is true that section 3257, after denouncing the single act of a distiller defrauding or attempting to defraud the United States of the

tax on the spirits distilled by him, declares the consequences of the commission of the act to be: 1, that certain specific property shall be forfeited, and 2, that the offender shall be fined and imprisoned. It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action; while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in *The Palmyra*, 12 Wheat. 1, 14 [25 U. S. bk. 6, L. ed. 531, 535]. Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt; and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant.

When an acquittal in a criminal prosecution in behalf of the Government is pleaded or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same; and often for the additional reason that a certain intent must be proved to support the indictment, which need not be proved to support the civil action. But upon this record, as we have already seen, the parties and the matter in issue are the same.

[446] Whether a conviction on an indictment under section 3257 could be availed of as conclusive evidence, in law, for a condemnation, in a subsequent suit *in rem* under that section, and whether a judgment of forfeiture in a suit *in rem* under it would be conclusive evidence, in law, for a conviction on a subsequent indictment under it, are questions not now presented.

The conclusion we have reached is in consonance with the principles laid down by this court in *Gelston* v. *Hoyt*, 3 Wheat. 246 [16 U. S. bk. 4, L. ed. 381]. In that case Hoyt sued Gelston the collector, and Schenck the surveyor, of the Port of New York, in trespass, for taking and carrying away a vessel. The defendants pleaded that they had seized the vessel, by authority of the President, as forfeited for a violation of the statute against fitting out a vessel to commit hostilities against a friendly foreign power, and that she had been so fitted out and was forfeited. At the trial it was shown that after seizure, the vessel was proceeded against by the United States, by libel, in the United States District Court, for the alleged offense, and Hoyt had claimed her and she was acquitted and ordered to be restored, and a certificate of reasonable cause of seizure was denied. The defendants offered to prove facts showing the forfeiture. The trial court excluded the evidence. In this court, the question was presented whether the sentence of the district court was or was not conclusive on the defendants, on the question of forfeiture. This court held that the sentence of acquittal, with a denial of a certificate of reasonable cause of seizure, was conclusive evidence that no forfeiture was incurred, and that the seizure was tortious; and that these questions could not again be litigated in any forum.

This doctrine is peculiarly applicable to a case like the present, where, in both proceedings, criminal and civil, the United States is the party on one side and this claimant the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts. This is a necessary result of the rules laid down in the unanimous opinion of the judges in the case of *Rex* v. *Duchess of Kingston*, 20 Howell, St. Tr. 355, 538, and which were formulated thus: the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea a bar, or as evidence conclusive, between the same parties, upon the same matter directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. In the present case, the court is the same court and had jurisdiction; and the judgment was directly on the point now involved and between the same parties. [445]

In a case before *Mr. Justice* Miller and *Judge* Dillon (*U. S.* v. *McKee*, 4 Dill. 128), the defendant had been convicted and punished under a section of the Revised Statutes, for conspiring with certain distillers to defraud the United States, by unlawfully removing distilled spirits without payment of the taxes thereon. He was afterwards sued in a civil action by the United States, under another section, to recover a penalty of double the amount of the taxes lost by the conspiracy and fraud. The two alleged transactions were but one; and it was held that the suit for the penalty was barred by the judgment in the criminal case. The decision was put on the ground that the defendant could not be twice punished for the same crime, and that the former conviction and judgment were a bar to the suit for the penalty.

There ought to have been a judgment for the claimant on the demurrer to the fourth paragraph of the answer, notwithstanding the ver-

dict; and as the facts set forth in that paragraph were admitted by the demurrer, and constituted a defense to the suit, *the judgment of the Circuit Court is reversed, and the case remanded to that court, with a direction to enter a judgment for the claimant, dismissing the libel [information], and to take such proceedings in regard to restoring the property attached as may be proper and not inconsistent with this opinion.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[461] LONDON ASSURANCE CORPORATION,

Plff. in Errr.,

v.

EUGENE J. A. DRENNEN ET AL., Partners, as DRENNEN, STARR and EVERETT.

(See S. C. Reporter's ed. 461–472.)

Participation in profits of partnership does not change title to property.

An agreement under which one is merely to participate in the profits of a partnership does not pass such an interest in the property of the firm as will invalidate a policy of insurance, which provides against a transfer or change of title or possession, against the real intention of the parties.

[No. 1222.]

Submitted Jan. 6, 1886. Decided Jan 18, 1886.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

This action was brought in the District Court (Fourth Judicial District) of Minnesota by the defendants in error, on two fire insurance policies. Upon the petition of the defendant the suit was subsequently removed into the court below. The first trial resulted in a verdict and judgment for the defendant. This judgment having been reversed and the case remanded by this court at the last term (Bk. 28. 919) a second trial was had, which resulted in a verdict and judgment for the plaintiffs, for $6,770, with costs. Whereupon the defendant sued out this writ of error.

For a full statement of the facts of the case, see the above report of the opinion of this court at the former hearing, where may be found the contract of May 24, 1883. See also, the present opinion for additional facts.

Messrs. **C. K. Davis** and **C. W. Bunn**, for plaintiff in error:

Where the bill of exceptions contains all the evidence, and the court was requested to direct a verdict, this court will determine whether, as a matter of law, the verdict ought to have been directed as requested.

Lancaster v. *Collins*, 115 U. S. 222 (Bk. 29, L. ed. 373).

The question is: Was the property, at the time of the fire, partnership property or not? And the decisive test of this question is whether Mr. Arndt's $10,000 was advanced as a loan up to the time of formation of the Corporation, or whether, during that time, it was embarked in the ventures of their trade; whether it became part of the capital stock. It is beyond all question that his contribution went to pay for goods purchased by the firm or to pay their debts, and was mingled through and through with the old stock, and that he was one of the losers by this fire.

We submit that his contribution was capital stock, and that he was a copartner and joint owner of the goods insured.

The cases are uniform that even where a party makes no contribution to the capital stock, but simply renders services, if he shares in the net profits as profits, he is a partner. Where he makes contribution to the capital and shares in the profits as such in proportion to his contribution, the question has never been one which is even open to doubt.

When the assured all testify that Arndt added his $10,000 to their capital as a part of it, and was to share profits according to his contribution, they make him a partner *per se*, both as to creditors and as between themselves.

Berthold v. *Goldsmith*, 24 How. 536 (65 U. S. bk. 16, L. ed. 762); *Beauregard* v. *Case*, 91 U. S. 140 (Bk. 23, L. ed. 264); *Whitcomb* v. *Converse*, 119 Mass. 38; *Livingston* v. *Blanchard*, 130 Mass. 341: *Ex parte Owen*, 4 De G. & S. 351; *Syers* v. *Syers*, 1 L. R. App. Cas. 174; Lindley, Part. 23, 24; *Note to Waugh* v. *Carver*, 1 Smith L. C. 1303, 1311; *Fitch* v. *Harrington*, 13 Gray, 468; *Loomis* v. *Marshall*, 12 Conn. 69; *Vassar* v. *Camp*, 14 Barb. 341.

Community of loss is not necessary to constitute a partnership, or to create a partnership property to be owned by the partners as such.

Bucknam v. *Barnum*, 15 Conn. 67; *Munro* v. *Whitman*, 15 N. Y. Sup. Ct. 558; *Ex parte Langdale*, 18 Ves. 299; *Gilpin* v. *Enderby*, 5 B. & A. 954; Pars. Part. 3d ed. 43–59; *Hendrick* v. *Gunn*, 35 Ga. 234.

The insurance company has the right to say with whom it will contract, and in whom it will rest its confidence. Any process by which a new party to the contract is introduced, by which the insured shifts the moral hazard from himself to a stranger, creates a new contract and a new relation which the company has not consented to assume.

Malley v. *Atlantic F. & M. Ins. Co.* 51 Conn. 222; *Dey* v. *Poughkeepsie Mut. Ins. Co.* 23 Barb. 623; *Pierce* v. *Nashua F. Ins. Co.* 50 N. H. 299; *West* v. *Citizens Ins. Co.* 27 Ohio St. 11; *Dix* v. *Mercantile Ins. Co.* 22 Ill. 272.

Some authorities hold that the insurers may be as greatly prejudiced by removing one to whom, with others, they had intrusted the guardianship of valuable property, as by the introduction of a stranger, and that a transfer from one partner to another vitiates the policy.

Barnes v. *Union Mut. F. Ins. Co.* 51 Me. 110; *Hartford F. Ins. Co.* v. *Ross*, 23 Ind. 179; *Finley* v. *Lycoming Co. Mut. Ins. Co.* 30 Pa. St. 311; *Western Mass. Ins. Co.* v. *Riker*. 10 Mich. 279; *Wood* v. *Rutland & Addison Mut. F. Ins. Co.* 31 Vt. 552; *Keeler* v. *Niagara F. Ins. Co.* 16 Wis. 523; *Home Mut. F. Ins. Co.* v. *Hauslein*, 60 Ill. 521; *Lappin* v. *Charter Oak F. & M. Ins. Co.* 58 Barb 325; *Lockwood* v. *Middlesex Mut. Ass. Co.* 47 Conn. 564; *Hoffman* v. *Ætna F. Ins. Co.* 32 N. Y. 405.

In *Card* v. *Ins. Co.* 4 Mo. App. 424, the court held that the introduction of a new partner was

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NOTE.—*Partnership; when a community of profits creates; exceptions.* See Ward v. Thompson, 53 U. S. (22 How.), 330, bk. 21, 249, *note.*

such a change of title and possession as to avoid the policy.

In *Drake* v. *Ætna Ins. Co.* 18 Mo. 128, the court held that where two insured partners dissolved and divided the property, converting the joint ownership into a several ownership, such a change of title would vitiate the policy.

Sennett v. *Howard Ins. Co.* 52 N. Y. 502; *Pinder* v. *Resolute F. Ins. Co.* 47 N. Y. 114; *Briggs* v. *Home Ins. Co.* 88 N. C. 141; *Oakes* v. *Manufacturers F. & M. Ins Co.* 131 Mass. 164. This case, first trial, per *Mr. Justice* Miller; 20 Fed. Rep. 657.

Upon this trial, this court having decided that the written contract had sole reference to a future corporation, and no reference to a partnership relation, a large amount of parol testimony was taken to show that there was a partnership relation between the parties prior to the formation of the contemplated corporation. It may well be, as these defendants in error have positively stated, that this $10,000 was paid in, not only to secure Mr. Arndt a share in the corporate stock, but in order to entitle him in the meantime and before the formation of the corporation, to a share of the net profits in the partnership business. We were entitled to have it submitted to the jury to say whether this money was not, as testified by the defendants in error, paid in for this double purpose. The circuit court, by withdrawing from the jury any consideration of this payment by Arndt, deprived the plaintiff in error of a great and almost controlling part of the *res gestæ* of the transaction.

Not being parties to the written contract, the plaintiffs in error had a clear right to vary or even contradict its terms.

Greenl. Ev. § 279; 2 Pars. Cont. 556, 557.

The rule is thus laid down in Chitty on Contracts:

"But though parties and privies, as between themselves, are estopped from contradicting a written statement by parol proof, yet the rule does not apply to strangers who have an interest in showing the true state of the case."

1 Chitty, Cont. 11th Am. ed. 141; Whart. Ev. § 1232; 2 Stark. Ev. 791; 2 Tayl. Ev. 978; *Barnes* v. *Hibbs*, 21 How. 169 (62 U. S. bk. 16, L. ed. 99); *Dempsey* v. *Kipp*, 61 N. Y. 471; *McMaster* v. *Ins. Co. of N. A.* 55 N. Y. 234; *Smith* v. *Moynihan*, 44 Cal. 53; *Husman* v. *Fisher*, 50 Cal. 250; *Edgerly* v. *Emerson*, 3 Fost. N. H. 305; *Overseers of P. of New Berlin* v. *Norwich*, 17 Johns. 229; *Krider* v. *Lafferty*, 1 Whart. 303; *Portland* v. *Goodwin*, 25 N. H. 425; *Low* v. *Blodgett*, 21 N. H. 121; *Woodman* v. *Eastman*, 10 N. H. 359; *Strader* v. *Lambeth*, 7 B. Mon. 589; *Reynolds* v. *Magness*, 2 Ired. 26; *Venable* v. *Thompson*, 11 Ala. 147; *Van Eman* v. *Stanchfield*, 10 Minn. 255; *Sanborn* v. *Sturdevant*, 17 Minn. 209.

Messrs. **L. J. C. Drennen and Shaw & Gray**, for defendants in error:

"One may be a partner in the profits of a business, without being a partner or part owner in the property with which it is conducted."

See Story, Part. ¶¶ 54-56; Pars. Part. 47; Lindley Part. p. 19; *Wish* v. *Small*, 1 Camp. 380; *Hinckley* v. *Becht*, 25 Minn. 212; *Ex parte Langton*, 17 Ves. Jr. 406; *Blanchard* v. *Coolidge*, 2 Pick. 151; *Lycoming Ins. Co.* v. *Barringer*, 7 Pa. St. 283.

The question to be determined upon the evidence was, whether the plaintiffs and Arndt had formed a partnership as between themselves in, and become joint owners of the insured property. The solution of this question must depend on the ascertainment of the intention of the parties.

Pars. Part. 18, and cases cited; *Gill* v. *Kuhn*, 6 S. & R. 337; 1 Lindley, Part. p. 18, notes and cases cited. 5 Wait, Act. & Def. p. 114.

"Persons may not be partners though they call themselves so."

Story, Part. 7th ed. p. 45, note. See also, *Radcliff* v. *Rushworth*, 33 Beav. 484; *Oliver* v. *Gray*, 4 Ark. 425; *Ridgway* v. *Philip*, 1 C. M. & R. 415, and particularly *Vice* v. *Anson*, 7 B. & C. 409.

If parties expressly declare that they do not mean to become partners, the courts neither consider the express contract nor their acts as creating a partnership in fact, although otherwise clearly established.

5 Wait, Act & Def. p. 114, 115; *Kerr* v. *Potter*, 6 Gill (Md.) 404; *Gilpin* v. *Endsberg*, 5 B. & Ald. 954. See also *Clement* v. *Hadlock*, 13 N. H. 185; *Pollard* v. *Stanton*, 7 Ala. 761; *Rice* v. *Austin*, 11 Mass. 197; *Pillsbury* v. *Pillsbury*, 20 N. H. 90; *Randle* v. *State*, 49 Ala. 14; *Niehoff* v. *Dudley*, 40 Ill. 406; *Lintner* v. *Millikin*, 47 Ill. 178; *Hubbell* v. *Woolf*, 15 Ind. 204; *Salter* v. *Ham*, 31 N. Y. 321.

Mr. Justice **Harlan** delivered the opinion of the court:

This case has been once before in this court. [468]
Drennen v. *London Assurance Co.* 113 U. S. 51 [Bk. 28, L. ed. 919]. It is an action upon two policies of fire insurance executed March 10, 1883, and covering certain goods, wares and merchandise belonging to the firm of Drennen, Starr & Everett. Each policy contains the following provisions: "If the property be sold or transferred, or any change takes place in title or possession (except by succession by reason of the death of the insured), whether by legal process, or judicial decree, or voluntary transfer or conveyance * * * then, and in every such case, this policy shall be void." "If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured * * * it must be so represented to the Corporation and so expressed in the written part of this policy; otherwise the policy shall be void. When property has been sold or delivered or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate."

The insurer contends that after the execution of the policies, and before the loss of July 29, 1883, there was, by the voluntary act of the in- [469]
sured, a sale or transfer of the property, or such a change in title or possession as rendered the policies, by their terms, void. This defense rests entirely upon the claim that, prior to the loss, one Arndt was admitted as a partner in the firm of Drennen, Starr & Everett. The plaintiffs deny that he ever became a partner with them, or ever acquired any interest in the property insured. Upon the record as it was at the former hearing, that question depended mainly upon the construction of the written

agreement of May 24, 1883, which is given in full in 113 U. S. 52 [Bk. 28, L. ed. 920], whereby the insured agreed to receive Arndt "into their business," upon certain terms and conditions, among which are the following: that the company should be incorporated; that Arndt should pay into the firm for its use, on or before June 14, 1883, the sum of $5,000, and a like sum on or before January 1, 1885, the latter amount until paid, to be evidenced by his promissory note, dated January 1, 1883, and each payment to bear interest at 8 per cent from the date last named; that the business "to be carried on by the new company to be formed," the name of which was to be thereafter determined, should be of the same nature as that then conducted by Brennen, Starr & Everett; and that "no change in the name or character" of that firm "shall be made until said corporation shall be formed." Arndt paid to the firm, on the 18th of June, 1883, the sum of $5,000, and executed on the third of July of the same year the required note for a like amount, the money and note being entered to his individual credit on the books of Drennen, Starr & Everett. Upon this state of facts this court, reversing the judgment rendered for the insurer, said: "The instruction by the court below proceeded upon the ground that the payment by Arndt in cash and notes of the amount which he agreed to pay, and their receipt and entry upon the books of the firm to his credit, gave him an interest as partner in the business; whereas, such facts only established the performance of some, not of all, the conditions prescribed; for, by the agreement, the formation of the proposed corporation was expressly made a condition, with the others named, to Arndt's becoming interested in the business. In our judgment, looking at the whole agreement, the parties did not contemplate a partnership, and none was ever established between them. The agreement looked only to a corporation, the [470] payment and other things specified being in preparation for its ultimate formation, which was an adequate, as it was the actual, consideration; consequently there was, prior to the loss and under the most liberal interpretation of the policies, no change in the title or possession of the property, nor any transfer thereof, that avoided the policies."

At the last trial there was evidence to the effect that Arndt, after paying the $5,000 in cash, and executing his note for the same amount became entitled, by agreement with the insured, to participate in the profits of their business from January 1, 1883, he paying interest on these amounts from that date. And there was some slight proof that Drennen upon one occasion spoke of Arndt as a member of his firm.

On behalf of the insured it is contended that even if Arndt had become a partner in their firm, the policy would cover their interest in the property. This results, it is claimed, from that clause in the policy providing for the termination of the insurance if the property be sold or delivered or otherwise disposed of, "so that *all* interest or liability on the part of the insured herein named has ceased." We deem it unnecessary to consider this question, because the case can be satisfactorily determined upon other grounds. In view of all the evidence, the court, when delivering its charge, might well have assumed that there was no purpose on the part of the insured, or of Arndt, that the latter should have such an interest in the property as would belong to a partner. The court, therefore, rightfully refused to instruct the jury that upon the undisputed evidence Arndt became a partner in the firm of Drennen, Starr & Everett. Such an instruction would not have been given, without disregarding the interpretation which this court at the former hearing gave to the written agreement of May 24, 1883; for, it was then said that the parties, by that agreement, appeared *ex industria* to have excluded the possibility of Arndt's acquiring an interest in or any control of the insured property in advance of the formation of an incorporated company. That interpretation was not affected by the fact that Arndt paid $5,000 in cash and gave his note for a like amount; for, as heretofore said, those acts were simply in execution of the agreement and in preparation for the ultimate formation of the proposed corporation, and were not, as the court below properly decided, evidence of a partnership. The payment of the money and the execution of the note were plainly required by the agreement; and the purpose of both acts is to be ascertained from its provisions.

The main ground upon which the defendant at the last trial, claimed exemption from liability on the policies, is indicated in two of its requests for instructions to the jury: 1. That "if it was not the understanding that Arndt became a lender of money, and if it was the understanding between the parties that the amount of his investment was to be risked in their business and become part of the capital stock, and he was to have a share of the net profits, he not a mere lender, but a partner;" 2. That "when a person contributes a portion of the common capital stock, which is mingled with the contributions of others, parties, and the whole is managed for the joint interests of those who contribute, the contributors each having a share of the net profits of the business, they become thereby partners as between themselves in the capital stock or property of the concern."

We are of opinion that the court did not err in declining to so instruct the jury. The question is not whether Arndt, by reason of his participation in the profits of the business of Drennen, Starr & Everett, could have been charged at the suit of creditors as a partner in that firm. The inquiry is, whether the insured, after the execution of the policies and before the loss sold or transferred the property covered by the policies; or whether there occurred, during that period, any change in title or possession. If there had been a sale or transfer of the entire property to one who had no interest in it nor any right to control it at the time the contract of insurance was made, there would undoubtedly have been such a change in the title as to render the policies void. And for the purposes of the present case, it may be conceded that such would have been the result had Arndt become a partner in the firm of Drennen, Starr & Everett. But the sale or transfer to which the policies refer was one that would pass interest in the property itself. Mere participation in profits would give no such interest contrary to the real intention of the

tion. Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself, so as to effect a change of title. As the charge to the jury was in accordance with these principles, and as the evidence conclusively showed that Arndt did not, prior to the loss, acquire an interest in, or any control of, the property insured, but was only entitled to participate in the profits arising from its management after a named date, there is no reason to disturb the judgment.

It is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

SAMUEL A. WALLING, *Plf. in Err.*
v.
PEOPLE OF THE STATE OF MICHIGAN.

(See S. C. Reporter's ed. 446-461.)

Constitutional law—regulation of commerce—state laws which discriminate against the citizens or products of other States invalid.

1. A state law which imposes a specific tax on persons engaged in the business of selling liquors at wholesale, or of soliciting or taking orders for such liquors to be shipped into the State from places out of the State, not having their principal place of business in the State, without imposing a like tax upon persons engaged in the like business in reference to liquors manufactured in the State, is unconstitutional and void; because such a law discriminates unfavorably against the citizens and products of other States and, therefore, is a regulation of commerce repugnant to the Constitution of the United States.

2. A law subsequently passed, imposing a greater tax upon all persons engaged in any city, township or village in the business of manufacturing or selling liquors in the State, does not have the effect of invoking the first law of its objectionable character, not being imposed upon the same class of persons, but being imposed on the principal dealers and not on their servants, clerks or drummers.

3. Effect of the commerce clause of the Constitution in giving Congress exclusive power to regulate commerce among the several States in cases admitting and requiring one uniform rule, etc.

[No. 741.]

Argued and submitted Dec. 3, 1884. Decided Jan. 18, 1886.

IN ERROR to the Supreme Court of the State of Michigan.

The history and facts of the case appear in the opinion of the court.

Mr. O. W. Powers, for plaintiff in error: State Legislatures must not discriminate in favor of their own citizens, nor intermeddle with commerce between the States.

Cooley, Tax. p. 64; *Hinson* v. *Lott*, 8 Wall. 148 (75 U. S. bk. 19, L. ed. 387); *Guy* v. *Baltimore*, 100 U. S. 438 (Bk. 25. L. ed. 744); *Ward* v. *Maryland*, 12 Wall. 418 (79 U. S. bk. 20, L. ed. 449); *Welton* v. *Mo.* 91 U. S. 275 (Bk. 23, L. ed. 347); *Webber* v. *Va.* 103 U. S. 344 (Bk. 26, L. ed. 565); *Daniels* v. *Richmond*, 78 Ky. 544; *Higgins* v. *300 Casks of Lime*, 130 Mass. 1; *State* v. *Furbush*, 72 Me. 495; *McGuire* v. *Parker*, 32 La. Ann. 832; *Pierce* v. *State*, 13 N. H. 582; *Cransom* v. *Smith*, 37 Mich. 311; *Re Rudolph*, 6 Sawy. C. C. 295; *State* v. *North*, 27 Mo. 467; *State* v. *Browning*, 62 Mo. 591; *County of Mobile* v. *Kimball*, 102 U. S. 691 (Bk. 26, L. ed. 238); *Wiley* v. *Palmer*, 14 Fla. 627; *Scott* v. *Watkins*, 22 Ark. 556, 564; *Aiver* v. *Washington Mills*, 11 Allen, 268.

Mr. J. J. Van Riper, *Atty-Gen. of Michigan*, for defendants in error:

State legislation taxing or prohibiting the sale of intoxicating liquors is not a regulation of commerce but the exercise of the police power of the State.

Commonwealth v. *Kimball*, 24 Pick. 363; *Bartemeyer* v. *Iowa*, 18 Wall. 129 (85 U. S. bk. 21, L. ed. 929); *License Cases*, 5 How. 504 (46 U. S. bk. 12, L. ed. 255); *Gibbons* v. *Ogden*, 9 Wheat. 205 (22 U. S. bk. 6, L. ed. 72); *Passenger Cases*, 7 How. 283 (48 U. S. bk. 12, L. ed. 702).

2. In the License Cases almost every phase of the liquor question, and the powers of the several States to legislate thereon was fully discussed, and their absolute control over the subject settled by this court.

3. There is no unjust discrimination against citizens of other States, but the statute is applicable alike to all persons, residents or nonresidents, who engage in this particular traffic.

4. The tax is not upon commerce but upon occupations.

McCulloch v. *Md.* 4 Wheat. 428 (17 U. S. bk. 4, L. ed. 606); *Brown* v. *Md.* 12 Wheat. 444 (25 U. S. bk. 6, L. ed. 687).

The right of a State to tax occupations generally cannot be questioned.

Nathan v. *La.* 8 How. 80 and *Peirce* v. *N. H.* 5 How. 593 (46 U. S. bk. 12, L. ed. 995, 296); *Hinson* v. *La.* 8 Wall. 148 (75 U. S. bk. 19, L. ed. 387); *Machine Co.* v. *Gage*, 100 U. S. 676 (Bk. 25, L. ed. 754).

5. In this case there is no importer of foreign goods taxed and no foreign imports to be affected thereby.

6. The terms "imports" and "exports" do not refer to goods brought from one State into another.

Brown v. *Maryland, supra; Woodruff* v. *Parham*, 8 Wall. 123 (75 U. S. bk. 19, L. ed. 382); *License Cases*, 5 How. 593 (46 U. S. bk. 12, L. ed. 296).

7. It has been held that a State may require a license to sell ardent spirits of foreign as well as of domestic manufacture, and that a law authorizing such a tax would not be a regulation of commerce, but within the police power of the State.

Passenger Cases, 7 How. 283 (48 U. S. bk 12, L. ed. 702); *Gibbons* v. *Ogden*, 9 Wheat. 208 (22 U. S. bk. 6. L. ed. 73).

8. In *Peirce* v. *New Hampshire, supra*, the third of the License Cases, the power of a State

*Head notes by Mr. Justice BRADLEY.

[illegible]—*Constitutional law; regulation of commerce by States.* See Gibbons v. Ogden, 22 U. S. (9 Wheat.), 1, bk. 6, 23, *note*; Brown v. Maryland, 25 U. S. (12 Wheat.) 419, bk. 6, 573, *note*.

Power of States to tax. See Providence Bank v. Billings, 29 U. S. (4 Pet.), 514, bk. 7, 989, *note*; Dobbins v. Comm. of Erie County, 41 U. S. (16 Pet.), 435, bk. [illegible], *note*.

to tax goods brought from and manufactured in another State was fully discussed and settled.

9. In every case where there has been no unjust discrimination between the tax or license imposed upon goods within the States, and goods brought into them from other States of the Union, the tax has been upheld as constitutional.

Woodruff v. *Parham, supra; Webber* v. *Va.* 103 U. S. 344 (Bk. 26, L. ed. 565); *Ward* v. *Md. supra; People* v. *Maring*, 3 Keyes, 374; *Gibbons* v. *Ogden, Nathan* v. *Louisiana* and *Hinson* v. *Lott, supra; Conner* v. *Elliott*, 18 How. 593 (59 U. S. bk. 15, L. ed. 498); *State* v. *North*, 27 Mo. 467; *Paul* v. *Va.* 8 Wall. 177 (75 U. S. bk. 19, L. ed. 359); Cooley, Const. Lim. p. 16; *Guy* v. *Baltimore*, and *Machine Co.* v. *Gage*, 100 U. S. 434, 676 (Bk. 25, L. ed. 743, 754).

10. The person selling or soliciting the sale of intoxicating liquors at wholesale, to be shipped into this State by nonresident dealers, is required to pay a tax of $300; and for selling malt, brewed or fermented liquors, the sum of $100; while the resident wholesale dealer is required to pay a tax of $500; and for malt, brewed or fermented liquors a tax of $200, from which it will be found that the nonresident may sell intoxicating liquors at wholesale, by paying only three fifths of what is required of the resident dealer, and may sell malt and fermented liquors by paying one half of that required of the resident dealer.

This discrimination is all in favor of the nonresident; and so long as the nonresident does not pay a greater sum than the resident, there is no unjust discrimination against him. He has no cause for complaint, and is not deprived of the privileges and immunities of citizens of this State.

Guy v. *Baltimore* and *Ward* v. *Maryland, supra.*

Mr. Justice **Bradley** delivered the opinion of the court:

[446] In 1875 the Legislature of the State of Michigan passed an Act relating to the sale of liquors in that State to be shipped into the State by persons not residing therein, known as Act No. 226 of the Session Laws of 1875, of which the following is a copy:

"An Act to Impose a Tax on the Business of Selling Spirituous and Intoxicating, Malt, Brewed and Fermented Liquors in the State of Michigan to be Shipped from without This State.

"Sec. 1. *The People of the State of Michigan enact:* That every person who shall come into, or being in this State, shall engage in the business of selling spirituous and intoxicating, malt, brewed or fermented liquors to citizens or residents of this State, at wholesale, or of soliciting or taking orders from the citizens or residents of this State for any such liquors to be shipped into this State, or furnished, or supplied at wholesale to any person within this State, not having his, their or its principal [447] place of business within this State, shall, on or before the fourth Friday of June in each year, pay a tax of $300 if engaged in selling, or soliciting, or taking orders for the sale of, such spirituous and intoxicating liquors, and $100 for malt, brewed or fermented liquors. Such tax shall be paid to the Auditor-General and be by him paid into the state treasury, to the credit of the general fund.

"Sec. 2. Upon the payment of such tax, the Auditor-General shall issue to such person a receipt therefor, and in case of loss thereof, a duplicate, when required by the person to whom the original receipt was issued. Every person making such sales, or soliciting or taking orders, as in the first section of this Act provided, shall exhibit such receipt to every person to whom he makes sale, or from whom he takes or solicits orders for such liquors, and shall exhibit such receipt to any supervisor, justice of the peace, sheriff, under sheriff or deputy sheriff, city or village marshal, chief of police, policeman, or constable, when required so to do, during business hours.

"Sec. 3. Any person liable to pay any tax under this Act, who shall sell any liquors, or solicit or take orders for liquors to be shipped from without this State to any person within this State, furnished or supplied by a person, copartnership, association or corporation, not resident in, or having his, their, or its principal place of business within this State, without the tax herein provided for having been paid, and having in his possession and exhibiting the receipt therefor, or a duplicate thereof; and any person residing or being in this State who shall purchase liquors from a person liable to pay a tax under this Act, who has not paid such tax, shall give an order for liquors to such person liable to pay a tax under this Act, which order is to be filled, and such liquors are to be shipped from without this State to a person within this State, furnished or supplied by a person, copartnership, association, or corporation, not resident in or having his, their, or its principal place of business within this State shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $25, nor more than $100 and in default of payment thereof, shall be imprisoned not less than ten nor more than ninety days, or both such fine and imprisonment, in the discretion of the court.

"Sec 4. Selling at wholesale shall be deemed to mean and include all sales of such spirituous and intoxicating, malt, brewed or fermented liquors, in quantities of five gallons or over or one dozen quart bottles or more, or soliciting orders therefor at any one time of any one person."

In addition to the foregoing Act there was another independent law in operation in Michigan in 1883, being an Act passed May 3, 1879, entitled "An Act to Provide for the Taxation of the Business of Manufacturing and Selling Spirituous and Intoxicating, Malt, Brewed or Fermented Liquors," and to repeal a previous Act for the same purpose, passed in 1875. Sess. Laws of 1879, p. 293. The Act of 1879 was amended by an Act passed May 19, 1881. Howell's Annotated Statutes § 1281. As amended it reads as follows:

"(Sec. 1281.) Sec. 1. In all townships, cities and villages of this State there shall be paid annually the following tax upon the business of manufacturing, selling or keeping for sale, by all persons whose business, in whole or in part, consists in selling or keeping for sale or manufacturing distilled or malt liquors, or mixed liquors, as follows: upon the business of s

ing or offering for sale spirituous or intoxicating liquors, or mixed liquors, by retail, or any mixture or compound, excepting proprietary patent medicines, which in whole or in part consists of spirituous or intoxicating liquors, the sum of $300 per annum; upon the business of selling or offering for sale, by retail, any malt, brewed or fermented liquors, $200 per annum; upon the business of selling brewed or malt liquors at wholesale, or at wholesale and retail, $200 per annum; upon the business of selling spirituous or intoxicating liquors at wholesale, or at wholesale and retail, $500 per annum; upon the business of manufacturing brewed or malt liquors for sale, if the quantity manufactured be less than fifteen hundred barrels, $65 per annum, and $25 upon each additional thousand barrels, or part thereof; upon the business of manufacturing for sale spirituous or intoxicating liquors, $500 per annum. No person paying a tax on spirituous or intoxicating liquors, under this Act, shall be liable to pay any tax on the sale of malt, brewed or fermented liquors. No person paying a manufacturer's tax on brewed or malt liquors, under this Act, shall be liable to pay a wholesale dealer's tax on the same. Howell's Annotated Statutes of Mich. p. 378.

It is not contended that this Act alters or affects the Act of 1875, on which the prosecution against Walling is based, except so far as it may have the effect of removing the discrimination against the citizens or products of other States, which would be produced by the Act of 1875 standing alone. The counsel for the State contend that the effect of the Act of 1881 is, not only to annul any such discrimination but to create a discrimination against the citizens and products of Michigan in favor of the citizens and products of other States. Whether this is so is a question to be discussed further on.

In June, 1883, Walling, the plaintiff in error, was prosecuted under the Act of 1875, No. 236, being charged in one count of the complaint with selling at wholesale without license, and in another count with soliciting and taking orders for the sale, without license, and at wholesale, of spirituous and intoxicating liquors, to be shipped from out of the State, to wit: from Chicago, in the State of Illinois, into the State of Michigan, and furnished and supplied to citizens and residents of said State by Cavanaugh & Co., a firm doing business in Chicago, not residents of Michigan and not having its principal place of business therein. The prosecution was instituted in the Police Court of Grand Rapids, and Walling was convicted and sentenced to pay a fine, and to be imprisoned in default of payment. He appealed to the county circuit court, in which the case was tried by a jury, who, under the charge of the court, rendered a verdict of guilty. Exceptions being taken, the case was carried to the Supreme Court of Michigan, which adjudged that there was no error in the proceedings and directed judgment to be entered against the respondent. The decision of the supreme court is brought here by writ of error, and is now before us for consideration.

By the bill of exceptions it appears that one Chapin Pease was called as a witness for the prosecution, and was asked what business the respondent (Walling) was engaged in. The respondent objected to the giving of testimony under the complaint, on the ground that the Act of 1875 is repugnant to the Constitution of the United States, and therefore void; that it is in conflict with paragraph 3 of section 8, article 1, giving Congress power to regulate commerce, etc.; paragraph 2 of section 10, article 1, prohibiting *ex post facto* laws and laws impairing the obligation of contracts; and paragraph 1 of section 2, article 4, which declares that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The defendant also objected to the admission of any testimony, because the law referred to is in conflict with the State Constitution. All the objections were overruled, and exceptions were duly taken. The witness then testified that Walling, on June 1, 1883, and before and since that time, was engaged as a traveling salesman for the firm of Cavanaugh & Co., of Chicago, Illinois (shown to be wholesale liquor merchants residing in Chicago), and that his business was that of selling liquor at wholesale for that firm; that the place of business of Cavanaugh & Co. was in Chicago and that the firm had no place of business in Michigan; that on the first of June, 1883, Walling solicited the witness' order for a barrel of whisky to be shipped to him by Cavanaugh & Co. from the City of Chicago, and from without the State of Michigan; that witness gave his order for a barrel of whisky, and the same was shipped to him by said firm from Chicago, and he paid for the same, and that Walling exhibited to witness no receipt from the Auditor-General of Michigan to show that he had paid the tax required by the statute. It was also shown that Walling had never paid any such tax nor received any such receipt.

The evidence being closed, the respondent, on the ground of the alleged conflict of the law with the Constitution of the United States, made various distinct applications to the court: first, to strike out the evidence and grant him a discharge; second, to charge the jury that the Statute of 1875 is in conflict with the Constitution of the United States and therefore void, and, therefore, that their verdict should be not guilty; third, to charge that under the facts disclosed, the jury should find the respondent [451] not guilty. These applications were severally refused and exceptions taken. The court then charged the jury that the Act in question must be regarded as within the power of the Legislature, and as being a valid statute; and that if they should find that the evidence sustained the allegations of the complaint, they must find the respondent guilty; to which charge the respondent excepted.

The single question therefore is, whether the statute of 1875 is repugnant to the Constitution [454] of the United States. Taken by itself and without having reference to the Act of 1881, it is very difficult to find a plausible reason for holding that it is not repugnant to the Constitution. It certainly does impose a tax or duty on persons who, not having their principal place of business within the State, engage in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the State. If this is not a discriminating tax levied

against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax that would be discriminating. It is clearly within the decision of *Welton* v. *Missouri*, 91 U. S. 275 [Bk. 23, L. ed. 347], where we held a law of the State of Missouri to be void which laid a peddler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares or merchandise, not the growth, product or manufacture of that State, and which did not lay a like tax upon the sale of similar articles, the growth, product or manufacture of Missouri. The same principle is announced in *Hinson* v. *Lott*, 8 Wall. 148 [75 U. S. bk. 19, L. ed. 387]; *Ward* v. *Maryland*, 12 Wall. 418 [79 U. S. bk. 20, L. ed. 449]; *Guy* v. *Baltimore*, 100 U. S. 438 [Bk. 25, L. ed. 744]; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697 [Bk. 26, L. ed. 288, 289]; *Webber* v. *Va.* 103 U. S. 344 [Bk. 26, L. ed. 565].

[455] A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.

We have so often held that the power given to Congress to regulate commerce with foreign nations, among the several States and with the Indian Tribes, is exclusive in all matters which require or only admit of general and uniform rules, and especially as regards any impediment or restriction upon such commerce, that we deem it necessary merely to refer to our previous decisions on the subject, the most important of which are collected in *Brown* v. *Houston*, [*ante*, 257], and need not be cited here. We have also repeatedly held that so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that such commerce shall be free and untrammeled; and that any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom. *Welton* v. *Mo.* 91 U. S. 282 [Bk. 23, L. ed. 350]; *County of Mobile* v. *Kimball*, 102 U. S. 697 [Bk. 26, L. ed. 239]; *Brown* v. *Houston* [*supra*]. In *Mr. Justice* Johnson's concurring opinion in the case of *Gibbons* v. *Ogden*, 9 Wheat. 222 [22 U. S. bk. 6, L. ed. 76], his whole argument, which is a very able one, is based on the idea that the power to regulate commerce with foreign nations and among the several States was by the Constitution surrendered by the States to the United States, and, therefore, must necessarily be exclusive; and that where Congress has failed to restrict such commerce, it must necessarily be free. He says: "Of all the endless variety of branches of foreign commerce, now carried on to every quarter of the world, I know of no one that is permitted by Act of Congress, any otherwise than by not being forbidden." * * * "The grant to Livingston and Fulton interferes with the freedom of intercourse among the States." The same sentiment was expressed by *Mr. Justice* Grier in his opinion in the *Passenger Cases*, 7 How. 462 [48 U. S. bk. 12, L. ed. 777], where he says: [456] "And to what weight is that argument entitled, which assumes that because it is the policy of Congress to leave this intercourse free, therefore it has not been regulated, and each State may put as many restrictions upon it as she pleases?" And one of the four propositions with which the opinion concludes is as follows, to wit: "4th. That Congress has regulated commerce and intercourse with foreign nations and between the several States, by willing that it shall be free; and it is, therefore, not left to the discretion of each State in the Union, either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it."

The argument of these eminent judges, that where Congress has exclusive power to regulate commerce, its nonaction is equivalent to a declaration that commerce shall be free (and we quote their opinions for no other purpose), seems to be irrefragable. Of course the broad conclusions to which they arrive, that the power is exclusive in all cases, are subject to the modifications established by subsequent decisions, such as *Cooley* v. *Board of Wardens*, 12 How. 299 [58 U. S. bk. 13, L. ed. 996], and others.

The law is well summarized in the opinion of this court delivered by *Mr. Justice* Field in *County of Mobile* v. *Kimball*, *supra*, where it is said: "The subjects indeed upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale and exchange of commodities. Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe. Its nonaction in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating state legislation."

Many state decisions might also be cited in which the same doctrine is announced. Thus, in the case of *Higgins* v. *300 Casks of Lime*, 130 Mass. 1, it is said: "The result of all these decisions is, that the several States have no authority to prescribe different regulations in relation to the commerce in certain articles, dependent upon the State from which they are brought. This rule in no manner controls or limits the power of a State to enact appropriate health or inspection laws; for such laws are necessarily uniform, and are not dependent upon place." In *State* v. *Furbush*, 72 Maine, 495, construing a statute of Maine, the supreme

court of that State says: "The Act is unconstitutional. It allows goods manufactured in this State to be peddled free; and exacts a license fee from those who peddle similar goods which are manufactured out of the State. Such a discrimination in favor of goods manufactured in this State, and against goods manufactured in other States, violates the Federal Constitution." In *State* v. *North*, 27 Mo. 464, where an Act of Missouri imposed a tax upon merchants for all goods purchased by them, except such as might be the growth, product or manufacture of that State, and manufactured articles the growth or product of other States, it was held by the Supreme Court of that State that the law was unconstitutional and void. The court says: "From the foregoing statement of the law and facts of this case it will be seen that it presents the question of the power of the States, in the exercise of the right of taxation, to discriminate between products of this State and those manufactured in our sister States." And after an examination of the causes which led to the adoption of the Federal Constitution, one of the principal of which was the necessity for the regulation of commerce and the laying of imposts and duties by a single government, the court says: "But, whatever may be the motive for the tax, whether revenue, restriction, retaliation or protection of domestic manufactures, it is equally a regulation of commerce, and in effect an exercise of the power of laying duties on imports; and its exercise by the States is entirely at war with the spirit of the Constitution, and would render vain and nugatory the power granted to Congress in relation to these subjects. Can any power more destructive to the union and harmony of the States be exercised than that of imposing discriminating taxes or duties on imports from other States? Whatever may be the motive for such taxes, they cannot fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures regardless of the consequences." See also *Norris* v. *Boston*, 4 Met. 282, [illegible] *S. C.* in error among the *Passenger Cases*, 7 How. 283 [48 U. S. bk. 12, L. ed. 702]; *Oliver* v. *Washington Mills*, 11 Allen, 268; *Pierce* v. *State*, [illegible] N. H. [illegible]; *McGuire* v. *Parker*, 32 La. Ann. [illegible]; *Wiley* v. *Parmer*, 14 Ala. 627; *Scott* v. *Watson*, [illegible] Ark. 556, 564; *State* v. *McGinnis*, 37 Ark. [illegible]; *State* v. *Browning*, 62 Mo. 591; *Daniel* v. *Richmond*, 78 Ky. 542.

In view of these authorities, especially the decisions of this court on the subject, we have no hesitation in saying that the Act of 1875, under which the prosecution against Walling was instituted, if it stood alone, without any concurrent law of Michigan imposing a like tax in that which it imposes upon those engaged in selling or soliciting the sale of liquors the produce of that State, would be repugnant to that clause of the Constitution of the United States which confers upon Congress the power to regulate commerce among the several States.

The question then arises whether the Act of 1875, as amended by that of 1881, has removed the objection to the validity of the Act of 1875. We have carefully examined that Act, and have come to the conclusion that it has not done so. We will briefly state our reasons for this conclusion.

The counsel for the State suppose that the Act of 1881 imposes a heavier tax on Michigan dealers in liquors of domestic origin than that imposed by the Act of 1875 on those who deal [459] in liquors coming from outside of the State, and, hence, that if there is any discrimination it is against the domestic and in favor of the foreign dealer or manufactured article. We do not think that this position is correct. Let us compare the two Acts!

Of course the Act of 1875 does not assume to tax nonresident persons or firms for doing business in another State. They are subject to taxation in the States where they are located. It is the business of selling for such nonresident parties, or soliciting orders for them for sale in Michigan of liquors imported into the State, that is the object of taxation under the law; and any person engaged in those employments, or either of them, is subject to the tax of $300 per annum. Now, is such a tax, or any tax imposed upon those who are engaged in the like employment for persons or firms located in Michigan, selling or soliciting orders for the sale of liquors manufactured in that State? Clearly not. The tax imposed by the Act of 1881 is a tax on the manufacturer or dealer. He is taxed in the city, township or village in which his distillery or principal place of business is situated. He is subject to a single tax of $500 per annum. No tax is imposed on his clerks, his agents or his drummers who sell or solicit orders for him. They are merely his servants and are not included in the law. It is he and not they whose business is the manufacture or sale of liquors and who is subject to taxation under the law; whereas, the drummers and agents of the foreign manufacturer or dealer, located in Illinois or elsewhere, are all and each of them subject to the tax of $300 per annum. In the one case it is a single tax on the principal; in the other it is a tax, not on the principal, for he cannot be taxed in Michigan, but on each and all of his servants and agents selling or soliciting orders for him. The tax imposed by the Act of 1875 is not imposed on the same class of persons as is the tax imposed by the Act of 1881. That this must give an immense advantage to the product manufactured in Michigan, and to the manufacturers and dealers of that State, is perfectly manifest.

It is suggested by the learned judge who delivered the opinion of the Supreme Court of [460] Michigan in this case, that the tax imposed by the Act of 1875 is an exercise by the Legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people. This would be a perfect justification of the Act if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the National Legislature. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby. *Gas Light Co.* v. *Light and Heat Co.* [*ante*, 516.]

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the court was interposed by the defendant [illegible]
Indianapolis and St. Louis Railroad Comp[illegible]

on the ground that the complainant was in fact a corporation of Indiana and, therefore, not a citizen of a different State from all the defendants. This plea was overruled by the circuit court. No error has been assigned on this ruling, and it was not referred to in the argument here. We do not, however, feel at liberty to pass it by unnoticed. Counsel may, if they desire to do so, file printed arguments on that question, together with copies of the statutes the consideration of which is involved, at any time before February 20.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

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[474] UNITED STATES, *Appt.*,
v.
DEWITT C. REDGRAVE.

(See S. C. Reporter's ed. 474–483.)

Naval Appropriation Act of August 5, 1882—pay of cadet engineers.

Cadet engineers, who had finished their four years' course at the naval academy, passed their final examination and received their diplomas, before the passage of the Act of August 5, 1882, became "graduates" and were made "naval cadets" by that Act, and are, therefore, entitled to the pay provided by section 1556, R. S. The further provisions of this Act, limiting the number of appointments to the number of vacancies occurring during the preceding year, and providing for the discharge of surplus graduates, refer to those who became graduates after 1882.

[No. 985.]

Submitted Jan. 6, 1886. Decided Jan. 25, 1886.

APPEAL from the Court of Claims.

Statement of the case by *Mr. Justice* **Matthews**:

The facts of the case brought here by this appeal, as found by the court of claims, are in substance as follows:

In 1877 the appellee, who was the claimant below, entered the naval academy as a cadet engineer, and on June 10, 1881, received a certificate signed by its officers that he had completed the prescribed course of study at the academy and had successfully passed the required examination before the academic board. He was on the same date detached from the academy and ordered to report for duty on board the United States practice steamer Mayflower. On August 30, 1881, he was detached from The Mayflower and ordered to proceed home on waiting orders. On October 28, 1881, he was ordered to proceed to the navy yard at League Island for duty on board the United States steamer Essex. On April 16, 1883, he reported to the superintendent of the naval academy, in pursuance of orders, for examination, which assumed that the Act of Congress of August 5, 1882, operated upon him as a naval cadet, requiring a six years' course before graduation, and a final examination at its conclusion. On June 23, 1883, he was detached from the naval academy on waiting orders. On June 28, 1883, the Secretary of the Navy addressed to him a letter, in which it is recited that he had successfully completed his six years' course at the naval academy, and [illegible] a certificate of graduation by the academic board, but "not being required to fill any vacancy in the naval service happening during the year preceding your graduation, you are hereby honorably discharged from the 30th of June, 1883, with one year's sea pay, as prescribed by law for cadet midshipmen, in accordance with the provisions of the Act of Congress approved August 5, 1882." [475]

From August 5, 1882, to June 30, 1883, the claimant was paid $769.86 for service in the Navy during that period. If paid during the same period as a graduated cadet engineer, he would have been entitled to receive $796.71.

Since then the claimant has received no pay and has been held by the navy department and the accounting officers of the treasury to be out of the naval service.

After leaving the academy, the claimant and all his classmates were classified on the official navy register, issued in July, 1881, as having "graduated;" and up to August 5, 1882, they were regularly paid as such at the rates prescribed by section 1556 of the Revised Statutes, viz: $1,000 at sea, $800 on shore duty, and $600 on leave or waiting orders. In the same manner the cadet engineers who completed their four years' course in 1878, 1879, and 1880 were all regularly classified in the succeeding navy registers as having graduated in those years respectively; and prior to August 5, 1882, they were all uniformly paid as such.

The regulations prescribing the qualifications for appointment of cadet engineers fixed a higher average age by two years for cadet engineers entering the academy than was required by law for cadet midshipmen so entering. After completing the four years' course, cadet engineers were permanently detached from the academy, and were never required to return to that institution. They remained in active service at sea, or upon other duty, two or three years or longer, until vacancies occurred in the grade of assistant engineer, when they were ordered singly or in groups for examination for promotion, under the provisions of section 1392 of the Revised Statutes, before a board of engineer officers, which held its sessions at Philadelphia.

The last two years of the academic course of cadet midshipmen were spent "at sea in other than practice ships." After four years at the academy they were temporarily detached from that institution by orders from the navy department, and were sent to sea singly or in squads. On shipboard they performed such active duties as were assigned to them. At the end of the two years, they were required to return and did return to the naval academy, where they were subjected to a "final graduating examination" before the academic board. If successful at such examination, they received appointments as midshipmen, and were thereafter classified in the navy register as having "graduated" at that date, and they were never so designated either in the navy register or elsewhere until after they had passed such examination at the end of the six years' course. [476]

The provisions of the Act of August 5, 1882, being the Naval Appropriation Act (22 Stat. at L. 284, chap. 391), which apply to the case, are as follows:

"For the pay of the navy, for the active list,

namely: * * * sixty-nine chief engineers, one hundred past assistant engineers, thirty-five assistant engineers, seventy-three cadet engineers (graduates) * * * one hundred and two cadet engineers, one hundred and thirty cadet midshipmen (not graduates; in all $4,048,300; *Provided*, That hereafter there shall be no appointments of cadet midshipmen or cadet engineers at the naval academy, but in lieu thereof naval cadets shall be appointed from each congressional district and at large, as now provided by law for cadet midshipmen, and all the undergraduates at the naval academy shall hereafter be designated and called 'naval cadets.' And from those who successfully complete the six years' course, appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line, and engineer corps of the navy and of the marine corps; *And provided further*, That no greater number of appointments into these grades shall be made each year than shall equal the number of vacancies which has occurred in the same grades during the preceding year; and such appointments to be made from the graduates of the year, at the conclusion of their six years' course in the order of merit, as determined by the academic board of the naval academy, the assignment to the various corps to be made by the Secretary of the Navy, upon the recommendation of the academic board. But nothing herein contained shall reduce the number of appointments from such graduates below ten in each year, nor deprive of such appointment any graduate who may complete the six years' course during the year 1882. And if there be a surplus of graduates, those who do not receive such appointment shall be given a certificate of graduation, an honorable discharge, and one year's sea pay, as now provided by law for cadet midshipmen. * * *

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"That the pay of naval cadets shall be that now allowed by law to cadet midshipmen, and as much of the money hereby appropriated as may be necessary during the fiscal year ending June 30, 1883, shall be expended for that purpose. * * *

"That no officer now in the service shall be reduced in rank or deprived of his commission by reason of any provision of this Act reducing the number of officers in the several staff corps; *Provided*, That no further appointments of cadet engineers shall be made by the Secretary of the Navy under section 3, of the Act of 1874."

The court of claims, following its previous decision in the case of *Leopold* v. *U. S.* 18 Ct. Cl. 546, affirmed the following propositions of law:

"1. Cadet engineers who had finished their four years' course at the naval academy, passed their final academic examinations, and received their diplomas before the passage of the Act of August 5, 1882, 22 Stat. at L. 285, became graduates, and are not made naval cadets by that Act. They are therefore entitled to pay provided by the Revised Statutes, § 1556, p. 268.

"2. The provision in the Act of August 5, 1882, for the discharge of surplus naval cadet graduates is prospective only, and does not apply to the classes of 1881 and 1882."

Judgment was accordingly rendered in favor of the claimant, from which this appeal is prosecuted by the United States.

Mr. **William A. Maury**, *Asst. Atty-Gen.*, for appellant.

Mr. **J. W. Douglass**, for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

In order to understand the operation of the Act of August 5, 1882, upon the status of cadet engineers, at the time it took effect, it will be necessary to consider what that was, according to laws then in force. That class or grade in the naval service owes its origin to provisions of law now contained in the Revised Statutes as follows:

"Sec. 1522. The Secretary of the Navy is authorized to make provision, by regulations issued by him, for educating at the naval academy, as naval constructors or steam engineers, such midshipmen and others as may show a peculiar aptitude therefor. He may, for this purpose, form a separate class at the academy, to be styled cadet engineers, or otherwise afford to such persons all proper facilities for such a scientific mechanical education as will fit them for said professions.

"Sec. 1523. Cadet engineers shall be appointed by the Secretary of the Navy. They shall not at any time exceed fifty in number (reduced to twenty-five by Act of June 22, 1874, § 3. Supp. R. S. 83), and no persons other than midshipmen shall be eligible for appointment unless they shall first produce satisfactory evidence of mechanical skill and proficiency and shall have passed an examination as to their mental and physical qualifications.

"Sec. 1524. The course for cadet engineers shall be four years, including two years of service on naval steamers. (By the Act of February 24, 1874, Supp. R. S. 6, this provision was changed so as to require the course of instruction at the naval academy for cadet engineers to be four years instead of two, but not dispensing with the additional two years' service on naval steamers.)

"Sec. 1525. Cadet engineers shall be examined from time to time, according to regulations prescribed by the Secretary of the Navy, and if found deficient at any examination, or if dismissed for misconduct, they shall not be continued in the academy or in the service except upon the recommendation of the academic board."

By section 1394, R. S. it was provided, that "cadet engineers who are graduated with credit in the scientific and mechanical class of the naval academy may, upon the recommendation of the academic board, be appointed by the President, and confirmed by the Senate, as second assistant engineers;" but by section 1392 no person could be so appointed until after he had been found qualified by a board of competent engineers and medical officers designated by the Secretary of the Navy. By section 1556 R. S. the pay of cadet engineers was, "before final academic examination, $500; after final academic examination and until warranted as assistant engineers, when on duty at sea, $1,000; on shore duty, $800; on leave or waiting orders, $600.

At the same time the students at the naval academy styled cadet midshipmen were required to take an academic course of six years, § 1520 R. S. when, having passed successfully

the graduating examination at the Academy, they were entitled to receive appointments as midshipmen. § 1521 R. S. The pay of cadet midshipmen was $500; for midshipmen after graduation, when at sea, $1,000; on shore duty, $800; on leave or waiting orders, $600. § 1556 R. S. By the Act of March 3, 1877, Supp. R. S. 294, cadet midshipmen "during such period of their course of instruction as they shall be at sea in other than practice ships, are entitled to receive, as annual pay, $950."

It is contended on the part of the Government, in opposition to the conclusions of the court of claims, that the Act of August 5, 1882, when it took effect, converted all cadet engineers who had not completed their six years' course during that year into naval cadets, all other cadet engineers being regarded as graduates; and that those who were not at that time graduates in that sense were subject to the provisions of the Act in regard to pay and discharge.

The controversy would seem to turn on the meaning to be given to the word "graduates" as used in this Act of Congress.

It is certain that the Act divides all who, at the date when it took effect, were known as cadet engineers, into two classes: graduates and not graduates. Prior to that date a cadet engineer might be pursuing the four years' course of study at the academy, or the two additional years of service on board a naval steamer; or having successfully passed both periods, might be waiting promotion to the grade of assistant engineer.

It is found as a fact by the court of claims that, before the passage of the Act, cadet engineers who had successfully passed their examination at the end of the four years' course of study at the academy, were called and considered graduates. The seventy-three cadet engineers, styled graduates, for whose pay the Act of August 5, 1882, makes appropriation, include all of that description, and among them the appellee in this case, while the one hundred and two cadet engineers, styled in the same Act "not graduates," are those who at that date were still at the academy pursuing their four years' course. This classification was followed by the navy department in the navy register. The Naval Appropriation Act of March 3, 1883, 22 Stat. at L. 472, chap. 97, provides for the pay of sixty-two cadet engineers, which it is not denied is the exact number of cadet engineers who had graduated at the academy, but were not yet eligible to promotion, or whose promotion had been delayed and includes the classes who completed their four years' course in 1880, 1881 and 1882. The same Act appropriates for the pay of three hundred and thirty-five naval cadets, being presumably the whole number of the "under graduates" referred to in the Act of August 5, 1882.

This would seem to settle the meaning of the words, according to the sense adjudged by the court of claims, unless some other meaning is required to be attached to them by other and controlling provisions of the same Act. It is argued by the Assistant Attorney-General that a consistent reading of the entire context does in fact require such other meaning to be given to the words "graduates" and "not graduates."

In support of this conclusion our attention is called to the provisos of the Act, whereby [481] it is enacted that appointments to fill vacancies in the lower grades of the line and the engineer corps, and of the marine corps, shall be thereafter made only from those who successfully complete a six years' course as naval cadets; that no appointments into these grades shall be made each year, except to fill vacancies therein which occurred during the preceding year; that such appointments are to be made only from the graduates of the year at the conclusion of their six years' course; that the exception made, that a graduate who completed his six years' course during the year 1882 shall not be deprived of his appointment, carries with it the implication that those who had not completed a six years' course at that time were included in the rule of exclusion; and that the surplus of graduates not receiving such appointment are therefore subject to discharge from the service on graduation, with one year's sea pay, in the language of the Act "as now provided by law for cadet midshipmen." No similar provision of law then in force relating to cadet midshipmen, however, appears; and the reference is without application. Such a provision did exist in reference to the appointment of graduates of the military academy, as second lieutenants of the army, and the discharge of supernumeraries after July 1, 1882, by virtue of § 3 of the Act making appropriations for the support of the Military Academy, approved June 11, 1878, Supp. R. S. 846; but no such legislation in regard to cadet midshipmen is to be found in force at the date of the Act of August 5, 1882. This, however, is not important, as nothing depends upon the accuracy of this reference.

The general purpose of this Act is quite apparent. One main object was to abolish the distinctions previously made by law between cadet engineers and cadet midshipmen, and for the future to merge both classes in the new designation of naval cadets. The previous differences between them grew out of separate provisions as to their number, their manner of appointment, their course and term of study, and their pay after their four years' course at the academy. Another principal purpose of the Act was to prevent the increase of the number of officers in the navy, by providing for the annual discharge from the service of all graduates of the year not needed to fill vacancies, in [482] the grade to which they were eligible for promotion, actually existing at the time of their graduation. But this was to be accomplished consistently with the declaration of the Act "that no officer now in the service shall be reduced in rank or deprived of his commission by reason of any provision of this Act reducing the number of officers in the several staff corps." And to this end the whole scheme of reform embodied in the legislation was made prospective. Its expressed language is that no appointments of cadet midshipmen or cadet engineers shall be made hereafter; that all the undergraduates at the naval academy shall hereafter be designated and called "naval cadets;" that from those, that is those now called naval cadets, who successfully complete their six years' course, appointments shall hereafter be made as it is necessary to fill vacancies in the

lower grades of the line, and engineer corps of the navy and of the marine corps. But none of these provisions touch the case of the cadet engineer who has already graduated at the date of the Act; that is, who had at that time successfully completed his four years' course of study at the academy and was serving on board a naval steamer. And the further provisions limiting the number of appointments to the number of vacancies occurring during the preceding year, and providing for the discharge of the surplus graduates, equally refer to those who become graduates after the year 1882, under this Act, which now requires for graduation a full course of six years for all naval cadets, including the two years of service on board a naval steamer, which before had constituted the service of a cadet engineer after graduation. This leaves the state and condition of cadet engineers, who at the date of the passage of the Act were already graduates according to the law as it then stood, unchanged; and to this class the appellee belonged.

He is therefore entitled to the pay claimed and withheld; and the judgment of the Court of Claims in his favor is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

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[483] UNITED STATES, *Appt.*,

v.

LYMAN B. PERKINS.

(See S. C. Reporter's ed. 483-485.)

Cadet engineer—Secretary of Navy cannot discharge.

1. A cadet engineer, a graduate of the Naval Academy in 1881, was an officer within the meaning of section 1229, R. S., and could not be discharged at the will of the Secretary of the Navy.
2. When Congress by law vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest.

[No. 986.]

Submitted Jan. 6, 1886. Decided Jan. 25, 1886.

APPEAL from the Court of Claims. *Judgment affirmed.*

The case is stated by the court. See also the preceding case of *U. S.* v. *Redgrave*, referred to in the opinion.

Mr. **William Maury**, *Asst. Atty-Gen.*, for appellant.

Mr. **J. W. Douglass**, for appellee.

Mr. Justice **Matthews** delivered the opin-
[483] ion of the court:

The object of this suit was to recover $100 as the salary of the plaintiff as a cadet engineer of the navy, from June 30, 1883, to September 1, 1883, at the rate of $600 per year, as provided by section 1556 R. S. Judgment was rendered in his favor for that amount.

The plaintiff entered the naval academy as a cadet engineer in 1877, and graduated therefrom on June 10, 1881. On June 26 1883, he received a letter from the Secretary of the Navy giving him notice that, as he was not required to fill any vacancy in the naval service happening during the preceding year, he was thereby honorably discharged from the 30th of June, 1883, with one year's sea pay, as prescribed by law for cadet midshipmen, in accordance with the provisions of the Act of Congress approved August 5, 1882.

He protested against this order as illegal and refused the pay; and regarding himself as continuing in the service, he sued for his pay subsequently accruing.

The case differs from that of Redgrave, just decided, in one particular only; that the claim is for pay after the alleged discharge.

The single question now raised as to that point is, that, although the discharge may not be justified by the Act of August 5, 1882, the Secretary of the Navy, irrespective of that Act, had lawful power to discharge him from the service, at will. This authority is claimed on the ground that the plaintiff was not an officer in the naval service within the meaning of section 1229 R. S. which provides that "No officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof;" and that consequently the right to remove and discharge him from the public service is implied in the power of appointment.

In reply to this position, the court of claims, in its opinion in this case, said:

"In this view we cannot concur. That a cadet engineer like the claimant was a graduate and in the naval service we have already decided; that he was an officer is made manifest by the terms of the Constitution, which provides that 'Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of Departments.' Congress has by express enactment vested the appointment of cadet engineers in the Secretary of the Navy, and when thus appointed they become officers and not employees. *U. S.* v. *Germaine*, 99 U. S. 508 [Bk. 25, L. ed. 482]; *U. S.* v. *Moore*, 95 U. S. 760 [Bk. 24, L. ed. 588]; *U. S.* v. *Hartwell*, 6 Wall. 385 [73 U. S. bk. 18, L. ed. 830].

"It is further urged that this restriction of the power of removal is an infringement upon the constitutional prerogative of the Executive, and so of no force, but absolutely void. Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution (article 2, § 2) does not arise in this case and need not be considered.

"We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.

"The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress; and by such legislation he must be governed,

not only in making appointments but in all that is incident thereto.

"It follows that as the claimant was not found deficient at any examination, and was not dismissed for misconduct under the provisions of Revised Statutes, § 1525, nor upon and in pursuance of the sentence of a court-martial to that effect or in commutation thereof, according to Revised Statutes, § 1229, he is still in office and is entitled to the pay attached to the same."

We adopt these views, and affirm the judgment of the Court of Claims.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

MATTHEW J. LAUGHLIN, *Appt.*
v.
DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 485-491.)

District of Columbia—payment of certificate of auditor of board of public works to holder—discharges debt when indorsement of in blank—notice not to pay to assignee.

1. The payment, by the District of Columbia, of certificates of the auditor of the board of public works, to a third person, where such certificates have been indorsed in blank and placed in his hands by the owner, in the absence of any notice of his want of authority to collect, discharges the debt.

2. A letter by the attorney of the owner, sent to the treasurer of the board of public works merely requesting him not to pay the certificates, was not sufficient to make the District liable to the owner after payment to the holder.

[No. 111.]

Argued Jan. 14, 1886. Decided Jan. 25, 1886.

APPEAL from the Court of Claims. *Judgment affirmed.*

The case is stated by the court.

Messrs. **Enoch Totten, Eppa Hunton** and *V. P. Edwards*, for appellant:

Whatever notice was conveyed to Magruder was conveyed to his principal, the Corporation. It may be that he, in addition to filing the paper, should have made some note or entry upon the books of the Corporation, in such manner as to arrest the attention of his successors; but a failure of that character on his part cannot change the position or rights of a creditor.

Bridgford v. *Tuscumbia*, 4 Woods, 611; 16 Fed. Rep. 910; 6 Barb. 516; *Bigelow* v. *Perth Amboy*, 1 Dutch. 297; *San Antonia* v. *Lewis*, 9 Tex. 69.

One notice to a corporation is enough; and a subsequent change of officers furnishes no defense against such a wrong as this. It is the duty of the outgoing officer to see to it that his successor is made acquainted with any unusual circumstances connected with any particular case or piece of property.

See *Mechanics Bank of Alexandria* v. *Seton*, 1 Pet. 299 (26 U. S. bk. 7, L. ed. 152); *People* v. *Comptroller*, 77 N. Y. 45.

Mr **John Goode**, *Solicitor-Gen.*, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit brought July 28, 1880, under the Act of June 16, 1880, chap. 243, 21 Stat. at L. 284, by Matthew J. Laughlin against the District of Columbia to recover an amount claimed to be due upon five certificates of the auditor of the board of public works. The facts are these:

Laughlin contracted with the board of public works to do certain work and furnish certain materials in grading the streets in Washington. The work was done and the board, according to its usage with contractors, issued to the attorney in fact of Laughlin, certificates of accounts allowed by its auditor, as follows:

"No. 4763. Office of Auditor of Board of Public Works,
Washington, D. C., Dec. 24th, 1873.

I hereby certify that I have this day audited and allowed the account of M. J. Laughlin, per J. F. Murray, att'y, for work, as per schedule, amounting to fifteen hundred dollars.

$1,500. J. C. Lay, Auditor."

Three other certificates for $6,000, $5,000, and $2,000 respectively, numbered 4764, 4766 and 4767, were issued to the same person and in the same form, all having the same date. Another certificate for $597 was also issued, but as the right to recover on that was abandoned at the argument it need not be specially referred to.

After the certificates were issued Laughlin demanded payment from the treasurer of the board of public works, which was refused for want of funds. He then borrowed money on them from Rudolph Blumenburg, at the rate of thirty-three cents on the dollar of their face value, giving his notes for the amount borrowed, and delivering the certificates indorsed by him in blank as collateral. Certificates Nos. 4764, 4766 and 4767 were hypothecated January 20, 1874, and No. 4763, February 14, 1874. [487]

On or about the 5th of June, 1874, a written document was delivered to James A. Magruder, treasurer of the board of public works, which he filed with the papers of the board, where it has ever since remained, and of which the following is a copy:

"Washington, D. C., June 5th, 1874.

Col. James A. Magruder, Treasurer, B. P. W.

Sir: I do most respectfully ask of you not to pay the following auditor's certificates, dated December, 1873, issued to 'M. J. Laughlin, per J. F. Murray, attorney,' viz: No. 4763, for $1,500; No. 4764, for $6,000; No. 4766, for $5,000; No. 4767, for $2,000.

Also a certificate issued in the name of M. J. Laughlin, No. 4426, for $597.

Very Respectfully,
J. F. Murray."

Previous to that date Laughlin had orally notified Magruder not to pay the certificates, but at what exact time does not appear. He did not, however, bring any suit to enjoin the payment or conversion of the certificates, or to establish his interest in or title to them.

On the 20th of June, 1874, Congress passed "An Act for the government of the District of Columbia and for other purposes" (chap. 337, 18 Stat. 116), by which "all provisions of law providing for an Executive, for a secretary for the District, for a Legislative Assembly, for a board of public works and for a delegate in

Congress in the District of Columbia" were repealed, and a commission created to exercise "all the power and authority now lawfully vested in the governor or board of public works of said District," except as thereinafter limited. This commission was authorized to take possession and supervision of all the offices, books, papers, records, moneys, credits, securities, assets and accounts belonging or appertaining to the [488] business or interests of the government of the District of Columbia and the board of public works, and exercise the power and authority conferred by the Act. By section 6 the First Comptroller of the Treasury and the Second Comptroller of the Treasury of the United States were constituted a board of audit "to examine and audit for settlement," among other things "the debt purporting to be evidenced and ascertained by certificates of the auditor of the board of public works." This board was required to "issue to each claimant a certificate, signed by each of said board and countersigned by the comptroller of the District, stating the amount found to be due to each and on what account." Power was given the board to "subpœna witnesses, administer oaths and examine witnesses under oath," and it was allowed "full access to all of the records, books, papers and vouchers of every kind whatsoever of the board of public works;" "and to the end that said books and accounts may be thoroughly examined, and the indebtedness of the District and of the board of public works, and the state of the books and accounts of the officers aforesaid, may be accurately ascertained," the board was authorized to "employ one or more skillful and impartial accountants * * * and such other assistants as they may deem necessary to make examination of said books, vouchers and papers, and discharge their duties * * * and shall procure inspection of such bank books and papers as may be necessary." The board was also to give notice for the presentation of claims, and no claim could "be audited or allowed unless presented within ninety days after the first publication of such notice." By section 7 the sinking-fund commissioners were required to exchange the three-sixty-five bonds of the District at par, for like sums of any debt evidenced by certificates of the board of audit.

On the 16th of July, 1874, N. A. Cowdrey presented the certificates, now in dispute, to this board of audit for allowance and settlement. Before their presentation, and after their delivery by Laughlin to Blumenburg, there had been printed over the indorsement in blank which was on them when delivered the following:

[489] "For value received, the within debt is assigned and transferred to N. A Cowdrey, who is authorized to collect the same for his own use." This was done without the knowledge of Laughlin. Certificates of allowance were issued to Cowdrey in due form by the board of audit; and these were taken up by an exchange of bonds for them by the sinking-fund commissioners. Neither Blumenburg nor any assignee of his has accounted to Laughlin for the proceeds of the certificates, nor returned the notes for which they were transferred as security.

Upon these facts the court of claims gave judgment against Laughlin, and to reverse that judgment this appeal was taken.

It has been settled in this court that if the owner of certificates of the auditor of the board of public works, like those now in question, places them in the hands of a third person, indorsed in blank so as to give him apparent authority for their collection, payment by the District to the person so invested with apparent authority, without notice of a want of actual authority, will discharge the debt. *Cowdrey* v. *Vandenburgh*, 101 U. S. 572 [Bk. 25, L. ed. 923]; *Looney* v. *District of Columbia*, 113 U. S. 258 [Bk. 28, L. ed. 974]. The court of claims so held in *Adams* v. *District of Columbia*, 17 Ct. Cl. 351, decided at the December Term, 1881, which was but a little more than a year after the Act giving that court jurisdiction in this class of cases was passed.

Such being the law, the only question we have now to consider is, whether the letter of June 5, 1874, addressed by the attorney of Laughlin to the treasurer of the board of public works and placed on file with the papers of the board, makes the District answerable to Laughlin for the amount due on the certificates notwithstanding the payment to Cowdrey upon the allowance by the board of audit. The court of claims was of opinion that it did not, and in this we concur.

The board of audit was in no sense the board of public works or its successor. It was a department of the District Government established "to examine and audit for settlement" certain classes of the debt of the District. It was invested for this purpose with *quasi* judicial powers. The commission, which was the general governing body of the District, had no control over it. No claim against the District, of either of the classes this board was required to audit, could be paid except upon a certificate of allowance signed by each of the members of the board and countersigned by the comptroller of the District. The board could not begin its work until public notice had been given the creditors of the District to appear and present their claims, and it could act only for a limited period. This notice was to all the world and required all who had claims to appear or suffer the consequences if they kept away. Laughlin was bound to take notice of the statute creating the board and of the duties of the board in respect to claims like his. He knew that his certificates were outstanding in the hands of some one invested by him with an apparent title as owner, or at least with an apparent authority to collect them. He knew or ought to have known that the holders of the certificates might present them and demand their allowance. The law charges him also with notice of the power of the board to examine witnesses and consider the rights of contesting parties. It is true he may have had the right to suppose that his letter to the treasurer of the board of public works would be brought to the attention of the board; but that letter was nothing more than a request to the treasurer not to pay. No reason was assigned for the request, and no statement was made of the facts connected with the title or authority of the person who might present them for payment. If the certificates had been presented to the treasurer

after the letter was delivered to him, it would have been his duty to notify Blumenburg before payment, so that the proper steps might be taken to contest the right of the holder to the money. But when the office of treasurer of the board of public works was abolished and the board of audit created, an entirely new condition of things arose. The statute authorizing the board gave notice to Laughlin that he must himself appear before that tribunal to assert his rights as against the holder of his certificates or take some other steps to prevent their payment, and, if he did not, that his claim against the District might be lost. The board, even if his letter had been brought to its attention, would not have been compelled to give him any other notice to appear than that which he already had. As he failed to appear at all, there was nothing for the board to do but to act upon the evidence which was before it, and decide accordingly. In *Cowdrey* v. *Vandenburgh* the suit was by Vandenburgh, the owner of a certificate like those now in question, against Blumenburg and Cowdrey, to compel surrender of the certificate to him upon allegations as to their title very similar to those which are here made against them. Upon proof of the charge against Blumenburg and a failure by Cowdrey to show that he paid value for the certificate, the decree sought was granted. So here, if Laughlin had appeared before the board and made his showing, it is possible he might have got the pay instead of Cowdrey; but he failed to do so, and it is now too late for him to assert his rights against the District.

The judgment of the Court of Claims is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ELIJAH M. DUNPHY, *Plf. in Err.*,
v.
JAMES M. RYAN.

(See S. C. Reporter's ed. 491-499.)

Statute of Frauds—parol contract to buy lands and convey, not enforcible—refusal to perform contract—pleading and evidence.

1. A parol agreement that one of the parties shall purchase a tract of land on the best terms possible, and then convey an interest therein to the other party, is within the Statute of Frauds and cannot be enforced.

2. Under the circumstances of this case the purchaser of the land was not the agent of the other party; and the law implies no promise by the latter to repay the price as for money paid out at his request.

3. The mere refusal of a party to perform a parol contract for the sale of land cannot be construed to be such a fraud as will give a court of equity jurisdiction to enforce it.

4. The denial of the making of a contract lets in the defense of the Statute of Frauds as effectively as if it had been specifically pleaded.

[No. 114.]

Argued and submitted Jan. 15, 1886. Decided Jan. 25, 1886.

IN ERROR to the Supreme Court of the Territory of Montana. *Judgment affirmed.*

Statement of the case by *Mr. Justice* Woods:

Under the statute law of the Territory of Montana there is no distinction between legal and equitable remedies, and there is "but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs," which is "the same at law and in equity." R. S. of Montana of 1879, p. 41. This law being in force, James M. Ryan, the defendant in error, brought this suit in the District Court for the Third Judicial District in the County of Lewis and Clarke, Montana Territory, against Elijah M. Dunphy, the plaintiff in error, to recover judgment against the latter on his promissory note for $1,511.50, dated June 1, 1879, and payable to the plaintiff in error on December 1 following. [491] [492]

The defendant admitted in his answer the execution and delivery of the note, and that it had not been paid; and by way of cross action and counter claim, alleged that in February, 1879 one Rumsey and one Embrey were the owners of certain placer mining ground, with the appurtenances particularly described, situate in Grizzly Gulch, Minnesota Mining District, in Lewis and Clarke County, Montana, and that at the time mentioned, the defendant being in negotiation for the purchase thereof, entered into a contract with the plaintiff, which is thus stated in the defendant's answer:

"The said defendant was to effect the purchase of the two thirds of the above-described property upon the best terms possible, exercising and using his best judgment for the joint use and benefit of said plaintiff and defendant; that the title thereto and all deeds of conveyances for the said interest in and to said premises and property were to be taken in the name of the defendant herein, and that the plaintiff herein was not to be known in the transfers and purchase until such time as the purchase was completed and all of the conveyances executed, and when so completed and a good and sufficient title acquired to said property by defendant, the defendant was to make and deliver to the said plaintiff a good and sufficient deed of conveyance for the undivided one third thereof; and that upon the execution and delivery of such deed the said plaintiff promised and agreed to pay to this defendant the one third of all moneys paid by him as the consideration for such conveyance and transfer, and the one half of all expenses incurred and paid in and about obtaining the title to the said property as aforesaid."

The answer further averred, in substance, that on July 26, 1879, the defendant had acquired a complete and perfect title to the entire interest and estate in said property by conveyances from Rumsey and Embrey; that the consideration for said conveyances was $5,200, and the expenses incident to acquiring the title were $2,200; and that on the day last mentioned the plaintiff was indebted to the defendant, under said contract, on account of the said purchase and expenses, in the sum of $1,985.51; and that on that day he tendered to the plaintiff a good and sufficient deed for the one undivided third of said property and demanded of him the payment of the last mentioned sum of money; and the plaintiff refused to receive the deed or pay the money demanded of him, and denied the existence of the agreement above set forth. The defendant therefore prayed judgment against [493]

the plaintiff for the sum of money so demanded, with interest from July 26, 1879.

The plaintiff filed a replication, in which he denied that he ever made the contract set out in the answer.

Upon the trial of the cause, as appeared by the bill of exceptions, the defendant being upon the stand as a witness in his own behalf, and having stated that he did in February, 1879, enter into a verbal contract with the plaintiff for the purchase of the mining ground described in the answer, and that there was no written agreement, was asked to state what the agreement was. "The plaintiff objected to the witness answering said question, for the reason that the agreement, not being in writing," was "void by the Statute of Frauds. The court sustained the objection and refused to permit the said witness to answer the question." "The defendant then proposed to prove by said witness the truth of the matters alleged and set up in his answer, and read the same to the court. The court refused to permit the defendant to prove said matters, on the ground that the said matters rested in parol and were not in writing." The defendant excepted to these rulings. There being no further evidence the jury returned a verdict for the plaintiff for $1,733, the amount due on the note sued on, for which sum the court rendered judgment against the defendant. Upon appeal by the de- [494] fendant to the supreme court of the Territory this judgment was affirmed. By the present writ of error the defendant seeks a reversal of the judgment of affirmance.

Mr. **M. F. Morris,** for plaintiff in error.

The rule that governs this class of cases has been well stated by a recent elementary writer, Bishop on Contracts, §§ 503, 535, 545:

"If one has voluntarily done a thing which, being within the statute, he could not have been compelled to do, he may enforce payment of it, that is, recover the consideration orally agreed—from the other."

And again: "If the conveyance is actually made, any oral promise to pay for the land is good."

And this is the tenor of all the authorities on the subject.

Phillips v. *Thompson*, 1 Johns. Ch. 418; *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. 273; *Baker* v. *Wainwright*, 36 Md. 336; *Green* v. *Drummond*, 31 Md. 71; *Nutting* v. *Dickinson*, 8 Allen, 540; *Philbrook* v. *Belknap*, 6 Vt. 383; *Ray* v. *Young*, 13 Tex. 550; *Zabel* v. *Schroeder*, 35 Tex. 308; *Sims* v. *McEwen*, 27 Ala. 184; *Knowlman* v. *Bluett*, L. R. 9 Exch. 1; *Swain* v. *Seamens*, 9 Wall. 254 (76 U. S. bk. 19, L. ed. 554).

It may be objected that if the plaintiff in error paid his own money and not that of the defendant in error, there is no resulting trust, and no relation of principal and agent. The answer is that if the plaintiff in error advanced his own money for the use and benefit of the defendant in error, the payment is a loan to the latter in contemplation of law; and it thereby becomes the money of the defendant in error.

Messrs. **Edward W. Toole** and **Joseph K. Toole,** for defendant in error:

Where a party pays money or renders services to another upon a contract void under the Statute of Frauds, it has always been held that he can recover for money had and received, or upon a *quantum meruit*. But in such case the contract is disregarded and the action is based upon the implied promise to pay. This however is emphatically a suit upon the contract, and the complaining party must stand or fall upon the establishment of it. The authorities cited by the plaintiff in error support this proposition.

See also, Browne, Stat. Frauds, 3d ed. p. 122, § 124: *Gray* v. *Hill*, Ryan & Moody, 420; *Fuller* v. *Reed*, 38 Cal. 99; *Patten* v. *Hicks*, 43 Cal. 509; *Cooper* v. *Pena*, 21 Cal. 403; *Dung* v. *Parker*, 52 N. Y. 494; *Kidder* v. *Hunt*, 11 Am. Dec. 183; *Houston* v. *Townsend*, 12 Am. Dec. 109; *Jackson* v. *Murray*, 17 Am. Dec. 58; Story, Part. p. 94, n. *a*.; 12 Wis. 138, 153, 169; 9 Wis. 397; 5 Ves. 314; 4 Fed. Rep. 694; Pac. Law. Rep. Apr. 9, 1885, 338.

Mr. Justice **Woods** delivered the opinion of the court: [4

The defendant insists that the court erred in refusing to allow him to prove the contract set up in his answer. The statute law of Montana applicable to the question in hand is as follows: Chapter XIII., art. I of the Revised Statutes of Montana of 1879 provides as follows:

"Sec. 160. No estate or interest in land, other than for leases for a term not exceeding one year, or any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

"Sec. 162. Every contract for the leasing for a longer time than one year, or for the sale of any lands or interest in lands, shall be void, unless the contract or some note or memorandum thereof expressing the consideration be in writing and be subscribed by the party by whom the lease or sale is to be made."

The denial in the replication of the plaintiff of the making of the contract on which the defendant based his cross action is as effective for letting in the defense of the Statute of Frauds as if the statute had been specifically pleaded. [4 *May* v. *Sloan*, 101 U. S. 231 [Bk. 25, L. ed. 797]; *Buttermere* v. *Hayes*, 5 M. & W. 456; *Kay* v. *Curd*, 6 B. Mon. 100. The question is, therefore, fairly presented, whether the contract alleged in the answer of the defendant, not being in writing, is valid and binding under the statutes of Montana.

We cannot doubt that the contract which the defendant seeks to enforce is a contract for the sale of lands. According to the averments of the answer it was this: the plaintiff, being in treaty for the purchase of the lands, agreed with the defendant to acquire title to the undivided two thirds thereof in his own name upon the best terms possible, and, when he had acquired the title, to convey to the plaintiff, by a good and sufficient deed, an undivided third of the premises, for which the plaintiff promised to pay the defendant one third of the purchase money and one half the expenses incurred in obtaining the title. This is simply an agreement of the defendant to convey to the

plaintiff a tract of land for a certain consideration. It therefore falls precisely within the terms of section 162 above quoted. It is a contract for the sale of lands and, not being in writing signed by the vendor, is void. The circumstance that the defendant, not owning the land which he agreed to convey, undertook to acquire the title, instead of taking the case out of the statute, brings it more clearly and unequivocally within its terms. A contract void by the statute cannot be enforced directly or collaterally. It confers no right and creates no obligation as between the parties to it. *Carrington* v. *Roots*, 2 M. & W. 248; *Dung* v. *Parker*, 52 N. Y. 494. The defendant must therefore fail in his cross action, unless he can take his case out of the operation of the Statute of Frauds.

The defendant seeks to evade the effect of the statute by the argument that in the transaction set out in his answer he was acting as the agent of the plaintiff as well as for himself; and that, having as such agent paid for the share of the land which he had agreed to convey to the plaintiff, he is entitled to recover back the price, as for money paid out and expended for the plaintiff at his request.

It is well settled that when one person pays money or performs services for another upon a contract void under the Statute of Frauds, he may recover the money upon a count for money paid to the use of defendant at his request, or recover for the services upon the *quantum meruit* count. *Wetherbee* v. *Potter*, 99 Mass. 354; *Gray* v. *Hill*, Ryan & Moody, 420; *Shute* v. *Dorr*, 5 Wend. 204; *Ray* v. *Young*, 13 Tex. 559. But in such cases the suit should be brought upon the implied promise. *Buttermere* v. *Hague*, 5 M. & W. 456; *Griffith* v. *Young*, 12 East, 513; *Kidder* v. *Hunt*, 1 Pick. 328. Clearly the present case does not belong to that class. Here the suit is based upon, and its purpose is to enforce, the void contract.

The cause of action set up in the defendant's answer is that the plaintiff, having contracted to purchase the land and receive a conveyance therefor, became liable, upon a tender to and refusal by him of the deed, to pay the agreed price. This is a suit upon the express contract. There is no implied contract on which the cross action can rest, for the law implies a contract only to do that which the party is legally bound to perform. As the express contract set up by the defendant was void under the statute, the plaintiff was not bound in law to accept the deed tendered him by the defendant or pay the purchase money. The defendant paid no money to or for the plaintiff. The money paid out by him was to enable him to perform his contract with the plaintiff. He paid it out for himself and for his own advantage. The plaintiff has received neither the money nor the land from the defendant. Neither reason nor justice dictates that he should pay the defendant the price of the land and therefore the law implies no provision to do so. 2 Bl. Com. 443; *Ogden* v. *Saunders*, 12 Wheat. 341 [25 U. S. bk. 6 L. ed. 650]. The cross action cannot, therefore, be sustained on any supposed implied promise of the plaintiff.

But the defendant's counsel further insist that there has been such a part performance of the contract as entitles the defendant to equitable relief, on the ground that it would be a fraud on him not to enforce the contract.

The case as stated in the defendant's answer is not, either in the averments or prayer, one for equitable relief. There is no averment, and [498] no proof was offered, that the refusal of the plaintiff to accept the deed and pay the purchase price of the land has subjected the defendant to any loss. His answer avers that before he made his contract with the plaintiff he was negotiating with the owner for the purchase of the land. It is not alleged that he would not have purchased the land if he had not made his contract with the plaintiff. There is no averment that the land is not worth, or that it cannot be sold for, all it cost him. As between these parties there has been no payment, no possession and no improvements. The only complaint of misconduct on the part of the plaintiff which can be inferred from the pleadings is his refusal to perform a verbal contract for the purchase of lands. But the mere breach of a verbal promise for the purchase of lands will not justify the interference of a court of equity. *Purcell* v. *Miner*, 4 Wall. 513 [71 U. S. bk. 18, L. ed. 435]. There is no fraud in such a refusal. The party who so refuses stands upon the law and has a right to refuse. Under the circumstances of this case the statute is as binding on a court of equity as on a court of law. If the mere refusal of a party to perform a parol contract for the sale of lands could be construed to be such a fraud as would give a court of equity jurisdiction to enforce it, the Statute of Frauds would be rendered vain and nugatory. The defendant knew or ought to have known that the statute requires such a contract as the one he seeks to enforce to be evidenced by writing. That he did not exact a contract in writing is his own fault. Courts of equity are not established to relieve parties from the consequences of their own negligence or folly.

The Statute of Frauds is founded in wisdom and has been justified by long experience. As was said by *Mr. Justice* Grier, in *Purcell* v. *Miner*, *ubi supra*, the statute "is absolutely necessary to preserve the title to real property from the chances, the uncertainty and the fraud attending the admission of parol testimony." It should be enforced. Courts of equity, to prevent the statute from becoming an instrument of fraud, have in many instances relaxed its provisions. But this case is barren of any averment or proof or offer of proof which ought to induce a court of equity to afford relief. It follows that neither in a court of law nor a court of equity can the defendant maintain his [499] suit on the cause of action set up in his answer by way of counterclaim or cross action.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Ct. U. S.

[499]

REECE M. OBERTEUFFER ET AL., *Plffs. in Err.*,

v.

WILLIAM H. ROBERTSON, Collector of the PORT OF NEW YORK.

(See S. C. Reporter's ed. 499–517.)

Import duties—whether boxes, cartons and packing are to be included in valuation.

1. Under the Act of 1883, repealing former provisions, boxes or coverings of any kind, not of a material or form designed to evade duties thereon but designed to be used in the *bona fide* transportation of the goods to the United States, are not subject to duty.
2. The exaction of duty on packing, whether packing the goods in cartons, or cartons in outer cases, or lining outer cases, is not warranted by law, such charges having been abolished by the Act of 1883.
3. The addition to the valuation of imported goods, of items for boxes and cartons and for packing, is no part of the appraisal; and the remedy of the importer is not to apply for a new appraisement, but to protest and appeal.
4. The protest in the present case held sufficient to raise the points relied upon by the plaintiffs in error.

[No. 1192.]

Argued Jan. 6, 7, 1886. Decided Jan. 25, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. **Edwin B. Smith, Stephen G. Clarke, William Stanley** and **Charles Curie,** for plaintiffs in error.

Mr. **John Goode,** *Solicitor-Gen.*, for defendant in error.

[500] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is an action brought in a state court in New York, by Reece M. Oberteuffer, Henry Abegg and Henry H. Baeniker, composing the mercantile firm of Oberteuffer, Abegg & Baeniker, against William H. Robertson, Collector of the Port of New York, to recover $140.80 as an excess of duties, paid on coverings and putting-up charges on hosiery and gloves, upon which *ad valorem* duties were imposed by law. It was removed into the Circuit Court of the United States by the defendant. At the trial the jury rendered a verdict for the defendant, by direction of the court, and there was a judgment for him for costs, to review which the plaintiffs have brought a writ of error.

In July, 1883, the plaintiffs imported from Bremen two cases of wool gloves, Nos. 4836, 4837; twenty-one cases of cotton hosiery, Nos. 4852 to 4872; and one other case of cotton hosiery, No. 168. There were three invoices covered by one entry.

The invoice of the two cases of gloves was dated at Leipzig and Chemnitz, in Saxony, June 29, 1883, and was of goods purchased by the plaintiffs. It covered 500 dozen of gloves, in five items, the prices of which per dozen were given and amounted to 2415 marks. There was a deduction of 3 per cent discount for cash, or 72 marks, 45 pfennigs, leaving 2342 marks, 55 pfennigs. There was then added, under the item of "packing charges," 25 marks "for cases," 220 marks "boxes," and 5 marks "packing," being a total of 250 marks, less 3 per cent discount for cash, or 7 marks, 50 pfennigs, leaving 242 marks, 50 pfennigs, which added make 2585 marks, 05 pfennigs. In the entry, the value was stated at 2342 marks, 55 pfennigs.

The invoice of the 21 cases of hosiery was dated at Leipzig and Chemnitz, in Saxony, July 5, 1883, and was of goods purchased by the plaintiffs. It covered 2949 dozen of hose, in twenty-one items, the prices of which per dozen were given, and amounted to 13,530 marks, 70 pfennigs. There was a deduction of 3 per cent discount for cash, or 405 marks, 95 pfennigs, leaving 13,124 marks, 75 pfennigs. There was then added, under the item of "packing charges," 420 marks "for cases," 1204 marks, 50 pfennigs "boxes," and 42 marks "packing," being a total of 1666 marks, 50 pfennigs, less 3 per cent discount for cash, or 50 marks, leaving 1616 marks, 50 pfennigs, which added made 14,741 marks, 25 pfennigs. In the entry the value was stated at 13,124 marks, 75 pfennigs.

The invoice of the one case of hosiery was dated at Hohenstein, Ernsthal, in Saxony, July 4, 1883, and was of goods consigned to the plaintiffs for sale. It covered 178 dozen of hose, in six items, the prices of which per dozen were given, and amounted to 1629 marks, 20 pfennigs. There was a deduction of 4 per cent discount for cash, or 65 marks, 20 pfennigs; leaving 1564 marks. There was then deducted, for "case" 10 marks; "freight from Hohenstein to Bremen," 15 marks; "and to New York," 29 marks; "consul fees," 10 marks, 75 pfennigs; and "insurance," 10 marks, 25 pfennigs; being a total of 75 marks, less 4 per cent discount for cash, or 3 marks; leaving 72 marks, which deducted left 1492 marks; which was the value stated in the entry.

On the invoice of the two cases of gloves the report of the appraiser was that 225 marks (being the 220 marks for "boxes" and the 5 marks for "packing"), less importer's discount, should be added "to make market value in marketable condition." This was done, and the duty paid on the added amount was $20.80.

On the invoice of the 21 cases of hosiery the report of the appraiser was that 1246 marks, 50 pfennigs (being the 1204 marks, 50 pfennigs, for "boxes," and the 42 marks for "packing"), less importer's discount, should be added "to make market value in marketable condition." This was done, and the duty paid on the added amount was $114.80.

On the invoice of the one case of hosiery, the report of the appraiser was that 30 pfennigs per dozen should be added "to make market value in marketable condition." This was done, and the duty paid on the added amount was $5.20.

The importers filed a protest with the Collector in due time, and duly appealed to the Secretary of the Treasury, and brought suit in due time. The protest covered the entry in this case and was as follows: "We protest against the liquidation, as made by you, of our entries of merchandise, below referred to, and against the payment of the duties exacted thereon, and exacted on the charges of whatever nature thereon, on the following grounds, and upon each and every one of them.

First. That, under the Act of March 3, 1883

the cost or market value of said merchandise is alone dutiable; whereas, in ascertaining the dutiable value thereof, there has been illegally estimated and included as a part of such value charges expressly declared by section 7 of said Act to be nondutiable.

Second. That, under the Act of March 3, 1883, only the value of said cotton hose or other merchandise is dutiable; whereas, the value of the usual and necessary sacks, crates, boxes and other coverings have been estimated as part of the value of said goods, in determining the amount of duties for which they should be liable, contrary to the provisions of section 7, Act, March 3, 1883.

Third. By the Act of March 3, 1883, all duties heretofore exacted upon charges incurred in the importation of merchandise are repealed, but there have been included, in estimating the dutiable value of said goods, actual, usual and necessary charges for putting up, preparing, and packing said merchandise; and we hereby separately and distinctly protest against all duties assessed by reason of such additions to the actual cost or market value of the actual merchandise imported.

Fourth. That under the Act of March 3, 1883, said cotton hose or other merchandise are only dutiable at their first cost or net market value in principal markets of countries whence exported; whereas, the appraiser, in fixing the dutiable value of said merchandise, has illegally estimated and included as a part of such value the charges for finishing and putting up said merchandise, or one or more of said charges.

Fifth. That the dutiable value of said merchandise is its cost or true market value at the date of its exportation, in the principal markets of the country whence it was exported, free of charges; but you have assessed a duty thereon upon a valuation in excess of such net cost or value.

Sixth. We further protest against the duty assessed hereon, claiming that, for reasons heretofore set forth, the net invoice or entered value is the true legal value upon which the duties should have been assessed, and that the additions made to such value are made contrary to the Statutes of the United States, in that nondutiable charges have been reckoned as a part of the dutiable value of said goods.

And we give notice that we pay all higher duties or rates than is claimed above as the legal duty, under compulsion, and to obtain and keep quiet possession of our goods; and we also give notice that we do not intend by this protest to relinquish or waive any right we may have to a refund of the difference between the duty exacted of us and any less duty which may hereafter be adjudged the legal duty upon said goods, intending this protest to be made against the present duty charged upon said goods; claiming that said duty is not the legal duty to which said goods are chargeable, holding you and the government responsible for all excess of duty exacted by you upon said goods above the legal duty, and protesting against all illegal exactions of duty thereon; and hereby give notice that we intend this protest to apply to all future similar importations by us; and also submit the duplicate protest herewith submitted for transmission by you to the Secretary of the Treasury, under the rules of your office, to be an appeal to him from your decision, and to likewise apply to all future similar importations by us."

The main question involved in the case is as to whether it was lawful to impose duties on the items for boxes and packing in the invoices of the two cases and the twenty-one cases, and on the item added to the invoice of the one case, which item was one for like boxes and packing. There was no duty charged on the outside packing case. The boxes in question were paper boxes or cartons which contained the goods, and were themselves packed in the outside case; and the item for packing was for packing the goods in the cartons and lining the outside case and packing the cartons in it. The cartons contained some of them a dozen and some a half dozen pairs of the articles. The outside case had a lining of heavy paper or oilcloth, to protect the goods from sea water. Some of the cartons had a partition running [504] through the middle, with half a dozen pairs of the articles on each side of the partition; some had a dozen pairs in each carton; and some had half a dozen pairs in each carton. The prices affixed to the gloves and hosiery bought, in the invoices of them, represent the prices of the goods, without case or cartons or packing. The plaintiffs paid, not only for the goods but for the cases, the cartons and the packing, paying a price per dozen of the goods, which covered the cases, the cartons and the packing, which price was 50 pfennigs higher per dozen of the goods than if there had been no cartons. In the invoice of the one case, the prices affixed are the prices for the goods, including, in fact, the items deducted on the invoice, and also the charge for cartons, which charge was not deducted on the invoice, although there is nothing on the invoice to show that that charge was part of the price. The cartons are for the convenience of the trade, in transporting the goods and preserving them and handling them and counting them; and the cartons go with the goods in them, until they become empty through the sale of their contents in the United States, to consumers who buy at retail, for use. The cartons have labels on, showing the article and the style and the size and the quantity.

The contention of the plaintiffs is that, by virtue of section 7 of the Act of March 3, 1883, 22 Stat. at L. 523, referred to in the protest, it was unlawful to exact duty on the value of the cartons and the packing; that, in respect to the invoice of the one case, the addition made was for cartons already included in the entered value; and that it was error to direct a verdict for the defendant.

Before examining the provisions of the Act of 1883, it will serve to make a determination of their meaning more easy, if it is distinctly seen what were the enactments in force on the subject at the time that Act was passed.

By section 7 of the Act of March 3, 1865, 13 Stat. at L. 493, it was provided as follows: "That in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, wares or merchandise imported into the United States, and in all cases where the duty [505] imposed by law shall be regulated by or directed to be estimated or based upon the value of the square yard, or of any specified quantity or parcel of such goods, wares or merchandise,

it shall be the duty of the collector within whose district the same shall be imported or entered, to cause the actual market value or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same shall have been imported into the United States, to be appraised; and such appraised value shall be considered the value upon which duty shall be assessed." The same section then provided for an addition, on entry, by the importer, to the invoice value, to make such actual market value or wholesale price, and for a duty of 20 per cent *ad valorem* on the appraised value, in addition to other lawful duties, if the appraised value should exceed, by 10 per cent or more, the value so declared in the entry. It also provided that the duty should not be assessed on an amount less than the invoice or entered value; and then repealed sections 23 and 24 of the Act of June 30, 1864, 13 Stat. at L. 216, 217, "and all Acts and parts of Acts requiring duties to be assessed upon commissions, brokerage, costs of transportation, shipment, transhipment and other like costs and charges incurred in placing any goods, wares or merchandise on shipboard, and all Acts or parts of Acts inconsistent with the provisions of this Act." Section 24 of the Act of 1864, thus repealed, was in these words: "That in determining the valuation of goods imported into the United States from foreign countries, except as herein before provided, upon which duties imposed by any existing laws are to be assessed, the actual value of such goods on shipboard at the last place of shipment to the United States shall be deemed the dutiable value. And such value shall be ascertained by adding to the value of such goods at the place of growth, production or manufacture, the cost of transportation, shipment and transhipment, with all the expenses included, from the place of growth, production or manufacture, whether by land or water, to the vessel in which shipment is made to the United States, the value of the sack, box or covering of any kind, in which such goods are contained, commission at the usual rate, in no case less than 2½ per centum, brokerage, and all export duties, together with all costs and charges, paid or incurred for placing said goods on shipboard, and all other proper charges specified by law."

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The effect of the legislation thus embodied in section 7 of the Act of 1865, as applicable to goods subject to *ad valorem* duty, was to fix as their dutiable value, their actual market value or wholesale price at the period of their exportation to the United States, in the principal markets of the country from which they were imported into the United States, instead of their actual value on shipboard at their last place of shipment to the United States. The provision in the Act of 1864, for adding, as part of the dutiable value, to the value of the goods themselves, the value of any sack, box or covering, containing the goods, was repealed; and, under the Act of 1865, the dutiable value was such actual market value or wholesale price abroad of the goods themselves, without sack, box or covering, and the value of the sack, box or covering was not to be added and was not dutiable.

So much of section 7 of the Act of 1865 as related to additions by the importer, on entry, and to the duty not being assessed on an amount less than the invoice or entered value, was re-enacted as section 2900 of the Revised Statutes. So much of the same section as related to the rule for appraisement was re-enacted as section 2906, in these words: "When an *ad valorem* rate of duty is imposed on any imported merchandise, or when the duty imposed shall be regulated by or be directed to be estimated or based upon the value of the square yard, or of any specified quantity or parcel of such merchandise, the collector within whose district the same shall be imported or entered shall cause the actual market value or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised; and such appraised value shall be considered the value upon which duty shall be assessed."

After the Act of 1865, followed the Act of July 28, 1866, the 9th section of which, 14 Stat. at L. 330, provided as follows: "That in determining the dutiable value of merchandise hereafter imported, there shall be added to the cost, or to the actual wholesale price or general market value, at the time of exportation, in the principal markets of the country from whence the same shall have been imported into the United States, the cost of transportation, shipment and transhipment, with all the expenses included, from the place of production, growth or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box or covering of any kind in which such goods are contained; commission at the usual rates, but in no case less than 2½ per centum; brokerage, export duty, and all other actual or usual charges for putting up, preparing and packing for transportation or shipment. And all charges of a general character incurred in the purchase of a general invoice shall be distributed *pro rata* among all parts of such invoice; and every part thereof charged with duties based on value shall be advanced according to its proportion, and all wines or other articles paying specific duty by grades shall be graded and pay duty according to the actual value so determined: *Provided*, That all additions made to the entered value of merchandise for charges shall be regarded as part of the actual value of such merchandise, and if such addition shall exceed by 10 per centum the value so declared in the entry, in addition to the duties imposed by law, there shall be levied, collected, and paid a duty of 20 per centum on such value."

These provisions of section 9 of the Act of 1866 were re-enacted as sections 2907 and 2908 of the Revised Statutes in these words: "Sec. 2907. In determining the dutiable value of merchandise, there shall be added to the cost or to the actual wholesale price or general market value, at the time of exportation in the principal markets of the country from whence the same has been imported into the United States, the cost of transportation, shipment and transhipment, with all the expenses included, from the place of growth, production or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box or covering of any kind in

which such merchandise is contained; commission at the usual rates, but in no case less than 2½ per centum; and brokerage, export duty, and all other actual or usual charges for putting up, preparing and packing for transportation or shipment. All charges of a general character incurred in the purchase of a general invoice shall be distributed *pro rata* among all parts of such invoice; and every part thereof charged with duties based on value shall be advanced according to its proportion, and all wines or other articles paying specific duties by grades shall be graded and pay duty according to the actual value so determined. Sec. 2908. All additions made to the entered value of merchandise for charges shall be regarded as part of the actual value of such merchandise, and if such addition shall exceed by 10 per centum the value declared in the entry, in addition to the duties imposed by law there shall be collected a duty of 20 per centum on such value."

Then followed section 14 of the Act of June 22, 1874, 18 Stat. at L., 188, which provided as follows: "That wherever any statute requires that, to the cost or market value of any goods, wares and merchandise imported into the United States, there shall be added to the invoice thereof, or, upon the entry of such goods, wares and merchandise, charges for inland transportation, commissions, port duties, expenses of shipping, export duties, cost of packages, boxes or other articles containing such goods, wares and merchandise, or any other incidental expenses attending the packing, shipping or exportation thereof from the country or place where purchased or manufactured, the omission, without intent thereby to defraud the revenue, to add and state the same on such invoice or entry shall not be a cause of a forfeiture of such goods, wares and merchandise or of the value thereof; but in all cases where the same or any part thereof are omitted, it shall be the duty of the collector or appraiser to add the same, for the purposes of duty, to such invoice or entry, either in items or in gross, at such price or amount as he shall deem just and reasonable (which price or amount shall, in the absence of protest, be conclusive), and to impose and add thereto the further sum of 100 per centum of the price or amount so added; which addition shall constitute a part of the dutiable value of such goods, wares and merchandise, and shall be collectible as provided by law in respect to duties on imports." Section 26 of the same Act repealed all prior inconsistent provisions.

Such were the enactments in force when the Act of 1883 was passed. When the duty was *ad valorem*, or based on the value of a given quantity or parcel of goods, there was, by section 2906 of the Revised Statutes, to be an appraisement here of the actual market value or wholesale price of the goods, at the period of exportation, in the principal markets of the country from which they were imported; and such appraised value was to be the dutiable value of the goods, as merchandise, without reference to any of the items required by section 2907 to be added as charges to such actual market value or wholesale price of the goods. All those items so required to be added were charges and not part of the appraised value of the goods. By section 2908, if the items added for charges, after entry, exceeded by 10 per cent the entered value of the goods, a duty of 20 per cent, in addition to the duties imposed by law, was required to be collected "on such value." This additional duty did not depend upon an intent to defraud, but was imposed for the mere omission of the charges from the entry. By section 14 of the Act of 1874, the omission to add the charges, without intent to defraud, was declared not to be a cause of forfeiture; but when they were omitted, it was made the duty of the public officers to add them for the purposes of duty, and to add the further sum of 100 per cent of the amount so added; such additions to be a part of the dutiable value.

Then followed the seventh section of the Act of 1883, in these words: "That sections 2907 and 2908 of the Revised Statutes of the United States, and section 14 of the Act entitled 'An Act to Amend the Customs Revenue Laws, and to Repeal Moieties,' approved June 22, 1874, be and the same are hereby repealed; and hereafter none of the charges imposed by said sections, or any other provisions of existing law, shall be estimated in ascertaining the value of goods to be imported; nor shall the value of the usual and necessary sacks, crates, boxes or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable; *Provided*, That if any packages, sacks, crates, boxes or coverings of any kind, shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods to the United States, the same shall be subject to a duty of 100 per centum *ad valorem* upon the actual value of the same." [510]

By this section 7 of the Act of 1883, in the first place, sections 2907 and 2908 of the Revised Statutes, and section 14 of the Act of 1874, are repealed. This repeals the provision of section 2907, that, in determining the dutiable value of the merchandise, there shall be added to its appraised market value (to be ascertained under section 2906, which is left unrepealed), the expenses and charges mentioned in section 2907, among which are "the value of the sack, box or covering of any kind, in which such merchandise is contained," "and all other actual or usual charges for putting up, preparing and packing for transportation or shipment." It also repeals the provision of section 2908 for the additional duty of 20 per cent when the addition for the charges mentioned in section 2907 exceeds by ten per cent the entered value. It also repeals the provisions of section 14 of the Act of 1874, for the addition of double the charges omitted, among which charges are specified "cost of packages, boxes or other articles containing such goods, wares and merchandise, and any other incidental expenses attending the packing, shipping or exportation thereof from the country or place where purchased or manufactured."

The items thus specified in section 2907 of the Revised Statutes, and in section 14 of the Act of 1874, being charges and being eliminated as part of the dutiable value of the goods, and section 2906 remaining for the appraisement of the goods *per se*, without the addition of any of the charges so abolished, it would seem that the meaning of section 7 of the Act of 1883 was plain.

But that section goes on to say: "And hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported." Nothing is imposed by section 2907 of the Revised Statutes but the addition to the appraised market value, provided for by section 2906, of the items specified [511] in section 2907, all of which are thus declared by section 7 of the Act of 1883 to have been "charges." Those charges are no longer to be added or estimated, as before, in determining the dutiable value of the goods. So, the repealed section 14 of the Act of 1867 imposed nothing except in respect of the items it specified, which were items to be added to appraised market value and are, therefore, declared by section 7 of the Act of 1883 to have been "charges."

But that section goes on still further to say: "Nor shall the value of the usual and necessary sacks, crates, boxes or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable." This means that not only, as the section had declared, shall none of the charges provided for in the repealed sections be added or estimated in ascertaining dutiable value, but the value of the sacks, crates, boxes or covering of any kind, shall not be estimated as part of the value or included in the value of the goods, but shall be omitted, leaving the value of the goods to be appraised *per se*, under section 2906, without estimating or including the value of the sack, crate, box or covering of any kind; and therefore requiring such latter value to be deducted, if the entry or invoice includes it, either separately or as part of a price or value affixed to the goods, if it is capable of separation and deduction, unless the effect is to reduce the dutiable value below the invoice or entered value. For by section 2907 of the Revised Statutes, "the value of the sack, box, or covering of any kind, in which such merchandise is contained," was required to be added, that is, estimated in determining the dutiable value of merchandise; and the items required by section 14 of the Act of 1874 to be added to the market value of goods, for the purposes of duty, cover the "cost of packages, boxes or other articles containing" the goods, and the expenses of packing.

The last clause of section 7 of the Act of 1883 adds force to the foregoing views. It is this: "*Provided*, That if any packages, sacks, crates, boxes or coverings of any kind, shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the [512] *bona fide* transportation of goods to the United States, the same shall be subject to a duty of 100 per centum *ad valorem* upon the actual value of the same." This implies that if the boxes or coverings of any kind are not of a material or form designed to evade duties thereon, and are designed to be used in the *bona fide* transportation of the goods to the United States, they are not subject to duty. If either of these things occurs they are subject to 100 per cent duty. There is not, in the present case, any suggestion that the cartons were of a form or material designed to evade duties thereon. They were of the usual kind known to the trade before the law was passed, as customarily used for the same purpose. They were designed to be used in the *bona fide* transportation of the goods to the United States, not only because they were and had been a customary article in the trade for covering and transporting these goods, but because they were intended to accompany the goods and remain with them in the hands of the retail dealer until the goods should be sold to the consumer.

The change made by section 8 of the Act of 1883 in the oaths required on entry is in consonance with the above interpretation of the effect of section 7. Section 8 amends section 2841 of the Revised Statutes, as to the forms of the three several oaths, in the following manner, the particular parts referred to of the old forms and the new ones being placed side by side, and the parts in each which differ from the other being in italic:

Oath of consignee, importer or agent.

Old oath.	*New oath.*
"That the invoice now produced by me exhibits the actual cost (if purchased) or fair market value (if otherwise obtained), at the time or times and place or places, when or where procured (as the case may be), of the said goods, wares and merchandise, *all the charges thereon*, and no other or different discount," etc.	"That the invoice now produced by me exhibits the actual cost (if purchased) or fair market value (if otherwise obtained), at the time or times and place or places, when or where procured (as the case may be), of the said goods, wares and merchandise, *including all costs for finishing said goods, wares and merchandise to their present condition*, and no other or different discount," etc.

Oath of owner in cases where merchandise has been actually purchased.

Old oath.	*New oath.*
"That the invoice which I now produce contains a just and faithful account of the actual cost of the said goods, wares and merchandise, *of all charges thereon*, including *charges of purchasing, carriages, bleaching, dyeing, dressing*, finishing, *putting up and packing*, and no other discount," etc.	"That the invoice which I now produce contains a just and faithful account of the actual cost of the said goods, wares and merchandise, including *all cost* of finishing *said goods, wares and merchandise to their present condition*, and no other discount," etc.

Oath of manufacturer or owner in cases where merchandise has not been actually purchased.

Old oath.	*New oath.*
"The invoice which I now produce contains a just and faithful valuation of the same, at their fair market value, *including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up and packing*, at the time," etc.	"The invoice which I now produce contains a just and faithful valuation of the same, at their fair market value, at the time," etc.
"That the said invoice contains also a just and faithful account of all *charges actually paid*, and no other discount," etc.	"That the said invoice contains also a just and faithful account of all *the costs for finishing said goods, wares and merchandise to their present condition*, and no other discount," etc.

It is apparent that these new forms of oath leave out "charges" entirely, because the statute leaves them out as dutiable items. The "cost of finishing the goods to their present condition" is part of the value of the goods abroad outside of the abolished "charges." Goods may be bought abroad unfinished, and then caused to be finished; but in no case can the cost of finishing be left out of their value however they have been obtained. So, the new oaths embrace only the value of the goods

per se, and there is no oath as to any item before called "charges." The item of "finishing" is broad enough to include bleaching, dyeing and dressing, but does not include any of the other charges specifically named in the old oaths.

The contention on the part of the government is that section 7 of the Act of 1883 repeals only so much of the prior statutes as added to the market value abroad the charges which were incident to the shipment of the goods, after they were put in a condition for the market abroad, as usually sold; that the expense of the cartons was necessary to put them into that condition; that the value of the cartons was part of the market value of the goods abroad; and that, therefore, it must enter into the dutiable value. It is urged that the carton is not incident to the transportation of the goods, but is part of their preparation for sale abroad; that it is an integral part of the value of the whole, carton and goods, as a unit; that in valuing such unit, nothing more is done than valuing the goods, ready for sale; and that although in one sense the carton is a charge, it is a charge incurred in putting the merchandise into the condition in which it is sold abroad and it becomes part of the goods; and its value is merged in the value of the filled carton. The sufficient answer to these suggestions is that they allow no weight to the declaration of the statute that the value of the usual and necessary box or covering of any kind shall not be estimated as part of the value of the goods, in determining the amount of duties for which the goods are liable. The carton is a usual box or covering. It is a necessary box or covering, within the meaning of the law, on the facts shown in the bill of exceptions. It was a box or covering in which the goods were contained, and so was a charge specifically imposed by section 2907 of the Revised Statutes; and section 7 of the Act of 1883 says that no charge imposed by section 2907 shall be estimated in ascertaining the value of the goods.

The bill of exceptions shows that, after the enactment of section 14 of the Act of 1874 and prior to March 3, 1883, it was the practice of the custom house at New York, where there were cartons with the goods, and the cartons were not set forth in the invoice, to treat the value of the cartons as a charge, under that section, and add such value, and 100 per cent thereon, to make dutiable value. No statute is referred to which ever recognized the value of cartons as other than a charge; and no such practice appears to have obtained before March 3, 1883.

As the action of the Collector in this case appears to have been founded on a circular issued by the Treasury Department on May 15, 1883, and was sanctioned by the opinion of the Attorney-General, Mr. Brewster, given to the Secretary of the Treasury on January 11, 1884, and as there have been decisions of circuit courts in accordance with those views (although there have been some to the contrary) the question involved has been carefully considered by this court, and the judges are unanimously of opinion that the true view of the statute in force at the time the goods in this case were entered is that announced in this opinion.

It appears that, after verdict and before judgment, there was a motion made for a new trial in this case, in deciding which (*Oberteuffer* v. *Robertson*, 24 Fed. Rep. 852) the court stated that the verdict for the defendant was directed on the ground that the plaintiff's protest "was insufficient to present the objections relied upon by them to the exaction of the duties in controversy," but that the motion for a new trial was denied upon the ground that the duties were not illegally exacted.

It is contended for the government that a reappraisement should have been applied for by the plaintiffs, under section 2930 of the Revised Statutes, and that they mistook their remedy. We are of opinion that this is not a sound view. They were not dissatisfied with the appraisement of the value of the goods *per se*. That [516] value was left at the value stated in the invoice. The addition of the items for cartons and packing was no part of the duty or function of the appraiser, acting under section 2906, to appraise the foreign market value of the goods. Although, in form, the appraiser added the items for cartons and packing, the action of the custom house was only a decision of the Collector, under section 2931, that the cartons and packing were dutiable costs and charges. Those items appeared distinctly, as to two of the invoices, on them and on the entry, as charges for boxes and packing; and, being deducted as such on the face of the entry, were again added as such by the appraiser. As to the third invoice, the value of the cartons and packing, being included in the invoice value, was left in in the entered value; and a sum was added which in fact represented a second time the value of the cartons and packing, as a dutiable charge. We are of opinion that the first, second and third paragraphs of the protest in this case are sufficient to raise the points relied on by the plaintiffs, and that to protest was the proper way to raise those points.

The exaction of duty on the packing, whether packing the goods in the cartons, or the cartons in the outer case, or lining the outer case, was not warranted by law. These were "charges" under the former statutes and were abolished as charges by the Act of 1883.

As to the one case of hosiery, the addition to the entered value, of thirty pfennigs per dozen for the cartons and packing, was unauthorized, and the goods were dutiable at only the entered value of 1492 marks. As, under section 2900 of the Revised Statutes, duty cannot, as to the goods, "be assessed upon an amount less than the invoice or entered value," whatever is put down in the invoice and entry as the value of the goods *per se* cannot be diminished, although in fact there may have been included in such value the cost of cartons and packing, unless the invoice or entry shows distinctly what such cost was and that it was included. In fact the cartons and packing were included twice, as to the one case of hosiery, in exacting duties, but only that which the appraiser added for them can be deducted, although their cost would not properly have been part of the dutiable value if the invoice and entry had not stated the value [517] of the goods at a price which in fact included the cost of the cartons and packing.

It results, from these views, that the judgment of the Circuit Court must be reversed and the case

[illegible] a little further on. Again it [illegible] although the intervening and superjacent country rock is here, the mineral deposit ceases to be found, but following the fissure it reappears again very soon.

It also appears that both fissure and mineral come to an end and are found no more in that direction, or, if found, so far off or so deflected from the original line as to constitute no part of that vein.

Of course it is sometimes easy to see that it is the same vein all through. It is also easy to see in some instances the vein is run out, as stated.

But there are other cases of a class of which that before us is one, where it is a matter of extreme difficulty to lay down such rules for the guidance of the jury as will lead them to arriving at a just verdict.

We are not able to see how the rules which prevailed at the trial of the case could have been [illegible] the jury that it had to [illegible] which the evidence [illegible] the vein as found in the [illegible] of the [illegible]

[illegible] the evidence before us, there are [illegible] in the [illegible] claims, and [illegible] that [illegible] the law [illegible] the claims [illegible] claims [illegible] claims [illegible]

based upon such admission or refusal; but the errors assigned relate solely to the charge given by the court to the jury, and to the refusal to give twenty-eight several instructions asked by the counsel of plaintiff.

As we have already said, the only question for the jury, the one on which their verdict depended, was whether plaintiff had identified the Lime lode or vein and traced it continuously from its connection, inside of the lines of its patent, as the same vein in which defendants were working under the name of the Smuggler lode.

As the charge of the court was very full and clear as to the rules of law by which this was to be determined, there is no occasion to inquire into the soundness of each of the twenty-eight propositions of plaintiff on the same subject. If any of these propositions were covered by the charge made by the court, there was no obligation on the judge to repeat it in the language of counsel. If there was a conflict in the law as laid down by the court and that requested by plaintiff's prayer for instruction, the correctness of the charge of the court is raised by the exceptions to that charge, and can be best considered in these exceptions. *Clymer* v. *Dawes*, 3 How. 689 [44 U. S. bk. 11, L. ed. 785]; *Mills* v. *Smith*, 8 Wall. 27 [75 U. S. bk. 19, L. ed. 346]; *Indianapolis, etc. R. R. Co.* v. *Horst*, 93 U. S. 291 [Bk. 23, L. ed. 898]; *Continental Improvement Co.* v. *Stead*, 95 U. S. 161 [Bk. 24, L. ed. 403].

The Act of Congress which confers the right under which plaintiff claims is in the following language of the Revised Statutes:

"Sec. 2322. The locators of all mining locations heretofore made or which shall hereafter be made on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States, and with state, territorial and local regulations, not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their location, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the owner or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

It is obvious that the vein, lode or ledge of which the locator may have the exclusive right of possession and enjoyment is one whose apex is found inside of his surface lines extended vertically; and this right follows such vein, although in extending downward it may depart from a perpendicular and extend laterally outside of the vertical lines of such surface location.

What constitutes a lode or vein of mineral matter has been no easy thing to define. In this court no clear definition has been given. On the circuit it has been often attempted. *Mr. Justice* Field, in the *Eureka Case*, 4 Sawy. 302, shows that the word is not always used in [534] the same sense by scientific works on geology and mineralogy, and by those engaged in the actual working of mines. After discussing these sources of information, he says:

"It is difficult to give any definition of this term as understood and used in the Acts of Congress which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to a lode in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well defined boundaries on the earth's surface and under it would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the Acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock."

This definition has received repeated commendation in other cases, especially in *Stevens* v. *Williams*, 1 McCrary, 488, where a shorter definition by *Judge* Hallett, of the Colorado Circuit Court, is also approved, to wit: "In general it may be said that a lode or vein is a body of mineral or a mineral body of rock, within defined boundaries, in the general mass of the mountain."

This lode, ledge or vein which may thus be possessed and enjoyed outside of the limits of the surface side lines extended vertically must be the same vein or lode on the apex or outcrop of which the claim of the party has been located. He can only go outside of this imaginary perpendicular wall to possess or enjoy a vein which, being *his* inside of that artificial line, he has the right to follow or pursue in its extension outside of these lines. The identity of the vein is, therefore, essential to his right to its possession there.

Now, a vein containing the precious metals is by no means always a straight line, of uniform dip or thickness, or richness of mineral matter throughout its course. Generally, the veins are found in what, when the mineral is taken [535] out of them, constitute clefts or fissures in the surrounding rock, with a well defined wall above and below of different kinds of rock, as porphyry on one side, above or below, and limestone on the other.

So long as these inclosing walls can be distinctly and continuously traced, and the mineral matter of the same character found between them, there can be no doubt that it is the same vein. But sometimes the cleft between the inclosing rocks, called in mining parlance the country rock, diminishes so as to be scarcely perceptible. Sometimes for a short distance the fissure disappears entirely, and again is found

distinctly to exist a little further on. Again it is seen that although the underlying and superposing country rock is there, the mineral deposit ceases to be found, but following the fissure it reappears again very soon.

It also happens that both fissure and mineral come to an end and are found no more in that direction, or, if found, so far off or so deflected from the original line as to constitute no part of that vein.

Of course it is sometimes easy to see that it is the same vein all through. It is also easy to see in some instances the vein is run out; is ended.

But there are other cases of a class of which that before us is one, where it is a matter of extreme difficulty to lay down such rules for the guidance of the jury as will best aid them in arriving at a just verdict.

We are not able to see how the judge who presided at the trial of the case could have better discharged this delicate task than he has in the charge before us to which the exceptions are taken, and we give here *verbatim* that part of it relating to this point as found in the bill of exceptions:

"Upon the evidence before you, these parties are to be regarded as owning the surface of the land by them respectively claimed, and all that rightfully goes with the surface under the law. No question is presented as to the right of the plaintiff to the Lime location. Holding by patent from the government, the plaintiff must be regarded as the owner of that [536] claim, and all lodes and veins existing therein. The statute gives the owner of a lode, the one who may locate it at the top and apex, the right to follow it to any depth, although it may enter the land adjoining. And if the Lime location was made on a lode or vein which descends from thence into the Smuggler location, the right of the plaintiff to follow the lode into the Smuggler ground and to take out ore therefrom cannot be denied. Thus, the principal question for your consideration is, whether there is a lode or vein in the Lime location which extends from that claim into the Smuggler claim? If a lode is found in that claim, all the evidence tends to prove that the top and apex of such lode is in that claim. There is no room for controversy on that point. To determine whether a lode or vein exists, it is necessary to define those terms; and as to that, it is enough to say that a lode or vein is a body of mineral or mineral bearing rock, within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral bearing rock and the boundaries; with either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a lode or vein. To maintain the issue on its part, the plaintiff must prove that a lode so here defined extends from the Lime to and into the Smuggler claim.

"Reverting to that definition, if there is a continuous body of mineral or mineral bearing rock extending from one claim to the other, it must be that there are boundaries to such body and the lode exists. Or if there is a continuous cavity or opening between dissimilar rocks in which ore in some quantity and value is found, the lode exists. These propositions are correlative and not very different in meaning, except that the first gives prominence to the mineral body, and the second to the boundaries.

"Proof of either proposition goes far to establish a lode, and it may be said, without proof of one of them a lode cannot exist. The proposition of the plaintiff is that the evidence before you shows that a lode exists in the ground in controversy as already defined. The defendants deny that proposition, and the case turns on that question. They concede that there is, in the territory open by the works, ore in detached masses or fragments, but so intermingled with the inclosing rocks that it cannot be regarded as a continuous body, or as marking the line of a lode or vein. All that has been said by witnesses about rock in place is valuable only as it tends to prove or disprove the existence of a crevice or opening extending from one claim to the other. Excluding the wash, slide or *débris* on the surface of the mountain, all things in the mass of the mountain are in place. A continuous body of mineral or mineral bearing rock, extending through loose and disjointed rocks, is a lode as fully and certainly as that which is found in more regular formation; but if it is not continuous, it cannot be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein. Recognizing this, the plaintiff has given evidence to establish the existence of porphyry and lime in regular order with an opening between them, filled with vein matter.

"The defendants sought to show that the ground is broken and disjointed and the several parts so intermingled that no lode can extend from one claim to the other.

"It is a question to be decided by the weight of testimony rather than the number of witnesses; upon the effect which the testimony has on your minds, accepting that which seems to you to be worthy of belief and rejecting the other. And that I believe, gentlemen, is the one and the only question in the case.

"If you find it affirmatively, of course you will return your verdict for the plaintiff, and if in the negative, you will find for the defendants.

"And to so much of said charge as reads as follows: 'But if it is not continuous or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that event it lacks the individuality and extension which is the quality of a lode or vein.' To which plaintiff's counsel then and there excepted."

If the language here excepted to stood alone it would be correct although possibly too general

or exclusive. Certainly the lode or vein must be continuous in the sense that it can be traced through the surrounding rocks, although slight interruptions of the mineral bearing rock would not be alone sufficient to destroy the identity of the vein. Nor would a short partial closure of the fissure have that effect if a little farther on it recurred again with mineral bearing rock within it. And such is the idea conveyed in the previous part of the charge. "On the other hand," said the judge, "with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure; and if in such fissure ore is found, *although at considerable intervals and in small quantities*, it is called a lode or vein."

The charge seems to us to be as favorable to plaintiff as the principles we have laid down would justify.

We find no error in the record, and the judgment of the Circuit Court is therefore affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EDWARD S. COE, *Plff. in Err.*,
v.
TOWN OF ERROL.

(See S. C. Reporter's ed. 517-529.)

Taxation of personal property designed for export to another State—intent of owner—his nonresidence—State has right to tax property found within its limits, not in control of carrier.

1. If the owner of personal property within a State resides in another State which taxes him for that property as a part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also.

2. Products of a State, although intended for exportation to another State and partially prepared for that purpose by being deposited at a place or port of shipment within the State, are liable to be taxed like other property within the State.

3. Exportation is not begun until goods are committed to the common carrier for transportation out of the State to the State of their destination, or until they have started on their ultimate passage to that State. Until that time they are taxable as a part of the general mass of property in the State, although they are not taxable as exports.

4. The carrying of property in carts or vehicles or floating it to the depot, where the journey is to commence, is no part of the exportation.

[No. 43.]

Submitted Oct. 12, 1885. Decided Jan. 25, 1886.

IN ERROR to the Supreme Court of the State of New Hampshire.

The case is stated by the court.

Mr. **Henry Heywood**, for plaintiff in error:

It will be seen by an examination of the provisions of the state statutes in question that all timber, logs and lumber that may be within the State on the first day of April is included within these provisions, although such property is at the time the subject of interstate commerce.

The logs in question, at the date of taxation, were in transit from the State of New Hampshire, upon a great, natural, water thoroughfare, in the ordinary course of transporting such property, to the place of manufacture in the State of Maine.

That the legal *situs* of this property, for the purposes of taxation, is not in the town or place where the property thus in transit happens to be on the first day of April or other date of taxation, see

Conley v. *Chedic*, 7 Nev. 336; *Parker Mills* v. *Tax Comrs.*, 28 N. Y. 245; *Ellsworth* v. *Brown*, 58 Me. 519; *Campbell* v. *Machias*, 33 Me. 419; Burroughs' Tax. chap. 4, § 48; Cooley, Tax. p. 269.

For the purposes of taxation, Lewiston was the legal *situs* of this personal property.

Desmond v. *Machias Port*, 48 Me. 478; R. S. of Maine, p. 131, §§ 13, 14, chap. 182, Laws 1877.

To sustain the taxation of the same property in New Hampshire must lead to double taxation, and the statute attempting to authorize such taxation is in conflict with the Constitution of New Hampshire.

Opinion of the Justices, 4 N. H. 565.

Upon the facts of this case we claim that this taxation is in conflict with the United States Constitution.

Art. 4, sec. 2: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

To hold that the property of a citizen of Maine, in transit through New Hampshire upon one of our public water courses and legally liable to taxation in Maine, is also liable to taxation in New Hampshire would not be according to the citizen of Maine the privilege of the citizen of New Hampshire; and the state statutes attempting to authorize such taxation of the property of the citizen of Maine is to that extent in violation of the provision of the Federal Constitution just cited.

Cooley, Tax. chap. 3, p. 64; *Oliver* v. *Washington Mills*, 11 Allen, 268; *Crandall* v. *Nev.* 6 Wall. 35 (73 U. S. bk. 18, L. ed. 745); *Brown* v. *Md.* 12 Wheat. 419 (25 U. S. bk. 6, L. ed. 677); *Ward* v. *Md.* 12 Wall. 418 (79 U. S. bk. 20, L. ed. 449); *Guy* v. *Baltimore*, 100 U. S. 434 (Bk. 25, L. ed. 743); *Paul* v. *Va.* 8 Wall. 168 (75 U. S. bk. 19, L. ed. 357).

We further claim that any taxation of this property under the laws of any of the States, it being at the time of taxation the subject of interstate commerce, is in violation of the provisions of article 12, section 8, paragraph 3 of the United States Constitution, by which power is given to Congress "to regulate commerce among the several States;" and of section 10, paragraph 2: "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

It has uniformly been held by the Supreme Court of the United States that a tax assessed

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NOTE.—*Constitutional law; interstate commerce; regulation of; power of Congress; how far exclusive.* For a full discussion, see Gloucester Ferry Co. v. Pa. ante, 192, *note*.

Regulation by States. See Gibbons v. Ogden, 22 U. S. (9 Wheat.), 1, bk. 6, 23, *note*.

Power of States to tax. See Brown v. Md., 25 U. S. (12 Wheat.), 419, bk. 6, 678, *note*; Providence Bank v. Billings, 29 U. S. (4 Pet.), 514, bk. 7, 939, *note*; Dobbins v. Comrs. Erie County, 41 U. S. (16 Pet.), 435, bk. 10, 1008, *note*.

under a state law, upon property being in transit through the State, or from a point in the State to another State, is in violation of these last provisions of the United States Constitution, or rather, as we understand it, in violation of the above cited provision giving Congress power to regulate commerce among the several States.

Case of the State Freight Tax, 15 Wall. 232 (82 U. S. bk. 21, L. ed. 146); *Almy* v. *California*, 24 How. 169 (65 U. S. bk. 16, L. ed. 644); *Woodruff* v. *Parham*, 8 Wall. 123 (75 U. S. bk. 19, L. ed. 382); *Steamship Co.* v. *Port Wardens*, 6 Wall. 31 (73 U. S. bk. 18, L. ed. 749); *Welton* v. *Mo.* 91 U. S. 275 (Bk. 23, L. ed. 347); *R. R. Co.* v. *Husen*, 95 U. S. 465 (Bk. 24, L. ed. 527); *Cook* v. *Pa.* 97 U. S. 566 (Bk. 24, L. ed. 1015).

Wherever the subjects, in regard to which a power to regulate commerce is asserted, are in their nature national or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of Congress. Transportation of merchandise through a State or from one State to another is of this nature.

State Freight Tax, supra; Hall v. *DeCuir*, 95 U. S. 485 (Bk. 24, L. ed. 547).

"The power to regulate commerce among the several States was vested in Congress, in order to secure equality and freedom in commercial intercourse against discriminating state legislation."

R. R. Co. v. *Richmond*, 19 Wall. 589 (86 U. S. bk. 22, L. ed. 176); *Welton* v. *Missouri*, above cited; *Webber* v. *Va.* 103 U. S. 344 (Bk. 26, L. ed. 565).

The nonexercise by Congress of its power to regulate commerce among the States is equivalent to a declaration by that body that such commerce shall be free from any restriction.

Welton v. *Mo. supra.*

It will be said that the levying of these taxes, as is said by Blodgett, *J.*, in the opinion in this case in the state court, is no attempt to regulate commerce upon the Androscoggin River, passing from New Hampshire into Maine, and the like in relation to the Connecticut and other large rivers in the State, but is a tax upon property in fact located within the State and legally taxable there. The answer to this position is the practical effect of taxes assessed under state laws upon property thus situated.

"It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected but by the subject upon which the burden is laid. The same has been decided in the following cases:

Bank of Commerce v. *N. Y. City*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200 (67 and 69 U. S. bk. 17, L. ed. 451, 793); *Society for Savings* v. *Coite*, and *Provident Institution* v. *Massachusetts*, 6 Wall. 594, 611 (73 U. S. bk. 18, L. ed. 897, 907); *Brown* v. *Md.* 12 Wheat. 419 (25 U. S. bk. 6, L. ed. 677); *Henderson* v. *Mayor of N. Y. City*, 92 U. S. 259 (Bk. 23, L. ed. 543); *State* v. *Engle*, 34 N. J. L. 425.

The case of *Conley* v. *Chedic*, 7 Nev. 336, is an illustration of our position. The wood there in question was situated in the State of Nevada, and under the ordinary rule of law would be a subject of taxation under the laws of the State where it was situated; but in that case the wood had been cut in the State of California, and was being floated down the river into Nevada, and was then the subject of interstate commerce, and the tax was illegal. This makes an exception to the general rule, and the residence of the owner and the actual *situs* of the property are not the elements that govern in the determination of this exception to the general rule. The governing element that determines whether the property comes within the exception is the fact as to whether the property is the subject of commerce, foreign or interstate. If it is, the constitutional provisions apply to it and Congress has the exclusive power over it and State legislation cannot interfere with it. It is the substance of the matter and not the form that this court has always been zealous to consider.

15 Wall. 272 (82 U. S. bk. 21, L. ed. 160).

It may be a license upon the importer; *Brown* v. *Md.* 12 Wheat. 436 (25 U. S. bk. 6, L. ed. 684); and a state law imposing a license upon all persons engaged in interstate commerce, like the present license law of New Hampshire, would stand the same.

Welton v. *Missouri*, 91 U. S. 275 (bk. 23, L. ed. 347).

It may be a tax upon passengers, as in *Crandall* v. *Nev.* 6 Wall. 35 (73 U. S. bk. 28, L. ed. 745).

It may be a direct tax upon the property then the subject of commerce.

Parker Mills v. *Comrs.* 23 N. Y. 245; *Welton* v. *Mo.* 91 U. S. 275 (Bk. 23, L. ed. 347); *Cook* v. *Pa.* 97 U. S. 566 (Bk. 24, L. ed. 1015).

It may be a tax upon the transportation of freight between different States.

Case of State Freight Tax, 15 Wall. 232 (82 U. S. bk. 21, L. ed. 146).

It may be a stamp duty on bills of lading.

Almy v. *Cal.* 24 How. 169 (65 U. S. bk. 16, L. ed 644).

It may be a fee given to wardens of a port upon every vessel arriving in port.

Steamship Co. v. *Port Wardens*, 6 Wall. 31 (73 U. S. bk. 18, L. ed. 749).

All such taxes, when they are levied upon the subjects of commerce under State laws, are void.

Messrs. **S. R. Bond**, and **Ladd & Fletcher**, for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

In September, 1881, Edward S. Coe filed a petition in the Supreme Court of New Hampshire for the County of Coös, against the Town of Errol, for an abatement of taxes, and therein, amongst other things, alleged that on the first of April, 1880, he and others, residents of Maine and Massachusetts, owned a large number of spruce logs that had been drawn down the winter before from Wentworth's location (in New Hampshire) and placed in Clear Stream and on the banks thereof, in the Town of Errol, County of Coös, New Hampshire, to be from thence floated down the Androscoggin River to the State of Maine to be manufactured and sold; and that the selectmen of said Errol for that year appraised said logs for taxation at the price of $6,000, and assessed thereon state, county, town and school taxes, in the whole to the amount of $120, and highway taxes to the

amount of $60. A further allegation made the same complaint with regard to a lot of spruce logs belonging to Coe and another person, which had been cut in the State of Maine, and were on their way of being floated to Lewiston, Maine, to be manufactured, but were detained in the Town of Errol by low water. Similar allegations were made with regard to logs cut the following year, 1880, and drawn from Wentworth's location, and part of them deposited on lands of John Akers and part on land of George C. Demeritt, in said Town of Errol, to be from thence taken to the State of Maine; and also with regard to other logs cut in Maine and floated down to Errol on their passage to Lewiston, in the State of Maine, and both which classes of logs were taxed by the selectmen of Errol in the year 1881. The petition also contained the following allegations, to wit:

"Said Coe further says that said logs of both years, so in the Androscoggin River, have each year been taxed as stock in trade in said Lewiston to said Coe and Pingree; and said Coe claims and represents that none of said logs were subject to taxation in said Errol for the reason that they were in transit to market from one State to another; and also because they had all been in other ways taxed.

"That said Androscoggin River, from its source to the outlet of the Umbagog Lake in the State of New Hampshire, through said State and through the State of Maine to said Lewiston, is now and for a long time has been, to wit: for more than twenty years last past, a public highway for the floatage of timber from said lakes and rivers in Maine, and from the upper waters of said Androscoggin River and its tributaries in New Hampshire down said river to said Lewiston; and has been thus used by the petitioner and his associates in the lumber business for more than twenty years last past."

Without further pleading, the parties made an agreed case, the important part of which is as follows, to wit:

"It is agreed that the facts set forth in the petition are all true except what is stated as to the taxation of the logs as stock in trade in Lewiston, Maine; and if that is regarded by the court as material, the case is to be discharged and stand for trial on that point. It is agreed that upon this petition the legality of the taxation is intended to be brought before the court for adjudication, and all formal objections to the proceedings in the town meeting, etc. and all other matters of form are waived; and we submit the matter to the court for a legal adjudication as to whether or not any or all of the taxes shall be abated.

"And it is agreed that for many years the petitioner and his associates in the lumber business have cut large quantities of timber on their lands in Maine and floated them down the said lakes and rivers in Maine and down the Androscoggin River to the mills at said Lewiston; and timber thus cut has always lain over one season, being about a year, in the Androscoggin River, in this State, either in Errol, Dummer or Milan; and the timber referred to in this petition as having been cut in Maine had lain over in Errol since the spring or summer before the taxation, according to the above custom."

Upon this case the Supreme Court of New Hampshire, in September Term, 1882, adjudged as follows, to wit: "Now, at this term, the said questions of law having been fully determined in said law term, and an order made that that portion of said tax assessed upon the logs cut as aforesaid in said State of Maine be abated, and that the tax assessed upon all of said logs cut in the State of New Hampshire be sustained, and said order having been fully made known to the parties of this case and become a part of the record thereof, it is therefore ordered and decreed by the court that there be judgment in accordance with said order made at said law term, without costs to either party." [520]

The petitioner took a bill of exceptions, setting forth the agreed case, and stating, amongst other things, the points raised on the hearing before the Supreme Court of New Hampshire, and the decision of that court thereon, as follows:

"On said hearing the petitioner claimed that said taxes named in the petition and the statutes of this State, under the provisions of which said taxes were assessed, were illegal and void because said taxes were assessed in violation of, and said statutes of this State are in violation of and repugnant to the general provisions of the Constitution of the United States; because said taxes were assessed in violation of, and said statutes of this State are in violation of and repugnant to, that part of section 2, art. 4 of the Constitution of the United States, which provides that 'The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States'; because said taxes were assessed in violation of, and said statutes of this State are in violation of and repugnant to those parts of section 8 of article 1 of the Constitution of the United States, which provide that 'The Congress shall have power * * * to regulate commerce with foreign Nations, and among the several States'; and section 10 of said article 1, which provides that 'No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'"

The case is now before us for consideration upon writ of error to the Supreme Court of New Hampshire; and the same points that were urged before that court are set up here as grounds of error. [524]

The question for us to consider, therefore, is whether the products of a State (in this case timber cut in its forests) are liable to be taxed like other property within the State, although intended for exportation to another State and partially prepared for that purpose by being deposited at a place of shipment, such products being owned by persons residing in another State.

We have no difficulty in disposing of the last condition of the question, namely: the fact, if it be a fact, that the property was owned by persons residing in another State; for, if not exempt from taxation for other reasons, it cannot be exempt by reason of being owned by nonresidents of the State. We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the

representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the Government of the United States. If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary. The fact, therefore, that the owners of the logs in question were taxed for their value in Maine, as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case and may be laid out of view.

We recur, then, to a consideration of the question freed from this limitation: Are the products of a State, although intended for exportation to another State and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State? [525]

Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution.

This question does not present the predicament of goods in course of transportation through a State, although detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepôt* for that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State.

Of course they cannot be taxed *as* exports; that is to say, they cannot be taxed by reason or because of their exportation or intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any State, without the consent of Congress, from laying any imposts or duties on imports or exports; and, although it has been decided—*Woodruff* v. *Parham*, 8 Wall. 123 [75 U. S. bk. 19, L. ed. 382]—that this clause relates to imports from and exports to foreign countries, yet, when such imposts or duties are laid on imports or exports from one State to another, it cannot be doubted that such an imposition would be a regulation of commerce among the States and, therefore, void as an invasion of the exclusive power of Congress. See *Walling* v. *Michigan* [*ante*, 691], decided at the present term, and cases cited in the opinion in that case. But if such goods are not taxed as exports, nor by reason of their exportation or intended exportation, but are taxed as part of the general mass of property in the State, at the regular period of assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed? Although intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding. [526]

The point of time when state jurisdiction over the commodities of commerce begins and ends is not an easy matter to designate or define; and yet it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question. In regard to imports from foreign countries, it was settled in the case of *Brown* v. *Md.* 12 Wheat. 419 [25 U. S. bk. 6, L. ed. 677], that the State cannot impose any tax or duty on such goods so long as they remain the property of the importer and continue in the original form or packages in which they were imported; the right to sell without any restriction imposed by the State being a necessary incident of the right to import without such restriction. This rule was deemed to be the necessary result of the prohibitory clause of the Constitution, which declares that no State shall lay any imposts or duties on imports or exports. The law of Maryland which was held to be repugnant to this clause required the payment of a license tax by all importers before they were permitted to sell their goods. This law was also considered to be an infringement of the clause which gives to Congress the power to regulate commerce. This court, as before stated, has since held that goods transported from one State to another are not imports or exports within the meaning of the prohibitory clauses before referred to: and it has also held that such goods, having arrived at their place of destination, may be taxed in the State to which they are carried,

if taxed in the same manner as other goods are taxed, and not by reason of their being brought into the State from another State, nor subjected in any way to unfavorable discrimination. *Woodruff* v. *Parham* [*supra*]; *Brown* v. *Houston* [*ante*, 257].

But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely: that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule, in many States there would be nothing but the lands and real estate to bear the taxes. Some of the western States produce very little, except wheat and corn, most of which is intended for export; and so of cotton in the southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. It is true, it was said in the case of *The Daniel Ball*, 10 Wall. 565 [77 U. S. bk. 19, L. ed. 1002]: "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced." But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.

The application of these principles to the present case is obvious. The logs which were taxed, and the tax on which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, been shipped or started on their final voyage or journey to the State of Maine. They had only been drawn down from Wentworth's location to Errol, the place from which they were to be transported to Lewiston in the State of Maine. There they were to remain until it should be convenient to send them to their destination. They come precisely within the character of property which, according to the principles herein laid down, is taxable. But granting all this, it may still be pertinently asked, How can property thus situated, to wit: deposited or stored at the place of *entrepôt* for future exportation, be taxed in the regular way as part of the property of the State? The answer is plain. It can be taxed as all other property is taxed, in the place where it is found, if taxed or assessed for taxation in the usual manner in which such property is taxed, and not singled out to be assessed by itself in an unusual and exceptional manner because of its destination. If thus taxed, in the usual way that other similar property is taxed, and at the same rate and subject to like conditions and regulations, the tax is valid. In other words, the right to tax the property being founded on the hypothesis that it is still a part of the general mass of property in the State, it must be treated in all respects as other property of the same kind is treated. [529]

These conditions we understand to have been complied with in the present case. At all events there is no evidence to show that the taxes were not imposed in the regular and ordinary way. As the presumption, so far as mode and manner are concerned, is always in favor of, and not against, official acts, the want of evidence to the contrary must be regarded as evidence in favor of the regularity of the assessment in this case.

The judgment of the Supreme Court of New Hampshire is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

Cited—117 U. S. 179, 506, 507.

GEORGE K. OTIS, *Plff. in Err.*, [548]

v.

OREGON STEAMSHIP COMPANY.

(See S. C. Reporter's ed. 548-550.)

Jurisdiction.

Upon a writ of error to a state court, if the record shows on its face that a federal question was not necessarily involved and does not show that one was raised, this court will not go out of it, to the opinion or elsewhere, to ascertain whether such a question was in fact decided.

[No. 1250.]

Submitted Jan. 25, 1886. Decided Feb. 1, 1886.

IN ERROR to the Court of Appeals of the State of New York.

On motion to dismiss.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **George H. Adams**, for defendant in error, in support of motion.

Messrs. **John R. Abney** and **John Sessions**, for plaintiff in error, *contra*.

[549]

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit brought December 12, 1878, by the Oregon Steamship Company, the defendant in error, against George K. Otis, the plaintiff in error. The complaint alleges that on the [549] second of March, 1874, Otis, as agent of the Steamship Company, entered into a certain steamboat contract with the United States for carrying the mails between San Francisco, California, and Portland, Oregon, from June 1, 1874, to June 30, 1878, at the rate of $25,000 per annum; that the Steamship Company performed the contract and that Otis received $97,131.38 on account of the service, which was the full amount due after certain deductions provided for in the contract were made; that of this amount he paid the Company $83,675.24, and is entitled to retain $2,500 as his agreed compensation, but that he neglects and refuses to pay over the balance, being $13,456.25, and for this judgment is asked. Otis in his answer admits the making of the contract as set forth in the complaint, but denies that he made it as agent for the Steamship Company. He also admits that he has received the amount of money which is stated, and that he has not paid over the balance claimed to be due.

The case was tried by a referee, who found that the contract was made by Otis as agent for the Company; that the Company had performed the service; that Otis had received the money as charged and that there was due from him the amout claimed. Upon the filing of the report Otis excepted to the findings in these words:

"The defendant excepts generally to the findings of the referee of fact and law, and to each and every such finding save only such as were requested by the defendant. The defendant further specially excepts severally to each and every finding, and to each and every part of each and every such finding designated in his report by the following numbers, namely: 2, 3, 4, 5, 6, 7."

Neither in the pleadings nor in the evidence nor in the findings nor in the exceptions as shown by the record was there any title, right, privilege or immunity specially set up or claimed under the Constitution or a law or authority of the United States. The sole issue in the case was as to the agency of Otis. The Steamship Company alleged that he made the contract as its agent; and this he denied. There was no [550] suggestion of the illegality of such an agency. The only dispute was as to the fact of its existence.

In *Moore* v. *Miss.* 21 Wall. 639 [88 U. S. bk. 22, L. ed. 654], it was held that "If the record shows on its face that a federal question was not necessarily involved, and does not show that one was raised, we will not go out of it, to the opinion or elsewhere, to ascertain whether one was in fact decided." That rule governs this case. There is not in the record the least suggestion of a federal question. We will not look into the opinion, therefore, which has been annexed to the record below, in obedience to our Rule No. 8, sec. 2 [bk. 20], to ascertain whether such a question was in fact decided. The only issue in the case was as to the agency, and that did not depend on the Constitution or any law of the United States. The contract was entered into by Otis, and it was performed by the Company. Otis collected the money and his liability depends, not on the effect of his contract but on the fact of his having received the money for the Steamship Company.

The motion to dismiss is granted.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

CHICAGO TYRE AND SPRING WORKS COMPANY, *Plff. in Err.*,

v.

JESSE SPALDING, Collector of Customs for the PORT AND DISTRICT OF CHICAGO.

(See S. C. Reporter's ed. 541-548.)

Practice on writ of error—finding of facts only and not stipulation as to additional facts, considered—rate of duty—decisions of Collector and Secretary of Treasury conclusive.

1. Upon a writ of error to review a judgment entered upon a special finding of facts, the trial in the court below having been without a jury, in the absence of a bill of exceptions, this court can only consider such special finding; and will ignore a stipulation between the parties after the trial, that certain other facts were shown by proof at the trial.

2. Where it appears as a fact, from the special finding, that certain "steel tire blooms" have passed through an important stage in the process of manufacture, and are, therefore, articles of steel partly manufactured, they are subject to a duty of 45 per cent under Schedule E of section 2504, R. S.

3. The decisions of the Collector and the Secretary of the Treasury are conclusive until the contrary is shown in a suit.

[No. 921.]

Submitted Jan. 8, 1886. Decided Feb. 1, 1886.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The history and facts of the case appear in the opinion of the court.

Mr. **Percy L. Shuman**, for plaintiff in error.

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

The Chicago Tyre and Spring Works Company, an Illinois Corporation, brought this suit against Jesse Spalding, Collector of Customs at Chicago, in the Circuit Court of the United States for the Northern District of Illinois, to recover moneys alleged to have been illegally exacted as duties on imported merchandise embraced in three entries made at the custom house in Chicago in 1882. The declaration did not mention what the merchandise was. After pleading the parties stipulated in writing that the cause should be tried by the court without a jury. It was so tried, and on the 31st of January, 1883, the following entry, entitled in the suit and headed "Judgment," was made in the record of the court:

"This day came the plaintiff and defendant by their attorneys, and, the parties having heretofore filed their stipulation in writing, waiving a jury and submitting the facts in issue to the court, and the court, having heard the evidence and arguments of counsel and duly considered

the same, now finds that the steel tire blooms, in the declaration mentioned, are produced by first casting a flat, round ingot of steel, somewhat in the shape of a cheese, or grindstone with no hole through the center. It is then reheated and hammered so as to reduce its thickness, thereby compacting its grain or fiber; a hole is swedged through its center; and it is then hammered on the horn or beak of an anvil, thereby expanding its circumference and forming a grain or fiber in its circumferential direction, and, when intended for tires of driving wheels, the rudiments of a flange are formed or swedged also upon the outer periphery of the circle. In this form these blooms are ready for rolling and are imported at this stage of development. On arriving in this country, they are heated and placed in the rolling machine, where they are rolled or spun into the size and shape adapting them for use for tires for locomotive driving wheels or car wheels; and after being rolled the inner and outer surfaces are turned and finished in a lathe. The court finds that when imported, these blooms had passed through an important stage in the process of manufacture into steel tires and are, therefore, articles of steel partly manufactured; and were, therefore, properly classified for duties as manufactures of steel not otherwise provided for. The court, therefore, finds the issues joined for the defendant. And thereupon the plaintiff, by its attorney, moves the court for a new trial herein; and the court, being now fully advised upon said motion, overrules the same and awards judgment. It is thereupon considered and adjudged, by the court, that the defendant do have and recover of the plaintiff his costs in this behalf expended, amounting to —— dollars and —— cents, and that he have execution therefor."

On the same day, the following stipulation, [543] entitled in the cause, and signed by the attorneys for the parties, was filed:

"It is hereby stipulated and agreed between the parties to the above entitled cause that, on the trial of the same, it was proved that the plaintiff imported the steel blooms mentioned in the pleadings and proofs in this case, at the Port of Chicago, during the year 1882, and entered them at the custom house as steel blooms; and that the same were assessed a duty of 45 per cent *ad valorem*, by the defendant Collector, as 'manufactures of steel not otherwise provided for,' under the provisions of Schedule E, § 2504, Revised Statutes; that the plaintiff paid the duty levied thereon, under protest, and in apt time took an appeal to the Secretary of the Treasury, claiming therein that the blooms in question were not dutiable as manufactures of steel not otherwise provided for, and were not specially provided for by name in the tariff, but were dutiable at the rate of 30 per cent *ad valorem* as 'steel, in any form not otherwise provided for,' under the provisions of Schedule E of the same section; that the Secretary of the Treasury decided such appeal, affirming the action of the Collector, and that this suit was afterwards commenced in due time, to recover the 15 per cent duty alleged to have been collected in excess, and so paid under protest; that issue was joined and, a jury having been waived in accordance with the statute, the case was submitted to the court for trial; that the proof shows that the steel tire blooms in question are produced by first casting a flat, round ingot of steel, somewhat in the shape of a cheese, or grindstone with no hole through the center. It is then reheated and hammered, so as to reduce its thickness, thereby compacting its grain or fiber; a hole is swedged through its center and it is then hammered on the horn or beak of an anvil, thereby expanding its circumference, and forming a grain or fiber in its circumferential direction; and, when intended for tires, the rudiments of a flange are formed or swedged also upon the outer periphery of the circle. In this form, these blooms are ready for rolling, and are imported at this stage of development. On arrival in this country, they are reheated and placed in the rolling machine, where they are rolled or spun into the size or shape adapt- [544] ing them for use for tires for locomotive driving wheels or car wheels, and, after being rolled, the inner and outer surfaces are turned and finished in a lathe; the work which had been expended on them to bring them from the ingot stage to tire blooms is shown to have been equal to $10 or $15 per ton; that these blooms are classed in trade and commerce with steel bars, steel ingots, steel billets, steel rail blooms, steel plates and all sorts of forgings, and are forms of steel known in trade and commerce as steel tire blooms; that a steel casting which has been hammered ready for rolling is a bloom; that hammering an ingot to prepare it for rolling is called blooming, regardless of the shape into which the steel is made by rolling or hammering; that when imported, these blooms were ready for rolling, and were imported at this stage of development. And the court, after hearing all of the evidence, found that, when imported, these blooms had passed through an important stage in the process of manufacture into steel tires, and are, therefore, articles of steel partly manufactured; and were, therefore, properly classified for duties as manufactures of steel not otherwise provided for, and the court found the issues for the defendant. That the plaintiff excepted to said finding of the court, viz.: that the blooms were properly classified for duties as manufactures of steel not otherwise provided for, as not being in accordance with the evidence, and moved the court to grant a new trial, which motion was overruled and judgment was entered for the defendant."

There is no bill of exceptions, but the plaintiff has sued out a writ of error to review the judgment.

Schedule E of section 2504 of the Revised Statutes, 2d ed. p. 465, in force at the time of these entries, contains the following provisions as to duties on imports:

"All manufactures of steel or of which steel shall be a component part, not otherwise provided for: 45 per centum *ad valorem*. But all articles of steel partially manufactured or of which steel shall be a component part, not otherwise provided for, shall pay the same rate of duty as if wholly manufactured."

"Locomotive tire or parts thereof: three cents [545] per pound." P. 465.

"Steel in ingots, bars, coils, sheets and steel wire, not less than one fourth of one inch in diameter, valued at seven cents per pound or less; two cents and one fourth per pound; valued at above seven cents and not above eleven cents per

pound, three cents per pound; valued at above eleven cents per pound, three cents and a half per pound, and 10 per centum *ad valorem*." P. 436.

"Steel in any form not otherwise provided for, 30 per centum *ad valorem*." P. 466.

The contention on the part of the plaintiff is that the articles in question were merely steel blooms—not manufactured articles or partially manufactured articles, but only forms of steel called steel tire blooms, and therefore subject to a duty of 30 per cent *ad valorem*, and not to a duty of 45 per cent *ad valorem*.

The court, in the paper which contains the judgment, finds certain facts, evidently intended to be facts specially found, under section 649 of the Revised Statutes. On these facts it bases its conclusion of law, that the articles were properly classified for duties as manufactures of steel not otherwise provided for, and its judgment for the defendant. The stipulation in the record, above set forth, is a paper signed after the trial, intended to take the place and serve the purpose of a duly signed bill of exceptions. It states what was proved on the trial as to the importations, the entries, the assessments and payments of duties, the protests, the appeals, the action thereon and the bringing of the suit in time. It then states what the proof showed, on the trial, as to the manner of producing the steel tire blooms in question, and as to their condition when imported, and as to how they were treated on their arrival in this country. It then states what the proof showed as to the value per ton of the work put on them from the ingot state until they arrived at the condition in which they were imported; and as to how they were classed and known in trade and commerce; and as to what a bloom and blooming are; but these last mentioned matters are none of them found as facts by the court, in its findings. The stipulation then states what the court found as a conclusion of law, and that the plaintiff excepted thereto. On this state of [546] the record, this court is authorized, under section 700 of the Revised Statutes, to determine whether the facts specially found by the circuit court are sufficient to support the judgment; but it can take no notice of any facts not thus specially found, because they were not found by the court below; and this court, as an appellate court, cannot try an issue of fact. The stipulation, however, does not contain any agreement as to the existence of any facts, but merely a statement as to what the proof showed on the trial; and does not state that the parties agreed, in advance, on the facts found by the court, or how they were proved; but states that the court heard all the evidence. As to any facts stated in the stipulation to have been shown by proof at the trial, if they are not contained in the special findings, the only conclusion can be that the court did not find them to be facts. So the case must be adjudicated on the special findings alone.

In the findings, the articles are described as steel tire blooms; not only steel and blooms, but steel tire blooms. This would indicate that they were steel blooms having some purpose in connection with tires. It is then set forth how they are produced. A flat, round ingot of steel, somewhat in the shape of a cheese or a grindstone, is cast, but without a hole in its center. It is then reheated and hammered, so as to reduce its thickness, thereby compacting its grain or fiber. A hole is then swedged through its center, and it is then hammered on the horn or beak of an anvil, thereby expanding its circumference and forming a grain or fiber in its circumferential direction. It is plain, so far, that the articles are being put into a shape in which they can be worked into tires, either for the driving wheels of locomotives or for car wheels, depending on their size, shape and weight. The findings go on to say that "When intended for tires of driving wheels, the rudiments of a flange are formed or swedged also upon the outer periphery of the circle." This is not a statement as to whether these particular blooms were intended to be tires for driving wheels or for car wheels. It is then stated that the blooms are ready for rolling and are imported at this stage. Then it is said: "On arriving in this country, they are heated and placed in the rolling machine, where they are rolled or spun into the size and shape adapting them for use for tires for locomotive driving wheels or car wheels; and, after being rolled, the inner and outer surfaces are turned and finished in a lathe." But this is not a statement as to whether these particular blooms were adapted or intended to be made into tires for driving wheels, or for car wheels or for both, or some for one and some for the other.

It is not found by the court that these blooms were partly manufactured tires for the driving wheels of locomotives. On the contrary, the concluding statement in the findings is, that "These blooms had passed through an important stage in the process of manufacture into steel tires." They may all have been blooms of which only tires for car wheels, and no tires for driving wheels, could have been made or were intended to be made. The Collector and the Secretary of the Treasury may have so decided. Those decisions stand and are conclusive, under section 2931 of the Revised Statutes, until the contrary is shown in a suit. *Arnson* v. *Murphy* [*ante*, 491]. The contrary is not shown. The case is not one of a doubt as to the meaning of the statute, or of a doubt as to what statute applies to a specific article, but is one of a failure of the importer to show that the decisions of the Collector and of the Secretary as to the rate and amount of duties were erroneous. These views also meet the suggestion of the plaintiff, that if these steel blooms were partially manufactured locomotive tires or parts of tires, they were dutiable at three cents per pound. The stipulation states that the protest was that the articles were not specially provided for by name in the tariff, but were liable to the 30 per cent duty, and not to the 45.

It being assumed, as it must be on the findings, that these blooms were adapted and intended for tires for car wheels, and not for driving wheels, it is clear, we think, that they were partially manufactured tires of that character, and were not otherwise provided for, and were subject to 45 per cent duty, and were not subject to 30 per cent duty, because, although forms of steel, they were provided for under the 45 per cent clause.

It is conceded by the government that if these blooms were ordinary steel blooms, that is, merely hammered steel castings, they would not

be articles of steel partially manufactured or liable to 45 per cent duty, but would be liable to only 30 per cent duty. But the hammering on the horn of the anvil formed a grain or fiber circumferentially; and this is what the court, in its findings, called the "important stage" through which the blooms had passed "in the process of manufacture into steel tires."

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOHN SHEPARD, HENRY NORWELL AND ROBERT FERGUSON, as SHEPARD, NORWELL & COMPANY, *Appts.*,

v.

EDWARD C. CARRIGAN, Admr. of HELEN M. MACDONALD, Deceased.

(See S. C. Reporter's ed. 593-596.)

Patent law.

Where an applicant for a patent to cover a new combination is compelled, by the rejection of his application by the Patent Office, to narrow his claim by the introduction of a new element, he cannot, after the issue of his patent broaden his claim by dropping such element.

[No. 128.]

Argued Jan. 20, 21, 1886. Decided Feb. 1, 1886.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

Statement of the case by *Mr. Justice* **Woods:**

This was a suit to restrain the infringement of letters patent for an improvement in dress protectors, granted to Helen M. Macdonald, the intestate of the defendant in error, dated September 29, 1874, upon an application filed May 10, 1873.

The specification of the patent described the invention as follows:

"My invention relates to protectors for the lower edge of dresses and other garments, and consists of a band or strip of fluted or plaited fabric, either water proof itself or covered or bound with any water proof material.

"In the drawing Figure 1 represents a view of a detached portion of the dress protector, and Figure 2 represents the protector as applied to the bottom of a dress skirt.

"A is the plaited or fluted band, which is water proof or bound with waterproof material, and *a* is a beading to which it may be secured for better attachment to the garment.

"Heretofore skirt protectors have been made of a plaited or fluted strip of wigan or other fabric stiffened with starch, which, upon becoming wet, gets limp, loses its shape and absorbs the dirt, besides being objectionable on account of the harsh scraping noise it makes upon the pavement.

"By my improvement these objections are overcome. The waterproof protector preserves the lower edge of the dress from all moisture on the ground, retains its rigidity and proper shape, giving a graceful hang to the skirt, and can easily be cleaned."

Both the figures referred to in the specification represented skirt protectors made with plaited or fluted bands.

The claim was as follows:

"As a new article of manufacture, a skirt facing or protector, having a fluted or plaited border, bound with or composed of enameled cloth or water proof material, substantially as and for the purpose set forth."

On November 9, 1874, the patentee filed in the Patent Office a disclaimer by which she struck out from her claim the words "facing or," leaving the claim to cover only a skirt protector.

The answer of the defendants denied infringement and denied that Macdonald was the first and original inventor of the improvement described in her patent.

Upon final hearing, the circuit court found the issues were for the plaintiff, and entered a decree in her favor against the defendants for profits and damages; and restrained the latter from selling, to be used, protectors embracing said patented improvement, or any substantial part thereof. From this decree the defendants appealed. After the appeal Macdonald died, and Carrigan, who had been appointed her administrator, was made appellee in her stead.

Mr. **Edward N. Dickerson,** for appellants.

Messrs. **B. F. Butler** and **F. P. Fish,** for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

The evidence shows that skirt protectors are made isolated and are sold as distinct articles of manufacture, and not as a part of the dress to which they are to be attached. They are kept in shops for sale singly or by the dozen, and the purchasers use them by sewing them on the inside of the trains of long dresses, near the lower edge. They can be easily detached when worn out and new ones substituted. [595]
It is admitted that the defendants sell skirt protectors made under the patent issued to Theodore D. Day, March 23, 1875, for an improvement in skirt protectors. The improvement of Day is that described in the specification of his patent:

"I use a strip of India rubber that is made with longitudinal ribs, of sufficient size to withstand the wear to which it is subjected; and between these ribs there is a groove that makes the strip light and flexible; and the web of rubber between the ribs receives a line of stitching, by which the protector strip is united to a strip of rubber cloth, muslin or other suitable material that is to be attached to the inside of the dress at or near the lower edge."

The skirt protectors made under this patent are not made with a fluted or plaited band or border. The defendants insist that, by reason of this fact, they are essentially different from the improvement described in the Macdonald patent, and therefore do not infringe that patent. On the other hand, the plaintiff insists that the fluted or plaited border mentioned in the Macdonald patent is a matter of descriptive form merely and not an essential part of the invention covered by the patent; and that the use of skirt protectors without a fluted or plaited

border, but in other respects substantially like the protectors described in the Macdonald patent, is an infringement of that patent. Upon this issue we think the defendants are right.

It appears from the file wrapper and and contents in the matter of letters patent granted to Helen M. Macdonald that in the first application for her patent, dated May 6, 1873, the specification described her patent as follows:

"My invention consists of a strip of enameled muslin from two to four inches wide, which may be covered with any dress material, such as silk, cashmere, alpaca, armure or tamise cloth; it is then formed in pleats, and bound across the top, like samples; said pleats being held in place by one row of machine stitching through the center. It is then ready to be sewed in the dress skirt.

[596] "My invention protects the dress from being cut or damaged by contact with earth or brick or concrete pavements and sidewalks, said invention being impervious to moisture; it also protects the skirt from being soiled or damaged by mud or dampness of street crossings, sidewalks, etc.

"It also forms a very neat trimming, and improves the hanging of the skirt."

On May 10, 1873, Macdonald, for some reason which does not appear, withdrew this specification and substituted the following:

"My invention consists in protecting the lower edge of dresses and other garments by affixing thereto a portion of water-proofed material, or in water proofing the material itself; and I claim as my invention the use of water-proofed material, in whatsoever form it now exists or may hereafter exist, for the purpose of protecting the lower edge of all garments from wear and soiling, either from friction or moisture; and refer to the inclosed samples as substantially representing my invention." In this specification all reference to plaits or plaiting is omitted.

The application with the substituted specification was rejected by the Patent Office on August 9, 1873, and the applicant was referred to the patent issued to James A. McKee, January 10, 1865, which covered neither a plaited nor fluted band or border as one of its elements. Upon re-examination her application was, on September 9, again rejected.

On October 9, 1873, after the second rejection, Macdonald filed an amended specification, in which she described her invention and stated her claim as follows:

"My invention consists in protecting the lower edge of dresses and other garments by affixing thereto a portion of water-proofed or enameled material, or in water proofing the material itself; and I claim as a new article of manufacture a skirt facing or protector, having a plaited or fluted border bound with or composed of enameled cloth or other water-proof material, substantially as and for the purpose set forth."

On October 30 she was informed by the Patent Office that her application was adjudged to interfere with the pending application, [597] among others, of M. Herbert Chase, and that "the subject matter involved in the interference" was "a skirt protector having a fluted or plaited border." The skirt protector of Chase referred to in the notice of interference was a plaited strip of India rubber. Macdonald prevailed over Chase in the matter of the interference between their two applications, and received the patent for her invention, which is the patent involved in this suit.

This patent, it will be observed, covers a skirt protector merely without including any means or method for attaching it to the dress, the purchaser being left to fasten the protector to the dress in her own way.

It is shown by the evidence in the record that for several years prior to the earliest date assigned by Macdonald for the discovery of her device, in fact as far back as 1857, strips of enameled cloth without fluting or plaiting had been sewed on the bottom of the skirts of ladies' dresses, so as to project below the lower edges, with a view of protecting the inside surface and lower edge.

This fact and the file wrapper and contents of which we have stated the substance, make it clear that the claim and specification of the Macdonald patent must be construed to include, as their language requires, a fluted or plaited band or border as one of the essential elements of the invention. Without this element the patent would not have been issued. The Patent Office decided, and it is clear, that without it the invention had been anticipated. Where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot after the issue of the patent broaden his claim by dropping the element which he was compelled to include in order to secure his patent. *Leggett* v. *Avery*, 101 U. S. 256 [Bk. 25, L. ed. 865]; *Goodyear Dental Vulcanite Co.* v. *Davis*, 102 U. S. 222–228 [Bk. 26, L. ed. 149, 151]; *Fay* v. *Cordesman*, 109 U. S. 408 [Bk. 27, L. ed. 979]; *Mahn* v. *Harwood*, and *Cartridge Co.* v. *Cartridge Co.* 112 U. S. 354, 359, 624–644 [Bk. 28, L. ed. 665, 667, 828, 834]; *Sargent* v. *Hall Safe and Lock Co.* [*ante*, 67].

In the case of *Fay* v. *Cordesman*, *ubi supra*, it was said by *Mr. Justice* Blatchford, who delivered the judgment: "The claims of the patents sued on in this case are claims for combinations. In such claims, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination; and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality." So in *Sargent* v. *Hall Safe & Lock Co. ubi supra*, the same justice said: "In patents for combinations of mechanism, limitations and provisos imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and in favor of the public, and looked upon as in the nature of disclaimers." These authorities are in point and decisive of the present case.

If an applicant, in order to get his patent accepts one with a narrower claim than tha

contained in his original application he is bound by it. If dissatisfied with the decision rejecting his application, he should pursue his remedy by appeal. Under the circumstances of this case, the inventor could not even get a reissue based on the broader claim which she had abandoned. *Leggett* v. *Avery, ubi supra.* Much less can she, in a suit brought to restrain its infringement, enlarge her patent by argument, so as to cover elements not falling within its terms, and which she had explicitly abandoned.

As the skirt protectors sold by the defendants have neither plaited nor fluted bands or borders, we are of opinion, in accordance with the views expressed, that they do not infringe the patent of the plaintiff. *The decree of the Circuit Court must, therefore, be reversed and the cause remanded, with directions to dismiss the bill.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

KENTUCKY CENTRAL RAILROAD COMPANY, *Plff. in Err.*,
v.
COUNTY OF BOURBON, STATE OF KENTUCKY.

(See S. C. Reporter's ed. "*Central Railroad Company* v. *Bourbon County*," 533-540.)

Practice as to advancement of causes.

Cases in which the execution of the revenue laws of a State have been enjoined or stayed will only be advanced on motion of the State, or those claiming under it; and then it must appear that the operations of the government of the State will be embarrassed by delay.

[No. 1098.]

Submitted Jan. 25, 1886. Decided Feb. 1, 1886.

IN ERROR to the Court of Appeals of the State of Kentucky.

On motion to advance.

This action was brought by the defendant in error in a state court to recover certain taxes assessed and levied by the State Board of Equalization of Kentucky, upon the property of the plaintiff in error. A judgment in favor of the plaintiff having been affirmed, on appeal, by the court below, the defendant sued out this writ of error.

The plaintiff in error now moves to advance upon the grounds that the delay in the settlement of the questions involved materially affects the collection of its revenue by the State, impedes the fiscal operations of all the cities, towns and counties through or into which its road extends, and oppresses the plaintiff in error and deranges its business, there being many suits pending against it of which the judgment of the court in this case will be decisive.

Mr. **John W. Stevenson,** for plaintiff in error, in support of the motion.

No counsel appeared for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. Cases in which the execution of the revenue laws of a State have been enjoined or stayed are only to be advanced on motion of the State or the party claiming under such laws. R. S. § 949. Here the motion is made by the party taxed, and the suit is by the County claiming under the tax laws for the recovery of a tax. Inasmuch as the County does not move we cannot presume that "the operations of the government of the State will be embarrassed by delay." Under the rule announced in *Hoge* v. *Richmond, etc. R. R. Co.* 93 U. S. 2 [Bk. 23, L. ed. 781] it must be shown that such will be the effect of delay before a case will be advanced, even on motion by the State or those claiming under it.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM HARTOG, *Plff. in Err.*, [588]
v.
HENRY MEMORY.

(See S. C. Reporter's ed. 588-592.)

Practice—jurisdiction of circuit court—when question of citizenship must be raised.

Where the citizenship of the parties was alleged in the declaration and was such as, if truly stated, gave the court jurisdiction, and the defendant, purposely omitting to make known his citizenship, pleaded to the merits, the question of citizenship did not arise; and evidence by the defendant contradicting the allegations in the declaration as to his citizenship, was irrelevant and afforded no basis for the dismissal of the suit.

[No. 1063.]

Submitted Dec. 4, 1885. Decided Feb. 1, 1886.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. **Julius Rosenthal** and **A. M. Pence,** for plaintiff in error.

Messrs. **E. B. Sherman** and **Austin Bierbower,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court: [588]

This is a writ of error brought under section 5 of the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470, for the review of an order dismissing a suit begun in the circuit court. The record shows that on the 19th of September, 1884, William Hartog sued Henry Memory in an action of assumpsit for a breach of a contract to deliver property sold. In the declaration Hartog is described as a citizen of the Kingdom of Holland, and Memory as a citizen of Illinois. On the 8th of October Memory filed three pleas: 1, general issue; 2, Statute of Limitations of Illinois; and 3, limitation laws of Holland, where the cause of action accrued. On the 8th of November Hartog obtained a commission for the taking of testimony in Holland, and Memory was ruled to file cross interrogatories by the following Monday. On the 9th of May, 1885, Memory withdrew his plea of limitation by the laws of Holland, and Hartog filed a replication to the plea of the Statute of Limitations of Illinois. The case was on the same day tried with a jury. On the trial the plaintiff introduced "evidence to sustain [589] the issues on his behalf, which evidence also shows that said plaintiff was a subject of the

King of Holland; and also shows that said defendant has been doing business in the City of Chicago for several years.

"And thereupon said defendant offered himself as a witness to maintain the issues on his behalf in said cause, and during the progress of his examination he was asked by his counsel the following questions, and gave the following answers:

Q. Are you a citizen of the United States, Mr. Memory?

A. No, sir.

Q. Of what dominion or kingdom are you a citizen?

A. I am a citizen of Great Britain, sir.

And thereupon said plaintiff, by his counsel, cross examined said Memory as follows:

Q. How long have you resided and done business in Chicago?

A. About from eight to ten years, I suppose.

Q. Where did you do business before that?

A. I did business for a short time in New York.

It also appeared that defendant was in Holland twice in 1879, and that the alleged contract was entered into there.

Which was all the evidence introduced by either party on the question of citizenship or residence."

The jury, on the 11th of May, brought in a verdict against Memory for $2,497. A motion for new trial was then entered. On the first of June, before judgment on the verdict, the defendant filed the following motion:

"And now comes the defendant, by his attorney, and it appearing that the defendant is not a citizen of the United States or of any State, but a citizen and subject of Great Britain, and that all the parties to this suit are aliens, and that the court has no jurisdiction in this cause, the said defendant moves that this case be dismissed for want of jurisdiction in this court."

This motion was granted, and the suit dismissed June 10, 23 Fed. Rep. 885. To reverse that order this writ of error was brought.

[590] It was well settled before the Act of 1875 that when the citizenship necessary for the jurisdiction of the courts of the United States appeared on the face of the record, evidence to contradict the record was not admissible, except under a plea in abatement in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such a plea to the jurisdiction. *Farmington* v. *Pillsbury* [*ante*, 114], and cases there cited. In its general scope this rule has not been altered by the Act of 1875, but before that Act was passed it had been held that the rule prevented the courts from taking notice of colorable assignments or transfers to create cases for the jurisdiction of the courts of the United States in the absence of a plea in abatement or to the jurisdiction; and as that Act "opened wide the door for frauds upon the jurisdiction of the court by collusive tranfers so as to make colorable parties and create cases cognizable by the courts of the United States," we held in *Williams* v. *Nottawa*, 104 U. S. 209, 211 [Bk. 26, L. ed. 719, 720], that the statute changed the rule so far as to allow the court at any time without plea and without motion, to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered.

Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence, the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction, when no such plea has been filed. The evidence must be directed to the issues, and it is only when facts material to the issues show there is no jurisdiction that the court can dismiss the case upon the motion of either party.

If in the course of a trial it appears by evidence, which is admissible under the pleadings and pertinent to the issues joined, that the suit does not really and substantially involve a dispute of which the court has cognizance, or that the parties have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court may stop all further proceedings and dismiss the suit.

In *Williams* v. *Nottawa*, the record showed that one of the issues to be tried was whether Williams, the plaintiff, was the real holder and owner of the bonds sued on; and the evidence showing the collusion, for which we ordered the suit to be dismissed, was all material and pertinent to that issue. And in *Farmington* v. *Pillsbury*, [*supra*] one of the defenses was that Pillsbury, the plaintiff, was not the *bona fide* holder of the coupons in suit, but that they were placed in his hands for the purpose of being sued on in the courts of the United States. The case came here on special findings applicable to that issue; and what we then said was in answer to the question certified on those findings.

Beyond this, no doubt, if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require, for its own protection against fraud or imposition.

But the evidence on which the circuit court acts in dismissing the suit must be pertinent, either to the issue made by the parties or to the inquiry instituted by the court; and must appear of record if either party desires to invoke the exercise of the appellate jurisdiction of this court for the review of the order of dismissal. *Barry* v. *Edmunds*, just decided [post, 729]. And when the defendant has not so pleaded as to entitle him to object to the jurisdiction, and the objection is taken by the court of its own motion, justice requires that the plaintiff should have an opportunity to be heard upon the motion, and to meet it by appropriate evidence.

Here the citizenship of both the plaintiff and the defendant, as it was in good faith understood by the plaintiff to be, was stated in the declaration; and it was such as, if truly stated, gave the court jurisdiction. The defendant

proceed to the merits. He alone knew of the mistake as to his citizenship, and purposely omitted to make it known at the time. Under the issues joined, the question of citizenship did not and could not arise. If a judgment had been rendered on the verdict Memory would have been bound by it, notwithstanding both he and Hartog were aliens. The record would have estopped him from denying the jurisdiction of the court. The testimony about his citizenship was irrelevant and wholly immaterial. It did not in any manner relate to the merits of the case. It apparently came out incidentally without attracting the attention of the court at the time. The defendant suffered it to pass without special notice until after the verdict against him. He then moved for a new trial, not, so far as the record discloses, because of any errors at the trial, but, as we must presume, for the purpose of laying the foundation for his motion to dismiss; and the case appears to have been dismissed by the court, solely upon the defendant's motion and the irrelevant testimony given at the trial, and without affording the plaintiff an opportunity to rebut or control that testimony.

Under these circumstances, as there is nothing else in the case to justify the dismissal of the suit, we are of opinion that the

Order dismissing the suit is erroneous and must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

R. B. CHAFFIN, *Plf. in Err.*,

v.

WILLIAM TAYLOR.

(See S. C. Reporter's ed. 567-572.)

Practice—proceedings in court below, on mandate from this court.

1. Whatever has been decided by this court on one writ of error cannot be re-examined on a subsequent writ of error in the same suit.

2. Every question of law in this case was covered by the judgment of this court at the former hearing, *ante*, 198; and it was error for the state court, in proceedings on the mandate, to permit the filing of a rejoinder setting up matters of law which had been already finally adjudged by this court in the same case.

[No. 1011.]

Argued Jan. 7, 8, 1886. Decided Feb. 1, 1886.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

Statement by *Mr. Justice* Mat Laws:

A former judgment in this case, rendered against the plaintiff in error by the Supreme Court of Appeals of the State of Virginia, was reversed by this court, a report of which will be found [*ante*, 198].

The record at that time showed the state of the pleadings as follows:

The declaration was in trespass *de bonis asportatis;* the defendant justified the taking, etc., as treasurer of Henrico County, charged by law with the duty of collecting taxes due the State of Virginia on property and persons in said county, alleging that the property was lawfully seized and taken for taxes due from the plaintiff to the State, which on demand he had refused to pay.

To this plea the plaintiff replied a tender in payment of the taxes, when demanded and before the trespass complained of, of the amount due in coupons cut from bonds of the State of Virginia, receivable in payment of taxes by virtue of the Act of the General Assembly of that State, passed March 30, 1871.

To this replication the defendant demurred specially, on the ground, first, that by the Act of January 26, 1882, he was forbidden to receive coupons in payment of taxes; and second, that by the Act of March 13, 1884, an action of trespass would not lie in such a case; the two Acts referred to being set out in the report of the opinion of this court in the case of *Poindexter* v. *Greenhow* [*ante*, 185].

On this demurrer judgment was rendered for the defendant, which was reversed by this court, for the reasons set out in the opinion in the case of *Poindexter* v. *Greenhow*, *ubi supra*, on the ground that the statutes referred to were unconstitutional, null and void, as impairing the obligation of the contract entered into by the State with the holders of its bonds in the Act of March 30, 1871. [568]

The cause was remanded, with directions to proceed therein in conformity with law and the opinion of this court. The mandate being received and entered of record in the Circuit Court of Henrico County, that court, against the objection of the plaintiff, on motion of the defendant, permitted the latter to file a rejoinder to the replication, as follows:

"And the said defendant, by his attorney, as to the replication of the plaintiff, says: that the said plaintiff ought not to have or maintain his aforesaid action against him, because he says that at the time the said plaintiff offered to the defendant, as treasurer and collector of taxes for the County of Henrico, in payment of the taxes of the said plaintiff for the year 1883 due to the State of Virginia, a paper or instrument in print, writing or engraving, purporting to be a coupon detached from a bond of the Commonwealth of Virginia, issued under the Act of Assembly of 1871, entitled 'An Act to Fund the Public Debt,' he, the said plaintiff, demanded that the said defendant should receive the same, together with a small sum of national bank currency, in full for said taxes due by the plaintiff for the year of 1883, and give him, the said plaintiff, a receipt in full discharge of said taxes, notwithstanding the Act of the General Assembly, approved January 14, 1882, which provides that whenever any taxpayer or his agent shall tender to any person whose duty it is to collect or receive taxes, debts or demands due the Commonwealth any papers or instruments in print, writing or engraving purporting to be coupons detached from bonds of the Commonwealth issued under the Act of 1871, entitled 'An Act to Fund the Public Debt,' in payment of any such taxes, debts and demands, the person to whom such papers are tendered shall receive the same, giving the party tendering a receipt, stating that he has received the same for the purpose of identification and verification; he shall at the same time require such taxpayer to pay his taxes in coin, [569]

legal tender notes, or national bank bills, and upon payment give him a receipt for the same; in case of refusal to pay, the taxes due shall be collected as all other delinquent taxes are collected. The said defendant, as treasurer and tax collector for the County of Henrico, as was his duty, did, on account of said Act of January 14, 1882, refuse to comply with the demands of the said plaintiff, but was willing and ready to receive and is still ready to receive the said paper or instrument in print, writing or engraving purporting to be a coupon detached from a bond of the Commonwealth, issued under the Act of 1871, entitled 'An Act to Fund the Public Debt,' and give said plaintiff a receipt for the same, for the purpose of identification and verification; at the same time receiving from the said plaintiff his taxes in coin, legal tender notes or national bank bills, giving him a receipt for the same, as required by said Act of January 14, 1882; and for the purpose herein set forth. But the said plaintiff was not willing to comply with the said Act of January 14, 1882, and did not comply with the same, as by law he was required to do; and he refusing to pay his taxes aforesaid, the defendant, as treasurer and tax collector for the County of Henrico, as was his duty under the law, proceeded to collect the taxes from the said plaintiff in the manner set forth in the plea of the defendant heretofore filed, and as provided for in said Act of January 14, 1882, and this he is ready to verify."

The cause was finally submitted on a demurrer to this rejoinder, when the court, being of opinion, as the record recites, that the judgment and opinion of this court in this cause did not preclude and forbid the defendant from pleading in bar the Act of Assembly of January 14, 1882, set forth by him in his rejoinder, and that the Constitution of the United States did not make said Act of Assembly null and void as a defense to the defendant in this action, rendered judgment on the demurrer in favor of the defendant. A petition to the Supreme Court of Appeals of Virginia for a writ of error to that judgment was denied; and the cause is now brought here again for review.

Messrs. **William L. Royall** and **Daniel D. Chamberlain**, for plaintiff in error.

Messrs. **Walter R. Staples, R. A. Ayres,** *Atty-Gen. of Virginia*, and *F. S. Blair*, for defendant in error.

[570] *Mr. Justice* **Matthews** delivered the opinion of the court:

The rejoinder which the Circuit Court of Henrico County permitted the defendant to file tendered no issue of fact, but one of law merely; and every question of law in the case had been covered by the former judgment of this court in this case. The proper action of the Circuit Court of Henrico County upon the mandate of this court would have been to enter judgment on the pleadings in favor of the plaintiff, and proceed to an assessment of his damages.

The Act of January 14, 1882, set up in the rejoinder, is the same that was considered by this court in *Antoni* v. *Greenhow*, 107 U. S. 769 [Bk. 27, L. ed. 468], where it was adjudged that, as an amendment to the law regulating the proceeding by *mandamus* to compel the acceptance by the officers of the State of tax receivable coupons in payment of taxes, it was not a law which impaired the obligation of the contract under the Act of March 30, 1871.

The same Act was necessarily considered in the opinion of the court in *Poindexter* v. *Greenhow*, [*ante*, 185], as it was claimed in argument on the part of the defendant in error that the case then under consideration ought to be governed by the decision in the case of *Antoni* v. *Greenhow*, *ubi supra*, on the ground that the remedies provided by the subsequent Acts of January 26, 1882, and of March 13, 1884, were, like that provided by the Act of June 14, 1882, adequate and therefore exclusive.

But we expressly pointed out that the last named Act of June 14, 1882, the one set up and relied on in the rejoinder of the defendant, had no application to the case, so far as the decision in *Antoni* v. *Greenhow*, *ubi supra*, upheld it, because the present action was not one to specifically compel the tax collectors to receive coupons in payment of taxes, but proceeded on the ground that after the tender of conpons, in pursuance of the law of March 30, 1871, the tax collector, in distraining property for the payment of the tax as still delinquent, was guilty of a trespass.

In *Antoni* v. *Greenhow*, that question was not decided. The court there said: "The question we are now to consider is not whether, if the coupon tendered is in fact genuine and such as ought, under the contract, to be received, and the tender is kept good, the treasurer can proceed to collect the tax by distraint or such other process as the law allows, without making himself personally responsible for any trespass he may commit, but whether the Act of 1882 violates any implied obligation of the State in respect to the remedies that may be employed for the enforcement of its contract if the collector refuses to take the coupon." P. 774 [471] And again: "In conclusion, we repeat that the question presented by the record is not whether the tax collector is bound in law to receive the coupon, notwithstanding the legislation which, on its face, prohibits him from doing so; nor whether, if he refuses to take the coupon and proceeds with the collection of the tax by force, he can be made personally responsible in damages for what he does, but whether the obligation of the contract has been impaired by the changes which have been made in the remedies for its enforcement in case he refuses to accept the coupons."

The question that was not decided in *Antoni* v. *Greenhow* was the very question decided in the present case, and in the case of *Poindexter* v. *Greenhow*, where the grounds of the judgment are set out in full. It was there decided that the taxpayer had a contract right to pay his taxes in coupons; that a tender of them for that purpose, as to subsequent steps to collect the tax as delinquent, was equivalent to payment; and that a seizure of property under a levy thereafter for their nonpayment was a trespass, notwithstanding any Act of the General Assembly to the contrary; for such an Act, being in breach of the obligation of the contract of the State, is unconstitutional and therefore null and void.

The rejoinder of the defendant allowed to

be filed after the judgment of reversal, therefore, sought again to draw in question the very matter which had been already finally adjudged by this court in the same case. It did not deny the genuineness of the coupons tendered nor the fact of tender, and the question of law broadly decided on the demurrer to the replication necessarily involved every defense, arising as matter of law, that could be made upon any existing Acts of the General Assembly of Virginia; for the whole law of the case, as to the plaintiff's legal right to recover on his cause of action, was presented by the pleadings and was concluded by the judgment of reversal.

As was said in *Clark* v. *Keith*, 106 U. S. 464 [Bk. 27, L. ed. 302], "That question is no longer open in this case, for the reason that it has long been settled that whatever has been decided here on one writ of error cannot be reexamined on a subsequent writ brought in the same suit. This rule was distinctly stated in *Supervisors* v. *Kennicott*, 94 U. S. 498 [Bk. 24, L. ed. 260], where numerous authorities are cited, beginning as early as *Himely* v. *Rose*, 5 Cranch, 313" [9 U. S. bk. 3 L. ed. 111].

The judgments of the Supreme Court of Appeals and of the Circuit Court of Henrico County, Virginia, are therefore reversed and the cause is remanded to the said Circuit Court, with instructions to take further proceedings, in accordance with law and in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ROBERT P. BARRY, *Plff. in Err.*,

v.

E. G. EDMUNDS, Treasurer of FAUQUIER COUNTY, VIRGINIA.

(See S. C. Reporter's ed. 550–566.)

Jurisdiction—amount in dispute in action for malicious trespass may include exemplary damages—practice.

1. The circuit court cannot dismiss a cause on the ground that it does not involve a dispute or controversy within its jurisdiction, unless the facts, when made distinctly to appear of record, create a legal certainty of the conclusion based on them.

2. In an action for a willful and malicious trespass, in seizing and taking personal property, if a claim is made for exemplary damages in excess of the sum necessary to bring the case within the jurisdiction of the circuit court, the court should not dismiss the case merely because the value of the property seized was less than the jurisdictional limit.

3. It was error for the court below to hold, as a matter of law, that there could be no lawful recovery, in a case such as that stated in the declaration, of an amount equal to that which is necessary to support its jurisdiction.

[No. 973.]

Argued Jan. 7, 8, 1886. Decided Feb. 1, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

Statement by *Mr. Justice* Matthews:

This is an action of trespass brought by the plaintiff in error. The declaration sets out the cause of action as follows:

"Robert P. Barry, plaintiff, complains of E. G. Edmunds, defendant, of a plea of trespass on the case, for this, to wit: that the plaintiff is a citizen and resident of Fauquier County, Virginia; that he owns property in said county, and that he was duly and lawfully assessed with the sum of $56.34 as taxes upon said property, to be paid to the State of Virginia for the year 1884; that said taxes, by the laws of said State, were not leviable for prior to the first day of December, 1884; but if not paid prior to said last named date were leviable for after said date.

"That by a further provision of the laws of said State, if the taxes assessed for the year 1884 are not paid on or before the first day of December, 1884, the person owing the same becomes liable to pay, in addition thereto, a further sum of 5 per centum upon the amount of the tax so due.

"That the plaintiff did not pay his said tax prior to the first day of December, 1884, and thereby became liable to pay an additional sum of $2.81, making the plaintiff thus liable after the 1st day of December, 1884, for the sum of $59.15.

"That the defendant is the Treasurer of Fauquier County, in the State of Virginia; and as such it is made his duty, by the laws of Virginia, to collect all taxes due to the said State by residents of said County; that in the month of June, 1885, the plaintiff tendered to the defendant, in payment of his said taxes, $59.15 in coupons and lawful money of the United States, the two together constituting the full amount due for said taxes; that each one of the said coupons was cut from a bond issued by the State of Virginia, under the authority of the provisions of an Act of her General Assembly, approved March 28, 1879, entitled 'An Act to Provide a Plan of Settlement of the Public Debt;' that each one bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes, debts and demands due to said State; and that each one was due and past maturity.

"That the defendant refused the said coupons and money in payment of the plaintiff's taxes; that he refused to receive the same in payment of his taxes, because an Act of the General Assembly of the State of Virginia, approved January 26, 1882, entitled 'An Act to Provide for the More Efficient Collection of the Revenue, to Support Government, Maintain the Public Schools and to Pay Interest upon the Public Debt,' forbade him to receive them; and because another Act of the General Assembly of said State, approved January 14, 1882, entitled 'An Act to Prevent Frauds upon the Commonwealth and the Holders of her Securities in the Collection and Disbursement of Revenue,' likewise forbade him to receive them. [552]

"That on the—day of June, 1885, the defendant, unlawfully, maliciously and against the will of the plaintiff, entered upon the premises of the plaintiff, situated and being in the County of Fauquier, Virginia, with force and arms and against the will of the plaintiff and, acting as said treasurer aforesaid, did levy on and forcibly seize and carry away valuable personal property belonging to the said plaintiff, to wit: one valuable horse, of the value of $125, for the purpose of selling the same, and thus compelling the plaintiff to pay his taxes in

another medium than that already offered by the plaintiff.

"That on the day when the defendant so levied on the plaintiff's property and before he did so, the plaintiff again tendered to the defendant the said coupons and money in payment of his said taxes, but the defendant refused to receive the same in payment thereof; and the plaintiff was always ready and willing up to the moment of said levy to deliver to the defendant the said coupons and money in payment of his said taxes, but the defendant always refused so to receive the same.

"That the defendant levied on the plaintiff's said property and carried the same away, because the 18th section of the Act of the General Assembly of Virginia, approved April 1, 1879, which is chapter 60 of the Acts of the Special Session of 1879, commanded him so to levy upon the plaintiff's property notwithstanding said tender.

"That by reason of the contract of the State of Virginia set forth upon the face of said coupons, the plaintiff had a right to pay his said [553] taxes with said coupons and money; and after he tendered the same to said Treasurer his said taxes were, in point of law, paid and extinguished; and he held the said coupons and money for the defendant as his agent in that behalf thereafter.

"That when the defendant so levied upon and seized the plaintiff's property, he knew that the Supreme Court of the United States had decided at its October Term, 1884, in the case of *Poindexter* v. *Greenhow*, that a tender by a taxpayer of the State's tax-receivable coupons, such as those tendered by the plaintiff in payment of taxes due the State, pays and extinguishes said tax; and that any and all laws of said State commanding her treasurers to refuse the same and commanding them to levy after said tender are repugnant to the Constitution of the United States, and are, therefore, null and void.

"That the defendant, so knowing the law, levied on and seized the plaintiff's property in contempt of and defiance of the law and with the deliberate intention of defying the Constitution of the United States and the judicial powers thereof.

"That there exists in the State of Virginia a very great political party, which comprises a majority of the voters in said State, which has for its aims and purpose to enact laws that will defeat and destroy the effect of the judgment of the Supreme Court of the United States in said case of *Poindexter* v. *Greenhow*, and will defeat and destroy the protection afforded by the Constitution of the United States to taxpayers who seek to pay their taxes with said tax-receivable coupons.

"That said party, being in control of the Legislature of the said State, has enacted a great number of statutes which are intended to have that effect, and it openly proclaims that it intends to enact all other and further statutes which shall be necessary to make it impossible for taxpayers to pay their taxes with said coupons.

"That the defendant is a member of said political party, and sympathizes with and shares in its aims and purposes, and actively co-operates in every way in his power in every attempt to make it impossible for taxpayers to pay taxes due to said State with said coupons.

"That, when he refused to receive said coupons in payment of plaintiff's taxes, and when he levied on plaintiff's property as aforesaid, he did it for the purpose of aiding and assisting his said political party in its attempts to defy and nullify the Constitution of the United States.

"That he intended thereby to intimidate the plaintiff and make him afraid to rely upon the Constitution of the United States and the judicial power thereof for protection in those rights guaranteed to the plaintiff by said Constitution.

"That he intended to make an example of the plaintiff and thereby deter him and all others from relying upon the Constitution of the United States and the judicial power thereof, for the protection in those rights guaranteed by the said Constitution; that in contempt of and defiance of the said Constitution and said judicial power the defendant made public advertisement in many parts of the County of Fauquier that he had levied on and seized plaintiff's property, because plaintiff was delinquent as a taxpayer, and that he would sell the same at public auction on a day named, at the court house of said County; that on the day named he did expose the said property to sale at public auction at said court house in the presence of many of plaintiff's neighbors, friends and fellow countrymen; and publicly proclaimed that plaintiff was a defaulter and delinquent taxpayer; that by reason thereof plaintiff's credit and standing were greatly injured and his feelings cruelly wounded and mortified.

"That the defendant well knew when he made said levy and sale that they were forbidden by the Constitution of the United States; but he did so trusting and believing that his said political party would enact statutes of its State of Virginia that would shield and protect him from all harm; that he made said levy and sale maliciously and with the purpose and intent to trample on the plaintiff's rights under the law and do him all the injury in his power.

"And the said plaintiff further says that he is a citizen of Fauquier County, Virginia; that he owns property in said County, and that he was duly and lawfully assessed upon said property with the sum of $56.34, as taxes to be paid to the State of Virginia for the year 1884, which taxes by the laws of Virginia were not leviable for prior to the first day of December 1884, but the same, if not paid prior to said last named date, were leviable for after the said date that by a further provision of the laws of said State, if the taxes assessed for the year 1884 are not paid on or before the first day of December 1884, the person owing the same becomes liable to pay in addition thereto a further sum of 5 per centum upon the amount of the tax so due; that the plaintiff did not pay his said tax prior to the first day of December, 1884, and thereby became liable to pay an additional sum of $2.81, making the plaintiff thus liable after December 1, 1884, for the sum of $59.15; that the defendant is the Treasurer of Fauquier County, in the State of Virginia, and as such it is made his duty, by the laws of Virginia, to collect all taxes due to the said State by residents and owners of property in said County.

"That in the month of June the plaintiff ten

dered to the defendant, in payment of his said taxes, coupons for $—— each, and $——, in lawful money of the United States, the two together constituting the sum of $59.15. That each one of said coupons was cut from a bond issued by the State of Virginia, under the authority and provisions of an Act of her General Assembly, approved March 28, 1879, entitled 'An Act to Provide a Plan of Settlement of the Public Debt;' that each one bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes and demands due said State; and that each one was over due and past maturity. That the defendant refused to receive the said coupons and money in payment of the plaintiff's taxes. That he refused to receive the same in payment of his taxes, because an Act of the General Assembly of the State of Virginia, approved January 26, 1882, entitled 'An Act to Provide for the More Efficient Collection of the Revenue, to Support Government, Maintain the Public Schools, and to Pay Interest upon the Public Debt,' forbade him to receive them; and because another Act of the General Assembly of the State of Virginia, approved January 14, 1882, entitled 'An Act to Prevent Fraud upon the Commonwealth and the Holders of her Securities in the Collection of Revenues,' likewise forbade him to receive them. That on the —— day of June, in the year 1885, the defendant, unlawfully and against the will of the plaintiff, entered upon the premises of the plaintiff, situate and being in the County of Fauquier, Virginia, with force and arms and against the will of the plaintiff and acting as said treasurer aforesaid, he levied on and forcibly seized and carried away valuable personal property belonging to the plaintiff, to wit: one horse, to the value of $125, for the purpose of selling the same and thus compelling the plaintiff to pay his taxes in another medium than that already offered by the plaintiff; that on the day when the defendant so levied on the plaintiff's property, and before he did so, the plaintiff again tendered to the defendant the said coupons and money in payment of said taxes, but the defendant refused to receive the same in payment thereof; and the plaintiff was always ready and willing, up to the moment of said levy, to deliver to the defendant the said coupons and money in payment of his said taxes, but the defendant always refused to receive the same.

"That the defendant levied on the plaintiff's said property and carried the same away because the 18th section of the Act of the General Assembly of Virginia, approved April 1, 1879, which is chapter 60 of the Acts of the Special Session of 1879, commanded him so to levy upon the plaintiff's property, notwithstanding said tender. That, by reason of the contract of the State of Virginia, set forth upon the face of said coupons, the plaintiff had a right to pay his said taxes with said coupons and money, and after he tendered the same to the said Treasurer his said taxes were, in point of law, paid and extinguished, and he held the said coupons and money for the defendant as his agent in that behalf thereafter. That when the defendant so levied upon and seized the plaintiff's property, he knew that the Supreme Court of the United States had decided, at its October Term, 1884, in the case of *Poindexter* v. *Greenhow* [*ante*, 185], that a tender by a taxpayer of the State's tax-receivable coupons, such as those tendered by the plaintiff, in payment of taxes due the State, pays and extinguishes said tax; and that any and all laws of said State commanding her Treasurer to refuse the same, and commanding them to levy after said tender, are repugnant to the Constitution of the United States and are therefore null and void. [557]

"That the defendant, so knowing the law, levied on and seized the plaintiff's property in contempt of and defiance of the law, and with the deliberate intention of defying the Constitution of the United States and the judicial power thereof.

"That in contempt of and defiance of the said Constitution and judicial power the defendant made public advertisement in many parts of the County of Fauquier that he had levied on and seized plaintiff's property because plaintiff was delinquent as a taxpayer, and that he would sell the same at public auction, on a day named, at the court house in said County. That on the day named he did expose the said property to sale at public auction, at said court house, in the presence of many of the plaintiff's neighbors and friends and fellow citizens and countrymen, and publicly proclaimed that the plaintiff was a defaulter and delinquent taxpayer.

"That by reason thereof plaintiff's credit and standing were greatly injured, and his feelings cruelly wounded and mortified. That whilst the said defendant was unlawfully and wrongfully upon the plaintiff's premises, as aforesaid, he did many other wrongs and injuries to the plaintiff of a malicious nature, by all of which wrongs and injuries the plaintiff has been injured and damaged $6,000. And therefore he brings his suit."

To this declaration the defendant filed a plea to the jurisdiction of the circuit court, alleging that as the plaintiff and defendant were both citizens of the State of Virginia the courts of that State had exclusive jurisdiction of the alleged cause of action.

The record shows the following action and judgment of the court:

"This cause came on this day to be considered by the court upon a motion made by the plaintiff to set a day for argument of a demurrer to the special plea filed herein. Upon consideration whereof the court is of opinion that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, for the reason that the amount of taxes due by the plaintiff to the State of Virginia was less than $100, and the property levied on and seized by the defendant was worth less than $200, and therefore, that the matter in dispute in this cause does not exceed, exclusive of costs, the sum or value of $500. [558]

"And it appearing to the court, that this being an action for damages, if the jury should render a verdict for $500 damages, such verdict would be excessive, and the court would feel compelled to set it aside. The court is further of opinion that this court is, for that reason, also without jurisdiction of this suit.

"The court is, therefore, for each of the aforesaid reasons, of opinion that it is required to dismiss this suit by the Act of Congress approved March 3, 1875, 'to determine the juris-

which there may be great differences of opinion. The general rule undoubtedly is that they should be precisely commensurate with the injury. Yet in England and in this country they have been allowed in excess of compensation, whenever malice, gross neglect or oppression has caused or accompanied the commission of the injury complained of." In the English Court of Common Pleas, it was held in the case of *Bell* v. *Midland R. Co.* 10 C. B. N.S. 287, that where a railway company had obstructed a siding belonging to an adjoining land owner with a high hand and in violation of his rights under an Act of Parliament, exemplary damages might justly be given. And the rule was applied in *Emblem* v. *Myers*, 6 H. & N. 54, against one who negligently and recklessly pulled down buildings on his own land so as to injure his neighbor with a view to make him give up possession. In that case *Baron* Bramwell said: "If a plaintiff, in his particulars, claimed £500 because the defendant walked over his lawn, the jury might award that amount if they thought it was done for the purpose of annoyance and insult." In *Johnson* v. *Hannahan*, 3 Strobh. 425, the Court of Appeals of South Carolina, in an action of trespass *quare clausum fregit*, where the plaintiff sought to recover damages for an invasion of his close, accompanied, as he alleged, by circumstances of oppression and insult, refused to set aside a verdict for $3,000 as excessive, although the actual and mere pecuniary loss it was shown did not amount to $20. In *Kolb* v. *Bankhead*, 18 Tex. 228, which was an action of trespass for cutting down and carrying off timber from the land of another, where the defendant has willfully or by gross negligence cut over his own line on the land of the plaintiff, it was said by the Supreme Court of Texas, that "in estimating the damages the jury were not confined strictly to mere compensation for the timber cut and removed. It was their right to look to the particular circumstances of the case, and give such damages as the facts were deemed by them to warrant and as would, in their judgment, be adequate, not only for compensation but also for prevention."

[565]

It is unnecessary, however, further to multiply authorities on this point. The precedents are indefinite in number, and the application of the rule as uniform as the circumstances of the cases are various. There was clear error in the circuit court in its ruling, as matter of law, that there could be no lawful recovery, in such a case as that stated in the declaration, of an amount equal to that which is necessary to support the jurisdiction of the court. The same error was repeated in acting upon the statement that a verdict, if rendered for that amount, would be excessive and set aside for that reason; a statement which could not, at any rate, be judicially made before such a verdict was in fact rendered. It adds, indeed, to the principal error, if any distinction can be made, that which consists in encroaching upon the province of the jury. For nothing is better settled than that in such cases as the present and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict. In *Whipple* v. *Cumberland Mfg. Co.* 2 Story, 661, 670, *Mr. Justice* Story well expressed the rule on this subject, that a verdict will not be set aside in a case of tort for excessive damages "unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated;" that is, "unless the verdict is so excessive or outrageous," with reference to all the circumstances of the case, "as to demonstrate that the jury have acted against the rules of law or have suffered their passions, their prejudices or their perverse disregard of justice to mislead them." In no case is it permissible for the court to substitute itself for the jury and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice which the jury itself is the appointed constitutional tribunal to award.

The case of *Beardmore* v. *Carrington*, 2 Wils. 244, was an action of trespass and false imprisonment against the defendants, who were four of the King's messengers in ordinary. They justified the alleged trespass under a warrant of the Earl of Halifax, then one of the principal Secretaries of State, requiring them to arrest the plaintiff as the author of some seditious libels and to seize his books and papers. There was a verdict for the plaintiff for £1,000 damages, and a motion for a new trial on the sole ground that the damages were excessive. The court (Pratt, afterwards Lord Camden, being *Lord Chief Justice*) said: "Can we say that £1,000 are monstrous damages as against him who has granted an illegal warrant to a messenger, who enters into a man's house and prys into all his secret and private affairs, and carries him from his house and business and imprisons him for six days? It is an unlawful power assumed by a great minister of state. Can anybody say that a guinea *per diem* is sufficient damages in this extraordinary case, which concerns the liberty of every one of the King's subjects? We cannot say the damages of £1,000 are erroneous." The dignity and value of the right assailed, and the power and authority of the source from which the assault proceeds, are elements to be considered in the computation of damages, if they are to be, not only compensation for the direct loss inflicted, but a remedy and prevention for the greater wrong and injury involved in the apprehension of its repetition. *Huckle* v. *Money*, 2 Wils. 205.

The section of the Act of March 3, 1875, under which the circuit court acted in dismissing the present action, confers a beneficial authority to be wisely exercised in defeating collusive and fraudulent experiments upon its jurisdiction; but the discretion it confers is judicial, proceeding upon ascertained facts according to rules of law, and subject to review for apparent errors. For the reasons already given we are not able to uphold its exercise in the present instance, and its judgment dismissing the action is accordingly reversed and the cause is remanded, with directions to take such further proceedings therein as the law requires and in conformity with this opinion.

It is accordingly so ordered.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM L. ROYALL, *Plf. in Err.*,

v.

STATE OF VIRGINIA.

(See S. C. Reporter's ed. 572-584.)

Constitutional law—tender of Virginia coupons in payment of license tax—effect of—rights and remedies of coupon holders.

1. A lawful tender of payment, as well as an actual payment, of taxes deprives the collecting officer of all authority for further action to enforce payment, and renders every subsequent step illegal and void.

2. Under the laws of Virginia, an assessment, made by law a condition precedent to obtaining a license for pursuing a profession, is payable in coupons of certain bonds issued by the State, being within the meaning of the words "taxes, debts, dues and demands due the State," as used in the Act of March 30, 1871.

3. It is the right of the coupon holder to have his coupons received for taxes when offered; and the Act of March 15, 1884, in so far as it forbids their receipt in payment of license taxes, is void as against coupon holders.

4. Where an applicant for a license has tendered coupons in payment therefor, he need not resort to a *mandamus* to compel its issue upon its being wrongfully withheld, but may, without a license, pursue the business of his calling, which is not unlawful in itself, and which he has a constitutional right to prosecute.

[No. 1010.]

Argued Jan. 7, 8, 1886. Decided Feb. 1, 1886.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

Statement by *Mr. Justice* **Matthews**

The plaintiff in error was convicted in the Hustings Court of the City of Richmond, of the misdemeanor under the laws of Virginia of practicing law as a lawyer without having first obtained a license so to do from the commissioner of the revenue.

To the information the plaintiff in error filed the following plea:

"And for a plea in this behalf the said William L. Royall comes and says that he is an attorney at law, duly licensed and qualified to practice law in the courts of the State of Virginia, under the laws of said State, and that he has been such for more than five years; that on the first day of May, 1884, he paid to Samuel C. Greenhow, who is the treasurer of the City of Richmond, Virginia, $25.75, and received from him and the commissioner of the revenue a revenue license as a lawyer for one year from that date; that he has not practiced his profession as a lawyer in the courts of said State between the first day of May, 1885, and the 11th day of July, 1885; that on the 11th day of July, 1885, he tendered to Seaton G. Tinsley, who is the deputy for Samuel C. Greenhow, one coupon for $15 and $10 in United States Treasury notes, in payment of his license tax as an attorney at law for the ensuing year, and seventy-five cents in silver coin for the fee of the commissioner of the revenue; that said coupon was cut from a bond issued by the State of Virginia under the provisions of an Act of the General Assembly, approved March 30, 1871, entitled 'An Act to Provide for the Funding and Payment of the Public Debt;' that it was over due and past maturity, and bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, demands and dues due to the said State; that when he made said tender he demanded of said Greenhow a certificate in writing stating that he had deposited with him said coupon and money; but the said Greenhow, by his said deputy, refused to receive said coupon and money for any purpose whatever, and refused to give him said certificate or any other certificate; that he refused to receive said coupon and money, because an Act of the General Assembly of the State of Virginia, approved February 7, 1884, forbade him to receive said license tax in coupons, and because the 112th section of an Act of the General Assembly of said State, approved March 15, 1884, provides that all license taxes shall be paid in current money of the United States, and not in coupons; that thereupon the defendant made the affidavit hereto attached, marked 'A,' and presented it to R. B. Munford, who is the commissioner of the revenue for the City of Richmond, and demanded of him a revenue license as an attorney at law, and at the same time he presented to the said Munford the paper hereto attached, marked 'B,' and at the same time he offered to pay the said Munford any and all fees that he was entitled to receive before issuing said license, but the said Munford refused to issue to defendant a license as an attorney at law; that thereafter defendant accepted the employment of a client who was being prosecuted for a misdemeanor in this honorable court, and assisted in his defense, and thus practiced his profession as a lawyer without a revenue license; but said [575] professional act was done after defendant had made the efforts hereinbefore described, to obtain a revenue license; and this he is ready to verify."

The affidavit referred to in the plea set forth the facts of the tender, and the paper marked "B" was the usual form of an application for a revenue license.

To this plea the Commonwealth filed a general demurrer, which was sustained by the court, on the ground that the defendant had no right to practice his profession as an attorney at law after the tender of the coupons and money, as described in the plea, without first having obtained a license therefor. The defendant then pleaded not guilty, and a trial was had, resulting in a verdict finding the defendant guilty and assessing his fine at $30.

During the progress of the trial a bill of exceptions was duly taken, as follows:

"Be it remembered that on the trial of this cause the same was submitted to the jury upon the following agreed statement of facts, to wit:

'It is admitted as evidence in the case of the *Commonwealth* v. *Royall*, that said Royall did not practice his profession as attorney at law between May 1, 1885, and July 11, 1885, and that on the latter day he tendered to the treasurer of the City of Richmond a coupon issued by the State of Virginia under the provisions of the Act of March 30, 1871, for the sum of $15 and $10.75 lawful money of the United States, in payment of his license tax for the ensuing year, and demanded his license of the proper officer; that said coupon was receivable in payment of all taxes, debts and demands due said State; that said tender was refused; that thereupon the defendant practiced his profes-

sion as an attorney after said tender, but not before, without revenue license, but the said defendant has for more than five years been duly licensed to practice law under the laws of Virginia. It is further agreed that the license tax on the defendant as an attorney at law is $25.'

"Thereupon the defendant moved the court to instruct the jury as follows:

[576] 'If the jury believe from the evidence that the defendant did not practice his profession of attorney at law between the first day of May, 1885, and the 11th day of July, 1885, and that on the 11th day of July, 1885, he tendered to the treasurer of the City of Richmond a coupon for $15, issued by the State of Virginia under the provisions of the Act of Assembly approved March 30, 1871, which coupon, by provisions of said Act, was receivable for all taxes, debts and demands due said State, and $10.75, in lawful money of the United States, in payment of his license tax, which said tax is $25, and seventy-five cents commissioner's fee, for the then ensuing year, and that said tender was refused by said treasurer, then they are instructed they must find the defendant not guilty.'

Which instructions the court refused to give. To the court's action in refusing which instructions the defendant excepts, and tenders this his first bill of exceptions, and prays that this his bill of exceptions be signed, sealed, and made a part of the record; which is accordingly done."

Judgment was entered on the verdict for the payment of the fine, and execution awarded. The record contains the following:

"And, at the instance of the defendant, the court certifies that in the record and at the trial of this cause there was drawn in question the validity of section 86 of chapter 34 of the Code of Virginia of 1873, and an Act of the General Assembly of said State, approved February 7, 1884, entitled 'An Act to Regulate the Granting of Licenses for the Exercise of any Privilege,' and the 112th section of an Act of the General Assembly of said State, approved March 15, 1884, entitled 'An Act to Provide for the Assessment of Taxes on Persons, Property and Incomes,' etc., upon the ground that, so far as they undertake to inflict punishment upon the defendant for practicing his profession as an attorney at law without a license, after having tendered the state's tax-receivable coupons in payment of his license tax, they are repugnant to section 10 of article 1 of the Constitution of the United States.

"But the court being of opinion that the defendant had no right to practice the profession

[577] of an attorney at law without a license after he had tendered payment of his license tax in coupons, decided and gave judgment that said section of said Code and said Acts of the General Assembly are not repugnant to section 10 of article 1 of the Constitution of the United States in that behalf; and it decided and gave judgment in favor of the validity of said section of said Code and said Act of Assembly."

The Supreme Court of Appeals denied a petition praying for an allowance of a writ of error; and to reverse that judgment this writ of error is prosecuted.

Messrs. **William L. Royall,** *in personam,* and **Daniel H. Chamberlain,** for plaintiff in error.

Messrs. **Walter R. Staples, R. A. Ayres,** *Atty-Gen. of Virginia,* and *F. S. Blair,* for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

The Virginia Code of 1873, § 60, provides that "No person shall, without a license authorized by law, practice as an attorney," and section 61, that "Every attorney at law, in addition to being licensed, sworn and admitted to prosecute or defend actions or other proceedings in the courts of this Commonwealth, on the retainer of clients, shall obtain a revenue license; and no person shall act as attorney at law, or practice law in the courts of this Commonwealth, without a separate revenue license." This revenue license, it will be observed, is different from and in addition to the license to practice law, given only to such as on examination, as to their character and acquirements, are found to be duly qualified therefor. The amount of this revenue license was fixed by an Act of March 15, 1884, at $15 for those who had been licensed to practice for less than five years, and at $25 for all others. Section 86 of chapter 34 of the Virginia Code of 1873 provides that "Any person who shall engage in or exercise any business, employment or profession, without a license, if a license be required by law, or shall in any manner violate the license or revenue laws of the State, if no specific fine is imposed for such violation, shall pay a fine of not less than $30 nor more than $1,000."

The Act of February 7, 1884 (Acts of Va. 1883–84, p. 120), enacts that no application for a license to do any business, or to follow any profession, trade or calling in that State, shall be made; and if made shall not be considered, except upon compliance with its provisions, which, among other things, require that the amount of the assessment prescribed by law as a condition precedent shall accompany the application, in gold or silver coin, United States Treasury notes or national bank notes.

Section 112 of the Act of March 15, 1884 (Acts of Va. 1883–84, p. 603), also provides that "applications for licenses shall be made, and all taxes assessed by chapter 1 of this Act, shall be paid in lawful money of the United States, in the mode and subject to the provisions of an Act to regulate the granting of licenses, approved the 7th day of February, 1884," etc.

By the terms of the Act of March 30, 1871, the coupons tendered in this case were made receivable for "all taxes, debts, dues and demands due the State;" and this stipulation, as has been repeatedly decided by the Court of Appeals of Virginia and by this court, constituted a contract between the coupon holder and the State of Virginia, the obligation of which the State is forbidden to impair by the Constitution of the United States, and any law of the State which would have that effect, if enforced, is thereby annulled and made void. To this point are the cases of *Antoni* v. *Wright,* 22 Gratt. 833; *Wise* v. *Rogers,* 24 Gratt. 169, and *Clarke* v. *Tyler,* 30 Gratt. 134, in the Court of Appeals of Virginia; and in this court the cases of *Hartman* v. *Greenhow,* 102 U. S. 672 [Bk. 26, L. ed. 271]; *Antoni* v. *Greenhow,* 107 U. S.

700 [Bk. 27, L. ed. 468], and *Poindexter* v. *Greenhow* [*ante*, 185]. In *Hartman* v. *Greenhow*, *ubi supra*, it was shown that the consideration for this stipulation was a surrender by its creditors of one third of their claim against the State. In *Antoni* v. *Greenhow*, [*supra*] it was said: "The right of the coupon holder is to have his coupon received for taxes when offered;" and "Any Act of the State which forbids the receipt of these coupons for taxes is a violation of the contract and void as against coupon holders." In *Poindexter* v. *Greenhow* [*supra*], no point in which was reopened in the argument of this cause, it was said: "It is well settled by many decisions of this court that for the purpose of affecting proceedings to enforce the payment of taxes, a lawful tender of payment is equivalent to actual payment, either being sufficient to deprive the collecting officer of all authority for further action and making every subsequent step illegal and void;" a proposition founded upon the authority of *Woodruff* v. *Trapnall*, 10 How. 190 [51 U. S. bk. 13, L. ed. 388]; *U. S.* v. *Lee*, 106 U. S. 196 [Bk. 27, L. ed. 171]; *Bennett* v. *Hunter*, 9 Wall. 326 [76 U. S. bk. 19, L. ed. 672]; *Tracey* v. *Irwin*, 18 Wall. 549 [85 U. S. bk. 21, L. ed. 786; *Atwood* v. *Weems*, 99 U. S. 183 [Bk. 25, L. ed. 471], and *Hills* v. *Exchange Bank*, 105 U. S. 319 [Bk. 26, L. ed. 1052].

That charges, or, as they are called in the "Act, assessments made by law as conditions precedent to obtaining licenses for pursuing a business or profession, are included within the meaning of the words "taxes, debts, dues and demands due the State," as used in the Act of March 30, 1871, does not seem to admit of reasonable doubt. In *Clarke* v. *Tyler*, 30 Gratt. 134, it was adjudged by the Court of Appeals of Virginia that a fine imposed for a violation of law could be discharged under this provision in coupons in lieu of money. So that upon the authority of that case the very fine imposed by the Hustings Court of Richmond upon the plaintiff in error for practicing law without a revenue license may lawfully be paid and discharged in the very coupons which were tendered in payment of the license itself and refused. Surely such an anomaly cannot be justified or admitted. The payment required as a preliminary to the license is in the nature and form of a tax, and is a due to the State which it may demand and exact from every one of its citizens who either will or must follow some business avocation within its limits, to the pursuit of which the assessment is made a condition precedent. It is an occupation tax, for which the license is merely a receipt and not an authority, except in that sense, because it is laid and collected as revenue, and not merely as incident to the general police power of the State, which, under certain circumstances and conditions, regulates certain employments with a view to the public health, comfort and convenience. In the latter class of cases the exactions may be either fees or fines, as they are proportioned to the expense of regulation or laid as a burden upon and a discouragement to the business, and not taxes which are levied for the purpose of raising public revenue by means of a contribution either from the person or the property or the occupation of all citizens in like circumstances. It was, therefore, in the character of a tax that the payments were required and made for licenses issued under the Internal Revenue Acts of the United States. *McGuire* v. *Commonwealth*, 3 Wall. 387 [70 U. S. bk. 18, L. ed. 165]. Speaking of them in the *License Tax Cases*, 5 Wall. 462, 471 [72 U. S. bk. 18, L. ed. 497, 500], *Chief Justice* Chase said: "The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax," etc., and that "this construction is warranted by the practice of the government from its organization. * * * They were regarded merely as a convenient mode of imposing taxes on several descriptions of business, and of ascertaining the parties from whom such taxes were to be collected. * * * But as we have already said, these licenses give no authority. They are mere receipts for taxes." The license under the laws of Virginia, required from the plaintiff in error, cannot be distinguished from those of the class just referred to, issued under the internal revenue laws of the United States.

We are referred to the case of *Sights* v. *Yarnalls*, 12 Gratt. 292, as defining a license under the laws of Virginia in a different sense. We think, on the contrary, that it is not only consistent with the view we have taken, but strongly in corroboration of it. In that case, the amount assessed as a condition of the license is expressly designated to be a tax. It was an exaction made by the municipal government of the City of Wheeling, under a law which expressly authorized it, in reference to houses of entertainment, to grant or refuse licenses; and the case was one of that class. The language of the city charter was: "They shall further have authority to regulate the manner in which such houses or places shall be kept, and to levy and collect taxes thereon, in addition to any tax which is or shall be payable on the same to the State." [581]

The law of Virginia, however, on this point was definitely settled in accordance with the view we have here taken, in the case of *Ould* v. *Richmond*, 23 Gratt. 464, followed by *Humphreys* v. *Norfolk*, 25 Gratt. 97, and *Western Union Telegraph Co.* v. *City of Richmond*, 26 Gratt. 1.

In the case of *Humphreys* v. *Norfolk*, *supra*, the Supreme Court of Appeals of Virginia, referring to the previous case of *Ould* v. *Richmond*, said: "The objection was made in that case that a power to license involves in its exercise the power to prohibit without such license, and that such power vested in a municipal corporation is incompatible with the rights of attorneys conferred by their general license to practice in any and every part of the State. This objection did not prevail. *Judge* Anderson, upon this point, speaking for the entire court, conceded that the city authorities could not prohibit attorneys at law already licensed from practicing their profession within the city limits. The exercise of the vocation was, however, a civil right and privilege, to which are attached valuable immunities and pecuniary advantages, and is a fair subject of taxation by the State and by municipal corporations. The power to impose a license tax upon the profession is included in the general power of taxation given by the sixty-ninth section of the charter and is not

taken away by subsequent limitations. * * * The principles settled by that case," continued the court, "are decisive of this. In neither case is the attempt made to prohibit the exercise of the business or vocation. The license required by the corporation is merely a mode of assessing the tax; if it be reasonable and just, it matters but little by what name it is called. The power to impose fines and penalties for a failure to pay the tax required is not only an incident to the power of taxation, but is expressly conferred by statute."

That the party complying with the statutory conditions is entitled as of right to the license, [582] is conclusive that the payment is a tax laid for revenue and not an exaction for purposes of regulation. *Mayor, etc.* v. *Second Ave. R. R. Co.* 32 N. Y. 261; *State* v. *Hoboken*, 33 N. J. L. 280; 2 Dill. Mun. Corp. 766, chap. 19, § 768. The occupation, which is the subject of the license, is lawful in itself, and is only prohibited for the purpose of the license; that is to say, prohibited in order to compel the taking out a license, and the license is required only as a convenient method of assessing and collecting the tax. Cooley, Tax. 407. Such a license fee was held to be a tax by this court in the cases of *Brown* v. *Md.* 12 Wheat. 419 [25 U. S. bk. 6, L. ed. 677]; *Ward* v. *Md.* 12 Wall. 418 [79 U. S. bk. 20, L. ed. 449], and *Welton* v. *Mo.* 91 U. S. 275 [Bk. 23, L. ed. 347]. We think it entirely clear, both from the nature of the case and upon authority, that the payments demandable by the State for the license applied for by the plaintiff in error are taxes within the meaning of the Act of March 30, 1871, in discharge of which coupons were receivable by its terms, and that the plaintiff in error must be regarded, after making the tender alleged, in the same situation in law as if he had tendered gold or silver coin or other lawful money of the United States.

Admitting this, it is still contended, half of the Commonwealth, that it was unlawful for the plaintiff in error to practice his profession without a license, and that his remedy was against the officers to compel them to issue it. It is doubtless true, as a general rule, that where the officer whose duty it is to issue a license, refuses to do so, and that duty is merely ministerial, and the applicant has complied with all the conditions that entitle him to it, the remedy by *mandamus* would be appropriate to compel the officer to issue it. That rule would apply to cases where the refusal of the officer was willful and contrary to the statute under which he was commissioned to act. But here the case is different. The action of the officer is based on the authority of an Act of the General Assembly of the State which, although it may be null and void because unconstitutional, as against the applicant, gives the color of official character to the conduct of the officer in his refusal; and, although at the election of the aggrieved party the officer might be subjected to the compulsory process of *mandamus* [583] to compel the performance of an official duty, nevertheless the applicant, who has done everything on his part required by the law, cannot be regarded as violating the law if, without the formality of a license wrongfully withheld from him, he pursues the business of his calling, which is not unlawful in itself and which under the circumstances he has a constitutional right to prosecute. As to the plaintiff in error, the Act of the General Assembly of the State of Virginia forbidding payment of his license tax in its coupons, receivable for that tax by a contract protected by the Constitution of the United States, is unconstitutional, and its constitutionality infects and nullifies the antecedent legislation of the State, of which it becomes a part, when applied, as in this case, to enforce an unconstitutional enactment against a party not only without fault, but seeking merely to exercise a right secured to him by the Constitution. It is no answer to the objection of unconstitutionality, as was said in *Poindexter* v. *Greenhow*, *supra*, "that the statute, whose application in the particular case is sought to be restrained, is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States."

In the present case the plaintiff in error has been prevented from obtaining a license to practice his profession, in violation of his rights under the Constitution of the United States. To punish him for practicing it without a license thus withheld is equally a denial of his rights under the Constitution of the United States; and the law, under the authority of which this is attempted, must on that account and in his case be regarded as null and void.

As the sum demanded for the license is a tax, the provision for the punishment of one who pursues his profession without a license is a part of the revenue system of the State, and is a means merely of enforcing payment of the tax itself, or of a penalty for not paying it. It is legally equivalent to a civil action of debt upon the statute, and its substantial character is not changed by calling the default a misdemeanor, and providing for its prosecution by information. The present case, therefore, stands precisely, so far as the constitutional questions arising in it are affected, as if it were a civil action, in which the Commonwealth of Virginia was plaintiff, seeking to recover the amount due on account of the tax and penalty. In that aspect no one would doubt that it would be a perfect defense that the defendant had previously paid the demand, or, what we have held to be legally equivalent, had tendered the amount in the coupons of the State, receivable in payment by an irrepealable contract, but which the appointed authorities of the State had wrongfully refused to receive. Such, as we conceive it, is the present case. The State of Virginia has sued the defendant for the recovery of a tax which he offered to pay, when it became due, in its own coupons, which by the law of its contract were receivable in satisfaction of the demand. Certainly the State cannot be permitted to recover against its own contract from the other contracting party, as to whom the

only default alleged is that he has performed the contract on his part.

The judgments of the Supreme Court of Appeals of Virginia and of the Hustings Court of the City of Richmond, Virginia, are accordingly reversed; and the cause is remanded to said Hustings Court, with instructions to take further proceedings therein, in accordance with law and in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WILLIAM H. SANDS, *Plf. in Err.*
v.
E. G. EDMUNDS, Treasurer of the COUNTY OF FAUQUIER, VIRGINIA.

(See S. C. Reporter's ed. 585-587.)

Constitutional law—Virginia lawyer has right to pay license tax in state coupons—mandamus.

A practicing lawyer in Virginia has the right to pay his license tax in coupons of certain bonds issued by the State; and the proper officer may be compelled by *mandamus* to receive such coupons tendered to him for verification under the Act of January 4, 1882.

[No. 1009.]

Argued Jan. 7, 8, 1886. Decided Feb. 1, 1886.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

Statement of the case by *Mr. Justice* **Matthews**:

The plaintiff in error filed in the Circuit Court of Fauquier County a petition for a *mandamus* against the Treasurer of that County, as follows:

"The petition of Wm. H. Sands respectfully represents that he is an attorney at law, regularly and duly licensed to practice law in the courts of the State of Virginia, according to the laws of said State.

"That on the 8th day of September, 1885, he tendered to E. G. Edmunds, who is the Treasurer of the County of Fauquier, and the officer whose duty it is to collect all license taxes due said State in said County, in payment of his license tax as an attorney at law for the ensuing year, $15 in lawful money of the United States and seventy-five cents in like money for the commission of the revenue's fee, in compliance with the provisions of the Acts of Assembly, approved February 7, 1884, entitled 'An Act to Regulate the Granting of Licenses for the Exercise of Any Privilege.'

"That, at the same time, he tendered to the said Treasurer a certain coupon for $15, which coupon was cut from a bond issued by the State of Virginia under the provisions of an Act of her General Assembly, approved March 30, 1871, entitled 'An Act to Provide for the Funding and Payment of the Public Debt.'

"That said coupon was over due and past maturity, and bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes, debts and demands due said State.

"That at the same time he demanded the said Treasurer should receive said coupon along with said lawful money for the purpose of identification and verification, in manner and form as required by an Act of the General Assembly of the State of Virginia, approved January 14, 1882, entitled 'An Act to Prevent Fraud upon the Commonwealth and Holders of Her Securities in the Collection of Her Revenues.'

"That the said Treasurer received said lawful money tendered by your petitioner, and gave him the certificate provided for in said Act of February 7, 1884, but he refused to receive said coupon as demanded by your petitioner, and he refused to receive it for any purpose whatever. Your petitioner claims that he had the right to have said Treasurer receive said coupon and deliver the same to the judge of the county court of Fauquier; and that it was your petitioner's right to prove said coupon before a jury in said court and thereupon to have his said money returned to him; and that said Treasurer did your petitioner a great wrong and injury when he refused to receive said coupon.

"That he refused to receive same because said Act of February 7, 1884, requires all license taxes to be paid in money only and not in coupons, and because the 112th section of an Act of the General Assembly of Virginia, approved March 15, 1884, entitled 'An Act to Provide for the Assessment of Taxes on Persons, Property, Incomes,' etc. requires all license taxes to be paid in money only and not in coupons.

"That both of said Acts in this particular are repugnant to section 10 of article 1 of the Constitution of the United States, and therefore null and void. That your petitioner has not been licensed to practice law so long as five years.

"Your petitioner therefore prays that a *mandamus nisi* may be issued commanding the said E. G. Edmunds, Treasurer aforesaid, to show cause why a peremptory *mandamus* shall not issue commanding him to receive said coupon, and deliver it to the judge of the county court for identification and verification, according to the terms and provisions of said Act of January 14, 1882." [587]

The prayer for the writ was denied by the Circuit Court of Fauquier County, and on application to the Supreme Court of Appeals of Virginia that judgment was affirmed by a refusal to allow an appeal. To reverse that judgment this writ of error is prosecuted.

Messrs. **Wm. L. Royall** and **D. H. Chamberlain**, for plaintiff in error.

Messrs. **R. A. Ayres**, *Atty-Gen. of Virginia*, **Walter R. Staples** and *F. S. Blair*, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court: [587]

The right of the plaintiff in error to pay his license tax as a lawyer in coupons, receivable for taxes, as described in his petition, is affirmed by the opinion and judgment in the case of *Royall* v. *Va.*, just decided [*ante* 785]. His remedy, to have them received for verification and to recover back the money paid for his license, is secured to him by the terms of the Act of January 4, 1882, which, for such pur-

poses, was upheld by this court as a valid enactment in *Antoni* v. *Greenhow*, 107 U. S. 769 [Bk. 27, L. ed. 468].

On the authority of these decisions the judgments of the Supreme Court of Appeals of Virginia and of the Circuit Court of Fauquier County, Virginia, are reversed, and the cause is remanded to said Circuit Court, with instructions to take further proceedings according to law and in conformity with this opinion.

And it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[599] JOHN H. MING ET AL., *Plfs. in Err.*,

v.

ALEXANDER M. WOOLFOLK.

(See S. C. Reporter's ed. 599-605.)

Action for deceit—damage must have been sustained.

1. An action to recover damages for a deceit cannot be sustained where it appears that the defendant, by false representations, induced the plaintiff to do something which he would have done anyhow, and by which he sustained no loss.
2. Upon a review of the evidence, this court holds that the plaintiffs in this case are not entitled to recover.

[No. 116.]

Submitted Jan. 15, 1886. Decided Feb. 1, 1886.

IN ERROR to the Supreme Court of the Territory of Montana.

Statement of the case by *Mr. Justice* **Woods:**

[599] The plaintiffs in error were the plaintiffs in the court below. They brought this suit against the defendant in error in the District Court for the County of Lewis and Clarke, in Montana Territory, and in their petition stated their case substantially as follows:

On September 16, 1874, the defendant made and delivered to the plaintiffs his contract in writing, of which the following is a copy:

"Helena, September 16, 1874.

"Whereas John Kinna and John H. Ming have this day joined with me in borrowing the sum of ($2,572.10) twenty-five hundred and seventy-two and $\frac{10}{100}$ dollars, for the purpose of paying R. S. Hale the balance of eight thousand dollars due him under private agreement with said Ming, Kinna and Woolfolk, in order for their release from certain notes executed by them to said Hale, as security for the Park Ditch Company; and whereas, the Park Ditch [600] Company has pledged the note of William Chessman to it, and its claim against Felix Poznainsky, and any other demands due it to the extent of repaying to the said Ming, Kinna and Woolfolk the sum of $2,572.10, this day borrowed; now, therefore, the said Woolfolk does hereby agree that if he shall collect any of the above amounts, or shall from any resources whatever of the Park Ditch Company receive any other sums, after deducting all costs, charges and expenses, to apply the same in payment of said note, and also another note executed to R. S. Hale for taxes, amounting to between six and seven hundred dollars, until said notes shall be fully paid, said payments to be made by the said Woolfolk after his return from the East next spring and as soon thereafter as the amounts shall be received; but the said Woolfolk does not assume to pay said note only to the extent that he shall receive such amounts from the resources of the Park Ditch Company as aforesaid.

A. M. Woolfolk."

The petition further averred that Woolfolk, in order to induce the plaintiffs to join him in borrowing the money and executing the note therefor, so as to accomplish the release of all three from their liability to Hale, represented to them that the Park Ditch Company had passed a resolution, in conformity with the recitals in the contract above set forth, by which it had pledged the Chessman note and the claim against Poznainsky, and all of its resources, including all of its receipts for water sold and to be sold by it, sufficient to pay the said sum of $2,572.10, and that, relying on this representation, they joined in the borrowing of said money and the execution of the note therefor; that the Park Ditch Company had never passed such resolution; that the plaintiffs had each paid out of his own funds the one third of said note for borrowed money, and they had also paid the sum of $445.50, being the two thirds of the note mentioned in the contract which Hale had given for taxes; that no part of said sums of money had been repaid to the plaintiffs, and the same were due to them, with interest.

The petition further alleged that about May 1, 1875, the defendant took the control and management of the affairs of the Park Ditch Company, and between that date and September 1 following received on the Chessman note and the claim against Poznainsky about $3,000; and from sales of water and other resources of the Park Ditch Company more than $3,500; and he should have applied a sufficient part of these sums to the reimbursement of the plaintiffs for the moneys paid out by them as aforesaid, amounting in all to the sum of $2,255.64, but that he had refused so to do. The plaintiffs therefore, prayed judgment against the defendant for the last mentioned sum, with interest.

The defendant, in his answer, admitted the making of the contract set out in the declaration, but denied that there was any valuabl

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NOTE.—*Action for deceit; what necessary to sustain.*

The conditions which must concur in order to support an action of deceit are thus summed up in 1 Benjamin on Sales, Corbin's ed., p. 606:

1. The representation must be made to the plaintiff, or with the direct intent that it should be communicated to him, and that he should act upon it.
2. It must be false in fact.
3. It must be false to the knowledge of the defendant, or made by him recklessly; that is to say, without reasonable grounds for believing it to be true, or under circumstances which show that he was careless, whether it was in fact true or false.
4. It must be a material one.
5. The plaintiff must have acted upon the faith o it, and thereby suffered damage; and where th meaning of the representation is ambiguous, it for the plaintiff to show that he understood it in th sense in which it is false.

For full discussion see above cited text book, 555 *et seq.*, and 595 *et seq.* and cases cited.

Some of the recent cases are: Cole v. Cassidy, 1 Mass., 437; Cowley v. Smyth, 46 N. J. L., 380; Wals v. Morse, 80 Mo., 568; Genesee Co. Savings Bank Michigan Barge Co., 52 Mich., 164; Bowin v. Davi 76 Me., 223; Rhoda v. Harris, 75 Me., 17; Arthur Wheeler & W. Mfg. Co., 12 Mo. App., 365.

consideration therefor; denied that he had stated to the plaintiffs that the Park Ditch Company had passed the resolution mentioned in the petition; denied that on May 1, 1875, or at any other time during that year, he took possession of the Park Ditch or the control or management of the Park Ditch Company; denied that he ever collected any sum whatever on the Chessman note or the Poznainsky claim, or ever received at any time after the execution of said contract, from sales of water or any other resources of the Park Ditch Company, the sum of $3,500, or any other sum, after deducting costs, charges and expenses. Upon the issues thus raised the case was tried.

After the plaintiffs had introduced their evidence and rested, the defendant moved the court for nonsuit. The court granted the motion, and rendered judgment for the defendant for costs. The plaintiffs thereupon took the case by appeal to the Supreme Court of the Territory of Montana, which affirmed the judgment of the District Court. By the present writ of error the plaintiffs seek the reversal of the judgment of the Supreme Court of Montana.

Messrs. **M. P. Morris,** and **L. M. Saunders,** for plaintiffs in error.

Mr. **Alexander M. Woolfolk,** *in person,* for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

It appears from the record that the Park Ditch Company was a corporation organized under the laws of the Territory of Montana; that on September 16, 1874, the date of the contract set out in the petition, it was insolvent, and that the plaintiffs and the defendant were jointly liable as its sureties to one R. S. Hale, for a balance of between $11,000 and $12,000, for which they held no indemnity; and that Hale, the creditor, offered to release them from this liability on the payment to him of the sum of $2,572.10, to pay which they borrowed the said money and gave the note mentioned in the petition. Both the plaintiffs were examined as witnesses. Ming testified that the water rents which had been pledged as he supposed for the indemnity of the plaintiffs were the rents for the season of 1875, and that the water did not begin to run until about the middle of May, and that in May, 1875, there was a contest between R. S. Hale and the Park Ditch Company over these receipts, and that Hale brought an action to recover them, and asked for the appointment of a receiver. Both Ming and Kinna testified that they would have paid said sum of $2,572.10 to Hale, to be released from the larger obligation, even if no representations had been made to them by the defendant to the effect that the Park Ditch Company had passed a resolution pledging its assets for their indemnity; that they were not induced by the said representations of the defendant to relinquish any security which they held; in fact they held none of any value. In short, to put the case as the plaintiffs themselves by their own testimony put it, they together with the defendant jointly borrowed $2,572.10, which they paid to Hale, who in consideration thereof released them from a liability to him as sureties of the insolvent Park Ditch Company of about $12,000, and they would have paid the money whether the Park Ditch Company had pledged its assets for their indemnity or not, and the borrowing of the money subjected them to no loss, but was greatly to their advantage.

So far, therefore, as the case made by the declaration is to be considered as an action to recover damages by a deceit practiced by the defendant, it amounts to this: that the defendant, by his false representations, induced the plaintiffs to do something which they would have done anyhow, and by which they sustained no loss, but on the contrary were greatly advantaged. "The requisites to sustain an action for deceit," says *Baron* Parke, in *Watson* v. *Poulson*, 15 Jurist, 1111, are "the telling of an untruth, knowing it to be an untruth, with intent to induce a man to alter his condition, and his altering his condition in consequence whereby he sustains damage." See also *Pasley* v. *Freeman*, 3 T. R. 51; *Polhill* v. *Walter*, 3 Barn. & Ald. 114: *Levi* v. *Langridge*, 4 Mees. & Wels. 337; *Brown* v. *Castles*, 11 Cush. 348; *Tryon* v. *Whitmarsh*, 1 Met. 1. Considered, therefore, as an action for a deceit it is plain that the case must fail; for, conceding the alleged representation to have been made by the defendant and to have been false, the plaintiffs were not induced thereby to change their condition and, moreover, have suffered no damage. [603]

The plaintiffs' counsel say, however, that the action is to be considered as based on the contract by which the defendant agreed to apply the assets of the Park Ditch Company which came to his hands, after deducting all costs, charges and expenses, to the reimbursement of the plaintiffs for the money borrowed by them and paid to Hale. Considered as an action on the contract, the suit must fail for want of evidence to support it. It is averred in the petition and not denied in the answer that the Park Ditch Company never pledged the assets and resources mentioned in the contract for the reimbursement of the plaintiffs, and nothing in the record shows that such pledge was made. The defendant in his answer denied that, after the making of the contract, he ever received any money from the assets of the Park Ditch Company, or for water rents.

It is clearly shown by the evidence, and the contrary is not now asserted by the plaintiffs, that no money whatever was paid to the defendant on the Chessman note or on the Poznainsky claim. The plaintiffs insist, however, that the defendant received the water rents of the Park Ditch Company in the year 1875 to the amount of about $3,500 over and above costs, charges and expenses. But upon a careful reading of the record we are unable to find any evidence to support this contention. The only testimony upon this point is the minutes of the meetings of the board of trustees of the Park Ditch Company offered in evidence by the plaintiffs. These minutes show that R. S. Hale had, in a suit brought by him against the Park Ditch Company, seized the net receipts for water sales of the company, and that on May 24, 1875, the board of trustees assigned said net proceeds to A. J. Davis, W. C. Gillette and Samuel Schwab, who had become the sureties of the company in the suit, to secure them against loss by reason of their suretyship. They further show that on October 20, 1875, a reso- [604]

lution was adopted by the board of trustees, by which, after reciting that, whereas R. S. Hale had proposed to dismiss his said action against the company for the proceeds of water sales for the year A. D. 1875, amounting to the sum of $3,450, on the following conditions, viz.: that A. M. Woolfolk should cause to be dismissed all proceedings involving the payment of certain water notes executed by the Park Ditch Company and held by him, amounting to the sum of about $8,000, and should deliver said notes to Hale to be canceled, and that Woolfolk should cause to be dismissed by T. P. Newton all appeals involving the right to the possession of the Park Ditch, and arbitrate the value of the Tucker extension belonging to Woolfolk, and that Woolfolk should sell said extension to Hale at such appraised value, and sell and dispose of all other property belonging to Woolfolk and connected with said ditch; and whereas, Woolfolk had at his own expense defended the right of the company to said receipts, and had furnished all necessary bonds for the company, and besides giving his own professional services, had employed and paid counsel to defend said suit; it was resolved that the company did thereby promise and agree with Woolfolk that if he would accede to the terms of Hale, the company would for this and the considerations aforesaid relinquish to him one half the amount of said receipts, to wit: $1,725, provided Woolfolk should accept the same as full reimbursement and satisfaction for all his charges against said company by reason of the premises aforesaid. The minutes further stated that "Woolfolk, being present, accepted."

This was the only evidence offered by the plaintiffs tending to show any receipt by the defendant of the water rents of the Park Ditch Company for 1875. If the proposition contained in the resolution was carried out, of which there is no evidence in the record, it can hardly be contended that Woolfolk might not receive and appropriate to his own use the $1,725 mentioned in the resolution without violating his [605] contract with the plaintiffs. After the water rents for 1875 had been attached in the suit brought by Hale and had been pledged by the Park Ditch Company to its sureties in that suit, and Woolfolk, to aid the company in compromising the case, had released a claim of $8,000 against it, and all claims for professional services rendered in the suit by himself and other counsel whom he had employed, and all claim for the moneys expended by him in the defense of the suit, and had consented to the other exactions imposed by Hale, it can hardly be said that the $1,725, the gross sum received by Woolfolk, if in fact he ever received it, was the net proceeds of the water rents, "after deducting all costs, charges, and expenses." It does not appear by the evidence that there were any net proceeds of the water rents; on the contrary, it appears there were not.

It needs no argument to show that the contract sued on was not meant to bind the defendant to pay over to the plaintiffs money obtained under the circumstances set out in the resolutions of the board of trustees. There is no other evidence to show the receipt of money by the defendant from the assets or resources of the Park Ditch Company. The case of the plaintiffs must, therefore, fail for want of any evidence to show a breach of the contract made by the defendant with them. Their suit is without support. The record fails to show any plausible ground for bringing it in the first instance, or for suing out the present writ of error.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JAMES C. JONES AND JACOB WEIL, Partners, as JONES & WEIL, *Plffs. in Err.*,

v.

BENJAMIN F. SIMPSON.

SAME, *Plffs. in Err.*,

v.

GEORGE HOISINGTON.

(See S. C. Reporter's ed. 609-615.)

Evidence — declarations of vendor admissible against vendee, when—fraud—under laws of Kansas, sale, fraudulent as to creditors, valid as to vendee, when.

1. The admissions or declarations of the vendor of personal property are admissible against the vendee where it appears from indisputable evidence that they were engaged in a common purpose to defraud the creditors of the former, and the admissions or declarations had such relation to the execution of such purpose as to fairly constitute a part of the *res gestæ*.

2. Under the laws of Kansas, a sale by the vendor to defraud his creditors is not invalid as against the vendee, if he purchased in good faith and for a sufficient consideration.

3. The law presumes the possession of the vendee to have been rightfully acquired; and where it appears that a sufficient consideration was paid, the vendee is entitled to a verdict and judgment, unless it appears affirmatively that he purchased in bad faith.

[Nos. 88, 89.]

Submitted Dec. 10, 1885. Decided Feb. 1, 1886.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **J. G. Mohler,** for plaintiffs in error.

Mr. **Reginald Fendall,** for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

These actions, one against the United States Marshal for the District of Kansas and the other against the sheriff of one of the counties of that State, were brought to recover damages for an alleged wrongful seizure and conversion, by those officers, of certain goods and chattels which plaintiffs in error, who were plaintiffs below, claimed to have purchased prior to such seizure, from G. & M. Goldsmith. The seizure, in each case, was made in virtue of attachments sued out by cre-

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NOTE.—*Evidence; declarations of vendor of chattels; when admissible against vendee.* Res gestæ. Compare Roeber v. Bowe, 30 Hun, 379; Truax v. Slater, 86 N. Y., 630; Williams v. Hart, 65 Ga., 292; Kennedy v. Divine, 77 Ind., 490; McCormicks v. Fuller, 56 Ia., 43; Hutchins v. Hutchins, 98 N. Y., 56.

tors of said vendors. The defense is that the property was liable to seizure as the property of the defendants in the attachments. Whether it was so liable depends upon the inquiry whether the sale to the plaintiffs passed a good title as against the creditors of the vendors. The defendants insist that it was made with the fraudulent purpose, on the part of the vendors, of cheating, hindering and delaying their creditors; and that the vendees either intended by their purchase to aid in accomplishing that result, or, at and before their purchase, were chargeable in law with notice of the fraud designed by the vendors.

It is unnecessary to set out all the facts which, according to the bill of exceptions, the evidence tended to establish. For the purpose of indicating the grounds upon which the case will be determined, it need only be said that while there was evidence tending to show the payment by plaintiffs of the fair value of the property, its actual delivery to them at the time of the sale, and their continued possession of it until seized under these attachments, there was, also, evidence tending to prove that the circumstances attending the transaction were so unusual and suspicious as to suggest to business men of ordinary prudence the purpose of the vendors to hinder or defraud their creditors. And from all the facts the jury might reasonably have concluded that the plaintiffs were willing, by purchasing the property, to aid the vendors in defeating any efforts of their creditors, by the ordinary process of the law, to obtain satisfaction of their demands. The correctness of this interpretation of the conduct of the parties to the sale is sustained by the admissions and declarations of the vendors, made so nearly contemporaneous with the delivery of the property that they may be said to have sprung out of the very transaction in virtue of which the plaintiffs claim title.

It is, however, contended that the admissions of the vendors, after the sale and delivery of the property, not in the presence of the vendees, were not competent evidence against the latter. We had occasion, at the present term, in *Winchester & Partridge Manufacturing Co.* v. *Creary*, [*ante* 501], to consider this question in a somewhat different aspect. In holding in that case that the court erred in admitting the declarations of a vendor in evidence against the vendee of personal property, which had been delivered before any suit by attaching creditors, it was said: "After the sale, their (the vendors') interest in the property was gone. Having become strangers to the title their admissions are no more binding on the vendee than the admissions of others. It is against all principle that their declarations, made after they had parted with the title and surrendered possession, should be allowed to destroy the title of their vendee." But it was also said that such admissions or declarations would be competent against the vendee, if it were shown by independent evidence that the vendor and vendee were engaged in a common purpose to defraud the creditors of the vendor, and the admissions had such relation to the execution of such purpose as fairly to constitute a part of the *res gestæ*. These conditions seem to be fully met in the present case; for the facts which the evidence tended to establish, apart from the admissions and declarations of the vendors, indicate collusion between them and their vendees for the purpose of delaying the creditors of the former, and that such admissions and declarations, although not precisely concurrent in time with the sale, were made in the course of the same day and were plainly in furtherance of the common design to delay the creditors of the vendors. Upon these grounds we think that those admissions and declarations of the vendors were admissible against the plaintiffs. There were other objections by plaintiffs to the admission of evidence, but they need not be specially noticed.

At the trial the plaintiffs asked the court to instruct the jury that if they believed from the evidence, "that the goods in controversy were sold and delivered to Jones & Weil before any attachment was made or issued; that they took possession of the goods after the sale; that the change of possession was actual and visible, such a change as to indicate to persons who had previously done business at the store where the goods were that Max S. & Gus. Goldsmith had no longer possession or control of the goods; that the sale was for an approximate price and for a valuable consideration paid by plaintiffs to Goldsmiths, the jury will find for the plaintiffs." This instruction was properly refused; for the facts stated in it did not entitle the plaintiffs to a verdict, if the evidence showed either that their purchase was not in good faith, or was made with knowledge at the time of such facts and circumstances as reasonably put them upon inquiry as to the purpose of the vendors to hinder and delay their creditors. And the same criticism may be made upon the instruction asked by the plaintiffs to the effect that "If Goldsmith had purchased the goods on time, and those debts were not due for the goods, the goods were the absolute property of the Goldsmiths, and they had a lawful right to sell and dispose of any and all of the goods in their possession without any regard to their creditors; and if they did so sell the goods to Jones & Weil before their debts were due, and plaintiffs took possession of them, the title of the goods passed to Jones & Weil, and were not, after such sale and delivery, liable to attachment for the debts of Goldsmith; and if so attached, Jones & Weil could either replevy the goods or treat such seizure as a sale and sue for the value of the goods." [613]

The record contains numerous instructions given to the jury, at the request of the defendants, and to the granting of which the plaintiffs excepted. We perceive no defect in any of them except the last one, which is in these words: "If the jury believe that Gus. and Max S. Goldsmith sold the goods to the plaintiffs, with the intention to hinder, delay or defraud their creditors, then the plaintiffs before they can recover must show, by a preponderance of the evidence, that they bought the goods for a good and valuable consideration, and that they acted in good faith in making said purchase. It is not sufficient that they paid a valuable consideration, even should you find that to be a fact. If plaintiff, did not act in good faith in making the purchase, it is void, although they paid a full consideration."

This instruction was clearly erroneous. It is unwarranted either by the laws of Kansas or by the principles of the common law. By the

second section of the Statute of Kansas for the prevention of frauds and perjuries, it is provided that "Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution made or obtained with intent to hinder, delay or defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons who shall purchase such lands, tenements, hereditaments, rents, goods or chattels, shall be deemed utterly void and of no effect." And by the third section of the same Act it is further provided that "Every sale or conveyance of personal property, unaccompanied by an actual and continued change of possession, shall be deemed void, as against purchasers without notice and existing or subsequent creditors, until it is shown that such sale was made in good faith and upon a sufficient consideration. Act of October 31, 1868, 1 Dassler's Kansas Stat. chap. 43, p. 441; Compiled Laws of Kansas, 1879, chap. 43. If the second section embraces such a sale of goods and chattels as the one here involved, it is not to be supposed that the Legislature intended, in every case, to deprive the [614] vendee of personal property, who buys in good faith and for a valuable consideration, of the benefit of his purchase simply because the vendor sold with the intent to hinder, delay or defraud his creditors; for the third section protects such a purchaser, even where there has not been an actual and continued change of possession, upon his showing that he bought in good faith and upon sufficient consideration. The necessary implication from the language of that section is that where the sale is followed by an actual and continued change of possession, the vendee is not obliged, in order to maintain his right of possession, to prove both the payment of a sufficient consideration and the exercise of good faith upon his part. His title, where such possession is shown, will be protected, unless it is successfully impeached by some one who has the right to question its validity. The party who asserts that the title did not pass as against him must make such proof as will establish that proposition. If he does not, the presumption which the law indulges that the vendee has rightfully acquired possession will control the determination of the issue. Upon its appearing that the vendor, possession having been delivered, made the sale with the fraudulent intent to hinder or delay his creditors, the utmost which the creditors could claim is that the burden of proof is upon the vendee, as between him and existing creditors, to show, by competent proof, that he paid a sufficient consideration for the property. But such payment being shown, the vendee is entitled to a verdict and judgment, however fraudulent may have been the intent of the vendor, unless it appears affirmatively, from all the circumstances, that he purchased in bad faith. And such bad faith may exist where the vendee purchases with knowledge of the fraudulent intent of the vendor, or under such circumstances as should put him on inquiry as to the object for which the vendor sells.

There can be no doubt that these principles are in accordance with the settled course of decision in the highest court of Kansas. In the recent case of *Baughman, Sheriff etc.* v. *Penn*, 6 Pacific Reporter, 890, which was an action of replevin to recover personal property which had been seized as the property of Howard Bros., who were defendants in certain attachment suits, but which property the plaintiffs in those suits claimed to have purchased from the debtors prior to the attachments being issued, that court said: "A further objection is made to the direction given by the court, 'that fraud is never presumed, but must be established by evidence.' Of the correctness of this proposition, or of its application to the case, there should be no question; but counsel seem to argue that the burden of proof was upon the plaintiff to show that he did not participate in the fraud now conceded to have been intended by the Howard Bros. Fraud is not so lightly imputed. While certain circumstances will give rise to an inference of fraud, yet the law never presumes it. It devolves on him who alleges fraud to show the same by satisfactory proof. And the burden rested upon the creditors of Howard Bros., who assailed the good faith of Penn in this transaction, to show, by either direct or circumstantial evidence, that the transaction was fraudulent as to Penn. As the trial court stated, 'The law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose; and anyone who alleges that such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the business of showing the same.'" See also *Wilson* v. *Fuller*, 9 Kan. 176, 187; *Diefendorf* v. *Oliver*, 8 Kan. 246, 249; *Wolfley* v. *Rising*, Id. 297; *Prewit* v. *Wilson*, 103 U. S. 24 [Bk. 26, L. ed. 363]; *Stewart* v. *Thomas*, 15 Gray, 171; *Elliott* v. *Stoddard*, 98 Mass. 146; *Hatch* v. *Bayley*, 12 Cush. 30; *Cooke* v. *Cooke*, 43 Md. 533.

There was, as we have seen, evidence tending to show that plaintiffs paid a sufficient consideration for the property, and that there was such a change of possession as is required by the statute. *And as the jury were erroneously instructed that they must find for the defendants unless the plaintiffs showed, by a preponderance of evidence, both the payment of a good and valuable consideration and good faith in the transaction, the judgments must, for that error, be reversed, and the cases remanded for a new trial. It is so ordered.*

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

CHRISTIAN F. LIEBKE ET AL., *Plffs. in Err.*,
v.
WILLIAM THOMAS.

(See S. C. Reporter's ed. 605-609.)

Composition under section 17 of the Bankrupt Act of 1874 operates discharge—parties.

1. A lawful composition under section 17 of the Act of June 22, 1874, and its performance, has the same effect as a discharge in bankruptcy.

2. The holder and owner of an accommodation note is the party to be dealt with in composition proceedings. The accommodation maker is not entitled to notice of such proceedings involving the

yee and indorser, for the accommodation of whom the note was made.

[No. 300.]

Submitted Jan. 8, 1886. Decided Feb. 1, 1886.

IN ERROR to the St. Louis Court of Appeals in the State of Missouri.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **G. M. Stewart**, for plaintiffs in error.

Messrs. **Upton M. Young** and **Alexander Young**, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the St. Louis Court of Appeals in the State of Missouri.

The defendant in error brought his action in the Circuit Court for the City of St. Louis against the plaintiffs in error, Liebke and Schrage. His petition alleged that on the 8th day of August, 1877, he executed and delivered to defendants, who were partners in trade, his promissory note, payable to their order, for the sum of $500, in three months after date; that the defendants sold said note to the Mullanphy Bank of St. Louis, to which plaintiff, on the 14th day of November, paid the amount of it, less a small sum credited on it as paid by defendants. The sum paid by plaintiff when he took it up from the bank was $435. He alleges that the note was made and delivered to defendants for their use and accommodation, and it was agreed that they would take care of and pay the same when it became due and hold plaintiff harmless in regard to it.

He further alleges that defendants have failed and refused to pay him any part of said $435 and still refuse to do so; wherefore he prays judgment for the $435, with interest and costs.

The answer of defendants sets up an adjudication of bankruptcy against them October 13, 1877, a composition in bankruptcy under the Act of Congress, duly agreed upon at a meeting of the creditors, and confirmed by the court, in which compliance with the requirements of the law as to such composition is fully set out, and they plead this and the payment of the composition note in bar of the plaintiff's action.

A general denial was made for replication, and the case was tried by the court without a jury. The circuit court gave judgment for plaintiff, and on appeal to the St. Louis Court of Appeals, this judgment was affirmed.

That court, in its opinion, found in 9 Mo. App. 434, bases its decision mainly on the proposition that Thomas, the plaintiff, was entitled to notice of the composition meeting, and had no such notice.

The facts in the case are that the composition proceedings took place before or about the time of the maturity of the note. The note was then the property of the Mullanphy Bank. This bank had notice of these proceedings, accepted the composition note of defendants for 80 per cent of the amount of the debt, according to the terms of the composition, and received the money paid on that note. We think the bank was the owner of the note, the party entitled to be dealt with in the composition proceedings, to take part in them, and receive the money paid under them. All this it did.

Mr. Thomas must be held in law to have had notice of the original bankruptcy proceedings, and that the defendants might be discharged under those proceedings. If he preferred to take part in them rather than intrust the claim to the bank, he could have paid the note and set up his claim as provided in section 5070 of the Revised Statutes. He did not do this, but permitted the bank to represent that debt, which, as owner of it, it had a right to do, and to receive the composition money. Mr. Thomas has not been hurt by this; for there is no reason to believe that he would have successfully opposed the composition or received anything more under it than the bank did. It can hardly be held that Mr. Thomas stood in any better condition than a person liable for the bankrupt as bail, security, guaranty or otherwise, who has not paid the debt. § 5070 R. S.

It is of the essence of the bankrupt law that when the bankrupt has complied with all the conditions of the statute and surrendered his [608] property he should be released from all his debts, except those of a fiduciary character or founded in fraud, of which this is not one. And the case of *Wilmot* v. *Mudge*, 103 U. S. 217 [Bk. 26, L. ed. 536], decides that although no written discharge be granted, a lawful composition and its performance by the party has the same effect. That case holds that section 17 of the Act of 1874, which governs this case, is a part of the bankrupt law; and the proceedings under it discharge all debts which can be discharged under the law, as to creditors "whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed."

As evidence that it is the *holder* of the promissory note who is to be named in the schedule as one having the right to appear at the composition meeting, the statute, 18 Stat. at L. 182, § 17, says: "When a debt arises on a bill of exchange or promissory note, if the debtor be ignorant of the holder of such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt."

As the statute requires that the composition resolution to be valid "must be passed by a majority in number and three fourths in value of the creditors of the debtor," the above mode of identifying the creditor and the amount of his debt shows that it is not indispensable that every person contingently interested in a debt of the bankrupt should have notice or take part in the composition proceedings.

It is argued that the liability of defendants to Thomas is not on the note, but on their promise to pay it at maturity. We cannot take this view of it. The note is the essential part of the transaction, and without its payment by Thomas he had no cause of action against defendants. They were both parties to the note and both liable on it, to the bank who held it, when it became due. Which was principal and which [609] security could be shown as between themselves by parol, and their liability to or for each other grew out of that transaction.

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[illegible] or compulsory production of a [illegible] papers to be used in evidence against [illegible] equivalent to compelling him to be a wit- [illegible] himself; and in a prosecution for a [illegible] penalty or forfeiture is equally within the [illegible] of the Fifth Amendment.

[illegible] Amendments relate to the personal se- [illegible] the citizen. They nearly run into and [illegible] throw light upon each other. When the [illegible] in the Fifth Amendment, namely: [illegible] a man to be a witness against himself, [illegible] of a search and seizure of his private [illegible] an "unreasonable search and seizure" [illegible] the Fourth Amendment.

[illegible] and seizure of a man's private papers [illegible] in evidence for the purpose of convict- [illegible] of a crime, recovering a penalty, or of for- [illegible] his property, is totally different from the [illegible] and seizure of stolen goods, dutiable arti- [illegible] which the duties have not been paid, and [illegible] which rightfully belong to the custody of [illegible] law.

[illegible] constitutional provisions for the security of [illegible] and property should be liberally construed.

[No. 983.]

Argued Dec. 11, 1885. Decided Feb. 1, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of the case appear in the opinion of the court.

Messrs. **Edwin B. Smith** and **Stephen G. Clarke**, for plaintiffs in error.

Mr. **John Goode**, *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Bradley** delivered the opinion of the court:

This was an information filed by the District Attorney of the United States in the District Court for the Southern District of New York in July, 1884, in a case of seizure and forfeiture of property, against thirty-five cases of plate glass, seized by the collector as forfeited to the United States, under the 12th section of the "Act to Amend the Customs Revenue Laws," etc., passed June 22, 1874, 18 Stat. at L. 186.

It is declared by that section that any owner, importer, consignee, etc., who shall, with intent to defraud the revenue, make or attempt to make any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper or statement, or affected by such act or omission, shall for each offense be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited.

The charge was that the goods in question were imported into the United States to the Port of New York, subject to the payment of duties; and that the owners or agents of said merchandise, or other person unknown, committed the alleged fraud, which was described in the words of the statute. The plaintiffs in error entered a claim for the goods, and pleaded that they did not become forfeited in manner and form as alleged. On the trial of the cause it became important to show the quantity and value of the glass contained in twenty-nine

s previously imported. To do this the dis- attorney offered in evidence an order de by the district judge under the fifth sec- n of the same Act of June 22, 1874, direct- g notice under seal of the court to be given o the claimants, requiring them to produce e invoice of the twenty-nine cases. The claimants, in obedience to the notice, but ob- ecting to its validity and to the constitution- ality of the law, produced the invoice; and when it was offered in evidence by the district attorney they objected to its reception, on the ground that in a suit for forfeiture no evidence can be compelled from the claimants them- selves, and also that the statute, so far as it compels production of evidence to be used against the claimants, is unconstitutional and void.

The evidence being received and the trial closed, the jury found a verdict for the United States, condemning the thirty-five cases of glass which were seized, and judgment of for- feiture was given. This judgment was affirmed by the circuit court, and the decision of that court is now here for review.

As the question raised upon the order for the production by the claimants of the invoice of the twenty-nine cases of glass and the proceed- ings had thereon is not only an important one in the determination of the present case, but is a very grave question of constitutional law, involving the personal security and privileges and immunities of the citizen, we will set forth the order at large. After the title of the court and term, it reads as follows, to wit:

"The United States of America
against
E. A. B., 1-35, Thirty-Five Cases of Plate Glass.

"Whereas, the attorney of the United States for the Southern District of New York has filed in this court a written motion in the above entitled action, showing that said action is a suit or proceeding other than criminal, arising under the customs revenue laws of the United States, and not for penalties, now pending un- determined in this court, and that in his belief a certain invoice or paper belonging to and un- der the control of the claimants herein will tend to prove certain allegations set forth in said written motion, hereto annexed, made by him on behalf of the United States in said action, to wit: the invoice from the Union Plate Glass Company or its agents, covering the twenty- nine cases of plate glass marked G. H. B. im- ported from Liverpool, England, into the Port of New York in the vessel Baltic, and entered by E. A. Boyd & Sons at the office of the col- lector of customs of the port and collection dis- trict aforesaid on April 7, 1884, on entry No. 67,108;

"Now, therefore, by virtue of the power in the said court vested by section 5 of the Act of June 22, 1874, entitled 'An Act to Amend the Customs Revenue Laws and to Repeal Moieties,' it is ordered that a notice, under the seal of this court and signed by the clerk thereof, be issued to the claimants, requiring them to produce the invoice or paper aforesaid before this court in the court rooms thereof in the United States postoffice and court house building in the City of New York on October 16, 1884, at 11 o'clock, A. M., and thereafter at such other times as the court shall appoint; and that said United States Attorney and his assistants and such per- sons as he shall designate shall be allowed be- fore the court, and under its direction and in the presence of the attorneys for the claimants, if they shall attend, to make examination of said invoice or paper and to take copies thereof; but the claimants or their agents or attorneys shall have, subject to the order of the court, the cus- tody of such invoice or paper, except pending such examination."

The 5th section of the Act of June 22, 1874, under which this order was made, is in the fol- lowing words, to wit:

"In all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the Government, whenever in his belief any business book, invoice or paper belonging to or [620] under the control of the defendant or claimant will tend to prove any allegation made by the United States, may make a written motion, par- ticularly describing such book, invoice, or paper and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defend- ant or claimant by the United States Marshal by delivering to him a certified copy thereof, or otherwise serving the same as original no- tices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice or paper as relate to or tend to prove the alle- gation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid." 18 Stat. at L. 187.

This section was passed in lieu of the second section of the Act of March 2, 1867, entitled "An Act to Regulate the Disposition of the Proceeds of Fines, Penalties, and Forfeitures Incurred under the Laws Relating to the Customs and for Other Purposes," 14 Stat. at L. 547, which section of said last mentioned statute authorized the district judge, on complaint and affidavit that any fraud on the revenue had been com- mitted by any person interested or engaged in the importation of merchandise, to issue his warrant to the marshal to enter any premises where any invoices, books or papers were de- posited relating to such merchandise, and take possession of such books and papers and pro- duce them before said judge, to be subject to [621] his order, and allowed to be examined by the collector, and to be retained as long as the judge should deem necessary. This law being

in force at the time of the revision, was incorporated into sections 3091, 3092, 3093 of the Revised Statutes.

The section last recited was passed in lieu of the 7th section of the Act of March 3, 1863, entitled "An Act to Prevent and Punish Frauds upon the Revenue," etc. 12 Stat. at L. 737. The 7th section of this Act was in substance the same as the second section of the Act of 1867, except that the warrant was to be directed to the collector instead of the marshal. It was the first legislation of the kind that ever appeared on the statute book of the United States, and, as seen from its date, was adopted at a period of great national excitement, when the powers of the Government were subjected to a severe strain to protect the national existence.

The clauses of the Constitution, to which it is contended that these laws are repugnant, are the Fourth and Fifth Amendments. The Fourth declares: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The fifth article, amongst other things, declares that no person "shall be compelled in any criminal case to be a witness against himself."

But, in regard to the Fourth Amendment it is contended that, whatever might have been alleged against the constitutionality of the Acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting; and to this extent the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former Acts; but it accomplishes the substantial object of those Acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure.

[622]

The principal question, however, remains to be considered. Is a search and seizure or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an "*unreasonable* search and seizure" within the meaning of the Fourth Amendment of the Constitution? Or is it a legitimate proceeding? It is contended by the counsel for the Government that it is a legitimate proceeding, sanctioned by long usage and the authority of judicial decision. No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it, in the law or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that *Consuetudo est optimus interpres legum;* and another maxim that *Contemporanea expositio est optima et fortissima in lege.* But we do not find any long usage or any contemporary construction of the Constitution which would justify any of the Acts of Congress now under consideration. As before stated, the Act of 1863 was the first Act in this country, and we might say either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the Act under which the obnoxious writs of assistance were issued* did not go as far as this, but only authorized the examination of ships and vessels and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid; and to enter into and search any suspected vaults, cellars or warehouses for such goods. The search for and seizure of stolen or forfeited goods or goods liable to duties and concealed to avoid the payment thereof are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto cœlo.* In the one case, the Government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past†; and the like seizures have been authorized by our own Revenue Acts from the commencement of the Government. The first statute passed by Congress to regulate the collection of duties, the Act of July 31, 1789, 1 Stat at L. 43, contains provisions to this effect. As this Act was passed by the same Congress which proposed for adoption the original Amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the Amendment. So also the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection,

* 13 & 14 Car. 2, chap. 11 § 5.

† 12 Car. 2, chap. 19; 13 & 14 Car. 2, chap. 11; 6 & 7 W & M., chap. 1; 6 Geo. 1, chap. 21; 26 Geo. 3, chap. 59 29 Geo. 3, chap. 68, § 153; etc.; and see the article "Excise, etc.," in Burn's Justice, and Williams' Justice *passim*, and Evans' Statutes, Vol. 2, p. 221, sub-pages 176, 190, 225, 361, 431, 447.

are necessarily excepted out of the category of unreasonable searches and seizures. So also the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. *Commonwealth* v. *Dana*, 2 Met. 329. Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration or an execution, is not within the prohibition of the Fourth or Fifth Amendment or any other clause of the Constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those Amendments.

But when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of exciable or dutiable articles, the Government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery; whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property.

In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms "unreasonable searches and seizures," it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;" since they placed "the liberty of every man in the hands of every petty officer."* This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

These things and the events which took place in England immediately following the argument about writs of assistance in Boston were fresh in the memories of those who achieved our independence and established our form of government. In the period from 1762, when the North Briton was started by John Wilkes, to April, 1766, when the House of Commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English Government and Wilkes, in which the latter appeared as the champion of popular rights and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the administration of public affairs. Prominent and principal among these was the practice of issuing general warrants by the Secretary of State, for searching private houses for [626] the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. Certain numbers of the North Briton, particularly No. 45, had been very bold in denunciation of the government and were esteemed heinously libelous. By authority of the secretary's warrant Wilkes' house was searched, and his papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of £1,000 against Wood, one of the party who made the search, and £4,000 against Lord Halifax, the Secretary of State who issued the warrant. The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of *Entick* v. *Carrington*, reported at length in 19 Howell, St. Tr., 1029. The action was trespass for entering the plaintiff's dwelling house in November 1762, and breaking open his desks, boxes, etc., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. *Lord* Camden pronounced the judgment of the court in Michaelmas Term, 1765, and the law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the Colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time.*

As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed [627] the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of

*Cooley, Const. Lim., 301-303. A very full and interesting account of this discussion will be found in the works of John Adams, Vol. 2, app. A, pp. 523-524; Vol. 10, pp. 183, 233, 244, 256, etc., and in Quincy's Reports, pp. 469-482; and see Paxton's Case, do. 51-57, which was argued in November of the same year, 1761. An elaborate history of the writs of assistance is given in the appendix to Quincy's Reports, above referred to, written by Horace Gray, Jr., Esq., now a member of this court.

*See May, Const. Hist. of England, Vol. 3, chap. 11; Broom, Constitutional Law, 558; Cox, Institutions of the English Government, 427.

what was meant by unreasonable searches and seizures. We think, therefore, it is pertinent to the present subject of discussion to quote somewhat largely from this celebrated judgment.

After describing the power claimed by the Secretary of State for issuing general search warrants, and the manner in which they were executed, *Lord* Camden says: "Such is the power and therefore one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there, it is not law.

"The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license but he is liable to an action though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books and see if such a justification can be maintained by the text of the statute law or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

"Papers are the owner's goods and chattels; [628] they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet, where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

"But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal.

"The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my *Lord* Coke denied its legality (4 Inst. 176); and, therefore, if the two cases resembled each other more than they do, we have no right, without an Act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description. * * *

"If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy, my answer is that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing."

Then, after showing that these general warrants for search and seizure of papers originated with the Star Chamber, and never had any advocates in Westminster Hall except *Chief Justice* Scroggs and his associates, *Lord* Camden proceeds to add:

"Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance as murder, rape, robbery and house breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. But our law has provided no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty."

After a few further observations, His Lordship concluded thus: "I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of opinion that the warrant to seize and carry

away the party's papers in the case of a seditious libel is illegal and void."*

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of *Lord* Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of *Lord* Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true *criteria* of the reasonable and unreasonable character of such seizures? Could the men who proposed those Amendments, in the light of *Lord* Camden's opinion, have put their hands to a law like those of March 3, 1863, and March 2, 1867, before recited? If they could not, would they have approved the fifth section of the Act of June 22, 1874, which was adopted as a substitute for the previous laws? It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against arbitrary power, in which they had been engaged for more than twenty years, would have been too deeply engraved in their memories to allow them to approve of such insidious disguises of the old grievance which they had so deeply abhorred.

The views of the first Congress on the question of compelling a man to produce evidence against himself may be inferred from a remarkable section of the Judiciary Act of 1789. The fifteenth section of that Act introduced a great improvement in the law of procedure. The substance of it is found in section 724 of the Revised Statutes, and the section as originally enacted is as follows, to wit:

"All the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, *in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery;* and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default."*

The restriction of this proceeding to "cases and under circumstances where they (the parties) might be compelled to produce the same (books or writings) by the ordinary rules of proceeding in chancery," shows the wisdom of the Congress of 1789. The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been thought hazardous. Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property.† And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom. [632]

It is proper to observe that when the objectionable features of the Acts of 1863 and 1867 were brought to the attention of Congress, it passed an Act to obviate them. By the Act of February 25, 1868 (15 Stat. at L. 37), entitled "An Act for the Protection in Certain Cases of Persons Making Disclosures as Parties, or Testifying as Witnesses," the substance of which is incorporated in section 860 of the Revised Statutes, it was enacted "that no answer or other pleading of any party, and no discovery or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness."

This Act abrogated and repealed the most objectionable part of the Act of 1867 which was then in force, and deprived the government officers of the convenient method afforded by it for getting evidence in suits of forfeiture; and this is probably the reason why the fifth section of the Act of 1874 was afterwards passed. No doubt it was supposed that in this new form, couched as it was in almost the language of the fifteenth section of the old Judiciary Act, ex-

*See further as to searches and seizures, Story, Const., §§ 1901, 1902, and notes; Cooley, Const. Lim. 300; Sedg. Stat. & Const. Law, 2d ed. 496; Wharton, Com. Am. Law, § 360; Robinson v. Richardson, 13 Gray, 454.

*Sixty-two years later a similar Act was passed in England, viz.: the Act of 14 and 15 Vict. chap. 99, § 6. See Pollock, Power of Courts to Compel Production of Documents, 5.

†See Pollock, Production of Documents, 27; 77 Law Lib.

cept leaving out the restriction to cases in which the court of chancery would decree a discovery, it would be free from constitutional objection. But we think it has been made to appear that this result has not been attained; and that the law, though very speciously worded, is still obnoxious to the prohibition of the Fourth Amendment of the Constitution, as well as of the Fifth.

It has been thought by some respectable members of the profession that the two Acts, that of 1868 and that of 1874, as being *in pari materia*, might be construed together so as to restrict the operation of the latter to cases other than those [633] of forfeiture; and that such a construction of the two Acts would obviate the necessity of declaring the Act of 1874 unconstitutional. But as the Act of 1874 was intended as a revisory Act on the subject of revenue frauds and prosecutions therefor, and as it expressly repeals the second section of the Act of 1867 but does not repeal the Act of 1868, and expressly excepts criminal suits and proceedings and does not except suits for penalties and forfeitures, it would hardly be admissible to consider the Act of 1868 as having any influence over the construction of the Act of 1874. For the purposes of this discussion we must regard the fifth section of the latter Act as independent of the Act of 1868.

Reverting then to the peculiar phraseology of this Act and to the information in the present case, which is founded on it, we have to deal with an Act which expressly excludes criminal proceedings from its operation, although embracing civil suits for penalties and forfeitures, and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both.

We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that pro- [634] ceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. In this very case, the ground of forfeiture as declared in the twelfth section of the Act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared that the offender shall be fined not exceeding $5,000, nor less than $50, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment and to file a civil information against the claimants (that is, civil in form) can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of *Coffey* v. *U. S.* [*ante*, 684], in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods arising upon the same acts. As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution; and is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the Fourth Amendment. Though the proceeding in question is devested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

There have been several decisions in the circuit and district courts sustaining the constitutionality of the law under consideration, as well as the prior laws of 1863 and 1867. The principal of these are *Stockwell* v. *U. S.* 3 Cliff. 284; *Platt and Boyd*, 7 Benedict, 261; *U. S.* v. *Hughes*, 12 Blatchf. 553; *U. S.* v. *Mason*, 6 Biss. 350; *U. S.* v. *Three Tons of Coal*, Id. 379; *U. S.* v. *Distillery No. 28*, Id. 433. The first and leading case was that of *Stockwell* v. *U. S.* decided by *Mr. Justice* Clifford and *Judge* Shepley, the law under discussion being that of 1867. *Justice* Clifford delivered the opinion and relied principally upon the collection statutes, which authorized the seizure of goods liable to duty, as being a contemporaneous exposition of the Amendments, and as furnishing precedents of laws analogous to that complained of. As we have already considered the bearing of these laws on the subject of discussion, it is unnecessary to say anything more in relation to them. The learned justice seemed to think that the power to institute such searches and seizures as the Act of 1867 authorized, was necessary to the efficient collection of the revenue, and that no greater objection can be taken to a warrant to search for books, invoices, and other papers appertaining to an illegal importation than to one authorizing a search for the imported goods; and he concluded that, guarded as the new provision is, it is scarcely possible that the citizen can have any just ground of complaint. It seems to us that these considerations fail to meet the most serious objections to the validity of the law. The other cases followed that of *Stockwell* v. *U. S.* as a precedent, with more or less independent discussion of the subject. The case of *Platt and Boyd*, decided in the District Court for the Southern District of New York, was also under the Act of 1867, and the opinion in that case is quite an elaborate one; but, of course, the previous decision of the circuit court in the *Stockwell Case* had a governing influence on the district court. The other cases referred to were under the fifth section of the Act of 1874. The case of *U. S.* v. *Hughes* came up, first, before *Judge* Blatchford in the district court in 1875, 8 Ben. 24. It was an action of debt to recover a penalty under the Customs Act, and the judge held that the fifth section of the Act of 1874, in its application to suits for penalties incurred before the passage of the Act, was an *ex post facto* law, and therefore, as to them, was unconstitutional and void; but he granted an order *pro forma* to produce the books and papers required, in order that the objection might come up on the offer to give them in evidence. They were produced in obedience to the order, and offered in evidence by the district attorney, but were not admitted. The district attorney then served upon one of the defendants a *subpœna duces tecum*, requiring him to produce the books and papers; and this being declined, he moved for an order to compel him to produce them; but the court refused to make such order. The books and papers referred to had been seized under the Act of 1867, but were returned to the defendants under a stipulation to produce them on the trial. The defendants relied not only on the unconstitutionality of the laws, but on the Act of 1868, before referred to, which prohibited evidence obtained from a party by a judicial proceeding from being used against him in any prosecution for a crime, penalty or forfeiture. Judgment being rendered for the defendant, the case was carried to the circuit court by writ of error; and in that court *Mr. Justice* Hunt held that the Act of 1868 referred only to personal testimony or discovery obtained from a party or witness, and not to books or papers wrested from him; and as to the constitutionality of the law, he merely referred to the *Case of Stockwell*, and the judgment of the district court was reversed. In view of what has been already said, we think it unnecessary to make any special observations on this decision. In *U. S.* v. *Mason*, *Judge* Blodgett took the distinction that in proceedings *in rem* for a forfeiture, the parties are not required by a proceeding under the Act of 1874 to testify or furnish evidence against themselves, because the suit is not against them but against the property. But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited; and to require such an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property is surely compelling him to furnish evidence against himself. In the words of a great judge: "Goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose goods they are." *

The only remaining case decided in the United States courts to which we shall advert is that of *U. S.* v. *Distillery No. 28*. In that case *Judge* Gresham adds to the view of *Judge* Blodgett, in *U. S.* v. *Mason*, the further suggestion that as in a proceeding *in rem* the owner is not a party, he might be compelled by a *subpœna duces tecum* to produce his books and papers like any other witness; and that the warrant or notice for search and seizure, under the Act of 1874, does nothing more. But we cannot say that we are any better satisfied with this supposed solution of the difficulty. The assumption that the owner may be cited as a witness in a proceeding to forfeit his property seems to us gratuitous. It begs the question at issue. A witness, as well as a party, is protected by the law from being compelled to give evidence that tends to criminate him, or to subject his property to forfeiture. *Queen* v. *Newel*, Parker, 269; 1 Greenl. Ev. §§ 451-453. But, as before said, although the owner of goods, sought to be forfeited by a proceeding *in rem*, is not the nominal party, he is nevertheless the substantial party to the suit; he certainly is so, after making claim and defense; and in a case like the present he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense. [638]

We find nothing in the decisions to change our views in relation to the principal question at issue.

*Vaughan, C. J., in Shepherd v. Gosnold, Vaugh. 159, 172, approved by *Ch. Baron* Parker in Mitchell v. Torup, Parker, 227, 236.

We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings.

We are of opinion, therefore, that the judgment of the Circuit Court should be reversed, and the cause remanded, with directions to award a new trial; and it is so ordered.

Separate opinion by *Mr. Justice* **Miller:**

I concur in the judgment of the court, reversing that of the Circuit Court, and in so much of the opinion of this court as holds the fifth section of the Act of 1874 void as applicable to the present case.

[639]

I am of opinion that this is a criminal case within the meaning of that clause of the Fifth Amendment to the Constitution of the United States which declares that no person "shall be compelled in any criminal case to be a witness against himself."

And I am quite satisfied that the effect of the Act of Congress is to compel the party on whom the order of the court is served to be a witness against himself. The order of the court under the statute is in effect a *subpœna duces tecum;* and though the penalty for the witness' failure to appear in court with the criminating papers is not fine and imprisonment, it is one which may be made more severe, namely: to have charges against him of a criminal nature taken for confessed and made the foundation of the judgment of the court. That this is within the protection which the Constitution intended against compelling a person to be a witness against himself, is, I think, quite clear.

But this being so, there is no reason why this court should assume that the action of the court below, in requiring a party to produce certain papers as evidence on the trial, authorizes an unreasonable search or seizure of the house, papers or effects of that party.

There is in fact no search and no seizure authorized by the statute. No order can be made by the court under it which requires or permits anything more than service of notice on a party to the suit. That there may be no mistake as to the effect of the statute and the power to be exercised under it, I give the section here *verbatim:*

"Sec. 5. That in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever, in his belief, any business book, invoice or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice or paper, in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant, by the United States Marshal, by delivering to him a certified copy thereof, or otherwise serving the same as original notice of suit in the same court is served; and if the defendant or claimant shall fail or refuse to produce such book, invoice or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid." 18 Stat. at L. 187.

[640]

Nothing in the nature of a search is here hinted at. Nor is there any seizure, because the party is not required at any time to part with the custody of the papers. They are to be produced in court and when produced the United States Attorney is permitted, under the direction of the court, to make examination in presence of the claimant, and may offer in evidence such entries in the books, invoices or papers as relate to the issue. The Act is careful to say that "the owner of said books and papers, his agent or attorney shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

The Fourth Amendment says: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

The things here forbidden are two: search and seizure. And not all searches or all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed; and if the thing sought be found, it may be seized.

But what search does this statute authorize? If the mere service of a notice to produce a paper to be used as evidence, which the party can obey or not as he chooses is a search, then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made. The searches meant by the Constitution were such as led to seizure when the search was successful. But the statute in this case uses language carefully framed to forbid any seizure under it, as I have already pointed out.

While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only *unreasonable* searches and seiz-

ures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for anything.

This was forbidden, while searches founded on affidavits, and made under warrants which described the thing to be searched for, the person and place to be searched, are still permitted.

I cannot conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party, who has that evidence in his possession, can be held to authorize an unreasonable search or seizure, when no seizure is authorized or permitted by the statute.

I am requested to say that the **Chief Justice** concurs in this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NORTHERN PACIFIC RAILROAD COMPANY, *Plf. in Err.*,

v.

CLAYTON D. HERBERT.

(See S. C. Reporter's ed. 642-660.)

Practice—allowance of challenge to juror—condition of refusing new trial, remitting portion of verdict, is discretionary—master's duty as to coservants—duty as to machinery—contributory negligence—Dakota Code.

1. A trial by an impartial jury being all that a party can demand, the allowance of a challenge for cause, even if the cause was insufficient, is no ground of complaint where a competent and unbiased jury was finally selected.

2. It is for the party asserting error to show it. Where a party was entitled to peremptory challenge it will not be assumed that a juror was rejected on a challenge for cause.

3. The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the damages awarded him by the verdict of the jury, is within the discretion of the trial court.

4. Where fellow servants are engaged in a common employment, each, in undertaking the service, assumes the risk that the others may fail in that care and vigilance which are essential to his safety.

5. It is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery or other means by which it is to be performed, and to keep them in repair and order. No duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from liability. This rule is not changed by the Dakota Code.

6. The liability of the employer is the same whether he totally fails to provide persons to perform a duty he owes to his servant, or provides persons who are incompetent and unskillful.

7. The rule of law as to contributory negligence applied to the facts of the present case.

[No. 87.]

Argued Dec. 4, 8, 9, 1885. Decided Feb. 1, 1886.

IN ERROR to the Supreme Court of the Territory of Dakota.

The case is stated by the court.

NOTE.—*Master and servant; injuries to servant from negligence of coservant; who are coservants.* For a full discussion, see Hough v. Tex. P. R. R. Co., 100 U. S., bk. 25, 612, *note*. As to the general rule, see Randall v. B. & O. R. R. Co., 109 U. S., bk. 27, 1003, and many authorities cited.

Messrs. **George Gray** and **W. P. Clough**, for plaintiff in error:

The examination of Weaver having conclusively proven the absence of any actual bias from his mind, and his business relations with the Company not furnishing any ground upon which bias could be implied, it follows that he stood proven to be a competent and lawful juror, summoned upon the *venire* and drawn upon the panel, in strict accordance with territorial laws; and hence, that the court erred in excluding him from the panel, against the objection of the defendant and merely because asked to do so by the plaintiff.

But it is said that such errors do not form grounds for reversal: because 1, a party is only entitled to an unbiased and a disinterested jury, in any case; and 2, if a reversal were to follow, the erroneously excluded juror would not be drawn upon the second jury. Applying these arguments to the case in hand it is said that, notwithstanding Weaver's exclusion, a fair jury was actually impaneled; and that even if a new trial should be granted, Weaver could not be made one of the jurors to sit in it.

From the standpoint of those who assert the power of the trial judge to reject a juror without legal reason for so doing, the matter is incapable of different statement; and the jury can be made up by the judge himself, selecting from the *venire* twelve men who are willing to swear themselves capable of deciding according to law and evidence; as what average man will not?

It would be sufficient for refuting the arguments of our opponents, under this head, to show that as a matter of fact a fair and unbiased jury was not impaneled to try the cause.

The record shows that at least three jurors were put upon the panel, over the Company's challenge for bias, whose examination showed them very clearly to have previously formed opinions, and at the time of the trial to have retained positive opinions upon one or more questions necessarily involved in the controversy.

But what is perfectly conclusive as to the prejudiced character of this jury as a body is that the trial court itself so distinctly decided, when the issue was specifically presented to it.

The verdict rendered against the Company was $25,000.

The Company moved to set it aside, upon the ground among others, that the damages were excessive, resulting from passion or prejudice on the part of the jury.

The amount of the verdict could not be put upon any other ground.

The trial judge decided with the Company upon this issue, and directed a new trial, unless the plaintiff should remit 60 per centum of the verdict with which this alleged "competent" jury had presented him.

The court necessarily found the jury which sat in the case to have been passionate or prejudiced, and both practically mean one thing; and yet the court permitted the verdict to stand, in part. By so finding, the court also, by necessary implication, found that the issues in the case had not been tried by such a jury as the law contemplates, and yet denied the Company the right to have those issues passed upon by a fair and lawful jury.

The questions raised and litigated in the courts

below in this suit are, to all intents and purposes, identical with those since settled by this court in the following cases:

Strauder v. *West Va., and Ex parte Va.* 100 U. S. 303, 349 (Bk. 25, L. ed. 664, 680); *Neal* v. *Del.* 103 U. S. 370 (Bk. 26, L. ed. 567).

Among the points necessarily adjudicated in those cases were: first, that the rights of suitors in the composition of juries are not limited to the negative one that the biased and interested shall be excluded, but embrace an affirmative one extending even to the race and color of those who may be admitted; or, in other words, that those rights extend to who shall be suffered to go on to the jury as well as to who shall be put off from it; and second, that the erroneous exclusion from the jury box of those who should have been admitted forms a ground for reversal.

The trial court erred in denying defendant's motion to dismiss the suit upon the ground that the plaintiff had failed to establish any cause of action against the defendant; and also in refusing the several requests of the defendant that the jury be instructed to find in its favor.

The evidence failed to disclose any omission by the Company to do what it had undertaken to do by its contract of hiring.

The evidence conclusively showed the omission, on Herbert's own part, to do what the circumstances required for self protection.

The evidence further conclusively showed that if Herbert's injuries are attributable to omissions of others than himself, such others were persons employed by the same master in the same general business.

The accident is not attributable to any omission by the Company, because:

(*a*) The rule of law, making an employer responsible to an *employé* using machinery for the care of another *employé* charged with the duty of keeping such machinery in order, is not in force in Dakota Territory.

(*b*) Even if such a rule were in force there, it would not be applicable to such an employment as Herbert's.

That the liability of a master to one servant, for negligence of another, in respect to keeping machinery in order, is nothing more than an exception to the general rule governing the responsibility of the master, has been decided by this court.

Hough v. *R. R. Co.* 100 U. S. 213 (Bk. 25, L. ed. 612). See *Besel v. N. Y. C. & H. R. R. R. Co.* 70 N. Y. 171; *King* v. *Boston etc. R. R. Corp.* 9 Cush. 112; *Gillshannon* v. *S. B. R. R. Corp.* 10 Cush. 228; *Seaver* v. *Boston, etc. R. R.* 14 Gray, 466; *Gilman* v. *Eastern R. R. Corp.* 10 Allen, 233; 13 Allen, 433; *Holden* v. *Fitchburg R. R. Co.* 129 Mass. 268; *Walker* v. *Boston etc. R. R.* 128 Mass. 8.

In each and every one of these cases this state of facts existed: a servant charged exclusively with the duty of keeping machinery in repair was hurt by the negligence of another servant charged exclusively with the duty of using the same machinery, or *vice versa*; for, tracks, bridges and switches are, in respect to the responsibility of the master, to be viewed in the same light as cars or locomotives.

The courts of these States have, in their opinions in cases recognizing and enforcing the liability of the master to a servant who has sustained injuries by the negligence of a fellow servant intrusted with the duty of keeping machinery in order, been compelled to admit that the *employé* who selects machinery and keeps it in repair and the one who uses it are fellow workmen.

Laning v. *N. Y. C. R. R. Co.* 49 N. Y. 521.

By force of Section 6 of the Civil Code, the common law upon the subject of the liabilities of masters to their servants has been superseded in Dakota Territory, and the whole law upon that subject is to be found in sections 1129–1131. If any rule of the common law has not been embodied in these sections, it must be deemed to have been purposely omitted therefrom and to have been expurgated from the jurisprudence of the Territory.

It will be observed that while section 1130 embodies the general rule of the common law, it is silent regarding that exception making the master liable when the subject of the neglect by one servant is the condition of machinery to be used by another.

It is, however, of high importance to observe that one of the two or three exceptions from the common-law rule has been incorporated with this section of the Civil Code.

Side by side with the exception relating to machinery, the courts have ranked another one, to the effect that the general rule shall not apply unless there has been exercised due care in the selection of the guilty servant.

This exception the Legislature has thought it wise to retain. Its retention proves that the Legislature had specifically under view the subject of the common-law exceptions to the general rule, and decided to retain this one only.

Even if the exception to the general rule, ingrafted thereon by the common law, existed in Dakota Territory, that exception could not apply to Herbert's case.

There is no resemblance between the case of putting into the hands of train men a train of cars ready to start out upon its run, or even placing cars in the hands of yard men, to be made up into a train for starting upon its run, and that of placing in the hands of the latter a train of cars, which has just arrived at a terminal yard, as its ultimate destination, for distribution.

The cars in this train had not been put into Herbert's hands as fit to do service upon the road. On the contrary, they were turned over to him that they might be placed for unloading, so that the requisite repairs could be ascertained and executed.

The following cases are decisive upon the point: *Yeaton* v. *Boston, etc. R. R. Corp.* 1[illegible] Mass. 418; *Gibson* v. *N. C. R. Co.* 22 Hun, 28[illegible]; *McCosker* v. *L. I. R. R. Co.* 84 N. Y. 77; *Flagan* v. *Chicago, etc. R. R. Co.* 45 Wis. 98; *Flanagan* v. *Chicago, etc. R. R. Co.* 50 Wis. 46[illegible]; *Brick* v. *Rochester R. R. Co.* 98 N. Y. 211.

The accident resulted from Herbert's own carelessness. The evidence showed conclusively that Herbert knew the train to have just arrived in the yard, after having encountered the perils and endured the wear and tear of the road. It did not appear from the evidence, that the Company had specially provided any servant whose exclusive duty it should be to look after the safety of the other workmen in the

yard. Naturally, in every such place there must be some *employé* who must rely upon his own vigilance.

If Herbert was not hurt through his own neglect, it was through that of his fellow servants.

Herbert, Gilboy and Quinlan were all fellow servants, working together in the same yard to accomplish the same ends; hence, each one assumed, by virtue of his employment, the risk of being hurt through the negligence of the others.

The fact that in their common employment Gilboy was superior in authority to Herbert makes no difference.

McCosker v. *L. I. R. R. Co.* 84 N. Y. 77; *Brick* v. *Rochester R. R. Co.* 98 N. Y. 211; *Crispin* v. *Babbitt*, 81 N. Y. 516; *Besel* v. *N. Y. C. & H. R. R. R. Co.* 70 N. Y. 171; *Gibson* v. *N. C. R. Co.* 22 Hun, 289; *Murphy* v. *Boston, etc. R. R. Co.* 88 N. Y, 146; *Yeaton* v. *Boston, etc. R. R. Corp.* 135 Mass. 418; *Walker* v. *Boston, etc. R. R.* 128 Mass. 8.

Mr. **Thomas Wilson** for defendant in error:

If the court erred in allowing the challenge to the juror, Weaver, it was an error without prejudice, for which this court will not reverse.

Beaston v. *Cin. & Ft. W. R. R. Co.* 16 Ind. 275; *Atchison, T. & S. F. R. R. Co.* v. *Franklin*, 23 Kan. 74; *Carpenter* v. *Dame*, 10 Ind. 130; *Morrison* v. *Lovejoy*, 6 Minn. 349; *U. S.* v. *Cornell*, 2 Mason, 104; *Hobbs* v. *State*, 7 Tex. App. 117, 620; *Grissom* v. *State*, and *McKinney* v. *State*, 8 Tex. App. 386, 626; *State* v. *Lawler*, and *Sullings* v. *Shakespeare*, 9 N. W. Rep 698, 451; *Atlas Mining Co.* v. *Johnston*, 23 Mich. 36; *State* v *Arthur*, 2 Devereux, 217; *Friery* v *People*, 3 Keyes, 442; *Mimms* v. *State*, 16 Ohio St. 221; *Erwine* v. *State*, 29 Ohio St. 186; *State* v. *Elliott*, 45 Iowa, 486; *Barnes* v. *Town of Newton*, 46 Iowa, 567; *West* v. *Forrest*, 22 Mo. 344; *Herbert* v. *N. P. R. R. Co.* 13 N. W. Rep. 849; *Sutton* v. *Fox*, 55 Wis. 531.

It does not appear from the record whether the challenge was for cause or peremptory, and it cannot be questioned but that plaintiff had the right of peremptory challenge.

It is for defendant to show error.

The duty of maintaining machinery in proper repair for the protection of *employés* operating it devolves upon the master and he is liable for injuries resulting from a failure to perform such duty. Even if not expressed, this is implied in the contract between the parties.

No act which the master is bound to perform for the safety and protection of his servants can be delegated so as to exonerate him from liability for an injury to a servant, caused by an omission to perform it.

The duty of a railroad company in respect of machinery and instrumentalities furnished to its *employés* is discharged when, but only when its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by *employés*.

Hough v. *R. R. Co.* 100 U. S. 213 (Bk. 25, L. ed. 612); *Wabash R. Co.* v. *McDaniels*, 107 U. S. 454 (Bk. 27, L ed. 607); *Chicago, etc. R. Co.* v. *Ross*, 112 U. S. 377 (Bk. 28, L. ed. 787).

The rule *respondeat superior* applies in all such cases.

This does not trench upon the other rule that the master is not liable to one servant for the negligence of a fellow servant. The latter rule does not exempt the master from liability for his own negligence.

Fuller v. *Jewett*, 80 N. Y. 46; *Ford* v. *Fitchburg R. R. Co.* 110 Mass. 241; *Bessex* v. *C. & N. W. R. Co.* 45 Wis. 477; *Shanny* v. *Androscoggin Mills*, 66 Me. 420; *Drymala* v. *Thompson*, 26 Minn. 40; *Wedgwood* v. *C. & N. W. R. Co.* 41 Wis. 478; *Toledo, etc. R. Co.* v. *Conroy*, 68 Ill. 561.

The Statute of Dakota relied on by defendant's counsel is merely declaratory of settled law on this subject.

It is alleged and proved by uncontradicted evidence that, in disregard of its duty in the premises, defendant had failed to adopt such rules and regulations for running its trains and switching its cars as would ensure the safety of brakemen and other *employés*. That it was bound to adopt such rules, see

C. & N. W. R. Co. v. *Taylor*, 69 Ill. 461; *Cooper* v. *C. R. R. Co.* 44 Iowa, 135; *Slater* v. *Jewett*, 85 N. Y. 61; *Lake Shore & M. S. R. Co.* v. *Lavalley*, 36 Ohio St. 221.

It was competent for the court to deny a new trial on condition that plaintiff should remit part of the verdict.

Diblin v. *Murphy*, 3 Sandf. 19; *Collins* v. *A. & S. R. R. Co.* 12 Barb. 492; *Blunt* v. *Little*, 3 Mason, 102; *Kinsey* v. *Wallace*, 36 Cal. 462; *Murray* v. *Hudson River R. Co.* 47 Barb. 196; *Doyle* v. *Dixon*, 97 Mass. 208; *Hayden* v. *Florence S. M. Co.* 54 N. Y. 221; *Belknap* v. *Boston & Maine R. R.* 49 N. H. 359; *Collins* v. *City of Council Bluffs*, 35 Iowa, 482; *Union Rolling Mills Co.* v. *Gillen*, 100 Ill. 52.

Mr. Justice **Field** delivered the opinion of the court:

The Northern Pacific Railroad Company is a [642] corporation created under the laws of Congress to construct a railroad and a telegraph line from Lake Superior to Puget Sound. In 1879 it had constructed and was operating the road from Duluth in Minnesota to Bismarck in Dakota. On the 24th of October of that year, the plaintiff in the court below, the defendant in error here, was a brakeman in its yard at Bismarck, [643] where its cars were switched upon different tracks and its trains were made up for the road. It was his duty, among other things, to set and to loosen the brakes of the cars whenever necessary, and whenever ordered to do so by the yard master. At the time mentioned, he was ordered to stop, with the brakes, two cars, which had been switched upon a track in the yard. In obedience to this order he went upon the rear car and attempted to set the brake attached to it; but the brake was so badly broken and out of order that it could not be made to work. As soon as he discovered this he stepped on the forward car in order to stop it. The brake on that car was a "step brake," and in order to work it he was obliged to place his foot on the step attached to the car below the top, and this brought his foot and leg between the two cars. This brake was also out of order, and while attempting to set it, his foot being upon the step, the car struck another car on the track and was suddenly stopped. The draw bar and bumper of the rear car had been pulled

out, and for want of them the two cars, when the forward one was suddenly stopped, came violently together, crushing his leg so that amputation became necessary. To recover damages for the injury sustained he brought this action against the Company, alleging that it was its duty to provide good and safe cars and machinery, and apparatus of a like character for breaking and handling them; and also to make rules and regulations for switching and handling them in the yard, and for notifying employés of the condition of defective and broken cars, so that they might not be subjected to unnecessary danger; but that it neglected its duty in these particulars, and thereby, without his fault, he was injured as stated.

In its answer the company admitted the allegations as to the employment of the plaintiff and the injuries he had received, but set up that it was his duty to know and that he did know
[644] the condition of each of the cars, and that he carelessly put his leg between them when setting the brake of the forward car; and thus, through his own fault, suffered the injury of which he complains.

There was a verdict in favor of the plaintiff for $25,000. A motion for a new trial was made on various grounds; among others that the damages were excessive. The court ordered that a new trial be granted unless he remitted $15,000 of the verdict, and in case he did so that the motion be denied. He remitted the amount, and judgment was entered in his favor for the balance, and costs of suit, which the supreme court of the Territory affirmed.

For the reversal of the judgment several errors of the court below are assigned; but, so far as they are deemed material, they may be reduced to four: 1, in sustaining a challenge to a juror; 2, in denying a new trial on condition that the plaintiff should remit a part of the sum awarded by the verdict; 3, in refusing to dismiss the suit at the close of the plaintiff's case; 4, in refusing to charge that the plaintiff should have taken notice of the defects in the cars, and that he was guilty of such negligence in that respect as to deprive him of a right to recover.

[646] 1. As to the challenge to a juror. It appears that one Weaver, summoned as a juror, testified that he was a lumber dealer and that the company gave him a place on its right of way for a lumber yard, without rent; and also that he had heard the accident to the plaintiff spoken of and explained. It was not shown, however, that he had any actual bias for or against either party, or any belief or opinion touching the merits of the case. He was, nevertheless, challenged, and the allowance of the challenge constitutes the first error assigned. It does not appear whether the challenge was for cause or was peremptory. Under the Statute of Dakota each party is entitled to three peremptory challenges. It is for the party asserting error to show it; it will not be assumed. But if we regard the challenge as for cause, its allowance did not prejudice the Company. A competent and unbiased juror was selected and sworn, and the Company had, therefore, a trial by an impartial jury; which was all it could demand. *U. S.* v. *Cornell*, 2 Mason, 104, *Heaston* v. *Cin. & Ft. Wayne R. Co* 16 Ind. 275, 279; *Atchison, T. & S. F. R. Co.* v. *Franklin*, 23 Kan. 74; *Carpenter* v. *Dame*, 10 Ind. 130; *Morrison* v. *Lovejoy*, 6 Minn. 349, 350.

2. The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict, was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could therefore, be properly allowed to stand. *Hayden* v. *Florence Sewing Machine Co.* 54 N. Y. 221, 225; *Doyle* v. *Dixon*, 97 Mass. 208, 213; *Blunt* v. *Little*, 3 Mason, 102, 107.

3. The dismissal of the suit at the close of the plaintiff's case was moved, on the ground that the plaintiff had failed to establish a cause of action; and in support of this position it is contended that the plaintiff was a fellow servant of the officer or agent of the Company who was charged with the duty of keeping the cars in order, and therefore could not recover against the Company for injuries suffered by reason of the latter's negligence, and that this exemption from liability is declared by the Statute of Dakota.

The general doctrine as to the exemption of an employer from liability for injuries to a servant, caused by the negligence of a fellow servant in a common employment, is well settled. When several persons are thus employed there is necessarily incident to the service of each the risk that the others may fail in that care and vigilance which are essential to his safety. In undertaking the service he assumes that risk, and if he should suffer he cannot recover from his employer. He is supposed to have taken it into consideration when he arranged for his compensation. As we said on a former occasion: "He cannot in reason complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid." *Chicago & Milwaukee R. R. Co.* v. *Ross*, 112 U. S. 377-383 [Bk. 28, L. ed. 787, 789].

It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service; and to furnish sufficient and safe materials, machinery or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful colaborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by courts of the highest character, that it can hardly be considered as any longer open to serious question. It was substantially declared in the recent case of *Hough* v. *R. R. Co.* 100 U. S. 213 [Bk. 25, L. ed. 612], where we said that, notwithstanding a railroad corporation may be

controlled by competent, watchful and prudent directors, and care and caution are exercised in the selection of subordinates at the head of the several branches of its service, its obligation still remains to provide and maintain in a suitable condition the machinery and apparatus to be used by its *employés;* and that it "cannot, in respect to such matters, interpose between it and the servant, who has been injured without fault on his part, the personal responsibility of an agent, who, in exercising the master's authority, has violated the duty he owes as well to the servant as to the corporation." In that case the engine of the railroad, coming in contact with an animal, was thrown from the track over an embankment, whereby the whistle fastened to the boiler was forced out, thus permitting hot water and steam to escape, which so scalded the engineer as to cause his death. The engine was thrown from the track because the cow catcher or pilot was defective; and the whistle was forced out because it was insecurely fastened. These defects were owing to the negligence of the company's master mechanic and the foreman of the round house, to whom was committed the exclusive management of the motive power of the company, with control over all the engineers employed. In an action by the widow and child of the deceased the company set up as a defense that if the alleged defects existed, which it denied, they were owing to the negligence of those servants for which the company was not liable. The court held that the company was not thereby exonerated from liability.

In *Flike* v. *Boston and Albany R. R. Co.* 53 N. Y. 549, it was held by the Court of Appeals of New York that a corporation is liable to an *employé*, for negligence or want of proper care in respect of such acts and duties as it was required to perform as master or principal, without regard to the rank or title of the agent intrusted with their performance; and that as to such acts the agent occupies the place of the corporation, and that the latter is deemed to be present and consequently liable for the manner in which they are performed. There it appeared that the accident which caused the injury complained of, was in consequence of an insufficient number of brakemen on the cars of the company. The fact that the company had an agent, whose business it was to make up the trains, to hire and station the brakemen, and to prepare and dispatch the trains, did not relieve it from liability.

In *Corcoran* v. *Holbrook*, 59 N. Y. 517, it appeared that the defendants operated a cotton mill to the management of which they gave no personal attention, but intrusted it to a general agent with full power. In the mill was an elevator used by the *employés* which became out of repair and unsafe, of which the agent had notice. He neglected to have it repaired, and an *employé* was injured by its fall. The court held that the defendants were liable; that the general agent was not a mere fellow servant, but occupied the place of the owners, and that they could not, by delegating their authority to another and absenting themselves, escape from liability for the nonperformance of duties they they owed to their *employés*. "As to acts," said the court, "which a master or principal is bound as such to perform towards his *employés*, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present and liable for the manner in which they are performed."

In *Fuller* v. *Jewett*, 80 N. Y. 46, an engineer on the Erie Railway was killed by the explosion of the boiler of a locomotive, caused by its defective condition. To the action brought by his administratrix, it was contended that the negligence of the mechanics in not keeping the boiler in a safe condition was the negligence of his *coemployés* in the service of the company for which it was not responsible. But the court affirmed the principle of the decisions already cited, and held that an act or duty which the master, as such, is bound to perform for the safety and protection of his *employés* cannot be delegated so as to relieve him from liability to a servant injured by its omission or its negligent performance, whether the nonfeasance or misfeasance be that of a superior or inferior officer, agent, or servant, to whom the doing of the act or the performance of the duty has been committed. "In either case, in respect to such act or duty," said the court, "the servant who undertakes or omits to perform it is the representative of the master and not a mere coservant with the one who sustains the injury." *Pantzar* v. *Tilly Foster Iron Min. Co.* 99 N. Y. 368, decided the present year by that court, is to the same effect. [650]

In *Ford* v. *Fitchburg Railroad*, 110 Mass. 241, which was a similar action for injuries caused by the explosion of an engine boiler out of repair, the same defense was made; that the want of repair was owing to the negligence of a fellow servant in the department of repairs; but the court said that "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it. They are charged with a master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other he may." And the court held that there was no error in a refusal to instruct the jury that the corporation was not liable unless the plaintiff proved that the president, directors or superintendent, either personally knew or by the exercise of reasonable care in the performance of their duties might have known, of the existence of the defect in the engine, which caused the explosion, or that the persons employed to have charge of the engine and keep it in repair were incompetent; observing that "The question was not whether the officers named knew or might have known of the defect or of the incompetency of those who had charge of the repairs, but whether the corporation in any part of its organization, by any of its agents or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use." [651]

In *Shanny* v. *Androscoggin Mills*, 66 Maine, 420, the action was by an *employé* of the de-

fendants for injuries to her hand caused by insufficient and defective covering to machinery and gearing which she was employed to clean. On the trial the defendants contended, among other things, that if the defective covering was owing to the negligence of a fellow servant whose duty it was to repair it, they were not liable. But the court said, "that the person whose duty it was to keep the machinery in order, so far as that duty goes, was not, in any legal sense, the fellow servant of the plaintiff. To provide machinery and keep it in repair, and to use it for the purpose for which it was intended, are very distinct matters. They are not employments in the same common business, tending to the same common result. The one can properly be said to begin only when the other ends. The two persons, may, indeed, work under the same master and receive their pay from the same source; but this is not sufficient. They must be at the time engaged in a common purpose or employed in the same general business. We do not now refer to the different grades of services, about which there is considerable conflict of opinion, but of the different employment. In the repair of the machinery the servant represented the master in the performance of his part of the contract, and therefore, in the language of the instructions, his negligence in that respect is the 'omission of the master or employer, in contemplation of law.'"

Numerous decisions from other courts to the same purport might be added. *Bessex* v. *C. & N. W. R. Co.* 45 Wis. 477, 481; *Wedgwood* v. *C. & N. W. R. Co.* 41 Wis 478; *Toledo R. R. Co.* v. *Conroy*, 68 Ill. 561; *Drymala* v. *Thompson*, 26 Minn. 40. The doctrine laid down in them is specially applicable when the employer is a common carrier of passengers and property, and steam is the motive power, inasmuch as any defect in the machinery may be followed by serious disasters. The same considerations which render him responsible in such cases for the safe transportation of passengers and property should also impose upon him an equal responsibility to his *employés*, so far as their safety depends upon the character and condition of the machinery and appliances used in the transportation. Where the *employé* is not guilty of contributory negligence, no irresponsibility should be admitted for an injury to him caused by the defective condition of the machinery and instruments with which he is required to work, except it could not have been known or guarded against by proper care and vigilance on the part of his employer.

[652]

According to the authorities cited there can be no question as to the liability of the Railroad Company to the plaintiff for the injuries he sustained. If no one was appointed by the Company to look after the condition of the cars, and see that the machinery and appliances used to move and to stop them were kept in repair and in good working order, its liability for the injuries would not be the subject of contention. Its negligence in that case would have been in the highest degree culpable. If, however, one was appointed by it charged with that duty, and the injuries resulted from his negligence in its performance, the Company is liable. He was, so far as that duty is concerned, the representative of the Company; his negligence was its negligence, and imposed a liability upon it, unless, as contended, it was relieved therefrom by the statute of Dakota. Section 1130 of the Civil Code of that Territory is in these words:

"*Coemployés.*—An employer is not bound to indemnify his *employé* for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable *employé*."

The next section, 1131, is as follows:

"*Employer's negligence.*—An employer must in all cases indemnify his *employé* for losses caused by the former's want of ordinary care."

We do not consider that the first of these sections changes the law previously existing as to the exemption of an employer from responsibility for injuries committed by a servant to a fellow servant in the same general business, or identifies the business of providing safe machinery and keeping it in repair with the business of handling and moving it. The two kinds of business are as distinct as the making and repairing of a carriage is from the running of it. They are, as stated in the case decided by the Supreme Court of Massachusetts, from which we have cited above, separate and independent departments of service, though the same person may, by turns, render service in each. The person engaged in the former represents the employer, and in that business is not a fellow servant with one engaged in the latter. The words "same general business" in the section have reference to the general business of the department of service in which the *employé* is engaged, and do not embrace business of every kind which may have some relation to the affairs of the employer, or even be necessary for their successful management. If any other construction were adopted there would, under the section, be no such thing as separate departments of service in the business of railroad companies; for whatever would tend to aid in the transportation of persons and property would come under the designation of its general business. The same section is in the Civil Code of California; and our construction of it accords with that of the Supreme Court of the State. In *Beeson* v. *Green Mountain Gold Mining Co.* 57 Cal. 20, the defendant, a corporation engaged in quartz mining, appointed a superintendent to supervise and manage its mining operations, with authority to employ and discharge laborers at the mine. One of the laborers thus engaged lost his life in a fire, which originated from a defective pipe put up by a tinner under the supervision of the superintendent, and connected with the engine used to raise ore and take water from the mine. It did not appear that the deceased knew or had reason to know of the defect. In an action by his widow for damages in consequence of his death, it was held, against the contention of the company, that the superintendent was not a fellow *employé* of the deceased in the sense intended by the section; that, for the purposes of managing the business and determining what machinery should be used and how placed, he was the representative of the company, and that the de-

ceased was not bound to know whether a defect existed in the machinery and appliances not within his view, but had a right to rely upon the implied engagement of the company that the pipe was properly placed and constructed. It was also held that the tinner, in performing his share of the work, was not a fellow servant of the deceased; that as his work was done under the direction and supervision of the superintendent, it was the same as if done by the superintendent in person.

We do not perceive that the provision of the sixth section of the Civil Code of Dakota, that in the Territory "There is no common law in any case where the law is declared by the Codes," at all affects the question before us. There cannot be two rules of law on the same subject contradicting each other. Therefore, where the Code declares the law there can be no occasion to look further; but where the Code is silent the common law prevails. What constitutes the "same general business" is not defined by the Code, but may be explained by adjudged cases. The declaration, by the Code, of a general rule which is conformable to existing law does not prevent the courts from looking to those cases for explanation, any more than it prevents them from looking into the dictionary for the meaning of words.

Section 1131 of the Dakota Code expresses the general law, as we have stated it to be, that an employer is responsible for injuries to his *employés* caused by his own want of ordinary care. His selection of defective machinery, which is to be moved by steam power, is of itself evidence of a want of ordinary care; and allowing it to remain out of repair, when its condition is brought to his notice or by proper inspection might be known, is culpable negligence. Here, the cars had been defective for years. The brakes were all worn out, and their condition had been called to the attention of the yard master, who had control of them while in the yard, and might have been ascertained, upon proper inspection, by the officer or agent of the Company charged with the duty of keeping them in repair; yet nothing was done to repair either brakes or cars. Under these circumstances it cannot be said that the Company exercised, through its officer or agent charged with that duty, ordinary care to keep the cars and brakes in good condition, and, therefore, under the provisions of this section, it is bound to indemnify the plaintiff.

4. As to the alleged negligence of the plaintiff only a few words need be said. Of course he was bound to exercise care to avoid injuries to himself. If he had known or might have known by ordinary attention the condition of the brakes and cars when he mounted the cars, and thus exposed himself to danger (in other words, if he did not use his senses as men generally use theirs to keep from harm) he cannot complain of the injury which he suffered. He had been employed in the yard only one day before the accident occurred; and it does not appear that the defects in the brakes or cars were brought to his notice, though there was some evidence that statements as to their defective condition were made in his presence and hearing. He testifies that he saw no defect in either of them, and was not apprised of any. The defect in the brakes was not patent to the eye; it could be known only from an attempt to set them, or by information from others. He had a right therefore to assume, without such information, that they were in a condition in which it was safe to mount the cars to set them when ordered by the yard master.

It was contended in the court below that the plaintiff might have inferred, from the manner in which the cars were attached, that there was a defect in them. The manner of their attachment showed nothing as to the condition of the brakes; and the court left the question of his negligence to the jury. It instructed them that if, from the unusual appearance of the car upon which he was engaged (as, for instance, its being attached to the next car by chains), or if, from any statements of the yard master or car repairer, he had reason to believe that the car in question was defective or had been broken, he was bound to take care not to expose his person to injuries which a broken and defective car might cause; and, further, that if they found from the evidence that the Company was guilty of negligence in not providing proper and safe machinery and appliances, in consequence of which neglect the injury was received; still, if he failed to exercise that prudence, care and caution which prudent men, under similar circumstances, would ordinarily exercise, and he thereby contributed approximately to the injury, he was not entitled to recover. [656]

The verdict of the jury, upon these instructions and others of the same general purport, negatived any imputation of negligence on his part. We see, therefore, no error on the trial, and the judgment below must be affirmed. So ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Harlan** concurring:

I concur in the opinion just delivered by *Mr. Justice* Field, and will add a few suggestions in support of the conclusion reached by the court. [656]

It is contended on behalf of the Railroad Company that if it used ordinary care in the *selection* of the *employé* to whose negligence the plaintiff's injuries are attributed, it is protected from liability by section 1130 of the Dakota Code, even if such culpable *employé* had superior or controlling authority over the injured *employé*, and even if the injuries were caused by the defective condition of the appliances and machinery provided by the Company through its agents for the use of the *employé* so injured. For, it is argued, the words "the same general business," in that section, embrace every branch or department of the common employer's business, and no distinction is therein made between *employés* in respect of grades or the nature of the particular service rendered by them. Even if that were admitted to be a proper construction of section 1130, standing by itself, the inquiry still arises as to the object of section 1131, which declares that the employer "must *in all cases* indemnify his *employé* for losses caused by the *former's* want of ordinary care." The latter section was plainly intended to cover cases not provided for in the preceding section. If one section applies to corporations, the other equally applies to them. The two sections must be construed together. And so construed [657]

it is manifest that while the statute establishes the rule that the employer is not bound to indemnify his *employé* "for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person, employed by the same employer in the same general business," it also, with equal distinctness, declares two exceptions to that rule: 1. Where the employer has neglected to use ordinary care in the selection of the *employé* whose negligence caused the losses in question. 2. Where the losses were caused by the employer's own want of ordinary care. The latter exception is as explicitly declared as is the former, and cannot be ignored or nullified by construction.

What case is more distinctly within section 1131 than one where a railroad company fails to appoint some one to provide and maintain machinery and appliances safe and suitable for use by its *employés*, or where its agent or *employé*, appointed to that duty, does not exercise ordinary care in its discharge? Such an agent or *employé* is, of necessity, the representative of the corporation, and his want of ordinary care in respect of such matters is negligence upon the part of the corporation itself. It cannot, in reference to those matters, whatever it may be permitted to do in reference to other matters connected with its business, "interpose between it and the servant who has been injured, without fault on his part, the personal responsibility of an agent." That is clearly shown in the opinion of the court. Between an agent, charged with the performance of the company's duty to provide and maintain safe and suitable appliances and machinery, and the *employés* who use them, the relation of fellow servants does not exist. The want of ordinary care upon his part is, in the language of section 1131 and according to the weight of judicial authority, a want of ordinary care upon the part of the corporation itself. This case, therefore, comes within that section.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Blatchford**, dissenting:

[658] *Mr. Justice* **Bradley**, *Mr. Justice* **Matthews**, *Mr. Justice* **Gray** and myself are unable to concur in the judgment of the court in this case.

The Civil Code of Dakota, sections 6 and 2129, provides as follows:

"Sec. 6. In this Territory there is no common law in any case where the law is declared by the Codes."

"Sec. 2129. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. This Code establishes the law of this Territory respecting the subjects to which it relates; and its provisions are to be liberally construed, with a view to effect its objects and to promote justice."

The rules of the common law are, therefore, not applicable in Dakota, in any case where the statute law is declared in the Civil Code on the subject; and that statute law is not to be construed strictly but liberally, with a view to effect its objects and to promote justice.

Now, what is the statute law of Dakota on the subject involved in this case? It is found in sections 1129, 1130 and 1131 of the Civil Code as follows:

"Sec. 1129. An employer must indemnify his *employé*, except as prescribed in the next section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the *employé*, at the time of obeying such directions, believed them to be unlawful.

Sec. 1130. An employer is not bound to indemnify his *employé* for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable *employé*.

Sec. 1131. An employer must, in all cases, indemnify his *employé* for losses caused by the former's want of ordinary care."

These provisions are very clear. The language used in section 1130, "another person employed by the same employer in the same general business," indicates that, in the view of the three sections of the Code in question, a *coemployé* is another person employed with the *employé* by the same employer, in the same general business. Therefore, wherever the word "*employé*" is used in any one of the three sections, it means a person who may be such a *coemployé*.

By section 1129, the Railroad Company is not bound to indemnify Herbert, except as prescribed in section 1130, for what he necessarily expended or lost by discharging the duty he did, in reference to the freight cars. What is prescribed in section 1130 is this: the Company is not bound to indemnify Herbert for what he so lost in consequence of the negligence of his *coemployés* in the same general business, unless the Company neglected ordinary care in the selection of such *coemployés*. No want of care in such selection is alleged, and the action is sought to be maintained and the verdict for the plaintiff may have been rendered, not on the neglect of the corporation itself to provide and maintain suitable cars, brakes, draw bars and bumpers, but on the neglect of inferior *employés* of the Corporation to keep them in repair. This is clearly shown by the refusal of the court to instruct the jury, as requested by the defendant, that the plaintiff could not recover by "reason of any acts of negligence on the part of any other persons employed by the defendant in the same general business with the plaintiff," and that "this would include the yard master and car repairer;" and by the fact that, on the contrary, it instructed them that "the negligence of those entrusted by the corporation with the power and duty of procuring or keeping in repair such machinery is in law the negligence of the Corporation."

It is sought to destroy the application of sections 1129 and 1130 to this case, by invoking the rule set forth in section 1131, that "an employer must, in all cases, indemnify his *employé* for losses caused by the former's want of ordinary care," and by saying that, in this case, the Company did not exercise ordinary care, because the *coemployés* of Herbert were guilty of the negli-

gence which caused his injury. But that is the very case provided for by section 1130; and the doctrine of the court comes to this, in Dakota: that even though a railroad corporation, acting by its board of directors, exercises ordinary care in the selection of its *employés*, and provides adequate and competent machinery, outfit and appliances, and prescribes proper rules and regulations for their use, and has no knowledge or notice of any defects in them, and no circumstances exist sufficient to charge it with such knowledge or notice, it is guilty of want of ordinary care, within section 1131, towards an *employe* who is injured by the negligence of his *coemployés* in the same general business, by the mere fact of the happening of such injury through such negligence, although section 1130 distinctly declares that, in such a case, the employer shall not be liable to the injured *employé*.

It is a rule for the construction of statutory provisions, especially those embraced in the same statute, that all must be construed so that all shall have effect, if possible. There is ample scope for the application of section 1131, by limiting it to cases not embraced within section 1130. Otherwise no force is given to section 1130.

The failure to give proper effect to section 1130 is the more marked, because, with one exception, the only authorities cited in the opinion of the court, to sustain its views, are cases decided where the common law prevails, and not where such statutory provisions as those in Dakota exist; provisions which declare that the common law is abrogated as to the subject matter of the controversy in this suit.

Sections 4, 1969, 1970 and 1971 of the Civil Code of California are the same, respectively, as sections 2129, 1129, 1130, and 1131, of the Civil Code of Dakota. But there is nothing in the case of *Besson* v. *Green Mountain Gold Mining Co.* 57 Cal. 20, cited in the opinion of the majority of the court, which sanctions the view that the yardmaster or the car repairer in the present case was not a person employed "in the same general business" with Herbert, within the meaning of such a statute.

Considering the case to be governed by the local statute, we express no opinion upon the question whether the instructions given to the jury accorded with the rules of the common law.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EVERETT B. PRESTON, *Appt.*,
v.
ALPHEUS B. MANARD ET AL.

(See S. C. Reporter's ed. 661-664.)

Patent law.

In a patent for an improved hose carriage, certain elements and their combination being old, the description of the hose reel as "a reel of large diameter to allow the water to pass through the hose when partially wound thereon," is not sufficient to sustain the patent.

[No. 962.]

Submitted Jan. 6, 1886. Decided Mar. 1, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Mr. **John W. Munday**, for the appellant.

Messrs. **J. F. Farnsworth** and **C. M. Brazee**, for the appellees.

Mr. Justice **Gray** delivered the opinion of the court:

This was a bill in equity for the infringement of letters patent granted October 10, 1876, and reissued February 22, 1882, for an improved fountain hose carriage. [661]

The specification of the original patent, after describing the apparatus as consisting of a standard mounted upon an axle, to which are applied two wheels and a foot so contrived that when the device rests upon the tripod formed by the wheels and the foot the standard will assume an upright position to serve as a suitable fountain standard; and the standard, for this purpose, having at its upper end a nozzle-holding contrivance, and at a suitable height from the ground a collar turning loosely upon it, to which is affixed the spindle of the hose reel; a set screw through one of the hubs of the reel, entering a groove in the spindle, and serving to hold the reel from slipping off, and also, by applying more or less friction, as a means of locking the reel from turning, or as a brake to prevent its turning too freely; on the face of the outer four arms of the reel, clasps which serve as a means not only for holding the nozzle, when desired, but also for holding the butt of the hose when it is all reeled in, or an intermediate part when the butt is connected with the hydrant; two handles near the top of the standard to afford a grasp in wheeling the apparatus about from place to place, and another handle projecting to the rear from the collar, to serve as a hold for the hand in shifting about and adjusting,—proceeded as follows:

"In operation, the butt of the hose may be attached to the hydrant, and the body of the hose being upon the reel, the standard and reel may be wheeled along to the place desired, paying out hose as it goes. More or less hose may be thus paid out and, the nozzle being poised to its work, it may remain in operation for a time in a fixed position or at rest; or the apparatus may be moved about from place to place and the hose taken up or paid out to suit, while the water is playing as well as when shut off. The reel being supported at a considerable height from the ground renders it possible to employ a reel of a sufficient diameter so that the water will freely flow through the portion of the hose wound thereon. It will be seen, therefore, that the apparatus may be used as a lawn fountain or sprinkler, and moved from place to place without touching the hose with the hands, thus avoiding the dirt and wet; and also that the hose may be taken up or paid out from the standard itself as it is moved about, which is a better way than having the standard at one place and the reel at another, or than having no reel, because the work may be all attended to at the standard, and no more hose left on the ground than is absolutely necessary. With a view to this method of using the apparatus, a peculiar feature of the reel consists in the fact that the hose is wound upon four separate points or bars. This, in connection with the large diameter of the reel, facilitates the discharge of the water. To make this clear it is necessary to understand that each bar is liable [662]

to make a dent upon the inner side of the hose. This dent the water passing through will straighten out; but the effort to straighten the dent will cause a tendency of the hose to rise at this point, and in the part of the hose between the bars to recurve or bend toward the center of the reel. Now, if a solid drum is employed, or a reel composed of a large number of bars, this rising and recurving tendency is resisted by the intermediate points or bars; and the dent or flattening or compression resists the water and will not straighten out. By sufficiently loosening the set screw, so that it will clear the groove in the spindle, the reel may be taken entirely off from the standard, and the latter in such case may be used as a plain, reelless fountain standard."

[663] The first claim in the original patent was as follows:

"1. The hose reel, mounted upon a wheeled carriage, which is provided with a foot or brace by means of which it may be sustained in an upright vertical position, whereby the device becomes capable of use both as a hose carriage and as a fountain standard, substantially as specified."

A former suit brought March 29, 1880, by the plaintiff against the defendants, under the original patent, was heard upon pleadings and proofs, and dismissed by the court on January 6, 1882, for want of novelty. On January 21, 1882, the plaintiff applied to the Patent Office for a re-issue, which was granted on February 22, 1882, with a specification exactly like that in the original patent, but with different claims, the first and only material one of which was in these words:

"1. The combined hose carriage and fountain standard, consisting in the combination of the following elements, viz: a wheeled carriage, provided with a foot or brace, by means of which it may be sustained in an upright vertical position, a nozzle-holding device and a reel of large diameter, to allow the water to flow through the hose when partially wound thereon, substantially as specified."

The present bill was filed April 13, 1882. By the evidence taken in the cause, it appeared that a fountain standard and hose reel, mounted upon a wheeled carriage, provided with a foot or brace to sustain it in an upright position, and with a nozzle holder, were known and used in combination with each other before the plaintiff's alleged invention. This bill also was dismissed, and the plaintiff appealed to this court.

It is unnecessary to consider the difference between the claim in the reissue and the claim in the original patent, because, assuming the reissue not to be invalidated thereby, yet it sets forth no patentable invention.

[664] The hose reel, the standard, the brace, the nozzle holder, and their use in combination being all old, the description of the hose reel, in the specification and claim, as "a reel of large diameter, to allow the water to pass through the hose when partially wound thereon," is not sufficient to sustain the patent.

The requisite diameter of the reel and its proportion to the size of the hose are not defined in the specification but are left to be ascertained by experiment or from general knowledge. If the patentee had discovered anything new in the size or proportions of the reel, requisite to allow the water to flow through the hose, he should have described it with such precision as to enable others to construct the apparatus. The fact that water will flow through a hose wound on a reel, if the diameter of the reel is large enough and the curves or angles are not too abrupt, is a matter of common knowledge which no one can appropriate to his own use, to the exclusion of the public. In any view of the case, the specification describes nothing that the patentee is entitled to claim; but only what every one has a right to use without his assistance. *Guidet* v. *Brooklyn*, 105 U. S. 550 [Bk. 26, L. ed. 1106]; *Flood* v. *Hicks*, 2 Biss. 169; *S. C.* 4 Fisher, Pat. Cas. 156; *King* v. *Wheeler*, 2 B. & Ald. 345, 354; *Macnamara* v. *Hulse*, Car. & M. 471, 477; *Kay* v. *Marshall*, 7 Scott, 548; *S. C.* 5 Bing. N. C. 492; 1 Beavan, 535; 8 Cl. & Fin. 245; West, H. L. 682; 2 Web. Pat. Cas. 34, 68, 75, 77, 82, 84.

To sustain this patent would be to deprive the public of the right to arrange and use a well known apparatus in the only way in which its purpose can be beneficially accomplished.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

EDWARD M. HIGGINS ET AL. Partners, as HIGGINS & GILBERT, *Plffs. in Err.*,

v.

JAMES McCREA.

(See S. C. Reporter's ed. 671-687.)

Commission merchants—rules of Chicago board of trade—substitution of contracts under—question of law for court—when defendant barred by his pleadings from recovering counterclaim—Ohio Code.

1. The rules of the Chicago Board of Trade provide that when a commission merchant, having made a contract for his principal with a third party, assumes to offset or cancel the contract he shall substitute therefor another equivalent contract with some other person; and, upon such substitution, shall guaranty to his principal the performance of the substituted contract. Where cancellation of contracts made by plaintiffs in error, members of the Chicago Board of Trade, for defendant in error was shown, and the uncontradicted evidence showed that no contracts had been substituted which the defendant could have enforced, the only substitution, if any, being in the mental operation of the plaintiffs, it was proper for the court to charge the jury that, under the above rules, no valid substitution had been shown.

2. A counterclaim cannot be sustained by the defendant, to recover money which in his pleadings he alleges to have been advanced by him to carry on a gambling transaction, and which with his concurrence was used to carry on such illegal transactions. The fact that the plaintiffs believed the transactions legal does not affect the defendant's right to recover.

3. Under the Ohio Code such a counterclaim stands upon the same footing and is to be tested by the same rules as an independent action.

[No. 1193.]

Submitted Jan. 8, 1886. Decided Mar. 1, 1886.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio.

Statement by *Mr. Justice* **Woods:**

The plaintiffs in error were the plaintiffs in the circuit court. They brought this action to

recover $31,644.31 and interest, for moneys paid by them, as they alleged, in executing the orders of the defendant for the purchase in May, 1888, of certain lots of pork and lard in the Exchange of the Chicago board of trade, to be delivered in the following August. The petition averred that the plaintiffs were commission merchants and members of said board of trade; that the transactions out of which the suit arose were governed by the rules of the board; and that the defendant had knowledge of said rules.

The petition then averred, as a first cause of action, that on May 19, 1888, the plaintiffs purchased, on the order of defendant and as his brokers and agents and for his account, 1,000 barrels of pork and 1,000 tierces of lard, to be delivered in August next, on such day as the vendor might elect. That on August 1, 1888, the property was tendered and payment demanded of the plaintiffs; and, in accordance with the defendant's instructions and the terms and conditions of their agency, the plaintiffs received the pork and lard and paid therefor $58,553.34, the price thereof, and $56 for inspection charges thereon; all which the plaintiffs were bound and compelled to do by the terms of the contract and the rules and regulations of the board of trade, which constituted a part of the contract of agency between the parties, and of the contract of purchase; that on the same day notice was given to the defendant that the pork and lard had been received and paid for; that he failed to give directions for the disposition of the property, and failed to pay therefor, and plaintiffs thereupon sold the same in the exchange of the board of trade and according to its rules, and received therefor and credited to the account of the defendant $42,615.97; that they had previously received from the defendant on that account the sum of $6,631.66; and that the balance due from him and unpaid on account of that transaction was $9,361.71, with interest from the date of sale.

For a second cause of action the plaintiffs set up transactions in all respects similar to those alleged in the first, namely: their purchase on May 23, 1888, for defendant, on his order, of 2,000 barrels of pork and 2,000 tierces of lard, deliverable in August following; the delivery of the produce on August 1st and the payment therefor by the plaintiffs; its subsequent sale by them at a loss of $21,832.60. By a third count the plaintiffs claimed $450 for commissions in said transactions.

The petition then averred that there was due to the plaintiffs from the defendant, by reason of the premises, the sum already stated, for which they demanded judgment.

The defendant, in an amended answer, averred that the plaintiffs were engaged in carrying on for themselves and others gambling transactions in pork, lard and other commodities on the Chicago board of trade; that, being solicited by the plaintiffs and being desirous himself to gamble and speculate on the prices of pork and lard, he engaged with the plaintiffs in such gambling transactions; that on May 19, 1888, he directed the plaintiffs to deal for him in pork and lard options to the amounts specified in the plaintiffs' petition; that the plaintiffs did, on or about the 19th of May, 1888, enter into contracts in their own name, but, as they now claim, upon account of this defendant, with certain named persons and firms, to wit. G. C. Eldridge & Company and others; that they did not contract for the actual delivery of any pork or lard whatever, but the pretended purchases were mere options; and that it was the understanding of all the parties to said transactions that no pork or lard should be delivered on the contracts, and that the same should be settled upon the differences between the contract and the market price.

The answer further averred that soon after the making of the contracts the plaintiffs disposed of the same for their own benefit, converted the proceeds to their own use and released the parties with whom they had made said contracts; and that at no time after June 16, 1888, did the plaintiffs hold any contracts whatever for the account of defendant, but falsely reported to him that they were carrying said contracts for his benefit, and required him from time to time to pay, and he did pay, into their hands large sums of money, amounting in the aggregate, with a balance already in their hands due to the defendant, to $19,895; and that in the latter part of June, 1888, the defendant gave the plaintiffs notice that he would no longer participate in said gambling transactions and that he repudiated the same. The answer also denied that any pork or lard was actually delivered to the plaintiffs on said contracts or that they paid any money thereon for account of defendant, and pleaded in bar the statute of the State of Illinois, which declares option contracts to be illegal and void. [674]

By way of counterclaim the defendant, in his answer, demanded judgment against the plaintiffs for his said advances, amounting in all to $19,895, and averred that this money was paid by him to the plaintiffs to promote and carry on said gambling transactions; that said transactions, being the purchase of option contracts, were forbidden by the Statute of Illinois, and were illegal and void; that the said sum was so lost by the defendant to the plaintiffs in the said gambling transactions and option contracts as set forth. The reply of the plaintiffs put in issue the new matter set up in the answer and counterclaim of the defendant.

The issues made by the pleadings were tried by a jury. The bill of exceptions states that the plaintiffs first offered in evidence section 6 of Rule 26 of the Chicago board of trade, which was as follows:

"In case any member of the association, acting as a commission merchant, shall have made purchases or sales by order and for account of another whether the party for whom any such purchase or sale was made shall be a member of the board of trade or otherwise, and it shall subsequently appear that such trades may be offset and settled by other trades made by said commission merchant, he shall be deemed authorized to make such offset and settlement, and to substitute some person or persons for the one from or to whom he may have purchased or sold the property originally; *Provided*, That in case of such substitution the member or firm making the same shall be held to guaranty to his or their principal the ultimate fulfillment of all the contracts made for account of such principal which have been so transferred, and shall be held liable to such principal for [675]

[illegible]

[illegible] The [illegible] coming in. "They [illegible] and balanced every few [illegible] they had stuff enough con[illegible]." When the produ[illegible] was delivered to them it was common property [illegible] elevator. Out of 7,000 ba[illegible] delivered to the plaintiffs on Augu[illegible] they applied a sufficient quantity to satisfy t[illegible] defendant's contracts of purchase. "It did [illegible] who it came from first, whatever ca[illegible] there first it was reserved for" the defenda[illegible] The plaintiffs received and paid for no lard [illegible] defendant's account on August 1, or at [illegible] other time.

After the cancellation of the contracts m[illegible] for the defendant by the plaintiffs the la[illegible] were the only persons to whom the defend[illegible] could look for the pork and lard mentione[illegible] the canceled contracts. He could hold no [illegible] liable to him for the delivery of the [illegible]

The pork delivered to plaintiffs on Aug[illegible] was delivered, not on contracts made in b[illegible] defendant but made for other persons; [illegible] the checks for money paid by the plai[illegible] on August 1st were on contracts of purc[illegible] made in behalf of other persons and no[illegible] the defendant.

The witness further testified that on Ma[illegible] 1883, there was standing to the credit [illegible] defendant on the books of plaintiffs $1,895[illegible] that after that date the defendant paid the [illegible] the transactions set out in the petition the [illegible] sum of $18,000.

The deposition of Edward M. Higgin[illegible] other plaintiff, taken in behalf of the d[illegible] ant, was also introduced in evidence by t[illegible] tor. So far as it went it was in substan[illegible] same as the deposition of Gilbert.

There was conflicting evidence upo[illegible] question whether the defendant, at the ti[illegible] the transactions out of which the suit [illegible] knew what were the rules and customs [illegible] board of trade.

The defendant, as a witness in his ov[illegible] half, testified in regard to his transaction[illegible] the plaintiffs as follows:

"I always knew it was gambling. I [illegible] bought any property for future delive[illegible] received it, or expected to. I never boug[illegible] property, or any pork or lard, or an opti[illegible] future delivery and received it. I ne[illegible] tended to receive it. I never intended [illegible] ceive this or any portion of it. I had [illegible] for it; all I wanted was the differenc[illegible] went my way."

The foregoing is the substance of t[illegible] dence necessary to be stated to show th[illegible] ing of the charge of the court to the jury[illegible]

The bill of exceptions then procee[illegible] state that the court, having explained [illegible] jury what would and what would not [illegible] tute a gambling contract, said, among [illegible] things not excepted to:

"It is legitimate for the parties to [illegible] contract for the delivery of property a[illegible] future period, provided they mean a re[illegible] *bona fide* contract, and the law recogni[illegible] obligation and will enforce it. If the c[illegible] is void for the reason heretofore state[illegible] plaintiffs cannot recover anything; no[illegible] the defendant recover on his cross actio[illegible]

law in that contingency would leave the parties in the situation that they have placed themselves in; and no recovery could be had by either plaintiffs or defendant. But if you should be of opinion that, although the defendant entertained the opinion that it was a gambling transaction, the plaintiffs did not participate in that view of the question, but contemplated and intended an actual purchase and an actual sale, the contract would be binding between the parties, it will become your duty to go further and make an additional finding.

"Assuming that this contract was valid and enforcible, the defendant says that he is not bound, for the reason that after the purchases were made by these plaintiffs as his agents, and for his account, they canceled the contracts and released the vendors therefrom, and that they did that without authority from him and without his knowledge or his subsequent ratification. Upon that state of facts, if found to be true, the plaintiffs could not recover anything; that cancellation of the contracts and release of the vendors would have absolved the defendant from any obligation to pay the plaintiffs for the property so purchased by them for his account. But the plaintiffs in reply say that the board of trade has certain rules and regulations which the court has permitted to be offered in evidence to you, and that under and in accordance with these rules they had a right to cancel these contracts and substitute others in place of them; that these rules were known to and understood by the defendant and that he, with that knowledge, acquiesced in the cancellation of the contracts and the alleged substitution of others in the place of those canceled.

"For present purposes and without expressing any opinion upon this proposition, the court instructs you that you may, for the purposes of this case, assume that the defendant did know and did consent that these plaintiffs might act under the 6th section of the 26th Rule, and that such knowledge and acquiescence of his authorized the plaintiffs to cancel the first contracts and substitute others in their place. But the court instructs you that, assuming plaintiffs' contention in this regard to be true and assuming that the plaintiffs themselves have told the truth in this case, there has been no valid substitution of other contracts for those that were canceled, and that the plaintiffs cannot, therefore, for that reason, upon their own testimony, recover anything in this action.

"If you find upon that question the original contract to have been valid, and that the defendant is excused or absolved from liability because of this attempted substitution, which the court instructs you was not made in accordance with said rule, then and in that case the defendant will be entitled to recover upon his cross action against the plaintiffs, for all the money which he advanced in pursuance of these contracts."

To the last two paragraphs of the charge the plaintiffs excepted.

The jury returned a verdict in favor of the defendant, and against the plaintiffs upon the cause of action set forth in their petition, and in favor of the defendant and against the plaintiffs, upon the counterclaim set forth in defendant's answer for the sum of $22,662.42. In accordance with the verdict the court rendered judgment. To reverse that judgment the plaintiffs have brought this writ of error.

Messrs. **Charles C. Bonney** and **Francis J. Wing**, for plaintiffs in error.

Messrs. **Stevenson Burke** and **William B. Sanders**, for defendant in error.

Mr. Justice **Woods** delivered the opinion of the court: [679]

It is not disputed that if the transactions out of which this suit arose were of the character described in the counterclaim and testimony of the defendant, they fell under the ban of section 130 of chapter 38 of the Revised Statutes of Illinois of 1885, page 405, which was in force when the transactions took place. That section, so far as applicable to this case, was as follows: "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts and shall be void."

The errors assigned by the plaintiffs relate exclusively to the charge of the court and the rendering of judgment in accordance with the verdict of the jury. [680]

The first complaint made against the charge is that the court withdrew from the jury the question of fact whether the plaintiffs had or had not complied with the rules of the board of trade in reference to the substitution of other contracts for those made by them for the defendant, and which they subsequently offset and settled, and charged the jury that certain substitutions of contracts alleged by the plaintiffs to have been made by them were not as matter of law made in accordance with the rules of the board of trade.

We think there was no error in the charge of the court complained of. The rule of the board of trade upon this subject (§ 6, Rule 26) provides that where purchases or sales shall have been made by a commission merchant, a member of the board, by order or for account of another person, and it shall subsequently appear that such "trades" may be offset and settled by other "trades" made by the same commission merchant, he shall be "authorized to make such offset and settlement and to substitute some person or persons for the one from or to whom he may have purchased or sold the property originally."

The meaning of this rule is plain, namely: that when a commission merchant, having made a contract for his principal with a third person, assumes to offset or cancel the contract, he shall substitute therefor another equivalent contract with some other person who shall be bound to his principal for its performance.

It is well settled as a general rule that a written contract made by a factor in his own name, for the purchase or sale of goods for his principal, will bind the principal; and he may sue and be sued thereon exactly as if he were named in it, for it is treated as the contract of the principal as well as of the agent. *Higgins* v. *Senior*, 8 M. & W. 834; *Huntington* v. *Knox*, 7 Cush. 371; *Taintor* v. *Prendergast*, 3 Hill. 72; *Ford* v. *Williams*, 21 How. 287 [62 U. S. bk. 16, L. ed. 36].

[681] The rule of the board of trade provided, as has been seen, that where the commission merchant has substituted one contract for another he shall guaranty to his principal the performance of the substituted contract.

It follows that upon the original contracts made by the plaintiffs for the defendant, the latter, upon their breach, had a right of action against the parties with whom the contracts were made. The purpose of the rule was, therefore, plain, namely: to provide that when contracts were canceled and others substituted, the commission merchant, as well as the party bound in the substituted contract to sell or buy, should be liable to the other party for its performance. The rule, therefore, does not authorize the commission merchant to release the party to the original contract unless he provided some one else to assume the obligation; or, as the rule states it, "substitute some person or persons for the one from or to whom he may have purchased or sold the property originally."

The only evidence in the case in regard to the cancellation of the original contracts made by the plaintiffs for the defendant and the substitution of other contracts was the testimony of the plaintiffs themselves. They do not contradict each other, and there is no contradiction or impeachment of their testimony on this point in the record. These witnesses make it clear that, after the contracts made by them for the defendant had been offset against others and thereby canceled, no other contracts were substituted in their place which the defendant could have enforced. In fact there was no substitution. No contracts were designated to take the place of those canceled. All that the plaintiffs say on this point is that it was their purpose to apply the first produce delivered in August on contracts of sale, first to the oldest contract of purchase; and it was uncertain on what contract the first delivery would be made until the delivery actually took place. If there was any substitution of other contracts for the canceled ones it was only in the mental operations of the plaintiffs, to which no outward expression whatever was given. The plaintiffs admit in their evidence that after the original contracts made for the defendant were offset and released they alone were bound to the defendant, and that there were no other persons
[682] against whom the defendant could have maintained an action. It is plain, therefore, that upon their own showing the plaintiffs did not make the substitution required by section 6 of rule 26 of the board of trade.

The facts of the case being shown and not disputed, the question whether there had been a valid substitution of contracts under the rule referred to was a question of law. It depended on the construction of the rule, which it was the duty of the court to interpret. *Levy* v. *Gadsby*, 3 Cranch, 180 [7 U. S. bk. 2, L. ed. 404]; *Walker* v. *Bank of Washington*, 3 How. 62 [44 U. S. bk. 11, L. ed. 494]; *Goddard* v. *Foster*, 17 Wall. 123 [84 U. S. bk. 21, L. ed. 589].

When, therefore, the circuit court said to the jury that, assuming that the plaintiffs themselves have told the truth in this case, there has been no valid substitution of other contracts for those that were canceled, it was merely applying the rule of the board of trade, as it construed it, to the plaintiffs' own version of the facts,

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to dismiss his suit without the defendant's consent: *Wissell* v. *First Congregational Church*, 14 Ohio St. 31; and it must state facts recognized by courts of law or equity as constituting a cause of action. *Hill* v. *Butler*, 6 Ohio St. 207. If a plaintiff dismiss his action against the defendant, or fail to appear, that will not prevent the defendant from prosecuting the counterclaim set up in the suit to final judgment against the plaintiff. Code of Procedure, § 373.

The court may at any time before the final submission of the cause allow a counterclaim set up in the answer to be withdrawn, and on motion of either party an action on the same shall be docketed and proceeded in as in like cases after process served. Code of Procedure, § 119.

The defendant's counterclaim is, therefore, to be tested by the same rule as if it had been the basis of an independent action, and the question is whether, under any circumstances, the defendant should have been allowed, upon the pleadings and evidence, to recover a judgment thereon. The instruction of the court now under review directed the jury, if they found the original contract to have been valid, but the defendant not liable thereon because the substitution was not made as required by the rules of the board of trade, that the defendant was entitled to recover the money advanced by him to the plaintiffs. The verdict of the jury for the defendant on his counterclaim must have been based on a finding that the original contracts were valid and not gambling contracts; and the question is, therefore, whether the instruction was right, and if not, whether the error was cured by the verdict of the jury.

We think the charge objected to was erroneous. The cross action of the defendant, as an independent suit, it is clear, could not have been maintained. His case, as stated by himself in his answer and counterclaim, was that the money was advanced by him to carry on a gambling transaction; that with his concurrence the money so advanced was used in such gambling transactions; and that, by the statutes of Illinois where the contracts were made, they were treated as gaming contracts and declared illegal and void, and the making of them a criminal offense. The counterclaim thus stated was supported by the testimony of the defendant himself, given upon the trial. There was no statute of Illinois to authorize the recovery of money paid on such contracts. The cross action, therefore, of the defendant, stated in his pleading and supported by his own deposition, was not one on which any recovery could be had. *Armstrong* v. *Toler*, 11 Wheat. 258 [25 U. S. bk. 6, L. ed. 468]; *Brown* v. *Tarkington*, 3 Wall. 377, and *Davidson* v. *Lanier*, 4 Wall. 447 [70 and 71 U. S. bk. 18, L. ed. 255, 377]; *Hanauer* v. *Doane*, 12 Wall. 342 [79 U. S. bk. 20, L. ed. 439]. The court was bound to take judicial notice of the fact that the dealings recited in the counterclaim were forbidden by law, and of its own motion should have directed a verdict against the defendant thereon. *Oscanyan* v. *Arms Company*, 103 U. S. 261 [Bk. 26, L. ed. 569]. If the defendant had withdrawn his counterclaim and docketed it as a separate suit against the plaintiffs, as permitted to do by the Code, it needs no discussion to show that his action must have failed. His rights are not changed by the fact that the two causes go on *pari passu*, and are tried at the same time. We do not see on what ground a party, who says in his pleading that the money which he seeks to recover was paid out for the accomplishment of a purpose made an offense by the law, and who testifies and insists to the end of his suit that the contract on which he advanced his money was illegal, criminal and void, can recover it back in a court whose duty it is to give effect to the law which the party admits he intended to violate.

In the present case the plaintiffs alleged and insisted that their transactions with the defendant were carried on with no unlawful purpose. On the other hand, the defendant alleged and insisted that in the same transactions he intended to violate the law. We see no reason why in such a case the plaintiffs might not, if they had not canceled the contracts, recover the money paid by them for the defendant, while at the same time the defendant could not recover the money advanced to the plaintiffs for what he intended to be an unlawful purpose.

In *Holman* v. *Johnson*, Cowper, 342, it was said by *Lord* Mansfield that "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appear to arise *ex turpi causa*, or the transgression of a positive law of the country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the defendant and the plaintiff were to change sides and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for when both are equally in fault, *Potior est conditio defendentis*." [686]

If, therefore, the defendant intended to embark his money in an illegal and criminal venture, we do not see how his case is helped by the fact that the purpose of the plaintiffs was to invest the money so advanced in what they understood to be a lawful and innocent transaction.

The paragraphs of the charge of the court excepted to amounted in substance to this: that if the plaintiffs, in making the contracts for the defendant, contemplated and intended an actual purchase and an actual sale, but the defendant did not, but on the contrary meant to engage in a gambling venture, the contract would, nevertheless, be binding on both parties; and if the plaintiffs canceled the contracts, the defendant, notwithstanding his intention to violate the laws, could recover from the plaintiffs the money advanced by him to carry out his unlawful purpose. We think this charge was erroneous. Upon the case made by his counterclaim, the defendant was not entitled to recover; and the fact that the plaintiffs were innocent of any unlawful purpose did not inure to the benefit of the defendant, who confessed that the

money which he sought to recover had been paid by him to promote an illegal and criminal venture.

Upon the pleadings, the verdict of the jury cannot help the defendant's case. Section 5228 of the Revised Statutes of Ohio of 1880 provides "that when upon the pleadings one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though
[687] a verdict has been found against such party." It is clear that upon the defendant's counterclaim, which showed that he had no valid cause of action against the plaintiffs, no valid judgment could be rendered against them. Notwithstanding the verdict, the judgment should have been against the defendant and for the plaintiffs, upon the counterclaim of the former.

We are of opinion, therefore, that the judgment in favor of the defendant on the cause of action alleged in the plaintiffs' petition should be affirmed; and the judgment in favor of the defendant, on the cause of action set up in his answer by way of counterclaim, should be reversed, and the cause remanded, with directions to enter a judgment for the plaintiffs and against the defendant on the counterclaim of the latter.

And it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[665] VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD COMPANY, *Plff. in Err.*,

v.

ELIAS S. DENNIS, Sheriff of MADISON PARISH, LOUISIANA.

(See S. C. Reporter's ed. 665–671.)

Exemption from taxation—construction of statute.

1. Where a statute provides that certain property of a railroad corporation shall be exempt from taxation "for ten years after the completion of said road," the time preceding the completion of the road is as distinctly excluded as the time succeeding ten years after its completion.
2. An intention to surrender the taxing power will not be presumed where the Legislature has not manifested it in clear and unmistakable terms.
3. The omission of the taxing officers of the State in previous years to assess the property in question cannot control the duty imposed by law upon their successors, or the power of the Legislature, or the legal construction of the statute under which the exemption is claimed.

[No. 121.]

Argued Jan. 20, 1886. Decided Mar. 1, 1886.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is stated by the court.

Messrs. **Edgar M. Johnson,** *George Hoadly* and *Edward Colston,* for plaintiff in error.

Messrs. **Thos. O. Benton** and *John S. Young,* for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

[665] The original suit was brought by the Sheriff,

NOTE.—*Exemption from taxation, never presumed* See Tucker v. Ferguson, 89 U. S. (22 Wall.), bk. 22, 805, *note.*

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roe and Shreveport, to
Texas.

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from taxation; and it
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and other appurtenanc
taxation for ten years
said road within the li

The eastern part of t
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January 1, 1862; leavi
Monroe to Shreveport
miles, uncompleted.
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Soon after the retu
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September 1, 1857, of i
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sale of the whole mo
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Upon a suit afterw
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illegal, and the railro
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bondholders and othe
ration. *Jackson* v. *Lu*
U. S. bk. 22, L. ed. 4

On December 1, 187
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Company, and now c
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its exemption from tax

In 1881 and 1882 the
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complete it; but it has

The Supreme Court
the provisions of the S

the railroad, fixtures and appurtenances "from taxation for ten years after the completion of said road," did not relieve the old corporation from taxation before the road was completed; and therefore gave judgment for the plaintiff, without determining whether the new corporation had succeeded to the rights of the old one in this respect. 34 La. Ann. 954.

A writ of error was sued out by the defendant, and allowed by the *Chief Justice* of that court, because there was drawn in question the validity of a statute of or an authority exercised under the State, on the ground of its being repugnant to the Constitution of the United States, as impairing the obligation of contracts, and the decision was in favor of its validity.

In determining whether a statute of a State impairs the obligation of a contract, this court doubtless must decide for itself the existence and effect of the original contract, although in the form of a statute, as well as whether its obligation has been impaired. *Louisville & N. R. R. Co.* v. *Palmes*, 109 U. S. 244, 256, 257 [Bk. 27, L. ed. 922, 926], and cases cited; *Wright* v. *Nagle*, 101 U. S. 791, 794 [Bk. 25, L. ed. 921, 922]. But the construction given by the Supreme Court of Louisiana to the contract relied on in the present case accords not only with its own decision in the earlier case of *Baton Rouge Railroad* v. *Kirkland*, 33 La. Ann. 622, but with the principles often affirmed by this court.

In the leading case of *Providence Bank* v. *Billings*, 4 Pet. 514 [29 U. S. bk. 7, L. ed. 939], *Chief Justice* Marshall, speaking of a partial release of the power of taxation by a State in a charter to a corporation, said: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm." "As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." "We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction." 4 Pet. 561-563 [29 U. S. bk. 7, L. ed. 955, 956].

In *Philadelphia, etc. R. R. Co.* v. *Md.* 10 How. 376 [51 U. S. bk. 13, L. ed. 461], *Chief Justice* Taney said: "This court on several occasions has held that the taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." *Id.* 393 [*Id.* 468].

In the subsequent decisions, the same rule has been strictly upheld and constantly reaffirmed in every variety of expression. It has been said that "Neither the right of taxation nor any other power of sovereignty will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken;" that exemption from taxation "should never be assumed unless the language used is too clear to admit of doubt;" that "nothing can be taken against the State by presumption or inference; the surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arise as to the intent of the Legislature, that doubt must be solved in favor of the State;" that a State "cannot by ambiguous language be deprived of this highest attribute of sovereignty;" that any contract of exemption "is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require;" and that such exemptions are regarded "as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris*." *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 446, and *Gilman* v. *Sheboygan*, 2 Black, 510, 513 [66 and 67 U. S. bk. 17, L. ed. 173, 178, 305, 307]; *Delaware R. R. Tax*, 18 Wall. 206, 225, 226 [85 U. S. bk. 21, L. ed. 888, 894]; *Hoge* v. *R. R. Co.* 99 U. S. 348, 355 [Bk. 25, L. ed. 303, 304]; *Southwestern R. R.* v. *Wright*, [*ante*, 626]; *Erie R. Co.* v. *Pa.* 21 Wall. 492, 499 [88 U. S. bk. 22, L. ed. 595, 598]; *Memphis Gas Light Co.* v. *Shelby Co. Taxing Dist.* 109 U. S. 398, 401 [Bk. 27, L. ed. 976, 977]; *Tucker* v. *Ferguson*, 22 Wall. 527, 575 [89 U. S. bk. 22, L. ed. 805, 816]; *West Wisconsin Railway Co.* v. *Supervisors*, 93 U. S. 595, 597 [Bk. 23, L. ed. 814, 815]; *Memphis & Little Rock R. R. Co.* v. *Railroad Comrs.* 112 U. S. 609, 617, 618 [Bk. 28, L. ed. 837, 840]. [669]

It is argued in support of this writ of error that as the exemption from taxation of the capital stock was unqualified and perpetual and began at the very moment of the creation of the Corporation, the further exemption of the railroad and its appurtenances, conferred in the same section, was intended to begin at the same moment, although limited in duration to ten years after the completion of the road; and that the Legislature, while exempting the railroad from taxation for ten years after its completion, could not have intended to subject it to taxation before its completion and while its earnings were little or nothing.

On the other hand, it is argued that the consideration of the exemption from taxation, as of all the franchises and privileges granted by the State to the Corporation, was the undertaking of the Corporation to prosecute to completion within a reasonable time the work of building the whole railroad from the Mississippi to the Texas line; that one reason for defining the exemption of the railroad and its appurtenances from taxation as "for ten years after the completion of said road," without including any time before its completion, was to secure a prompt execution of the work, and to prevent the Corporation from defeating the principal object of the grant, and prolonging its own immunity from taxation, by postponing or omitting the completion of a portion of the road; and that the State had never allowed a similar exemption to take place, except after a railroad had been entirely finished; and this argument is supported by the opinions of the Supreme Court of Louisiana in *State* v. *Morgan*, 26 La. Ann. 482, 491, and in the case at bar, 34 La. Ann. 954, 958.

Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision, where the words of the statute

creating the exemption are plain, definite and unambiguous.

In their natural and their legal meaning, the words "for ten years after the completion of said road" as distinctly exclude the time preceding the completion of the road, as the time succeeding the ten years after its completion. [670] If the Legislature had intended to limit the end only and not the beginning of the exemption, its purpose could have been easily expressed by saying "until" instead of "for," so as to read "until ten years after the completion," leaving the exemption to begin immediately upon the granting of the charter.

To hold that the words of exemption actually used by the Legislature include the time before the completion of the road would be to insert by construction what is not to be found in the language of the contract; to presume an intention which the Legislature has not manifested in clear and unmistakable terms; to surrender the taxing power, and to go against the uniform current of the decisions of this court upon the subject, as shown by the cases above referred to.

The omission of the taxing officers of the State in previous years to assess this property cannot control the duty imposed by law upon their successors, or the power of the Legislature, or the legal construction of the statute under which the exemption is claimed.

In the case of *Morgan* v. *La.* 93 U. S. 217 [Bk. 23, L. ed. 860], affirming the decision in 28 La. Ann. 482, neither this court nor the Supreme Court of Louisiana expressed any opinion upon the question now before us, because both courts held that the sale of the railroad in that case having taken place before the passage of the Statute of 1877, whatever rights were conferred by a similar clause of exemption had not passed to the purchasers.

Judgment affirmed.

Mr. Justice **Field, dissenting:**

I am obliged to dissent from the judgment in this case. I agree with the majority of the court in all that is said in the opinion as to the construction of statutes which are alleged to exempt from the taxing power of the State, property within its jurisdiction. Where there is a reasonable doubt as to their construction, whether or not they create the exemption, it should be solved in favor of the State. But here it does not seem to me there can be any [671] such doubt. The statute in question declares that the capital stock of the Company "shall be exempt from taxation; and its roads, fixtures, workshops, warehouses, vehicles of transportation and other appurtenances shall be exempt from taxation for ten years after the completion of said road within the State." This exemption was designed to aid the road and was, therefore, much more needed during its construction than when completed. It seems like a perversion of the purpose of the statute to hold that it intended to impede by its burden the progress of the desired work, and relieve it of the burden only when finished. The enterprise is to be nursed, according to the majority of the court, not in its infancy, but when successfully carried out and needing no support.

I am authorized to say
Waite, *Mr. Justice* **Mi**
Bradley concur with m
True copies. Test:
James H. McKenney,

Cited—117 U. S. 148, 655.

CITY OF WATERVI
v.
BALTUS VA

(See S. C. Reporte

Jurisdiction—certificate
from circuit court—f
stated—more than one
braced—whole case mus

*1. When a case is brou
court for review, in which
sy is less than $5,000, it will
accompanied by a certifica
by the judges holding the c
cate presents a case proper
this court.
2. Each question so certif
and distinct proposition of
can respond, and not a pr
and facts.
3. While such a statemen
certificate as to show that t
plicable to the case, the po
differed must be a distinct
stated.
4. This procedure is mean
two judges sitting, a clear
of law material to the deci
which, differing in opinion,
certificate as will enable th
question. If in reality m
tion occurs, they may be em
but where it is apparent th
sented to this court for dec
sitions of fact and of law, t
tained. Such is this case, a
missed.

[No. 9

Submitted under Rule 20,
25, 1886. Decide

IN ERROR to the Circu
States for the District
A motion to dismiss t
November 2, 1885, by
opposed by *Mr. E. Still*
the consideration of the
postponed until the heari
The case is stated by t
Messrs. **E. Stillings**
for plaintiff in error.
Mr. **S. E. Brown,** fo

Mr. Justice **Miller** de
the court:
This is a writ of error
the District of Kansas.
In that court there wa
the plaintiff in error for
The amount is too small
diction on a writ of er
There is, however, a ce
opinion between the circ
trict judge sitting at the
We have decided that
a case may be brought t
cate of division, without
in controversy. *Dow* v.

* Head notes by *Mr. Just*

L. ed. 632]. But that decision was
n a valid certificate which presented
uestions material to the decision of
If this were not necessary to our ju-
a form of certificate which might
question that this court can consider
sed to require of it a review of other
an those on which the court divided,
e amount in controversy is insignifi-
a, therefore, only where the certifi-
present, in accordance with the stat-
sion of opinion in such a manner and
question as to give this court juris-
at the amount in controversy can be
d as an element of jurisdiction.
e character of the certificate on which
will act, the Statute of 1872 and the
atutes have made no change, and the
f this court are full on that subject.
nce of these decisions, as applicable
before us, is that each question so
ust contain a distinct proposition of
this court can answer negatively or
ly, and that the whole case cannot
d by a recital of the evidence and in-
es so framed as to require this court
he whole case on mixed propositions
fact.
, while such a statement of facts must
the certificate as to show that the
law is applicable to the case, the
which the judges differed must be a
estion of law clearly stated.
n v. *Barnum*, 8 How. 258 [49 U. S.
ed. 1070], the court said: "This Act
force for nearly forty years * * *
multitude of questions which have
ed, this court has never taken juris-
a question of fact. And in a question
quires the precise point to be stated,
he case is remanded without an an-

e thing is said in *Brobst* v. *Brobst*, 4
1 U. S. bk. 18, L. ed. 387], namely:
as been repeatedly determined that
ions of law upon distinct points in a
e brought to the court by certificate."
se of *U. S.* v. *Briggs*, 5 How. 208 [46
2, L. ed. 119], on a demurrer to in-
he judges certified a division of opin-
hether the demurrer was well taken;
the record showed the grounds of
the court said: "The question upon
disagreement took place is not certi-
difference of opinion is, indeed, stated
n upon the point whether the de-
uld be sustained. But such a ques-
rdly be called a point in the case
meaning of the Act of Congress, for
show whether the difficulty arose
onstruction of the Act of Congress
the indictment is founded, or upon
f proceeding adopted to inflict the
t, or upon any supposed defects in
ment. On the contrary, the whole
ered to be certified upon the indict-
urrer and joinder, leaving this court
the record and determine for itself
y sufficient objection can be made in
prosecution, and without informing
estions had been raised in the circuit
which they differed." Having said
uses of demurrer could not inform
the court on that subject, the *Chief Justice* added: "But we are bound to look to the certificate alone for the question which occurred and for the point on which they differed; and [702]
as this does not appear, we have no jurisdiction in the case."

A case very analogous to the one before us is that of *White* v. *Turk*, 12 Pet., 238 [37 U. S. bk. 9, L. ed. 1069], in which the court says: "The intention of Congress, in passing the Act under which this proceeding has taken place, was that a division of the judges of the circuit court, upon a single material point, in the progress of the cause, should be certified to the court for its opinion, and not the whole cause. * * * This certificate brings the whole cause before this court; and if we were to decide the question presented, it would in effect be the exercise of original rather than appellate jurisdiction."

To the same purport is the language of *Chief Justice* Marshall in *U. S.* v. *Bailey*, 9 Pet. 273 [34 U. S. bk. 9, L. ed. 126].

In the case of *Havemeyer* v. *Iowa Co.* 3 Wall. 294 [70 U. S. bk. 18, L. ed. 38], the point is fully considered. See also *Dennistoun* v. *Stewart*, 18 How. 565 [59 U. S. bk. 15, L. ed. 489]; *Sadler* v. *Hoover*, 7 How. 646 [48 U. S. bk. 12, L. ed. 855].

Applying these principles to the case before us, we think it must be dismissed.

The record shows a finding of facts upon the whole case as it was submitted to the court without a jury.

This finding is stated to be made under the laws of Kansas in such cases, and not under the Act of Congress concerning a review when a jury is waived, nor under the Act concerning differences of opinion between the judges to be certified to this court. The finding is, in fact, nothing but a recital of the evidence on which the presiding justice rendered judgment in favor of plaintiff. They number eleven separate findings of fact, and were excepted to by counsel; and exception was taken to the evidence received to support them.

This is accompanied by the following certificate:

"Be it remembered, that upon the trial of this action upon issue joined upon petition of plaintiff, answer of defendant, and reply of plaintiff, the cause having been duly heard and taken under advisement by the court, was considered by said two judges; and thereupon the said two judges were divided in opinion upon questions of interest and importance arising upon the conclusions of fact found and stated by the court upon the said trial, viz:

1. Had the defendant, as such City, power to issue such bonds for the said purpose in the [703]
original issue thereof, 1872? And did such want of power or such power appear upon the face thereof?

2. Did defendant issue the said bonds sued on?

3. If issued by defendant, had defendant power, as such City, to issue such bonds sued on for the said purpose therein expressed? And did such want of power, if existing, appear upon the face of such bonds?

4. If such bonds sued on were issued by defendant and disposed of in open market for value, without other notice to purchasers than such as all persons were bound to take from

the public character thereof, is the defendant estopped from denying its liability thereon to plaintiff?

5. Upon the conclusions of fact so found and stated upon the trial of this action, is the plaintiff entitled to judgment for said amount stated, the said circuit judge being of opinion that such questions should be determined in favor of the plaintiff and judgment rendered in his favor for the said amount stated, and the said district judge differing therefrom?

And judgment having been ordered in favor of plaintiff, and defendant having duly excepted thereto:

It is now here ordered that the said questions as above stated and upon which the said judges were divided in opinion, as aforesaid, that same shall be forthwith stated under the direction of said judges and certified and entered of record in said cause for writ of error to the Supreme Court of the United States, and which is now accordingly done in open court at said term thereof; and writ of error from such judgment is now allowed to said defendant, and bond fixed therefor to operate as *supersedeas* in the sum of $2,000.

Done and certified this 3d day of March, A. D. 1885, in open court."

We do not see that any distinct question of law is stated on which the judges differed. In [704] every instance it is what inference should be drawn from the facts found in the case, or rather from the evidence.

Take the first question. Does it refer to want of legislative action in regard to the power, or to want of constitutional power, in the Legislature? Or, does it refer to the want of proper action by the town authorities, or to want of the recital of their action in the face of the bond?

As to the second question, it appears to present a simple question of fact as to the actual issue of the bonds by the defendant. The third is very much like the first.

The fourth and fifth are still less presentations of any distinct propositions of law, but are mixed propositions of law and fact, in regard to which the court cannot know precisely where the division of opinion arose on a question of law alone.

And finally, it is very clear that the whole case has been sent here for us to decide, with the aid of a few suggestions from the circuit judges, of the difficulties they have found in doing so.

It presents nothing like as clear a case as that of a demurrer to an indictment, which demurrer recited the grounds on which it was made, but which this court held presented no statement of the question of *law* on which the judges differed. *U. S.* v. *Briggs*, 5 How. 208 [46 U. S. bk. 12, L. ed. 119].

We repeat that this procedure is not intended to enable the parties in the circuit court to bring up the entire case to be retried here. It is meant to meet a case where, two judges sitting, a clear and distinct proposition of law material to the decision of the case arises, on which, differing, they may make such a certificate as will enable this court to decide that question. If in reality more than one such question occurs, they may be embraced in the certificate; but where it is apparent that the whole case is presented to this court fo
propositions of fact an
not be entertained.

Such a case is this, a
missed.

True copy. Test:
James H. McKenne

JOSEPH REYNOL
MORRISSEY,
v
IRON SILVER MI

(See S. C. Repor

Placer mine claim—pate
within boundaries of
vein or lode remains i
patentee without title
in peaceable possession

*1. In procuring a pater
under section 2333 of the
the claimant is also in pos
included within the boun
the patent shall cover bot
and pays $5 per acre for
side of his vein, and $2.50
der of his placer claim.

2. Where no such vein c
the patent for a placer c
veins or lodes within its b
afterwards found to exist

3. But where a vein or lo
the surface included in s
claimant's possession and
claim on which the paten
vein or lode remains in
previously conveyed to s
not pass to the patentee,
interest in such vein or lo

4. The title remaining in
veins thus known to exist
ferred to in the patent, the
have no right to dispossess
possession of such vein,
any title or not.

5. In such case the rule
of ejectment, and to all a
sion of real estate applies,
iff can only recover on
title, and not on the weak

[No.

Submitted Jan. 4, 1886.

IN ERROR to the Circ
States for the District
The case is stated by

Messrs. **T. M. Patte**
and **R. S. Morrison,**

Messrs. **Hugh Butle**
for defendant in error.

Mr. Justice **Miller** d
the court:

This is a writ of error t
the District of Colorado,
review a judgment of th
to recover possession of
of mineral deposit.

The plaintiff below, t
Company, alleged that
$193\frac{43}{160}$ acres of land, con
States by patent to its gr
cover of defendants a pa
tented. It is described in
land and a mining clai

Head notes by *Mr. Justic*

tiff claims, which was introduced in urports to be for placer mines; and pages of printed matter to describe , distances and corners. As the law rmit any one claim to cover more y acres in locating placer mining obvious that under the ruling of n *Smelting Co.* v. *Kemp*, 104 U. S. , L. ed. 875], a number of these ounting at least to ten, have been d into one patent, which was issued d Moyer, the patentees.

ndants asserted a right to the vein n which they were working under called the Crown Point and Pinnacle ch were older than that of plaintiff. ts also set out another defense in the anguage:

the time of the survey, entry and f the said Wells and Moyer placer rtain lode, vein or deposit of quartz ck in place carrying carbonates of ver bearing ore, and of great value, Pinnacle lode, and a certain lode, osit carrying like minerals of great known and claimed to exist within ries and underneath the surface of claim, survey lot No. 281; and that t such vein or veins were claimed did exist as aforesaid within said as known to the patentees of said the times hereinbefore mentioned, the application for patent for said n the said vein or veins so known re not included and were, in the pa- upon such application, expressly ex- efrom. And further; in the said pa- expressly and in terms reserved that s in and by such patent conveyed the proprietor of any such vein or rtz or other rock in place bearing ore as aforesaid, be entered for the extracting and removing the ore lode, vein or deposit, should the y part thereof be found to penetrate, ass through or dip into the premises tent granted."

was tried by a jury, and a verdict r plaintiff, under a charge from the h required such a verdict at their

here must be decided on the cor- the action of the court in giving , and in refusing to give instructions efendants.

charge of the court, which was duly , is as follows:

idence tends to prove that the lode rsy was known to Wells and Moyer, the United States, at the time they ation for the placer patent, under tiff claims title; also that William , one of the grantees of Wells and a grantor of the plaintiff, knew of e of the lode at the time applica- de by Wells and Moyer for the placer cured such application to be made to acquiring title to himself and es to the territory described, and ith a view and intention to acquire lode now in dispute in this action. the placer patent to have been obtained with knowledge and intention on the part of the patentees, as stated, the question is, whether any right or interest in the lode in controversy was conveyed by the patent. That is a question of some difficulty when presented by or on behalf of one who has shown some right or interest in the lode, or an intention to claim the same according to local law and the Acts of Congress. But here the defendants show no right or title in the lode at the place in controversy. They assume the right to follow the lode on its dip without the side line of the Pinnacle location, and under the Wells and Moyer placer location. To that it is essential that they have the top and apex of the lode within their location in the general direction of the location. A small segment of the top and apex of the lode is shown within the Crown Point location, but it extends, not with the length of the location but across it, so as to convert the side lines of the claim into the end lines, and to limit the direction in which it may be pursued to the space inclosed by those lines. The place in controversy is not within the side lines of either of defendants' locations, nor within the extensions of those lines. No other ground is perceived, upon which defendants may assert title or right of possession to the place in controversy, and therefore they are to be regarded as naked intruders; and as to such intruders, the plaintiffs' placer title may give a right of possession and recovery. The jury is advised to find for plaintiff, with the value of the ore removed from the placer ground by defendants."

This charge was delivered to the jury after a refusal to give any of the following instructions asked by defendants:

"1. A patent to a placer claim does not pass title to any vein or lode then known or claimed to exist.

2. If the Pinnacle and Crown Point lodes, or their vein upon which it is alleged defendants have followed into the ground of the Wells and Moyer placer, were known at time of issue of Wells and Moyer patent, then the vein was not granted in (or was excepted from) the Wells and Moyer patent, and the plaintiff is not entitled to recover. [691]

4. The plaintiff must recover on strength of his own title. If the vein is not conveyed to plaintiff by the placer patent under which it claims, then it makes no difference whether defendants have any title or not; the plaintiff cannot recover on the weakness of defendant's title.

5. If the jury believe from the evidence that the plaintiff's grantors, at the time of the locations and entry of the Wells and Moyer placer claim, knew or had reason to presume that underneath it was a deposit or vein of ore carrying precious metals in rock in place, then the same was specially excepted from the grant of their patent, and never was the property of the plaintiff or any of its grantors, having been excluded from the grant of the Government. No trespass can be committed thereon as against the plaintiff, and it cannot recover; and if the vein upon which the trespass is alleged was the vein so known, then plaintiff cannot recover.

6. It was not the intention of the Federal Government to permit owners of placer mining

[illegible] lode in veins of [illegible] the same in applica- [illegible] placer claims unless [illegible] vein in such appli- [illegible] patent are to be [illegible] against the patentees, [illegible] not only lodes [illegible] to exist within [illegible] the patent; if, there- [illegible] evidence that the lode [illegible] of the Wells and [illegible] known, or upon valid [illegible] was claimed to exist [illegible] application, entry or date of [illegible] is the property of the [illegible] government is immaterial; [illegible] has been no ousting or [illegible] as to its property, and [illegible] defendants."

[illegible] between the instruc- [illegible] and those given by the [illegible] easily discerned, and pre- [illegible] in the case.

[illegible] presented by the fourth [illegible] requests, namely: "that [illegible] recover on the strength of his own title." This is the fundamental principle [illegible] of ejectment or actions to [illegible] possession of real estate rest. Even [illegible] plaintiff recovers on proof of priority [illegible] because, in the absence of [illegible] this is evidence of a [illegible] in plaintiff. If there is any exception to [illegible] in an action to recover possession [illegible] plaintiff must recover on the strength [illegible] and that the defendant in pos- [illegible] may truthfully say, Until you show *some* [illegible] you have no right to disturb me—it has [illegible] to us.

The remainder of this fourth prayer was a [illegible] of the same rule as applied to [illegible] "If the vein is not conveyed [illegible] by the placer patent under which [illegible] claims, then it makes no difference whether [illegible] have any title or not; the plaintiff [illegible] on the weakness of defendant's [illegible]

There is not in the record any pretense or claim of title in plaintiff, except that growing out of the placer patent to Wells and Moyer. If that gave no title to the vein in controversy, plaintiff had none. There is no assertion by them of prior possession, discovery or claim to that vein, nor of any other right to it than that it is found beneath the surface of this placer patent.

While the court refused to give this instruction, he did instruct the jury that defendants were naked trespassers; and added that, "as to such intruders the plaintiff's placer title might give a right of possession and recovery." He had previously said that this would be a ques- [illegible] of some difficulty in a case where defend- [illegible] had shown some right or interest in the [illegible] or an intention to claim the same accord- [illegible] to local laws and the Acts of Congress. If [illegible] any difference in defendant's right as [illegible] the placer patent, then it appears to us [illegible] show an intention to claim the [illegible] according to local laws and the [illegible] of Congress; "for they were working [illegible] the Crown Point and Pinnacle claims [illegible] were legally established, and were pur- [illegible]

suing the vein on whic
cated. But the court
showed that they we
passed out of the end
of the side lines. It w
session as this ought t
them to put the plainti

It is fair, however,
effect affirms the doctr
placer mine (this paten
lode under its surface,
original claimant or pa
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tioned in the patent or
against one not having

The court says the
that the lode in cont
Wells and Moyer, gran
at the time they made
patent under which pl
that Stevens, a grantee
grantor of plaintiff, k
the lode at the time th
for the patent, and pro
be made, with the inte
the lode now in disput

Yet, while the lode
patent, the court held
this suit the title to it
strument.

It appears to us tha
opposed to the policy
in the different rules w
ing titles to placer min
fissure mines; to the
statute; and to the rese
self.

It is not necessary to
amination of chapter 6
concerning the public
ence. An Act of Cong
the foundation of the
the citizen acquires rig
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and its provisions are f
2336 inclusive.

These sections, up
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veins; and among oth
amount or quantity of
quired under any one
which is 1,500 feet alon
in width on each side o
limitations under Acts o
and the mining rules of
for this when a patent i
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Placer claims, beginn
are declared to include
eral deposits except ve
rock in place, and may
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claims. The surveys f
as near as may be to Con
may include in each cla
perficial area, but when

conform to legal subdivision, it may
s upon unsurveyed lands.
st important part of the law in refer-
e matter in hand is found in section
e Revised Statutes, which is as fol-

333. Where the same person, associa-
rporation is in possession of a placer
d also a vein or lode included within
daries thereof, application shall be
a patent for the placer claim, with the
that it includes such vein or lode, and
se a patent shall issue for the placer
bject to the provisions of this chapter
such vein or lode, upon the payment
acre for such vein or lode claim, and
e feet of surface on each side thereof.
inder of the placer claim, or any pla-
not embracing any vein or lode claim,
aid for at the rate of $2.50 per acre,
with all costs of proceedings; and
vein or lode such as is described in
20 is known to exist within the boun-
a placer claim, an application for a
such placer claim which does not in-
application for the vein or lode claim
onstrued as a conclusive declaration
aimant of the placer claim has no right
sion of the vein or lode claim; but
existence of the vein or lode in a placer
not known, a patent for the placer
ll convey all valuable mineral and
osits within the boundaries thereof."
arying provisions of the Act of Con-
egards the two classes of mineral de-
l their surroundings are founded on
known difference in their character.
, lodes or fissues mentioned in sec-
are found in the surrounding rock,
escribed and defined in the case of the
r Co. v. *Cheesman*, [*ante*, 712] recently
n this court. Placer mines, though
e statute to include all other deposits
l matter, are those in which this min-
nerally found in the softer material
ers the earth's surface, and not among
beneath. The one is only made avail-
ollowing this vein into its stony case
wels of the earth, detaching and
t to the surface, and subjecting it to
melting and other processes by which
us metal is separated from the ore of
s a part. In the other, the more usual
take the soft earthy matter in which
les of mineral are loosely mingled and
on separate the one from the other.
clear that Congress considered that
f mineral-bearing quartz was more
han the surface or placer deposit; and
ngly, when a patent was asked, fixed
of the former at $5 and of the latter
er acre, as represented by the super-
of the survey. It also for the
on limited the quantity of the former,
r single claimant could obtain from
ment in some cases, to less than h[illegible]
e could obtain of the latter.
s not done, as suggested by counsel, in
gard to the revenue of the government
source, but to prevent too much of
ublic mineral falling into the hands
ccessful explorer, to the exclusion of

But experience had shown that both of these classes of mineral deposits might be found within the same survey of superficial area; and section 2333 makes specific provision for such a case. There was no difficulty in case of a patent for a lode or vein, for this necessarily must include both the surface by which it was measured and the vein beneath it. But in the case of a placer mine whose deposits were superficial, there might be under it a vein of far more value than the twenty acres of surface mineral. [696]

A man cognizant of the existence of such a vein who could, if he established his right to it as a lode, secure only a limited part of it, if he could cover it with a placer claim, would thereby increase the quantity of this vein over what he could get by making a lode claim, in double the amount; and in some cases, regulated by state or local mining laws, he might quadruple it. Congress also had to deal with the possibility that a vein might be discovered under the surface of a placer claim after the claimant had received his patent.

What Congress did and intended to do in the presence of these suggestions is, we think, very plain. It made provision for three distinct classes of cases:

1. When the applicant for a placer patent is at the time in possession of a vein or lode included within the boundaries of his placer claim, he shall state that fact; and on payment of the sum required for a vein claim and twenty-five feet on each side of it, at $5 per acre, and $2.50 for the remainder of the placer claim, his patent shall cover both.

2. It enacts that where no such vein or lode is known to exist at the time the patent is applied for, the patent for a placer claim shall carry all valuable mineral and other deposits which may be found within the boundaries thereof.

3. But in case where the applicant for the placer patent is not in possession of such lode or vein within the boundaries of his claim, but such a vein is *known to exist*, and it is not referred to or mentioned in the claim or patent, then the *application shall be construed as a conclusive declaration that the claimant of the placer mine has no right to the possession of the vein or lode claim.*

It is this latter class of cases to which the one before us belongs.

It may not be easy to define the words "*known to exist*" in this Act. Whether this knowledge must be traced to the applicant for the patent, or whether it is sufficient that it was generally known, and what kind of evidence is necessary to prove this knowledge, we need not here inquire. It is perhaps better that these questions should be decided as they arise. They do not arise here, because the court took all this kind of evidence from the jury on the ground that defendants were trespassers. [697]

It said, in the charge, not only was there evidence that the vein was known to exist when the application was made by Wells and Moyer, but that *they* knew it, and that one of the parties in interest, Stevens, knew it and procured the application to be made for the placer patent with the intent to secure this lode. There was here no question of sufficiency or character of the testimony as to the knowledge of the ex-

istence of this vein, but the jury was told that it was all immaterial because in any event the patent carried the lode as against the defendants.

The patent itself declares that it is subject to the following conditions:

1. That it is restricted to any lodes, veins or other mineral-bearing quartz, which *are not claimed or known to exist* at the date of the patent.

2. That should any such vein or lode be claimed or known to exist within the described premises at the date of the patent, the same is expressly excluded from it.

It is said that this part of the patent is void because there was no law which authorized its insertion and because it is in conflict with the rights of the claimant of a placer mine under the Acts of Congress.

Without deciding on the effect of the acceptance without protest of a patent with such exceptions in the granting clause, where their insertion is the voluntary act of the officers who execute the instrument, it is sufficient to say that these conditions but give expression to the intent of the statute.

We are of opinion that Congress meant that lodes and veins known to exist when the patent was asked for should be excluded from the grant as much as if they were described in clear terms. It was not intended to remit the question of their title to be raised by some one who had or might get a better title, but to assert that no title passed by the patent in such case from the United States. It remains in the United States at the time of the issuing of the patent, and in such case it does not pass to the patentee. He takes his surface land and his placer mine, and such lodes or veins of mineral matter within it as were unknown, but to such as *were known* to exist he gets by that patent no right whatever. The title remaining in his grantor, the United States, to this vein, the existence of which was known, he has no such interest in it as authorizes him to disturb any one else in the peaceable possession and mining of that vein. When it is once shown that the vein was *known to exist* at the time he acquired title to the placer, it is shown that he acquired no title or interest in that vein by his patent.

[698]

Whether the defenda
mere trespassers, it is ce
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against one who has no
had any.

*The judgment of the Ci
and the case remanded to t
tions to set aside the ver
trial.*

Mr. Chief Justice **Wa**
I am unable to agree t
facts briefly stated are th
pany holds title under
claim. Within the bound
located on the surface an
downwards, is a vein or
this vein or lode was kn
under which the Mining
issued, but it had not the
located as a vein or lode
nolds nor Morrissey has
upon the lode within t
placer claim. They are
wrongfully and without
worked from an adjoin
surface of the placer
Company and taken pos
in the lode. Under th
seems to me the Mining
ter right. The question
Company owns the lode
has the right to take m
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better right to the posses
provision of section 23
which the Company hold
the possession of any vei
the boundaries of the pla
no such *claim* exists. T
but no one has either cla
claim it. Quite different
if Reynolds or Morrisse
locate a lode claim within
placer patent, upon a lod
the patent was applied fo
charge of the court was
ment should be affirmed.

True copies. Test:
James H. McKenney,

END OF VOL. 116.

NOTES

ON THE

NITED STATES REPORTS.

CXVI UNITED STATES.

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pproved in Wisconsin v. Pelican Ins. Co., 127 U. S. 292, 32 L. , 8 S. Ct. 137, holding Federal Supreme Court has not original isdiction of action by State on judgment recovered against for n corporation; Merritt v. American Steel-Barge Co., 75 Fed. 818, U. S. App. 127, holding Federal court can review judgment to ermine whether full force has been given to judgment of sister te; Tourigny v. Houle, 88 Me. 409, 34 Atl. 159, holding record foreign judgment sufficient to sustain action of debt; Herndon Vick, 18 Tex. Civ. App. 585, 45 S. W. 853, applying rule to for- n judgment of lunacy; Renaud v. Abbott, 116 U. S. 287, 29 L. . 6 S. Ct. 1197, Holt v. Johnson, 50 Mo. App. 377, Griggs v. cker, 87 Wis. 317, 58 N. W. 398, all enforcing judgment of an- er State.

Distinguished in Crippen v. Laighton, 69 N. H. 548, 44 Atl. 541, ding statutory remedy given by one State against stockholders, enforceable in another; McCreery v. Davis, 44 S. C. 211, 51 Am. Rep. 805, 22 S. E. 184, 28 L. R. A. 661, holding foreign divorce er published summons, not binding.

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Cited in Renaud v. Abbott, 116 U. S. 289, 29 L. 632, 6 S. Ct. 1198, plying rule and enforcing judgment; Allnut v. Lancaster, 76 Fed. . holding court may proceed to trial without defendants not ved, under Federal statute.

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Craven v. Bates, etc., Co., 96 Ga. 80, 23 S. E. 208, refusi
interest laws of another State.

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Distinguished in McCreery v. Davis, 44 S. C. 212, 51 A
806, 22 S. E. 184, 28 L. R. A. 661, holding foreign di
published summons, not binding.

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U. S. 445, 32 L. 793, 9 S. Ct. 473, refusing to notice law of Great Britain since Declaration of Independence; Lloyd v. Matthews, 155 U. S. 227, 39 L. 130, 15 S. Ct. 72, refusing to notice effect of insolvent law of another State not proved in State court; Mills v. Green, 159 U. S. 657, 40 L. 295, 16 S. Ct. 134, Federal court noticing day of election of members of legislature, its sittings, acts, etc.; Loree v. Abner, 57 Fed. 164, 6 U. S. App. 649, Federal court noticing statutes of States in force before adoption of United States Constitution; L'Engle v. Gates, 74 Fed. 514, Federal court noticing attachment laws of State outside its district.

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Distinguished in Davidow v. Pennsylvania R. Co., 85 Fed. 944, holding allegation of effect of State law not admitted by demurrer in Federal suit.

116 U. S. 8-10, 29 L. 557, BRIDGEWATER IRON CO. v. LISSBERGER.

Corporations.— Unrecorded stock transfer is valid against attaching creditor with notice, p. 10.

Approved in Bangor Electric-Light, etc., Co. v. Robinson, 52 Fed. 521, holding ownership of indorsed stock certificate not deprived by its theft and transfer to bona fide purchaser; Tombler v. Ice Co., 17 Tex. Civ. App. 601, 43 S. W. 897, holding unregistered indorsee of stock certificate protected against attachment by creditor of indorser. See note in 57 Am. St. Rep. 392.

116 U. S. 11-12, 29 L. 550, MARVEL v. MERRITT.

Statutes.— Interpretation of non-technical words is within judicial knowledge, and, therefore, matter of law, p. 12.

Approved in Lutz v. Magone, 153 U. S. 108, 38 L. 653, 14 S. Ct. 779, Sonn v. Magone, 159 U. S. 421, 40 L. 204, 16 S. Ct. 69, Weilbacher v. Merritt, 37 Fed. 87, and Nix v. Hedden, 39 Fed. 110, all applying rule in construing tariff acts; United States v. Thompson, 41 Fed. 29, applying rule in construing immigration act; Hanifen v. Godshalk, 84 Fed. 653, 55 U. S. App. 477, applying rule in interpreting patent.

Customs duties.— Duty on iron ore, under act of 1874, stated, p. 12.

116 U. S. 13-21, 29 L. 554, SAXONVILLE MILLS v. RUSSELL.

Customs duties.— Valuation of wools, under acts of 1867, 1872, is determinable under proviso of act of 1865, p. 20.

Customs duties.— In construing altered tariff provisions, no disturbance in general system must be allowed unless clearly intended, p. 21.

Approved in United States v. Sapinkow, 90 Fed. 659, rule in construing internal revenue enactments; Dieckerhof ler, 93 Fed. 653, applying rule in determining duty on h goods.

116 U. S. 22–28, 29 L. 552, MILLER v. FOREE.

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Patents.— Application of old process to similar subject, change in manner or substantial result, is not patentable, p

Approved in Ansonia Co. v. Electrical Supply Co., 144 36 L. 329, 12 S. Ct. 604, holding patent for insulated elec ductor, void; Lovell Mfg. Co. v. Cary, 147 U. S. 636, 37 L. 3 Ct. 477, holding patent for improved method of tempering void; Grant v. Walter, 148 U. S. 553, 37 L. 556, 13 S. Ct. 70 ing S. C., 38 Fed. 596, holding patent for improvement in thread, void; Holmes Electric Co. v. Metropolitan Burgl Co., 33 Fed. 258, holding patent for electric safe-lining, vo cock, etc., Co. v. Pioneer Iron Works, 34 Fed. 339, holdin for improved steam-generators, void; Stearns v. Russell, 230, 54 U. S. App. 617, holding patent for pill-dipping devi

116 U. S. 28–33, 29 L. 542, UTAH, ETC., RY. v. FISHER.

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Approved in Thomas v. Gay, 169 U. S. 277, 42 L. 745, 345, holding territorial tax on non-resident's cattle grazin dian reservation, valid; Wau-pe-Man-qua v. Aldrich, 28 holding land held by Miami Indians, exempt from taxati treaties; Truscott v. Hurlbut Land, etc., Co., 73 Fed. 62, App. 248, holding Crow Indian reservation within bounds jurisdiction of Montana; State v. Denoyer, 6 N. Dak. 596, 1017, holding Indians living on lands allotted to them in s citizens of United States and qualified electors of North Fremont County v. Moore, 3 Wyo. 201, 19 Pac. 438, holdi kept by post-trader on Indian reservation, not taxable by Torrey v. Baldwin, 3 Wyo. 435, 436, 26 Pac. 910, holding Indian reservation included within territory.

Railroad through Indian reservation within territory, ceded by Indians to United States, is taxable by territory,

Approved in Maricopa, etc., R. R. v. Arizona, 156 U. S. 3 449, 15 S. Ct. 393, applying rule; Truscott v. Hurlbut La Co., 73 Fed. 65, 44 U. S. App. 248, Torrey v. Baldwin, 3 W 439, 26 Pac. 911, and Thomas v. Gay, 169 U. S. 273, 275, 4 18 S. Ct. 343, 344, all holding territorial tax on non-residen grazing on Indian reservation, valid.

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Distinguished in Brown v. Guarantee Trust Co., 128 U. S. 414, L. 471, 9 S. Ct. 130, enforcing contract for sale of land, where e was not of essence of contract; Cheney v. Libby, 134 U. S. 77, L. 823, 10 S. Ct. 501, enforcing sale of land where delay was not reasonable.

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Vendor and purchaser.—Terms on which wife's heirs might en- re her rights in lands sold without authority by husband, stated, 41, 42.

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Approved in Marbell v. Kasson, 31 Fed. 106, The Blue Lines, Fed. 122, and Blythe v. Hinckley, 40 Fed. 220, all applying rule; Diego Flume Co. v. Gentley, 50 Fed. 167, 41 U. S. App. 141, ing cross-bill containing all essentials of original bill, not of- ed by dismissal of original bill.

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Approved in United States v. New York Indians, 173 U. S. Ct. 491, Merrill v. National Bank of Jacksonville, 78 41 U. S. App. 645, Krantz v. Rio Grande Ry., 13 Utah, 624, 32 L. R. A. 829, and Patten Paper Co. v. Green Bay, e Co., 93 Wis. 290, 66 N. W. 602, all applying rule; Wat Lemon, 3 Wash. Ter. 17, 13 Pac. 905, holding non-compli mandate corrigible by further mandate and not by appeal.

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116 U. S. 48–53, 29 L. 570, LEE v. JOHNSON.

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Approved in Knight v. United States Land Assn., 142 35 L. 981, 12 S. Ct. 264, holding patent conclusive again quent claimants; Southern Pac. R. Co. v. United States, 6 29 U. S. App. 669, maintaining suit by United States to title to land patented to railroad.

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6 U. S. 54–55, 29 L. 535, SIMMERMAN v. NEBRASKA.

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Approved in Fowler v. Lamson, 164 U. S. 255, 41 L. 425, 17 S. . 113, and Chappell Chemical Co. v. Sulphur Mines Co., 172 U. 471, 19 S. Ct. 267, both applying rule.

6 U. S. 55–80, 29 L. 561, CANNON v. UNITED STATES.

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Approved in Cook v. Hart, 146 U. S. 193, 36 L. 939, 13 S. Ct. 43, refusing habeas corpus to prisoner extradited from one State to another; In re Cook, 49 Fed. 838, and In re White, 55 Fed. 57, 58, 14 U. S. App. 87, affirming S. C., 45 Fed. 240, all refusing habeas corpus to prisoner duly charged with crime in another State; Ex parte Hart, 59 Fed. 895, holding information charging crime, sufficient on interstate extradition; Barranger v. Baum, 103 Ga. 474, 68 Am. St. Rep. 121, 30 S. E. 528, State v. Goss, 66 Minn. 293, 68 N. W. 1090, In re Van Scieever, 42 Neb. 780, 47 Am. St. Rep. 734, 60 N. W. 1039, and Webb v. York, 79 Fed. 622, 49 U. S. App. 173, all holding technical defects will not defeat extradition, where indictment substantially describes crime; Ex parte Dawson, 83 Fed. 308, 49 U. S. App. 678, refusing habeas corpus to prisoner held under sufficient extradition warrant. See 68 Am. St. Rep. 131, note.

Extradition.— Question, if whether fugitive is properly charged with crime, is of law, examinable on habeas corpus, p. 95.

Approved in Ex parte Spears, 88 Cal. 641, 22 Am. St. Rep. 342, 26 Pac. 609, discharging fugitive, where affidavit charging crime is made on belief; Barranger v. Baum, 103 Ga. 475, 68 Am. St. Rep. 122, 30 S. E. 528, refusing to discharge fugitive substantially charged with crime.

Extradition.— Whether accused is fugitive is question of fact, and warrant sufficient prima facie proof, p. 95.

Approved in Whitten v. Tomlinson, 160 U. S. 245, 40 L. 413, 16 S. Ct. 303, Federal court refusing habeas corpus to State prisoner after extradition; Ex parte Brown, 28 Fed. 655, refusing habeas corpus to fugitive arrested by lawful stratagem; In re Keller, 36 Fed. 686, holding resident of State where found, if accused of crime in another State, may be extradited; In re Cook, 49 Fed. 839, 841, refusing habeas corpus to prisoner, after delivery to demanding State; In re Huse, 79 Fed. 307, 48 U. S. App. 323, refusing habeas corpus to insane person, confined under State authority; Ex parte Devine, 74 Miss. 718, 22 So. 3, In re Sylvester, — Wash. —, 57 Pac. 831, and In re Bloch, 87 Fed. 983, all applying rule, and refusing habeas corpus to prisoner held under extradition warrant; Eaton v. West Virginia, 91 Fed. 763, 61 U. S. App. 672, refusing habeas corpus after extradition, trial and conviction.

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Distinguished in Sherwood v. Roundtree, 32 Fed. 120, 121, 122, holding retention by agent of unlawful commission, which was divided with principal, usury; Brown v. Archer, 62 Mo. App. 288, Brown v. Brown, 38 S. C. 184, 17 S. E. 455, Loan Agency v. Hunter, 13 Tex. Civ. App. 408, 35 S. W. 402, and Scottish Mtge. Co. of New Mexico v. McBroom, 6 N. Mex. 577, 30 Pac. 860, all holding loan usurious, where unlawful commissions were exacted by agent, with principal's knowledge.

Usury.— Contract in consideration of usurious contract, but with third party, and not an evasion, is valid, p. 108.

Approved in Brown v. Cass Co. Bank, 86 Iowa, 535, 53 N. W. 412, holding note given for money advanced to pay usurious loan, valid.

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Statutes.— Presumably, language with settled judicial meaning, is used by Congress in that sense, p. 106.

Approved in Logan v. United States, 144 U. S. 301, 36 L. 442, 12 S. Ct. 629, applying rule in construing statute regulating witnesses; United States v. Mexican Ry., 40 Fed. 773, holding District Court has jurisdiction of suit, to recover statutory penalty for importing contract laborers.

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116 U. S. 108-113, 29 L. 583, COYLE v. DAVIS.

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Cal. 58, 31 Am. St. Rep. 177, 30 Pac. 1021, all applying rule
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116 U. S. 113-131, 29 L. 575, LIVERPOOL, ETC., IN
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Approved in Grayson v. Lynch, 163 U. S. 479, 41 L. 234,
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Insurance.— Violation of prohibition of a policy, by
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Approved in Gunther v. Liverpool Ins. Co., 134 U. S. 116, 33 L. 860, 10 S. Ct. 450, refusing recovery where assured's lessee violated policy by keeping oil and filling lamps at night; Insurance Co. v. Shawne Co., 54 Kan. 737, 45 Am. St. Rep. 307, 39 Pac. 699, La Force v. Williams City Ins. Co., 43 Mo. App. 533, and Fisher v. London, etc., Ins. Co., 83 Fed. 810, all refusing recovery where gasoline was kept, contrary to policy; Concordia Fire Ins. Co. v. Johnson, 4 Kan. App. 13, 45 Pac. 724, holding policy avoided by prohibited use of premises by tenant; dissenting opinion in Smith v. German Ins. Co., 107 Mich. 298, 299, 65 N. W. 246, 30 L. R. A. 378, majority holding prohibition against keeping gasoline, not violated by temporary use, for making repairs. See 66 Am. St. Rep. 696, note.

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Approved in Gunther v. Liverpool Ins. Co., 134 U. S. 112, 115, 33 L. 859, 860, 10 S. Ct. 448, 449, refusing recovery where oil was kept, and lamps filled at night, where only filling in daytime was permitted.

116 U. S. 131-135, 29 L. 587, FISK v. JEFFERSON POLICE JURY.

Office.— Elective office is not a contract preventing its abolition, diminution, or change, p. 133.

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Constitutional law.— Diminution in amount payable to public officer, for past services under implied contract, is void, p. 134.

Constitutional law.— Both express and implied contracts are protected by contract obligation clause, p. 134.

Approved in St. Louis, etc., Ry. v. Alexander, 49 Ark. 194, 4 S. W. 755, holding repeal of statute allowing recovery of taxes paid at tax sale, cannot affect vested right; State v. Helms, 136 Ind. 133, 35 N. E. 897, holding statute affecting remedy of contract, void; Leavitt v. Lovering, 64 N. H. 609, 15 Atl. 415, 1 L. R. A. 59, and Danforth v. Robinson, 80 Me. 472, 6 Am. St. Rep. 228, 15 Atl. 29, both holding liability under implied contract, not affected by subsequent insolvent law; Seton v. Hoyt, 34 Or. 279, 55 Pac. 970, 43 L. R. A. 637, holding statute changing rate of interest cannot affect outstanding county warrants; dissenting opinion in Morley v. Lake Shore Ry., 146 U. S. 174, 36 L. 931, 13 S. Ct. 59, majority holding judgment not a contract, impaired by statute reducing interest.

Distinguished in Ladd v. City of Portland, 32 Or. 275, 67 Am. St. Rep. 528, 51 Pac. 655, holding provision of charter that street may be improved once at property-owner's expense, and not thereafter, not a contract prohibited by Constitution.

116 U. S. 135–137, 29 L. 588, STEWART v. JEFFERSON
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Not cited.

116 U. S. 138–142, 29 L. 589, SAN MATEO CO. v. SO
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sued upon is unconditionally paid, pp. 141, 142.

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L. 749, 13 S. Ct. 878, and Little v. Bowers, 134 U. S. 558, 3
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etc., R. R. v. Blanton, 80 Ga. 566, 6 S. E. 586, dismissi
from award against railroad to landowner, where amount
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Distinguished in State v. Philips, 97 Mo. 338, 10 S.
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Miscellaneous.— Wadsworth v. Union Pac. Ry., 18 Col
Am. St. Rep. 320, 33 Pac. 520, not in point.

116 U. S. 142–145, 29 L. 581, HEWITT v. FILBERT.

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93 Fed. 579, applying rule in Circuit Court of Appeals; Guarantee Trust, etc., Co. v. Buddington, 23 Fla. 528, 2 So. 891, holding, where citation has been properly issued and served on some parties, new citation may be issued for others; Sammis v. Wightman, 25 Fla. 555, 6 So. 175, arguendo.

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Approved in Brown v. McConnell, 124 U. S. 491, 31 L. 497, 8 S. Ct. 561, holding signing of citation, without acceptance of security, gives jurisdiction here, and security may be given here; Altenberg v. Grant, 33 Fed. 982, 54 U. S. App. 315, holding appellate court may issue alias citation, after writ of error has been properly docketed.

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116 U. S. 145–154, 29 L. 572, McCLURE v. UNITED STATES.

Courts.— Statutory authority to sue in Court of Claims is subject to ordinary rules and facts found are conclusive, pp. 148–153.

Approved in United States v. Cumming, 130 U. S. 455, 32 L. 1031, 9 S. Ct. 584, statute allowing suit does not make government liable for torts of officers; Union Pac. Ry. v. United States, 116 U. S. 157, 29 L. 585, 6 S. Ct. 326, reaffirmed; Stone v. United States, 164 U. S. 382, 41 L. 478, 17 S. Ct. 71, determines all matters like the findings of jury; United States v. New York Indians, 173 U. S. 471, 19 S. Ct. 490, refusing to order further findings; Hathaway v. Cambridge Nat. Bank, 134 U. S. 498, 499, 33 L. 1006, 10 S. Ct. 610, and Williams v. United States, 137 U. S. 136, 34 L. 598, 11 S. Ct. 51, arguendo.

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Courts.— Facts found by Court of Claims are conclusive on appeal, only law being re-examinable, p. 157.

Approved in Hathaway v. Cambridge Nat. Bank, 134 U. S. 498, 33 L. 1006, 10 S. Ct. 610, applied on error to Circuit Court.

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116 U. S. 167–186, 29 L. 601, SMITH v. WHITNEY.

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Prohibition is matter of right, where court has no jurisdiction, and defendant no other remedy; its refusal error, p. 173.

Approved in State v. Williams, 48 Ark. 230, 2 S. W. 844, issuing prohibition against retrial, after final judgment.

Distinguished in In re Cooper, 143 U. S. 495, 36 L. 239, 12 S. Ct. 458, refusing prohibition where party has lost right of appeal through neglect; In re Rice, 155 U. S. 403, 39 L. 201, 15 S. Ct. 152, In re New York, etc., Steamship Co., 155 U. S. 531, 39 L. 249, 15 S. Ct. 186, People v. Cook Circuit Court, 169 Ill. 205, 48 N. E. 719, State v. Benton, 12 Mont. 73, 29 Pac. 427, Cereghio v. District Court, 8 Utah, 458, 32 Pac. 698, and In re Morrison, 147 U. S. 33, 37 L. 67, 13 S. Ct. 253, all refusing prohibition, where party had adequate remedy by appeal; State v. District Court, 22 Mont. 232, 56 Pac. 224, and In re Alix, 166 U. S. 138, 41 L. 949, 17 S. Ct. 522, both refusing prohibition where lack of jurisdiction is not clear; Lincoln, etc., Min. Co. v. District Court, 7 N. Mex. 495, 38 Pac. 583 (dissenting opinion in S. C., 7 N. Mex. 513, 38 Pac. 589), issuing prohibition without plea to jurisdiction, where court had no jurisdiction of original subject-matter; Harris v. Brooker, 8 Wash. 139, 35 Pac. 600, refusing writ, where no objection to jurisdiction was taken in lower court.

Prohibition is law remedy, and should issue from law side of court, having also equity powers, p. 174.

Prohibition is issuable only to restrain judicial functions, not to secretary of navy, convening court-martial, p. 176.

Approved in Speed v. Common Council, 98 Mich. 362, 39 Am. St. Rep. 556, 57 N. W. 407, 22 L. R. A. 843, issuing writ against city council attempting to remove counsellor without authority; State v. Keyes, 75 Wis. 299, 44 N. W. 16, refusing prohibition against judge compelling witness to answer in proceeding within his jurisdiction; In re Radl, 86 Wis. 646, 39 Am. St. Rep. 918, 57 N. W. 1105, refusing prohibition to test title of de facto judicial officer.

Prohibition.— When suit is by government, writ can go to court only, otherwise, if private plaintiff, p. 176.

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Approved in Swaim v. United States, 165 U. S. 555, 561, 41 L. 824, 826, 17 S. Ct. 449, 451, and United States v. Fletcher, 148 U. S. 92, 37 L. 380, 13 S. Ct. 555, both refusing to review action of court-martial having jurisdiction; Johnson v. Sayre, 158 U. S. 115, 118, 39 L. 917, 15 S. Ct. 776, 777, refusing to review decision of court-martial on habeas corpus proceedings; In re Zimmerman, 12 Sawy. 260, 268, 30 Fed. 178, 180, refusing habeas corpus to minor in army, awaiting trial by court-martial for desertion; In re Spencer, 40 Fed. 150, refusing habeas corpus to minor, tried by court-martial for desertion from army; United States v. Maney, 61 Fed. 141, refusing prohibition to restrain court-martial.

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lock, 165 U. S. 537, 41 L. 817, 17 S. Ct. 448, both hol
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Approved in M'Donald v. Seligman, 81 Fed. 757, Fe
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116 U. S. 198-200, 29 L. 598, DOE v. LARMORE.

Public lands.— Act of 1869, renewing railroad-aid la
Alabama, construed, p. 200.

Cited in Miller v. Swann, 150 U. S. 137, 37 L. 1030, 14 S. Ct. 54, dismissing for want of jurisdiction; Miller v. Swann, 89 Ala. 635, 7 So. 772, considering right of State in disposition of such lands.

116 U. S. 200-206, 29 L. 657, KINGS COUNTY SAV. INST. v. BLAIR.

Internal revenue.— No suit lies to recover taxes, unless claim is made to commissioner within two years, pp. 205, 206.

Approved in Sinking Fund of Louisville v. Buckner, 48 Fed. 535, strict compliance with terms of statute is necessary.

116 U. S. 207-212, 29 L. 598, BROWN v. GRANT.

States.— Donor of land to territory, for capitol, is not deprived of property, where so used only after admitted as State, p. 212.

States.— Unless Congress declares contra, all territory's property passes to State, upon admission, p. 212.

Not cited.

116 U. S. 213-218, 29 L. 608, FORD v. UNITED STATES.

United States.— Claims referred to Court of Claims by Congress, are subject to prescribed statute of limitations, p. 218.

Approved in Finn v. United States, 123 U. S. 231, 31 L. 130, 8 S. Ct. 85, court dismisses claim against United States of its own motion, when barred by limitations.

116 U. S. 219-226, 29 L. 612, MILWAUKEE v. KŒFFLER.

Injunction does not lie to restrain illegal tax on personalty, except in special cases, p. 226.

Approved in Pittsburgh, etc., Ry. v. Board of Public Works, 172 U. S. 37, 19 S. Ct. 92, refusing to enjoin tax, where there is an adequate remedy at law; De La Cuesta v. Insurance Co., 136 Pa. St. 665, appendix, applying rule in case of personal property; dissenting opinions in Pollock v. Farmers' Loan, etc., Co., 157 U. S. 611, 39 L. 830, 15 S. Ct. 701, majority holding corporation may be enjoined from payment of an illegal tax; Butler v. Ellerbe, 44 S. C. 259, 22 S. E. 428, arguendo. See 53 Am. Rep. 110, note.

116 U. S. 227-231, 29 L. 610, CONEY v. WINCHELL.

Removal cannot be had in foreclosure suit, where both mortgagor and his grantee have not necessary citizenship, p. 230.

Approved in Winchell v. Coney, 27 Fed. 482, 483, prayer for reformation does not create separate controversy from foreclosure; Davis v. County Court, 88 Fed. 706, where injunction will operate on all defendants, there is no separable controversy; dissenting opinion in Hicklin v. Marco, 56 Fed. 556, 13 U. S. App. 55, majority holding occupants of land not indispensable on foreclosure.

116 U. S. 231-237, 29 L. 626, SOUTHWESTERN R. R. v. V

Taxation.— Southwestern railroad is subject to taxati tensions, though original road exempt, p. 236.

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Approved in Vicksburg, etc., R. R. v. Dennis, 116 U. S. 771, 6 S. Ct. 627, collecting cases, exemption from taxa completion of road, does not exempt it before completion; etc., R. R. v. Guffey, 120 U. S. 575, 30 L. 734, 7 S. Ct. 696, ton, etc., R. R. v. Alsbrook, 146 U. S. 301, 36 L. 980, 13 and Railroad v. Alsbrook, 110 N. C. 156, 14 S. E. 656, a exemption does not extend to branch lines; Baltimore, et Ocean City, 89 Md. 97, 42 Atl. 922, exemption of road extend to those it is authorized to purchase; Assessors v. etc., R. R., 50 N. J. L. 450, 14 Atl. 612, applied; Dow v. R. R., 67 N. H. 49, 36 Atl. 534, collecting cases, rule appli render of power of repealing charter by legislature.

Distinguished in Allen County v. Simons, 129 Ind. 199, 422, 13 L. R. A. 514, and n., holding case not applicable.

Courts.— On error to State court, if Federal question is decided, others are not examinable, p. 236.

116 U. S. 237-252, 29 L. 659, BROWN v. DAVIS.

Patents.— Use of hand instead of lever in grain drill, an equivalent, p. 249.

Approved in Carter Mach. Co. v. Hanes, 70 Fed. 866, n labor cannot be substituted as an equivalent by one wh his improvement as a mechanical device applied in special ment; Fond du Lac County v. May, 137 U. S. 408, 34 L. Ct. 102, arguendo.

Patents.— Davis and Allen reissue for grain drills, l specified arrangement and held not infringed, p. 251.

Cited in Wright v. Yuengling, 155 U. S. 52, 39 L. 66, 15 where connecting piece is described as material, machine same is no infringement; United States Axle Lubricat Wurster, 38 Fed. 430, applying rule to axle lubricators; H Boiler Co. v. Anheuser, etc., Brewing Assn., 43 Fed. 790, cases, one merely changing form is limited to that for drawings disclose; Craig v. Michigan Lubricator Co., 72 patentee cannot obtain by construction what patent offic or evade his own limitations on his claims; Campbell Prin Mfg. Co. v. Duplex Printing, etc., Co., 86 Fed. 334, inven ited to escape prior patents are restricted to mechanism Parlin v. Moline Plow Co., 89 Fed. 333, 60 U. S. App. 308,

Patents.— Reissue, after eleven years, enlarging claims excuse shown, is invalid, p. 251.

116 U. S. 252–269, 29 L. 615, PRESSER v. ILLINOIS.

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Approved in Baldwin v. Franks, 120 U. S. 688, 689, 30 L. 769, 770, 7 S. Ct. 660, holding § 5519, R. S., invalid in its operation in States; In re Baldwin, 11 Sawy. 535, 540, 541, 27 Fed. 187, 191, holding § 559, R. S., unconstitutional; In re Moore, 66 Fed. 951, applied where part of statute is repealed by repugnancy of later statute; Levis v. City of Newton, 75 Fed. 895, collecting cases, upholding statute granting use of streets, though provision for perpetual grant is void; State v. Gerhardt, 145 Ind. 465, 44 N. E. 477, 33 L. R. A. 823, applying rule to statute regulating liquor licenses; Smith v. McClain, 146 Ind. 89, 45 N. E. 44, holding part of statute valid; State v. Ray, 158 Ind. 336, 54 N. E. 1068, collecting cases, clause creating office may be valid, though that providing for officer's requirements is unconstitutional; Rothermel v. Meyerle, 136 Pa. St. 265, 20 Atl. 586, 9 L. R. A. 368, and n., license statute void as to interstate commerce, may be valid as to that purely local.

Civil rights.— State militia law forbidding others parading with arms, does not infringe right to bear arms or other Federal right, p. 264.

Followed in Commonwealth v. Murphy, 166 Mass. 172, 44 N. E. 138, 32 L. R. A. 608.

United States.— Second amendment limits Federal, not State powers, p. 265.

Approved in Spies v. Illinois, 123 U. S. 166, 31 L. 86, 8 S. Ct. 24, collecting cases, first ten amendments only limit Federal government; Eilenbecker v. Plymouth County, 134 U. S. 34, 33 L. 803, 10 S. Ct. 425, State may authorize punishment of one violating injunction against selling liquor as for contempt; City of St. Joseph v. Levin, 128 Mo. 592, 49 Am. St. Rep. 579, 31 S. W. 102, amendment 5 has no force against States.

Distinguished in Brown v. Walker, 161 U. S. 606, 40 L. 824, 16 S. Ct. 650, holding Federal statute granting immunity to witness before interstate commerce commission, applies to State courts.

State may regulate its citizens if it abridges none of their Federal rights, p. 266.

Approved in Jamieson v. Indiana Nat. Gas, etc., Co., 128 Ind. 580, 28 N. E. 84, 12 L. R. A. 660, may regulate pressure in transporting natural gas; Bullard v. Northern Pac. R. R., 10 Mont. 180, 25 Pac. 122, 11 L. R. A. 250, and n., arguendo.

Civil rights.— Privileges of Federal citizenship come from Federal Constitution and laws; right to parade with arms not among them, p. 266.

Approved in Caldwell v. Wilson, 121 N. C. 462, 28 S. E. 559, legislature creating an office, may give governor the right to suspend the incumbent.

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tion, p. 269.

Approved in Hooper v. California, 155 U. S. 657, 39 L
Ct. 211, holding § 439, penal code of California, valid.

Courts.— On error to State court, judgment is affirmed
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116 U. S. 270–277, 29 L. 664, UNITED STATES v. SPIEG

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116 U. S. 277–289, 29 L. 629, RENAUD v. ABBOTT.

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Approved in Liverpool Steam Co. v. Phenix Ins. Co.,
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Judgments.— In suit on foreign judgment, defendant
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States v. American Bell Tel. Co., 29 Fed. 32, arguendo.
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Judgment valid against one joint debtor, the other
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Approved in Holt v. Johnson, 50 Mo. App. 377, simil
case; Chicago, etc., Bridge Co. v. Anglo-American Pack
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Distinguished in Crippen v. Laighton, 69 N. H. 548, 4
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116 U. S. 289-306, 29 L. 620, MOBILE v. WATSON.

Municipal corporations.— Port of Mobile is substantially the same community as the city of Mobile, p. 300.

Municipal corporation, substantially including same inhabitants and property as its predecessor, is liable for latter's debts, p. 300.

Approved in Shapleigh v. San Angelo, 167 U. S. 653, 42 L. 313, 17 S. Ct. 959, applying rule in Texas; Devereaux v. Brownsville, 29 Fed. 744, applying rule to taxing districts in Tennessee; Hill v. Kahoka, 35 Fed. 33, successor of municipality whose charter is forfeited, is liable for its bonds; Pacific Imp. Co. v. Clarksdale, 74 Fed. 533, 41 U. S. App. 68, bond issue authorized by voters to pay for stock, liability must be discharged by successor; Bates v. Gregory, 89 Cal. 396, 26 Pac. 893, applying rule to city of Sacramento; Higginson v. Turner, 171 Mass. 592, 51 N. E. 173, enlargement of Boston from two square miles to 129, does not affect its title to property; Guthrie v. Territory, 1 Okl. 202, 31 Pac. 194, 21 L. R. A. 847, Oklahoma bound by predecessor's debts; Broadfoot v. Fayetteville, 124 N. C. 485, 486, 488, 70 Am. St. Rep. 613, 614, 615, 32 S. E. 805, 806, applying rule in North Carolina; Herring v. Modesto Irr. Dist., 95 Fed. 724, arguendo.

Distinguished in Amy v. Watertown, 130 U. S. 319, 32 L. 952, 9 S. Ct. 537, as not applicable; Vandriss v. Hill, 58 Kan. 613, 50 Pac. 873, township abolished and included in another county, and three townships from same territory are not liable for its bonds.

Constitutional law.— Existing remedies for city's debts, or their equivalent, must be preserved; e. g., remedy by taxation, p. 304.

Approved in Hare v. Kennerly, 83 Ala. 612, 3 So. 685, State dissolving municipality may levy tax to pay its obligations, in addition to those allowed as State taxes; Watkins v. Glenn, 55 Kan. 431, 40 Pac. 819, collecting cases, holding laws concerning sale and redemption, void if retroactive; Phinney v. Phinney, 81 Me. 464, 10 Am. St. Rep. 272, 17 Atl. 408, 4 L. R. A. 351, and n., law in regard to equity of redemption invalid as to existing mortgages.

Distinguished in Osborn v. Johnson Wall-Paper Co., 99 Ala. 313, 13 So. 778, collecting cases, amendment requiring ten days' notice to owner before filing mechanic's lien, is valid.

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Approved in Robertson v. Blaine County, 90 Fed. 70, 61 U. S. App. 255, provisions for payment of bonds in statute are part of the contract; Broadfoot v. Fayetteville, 124 N. C. 490, 492, 70 Am. St. Rep. 617, 618, 32 S. E. 807, 808, act prohibiting a municipality to levy tax to pay bonds of predecessor is void; dissenting opinion in State v. Denny, 118 Ind. 419, 21 N. E. 265, 4 L. R. A. 91, majority holding void, appointment of board for governing municipal utilities by legislature.

116 U. S. 307–347, 29 L. 636, RAILROAD COMMISSIO
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L. R. A. 506, holding statute regulating tolls for public grist-mills, valid; Attorney-General v. Old Colony R. R., 160 Mass. 87, 35 N. E. 256, 22 L. R. A. 118, holding statute requiring railroads to provide mileage tickets good on all railroads in State, valid; Bullard v. Northern Pac. R. R., 10 Mont. 181, 25 Pac. 123, 11 L. R. A. 250, and n., holding Federal statute regulating rates for interstate transportation, valid; Buffalo, etc., R. R. v. Buffalo Street R. R., 111 N. Y. 140, 19 N. E. 65, 2 L. R. A. 386, holding statute fixing maximum street railroad fares, valid, although interfering with contracts between such railroads; Lake Shore, etc., Ry. v. State, 8 Ohio C. C. 224, holding statute requiring trains to stop at towns of certain size, valid; Gulf, etc., Ry. v. Eddins, 7 Tex. Civ. App. 127, 26 S. W. 165, holding statute regulating shipping contracts, valid; Northern Pac. R. R. v. Barnes, 2 N. Dak. 346, 51 N. W. 395, arguendo. See 16 Am. St. Rep. 134, 25 Am. St. Rep. 889, 27 Am. St. Rep. 559, and 52 Am. St. Rep. 291, notes.

Distinguished in Louisville, etc., R. R. v. Commonwealth, 99 Ky. 138, 59 Am. St. Rep. 459, 35 S. W. 130, 33 L. R. A. 212, and n., statute making railroad liable for charging more than "reasonable" rates, is void for uncertainty.

Railroads.— State's power to regulate rates can only be lost by positive grant or equivalent, p. 325.

Approved in Wabash, etc., Ry. v. Illinois, 118 U. S. 575, 30 L. 250, 7 S. Ct. 12, holding State statute prohibiting short-haul discrimination, void as applied to interstate transportation; Winchester, etc., Road Co. v. Croxton, 98 Ky. 744, 746, 34 S. W. 520, 33 L. R. A. 190, and n., holding statute regulating rates of toll chargeable by turnpike road, valid; Wellman v. Railway, 83 Mich. 616, 47 N. W. 496, holding statute fixing maximum railroad rates, valid; McGowan v. Railroad, 95 N. C. 428, holding statute requiring railroads to ship freight within five days after its delivery, valid; State v. Cleveland Gas-Light, etc., Co., 3 Ohio C. C. 254, holding ordinance regulating gas rates, valid; New Orleans, etc., Co. v. New Orleans, 143 U. S. 195, 36 L. 122, 12 S. Ct. 407, Opinion of the Justices, 66 N. H. 631, 33 Atl. 1077, and Dow v. Railroad, 67 N. H. 30, 48, 36 Atl. 525, 534, all arguendo.

Railroad's charter power to make by-laws does not create contract of exemption from State regulation of rates, p. 329.

Railroad's charter power to fix rates implies reasonable ones, and State may still determine them, p. 329.

Approved in Stone v. Illinois Cent. R. R., 116 U. S. 354, 29 L. 651, 6 S. Ct. 349, and Stone v. New Orleans, etc., R. R., 116 U. S. 351, 29 L. 650, 6 S. Ct. 348 (dissenting opinion in S. C., 116 U. S. 352, 29 L. 651, 6 S. Ct. 349), both applying rule, and holding railroad subject to supervision by State railroad commission; Pingree v. Michigan Cent. R. R., — Mich. —, 76 N. W. 640, and St. Louis, etc., Ry. v.

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Approved in Dow v. Beidelman, 125 U. S. 689, 31 L
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Ry., 51 Fed. 536, holding mortgage bondholders can
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Pac. 916, 6 L. R. A. 762 (dissenting opinion in S. C., 82 Cal. 322, 325, 326, 327, 22 Pac. 1048, 1049), both holding ordinance fixing water rates too low to allow profit, void; Pensacola, etc., R. R. Co. v. State, 25 Fla. 318, 319, 50 So. 836, 837, 3 L. R. A. 664, and n., holding schedule of rates which will not pay operating expenses, invalid; City of Indianapolis v. Navin, 151 Ind. 144, 47 N. E. 526, 41 L. R. A. 340, holding statute fixing maximum for street railroad fares, valid; Des Moines v. Water-Works Co., 95 Iowa, 364, 64 N. W. 275, holding ordinance fixing reasonable water rates, valid; State v. Sioux City, etc., R. R., 46 Neb. 691, 65 N. W. 768, 31 L. R. A. 51, holding statute requiring different railroads to haul freights between same points at same rates, void; Griffin v. Water Co., 122 N. C. 210, 30 S. E. 320, 41 L. R. A. 242, holding court will enjoin collection of unreasonable water rates, although within maximum fixed by ordinance. See 16 Am. St. Rep. 135, and 62 Am. St. Rep. 298, note.

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Approved in Wabash, etc., Ry. v. Illinois, 118 U. S. 564, 30 L. 246, 7 S. Ct. 6 (dissenting opinion in S. C., 118 U. S. 593, 30 L. 256, 7 S. Ct. 22), holding State statute prohibiting short-haul discrimination, void as applied to interstate transportation; Philadelphia S. S. Co. v. Pennsylvania, 122 U. S. 346, 30 L. 1205, 7 S. Ct. 1125, holding State tax on gross receipts of steamship company engaged in interstate and foreign transportation, void; Louisville, etc., Ry. v. Mississippi, 133 U. S. 592, 33 L. 786, 10 S. Ct. 349, holding statute requiring railroads to separate white and colored persons, valid as to domestic traffic; Mobile, etc., R. Co. v. Sessions, 28 Fed. 595, 596, holding State regulation of interstate transportation, void; Central Trust Co. v. Charlotte, etc., R. Co., 65 Fed. 260, and Western, etc., R. Co. v. Roberson, 61 Fed. 596, 22 U. S. App. 187, both holding corporation a citizen of each State where incorporated; Illinois Cent. R. R. v. People, 143 Ill. 455, 33 N. E. 179, 19 L. R. A. 126, holding statute requiring trains to stop at county seats, valid; Cleveland, etc., Ry. v. People, 175 Ill. 365, 368, 51 N. E. 844, 845, holding statute requiring all trains to stop at county seats, valid; Pittsburgh, etc., Ry. v. Harden, 137 Ind. 492, 37 N. E. 327, holding railroad property subject to township taxation to aid rival road; Norfolk & W. R. Co. v. Commonwealth, 88 Va. 110, 13 S. E. 345, 13 L. R. A. 12, and n., holding statute prohibiting running of freight trains on Sunday, void as to interstate trains; Martin v. Baltimore, etc., R. R., 151 U. S. 677, 38 L. 313, 14 S. Ct. 535, and Louisville, etc., Ry. v. Louisville Trust Co., 174 U. S. 562, 19 S. Ct. 821, arguendo. See 9 Am. St. Rep. 714, note.

Railroads.— Mississippi railroad commission act of 1884 is valid, p. 336.

Approved in Chicago, etc., R. R. v. Jones, 149 Ill. 381, 41 Am. St. Rep. 288, 37 N. E. 252, 24 L. R. A. 146, holding Illinois statute valid.

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Railroad charter authorizing directors to establish ra prevent State regulation thereof, p. 351.

Approved in Stone v. New Orleans, etc., R. R., 116 L. 651, 6 S. Ct. 349, applying rule; Dow v. Beidelman, 1 31 L. 843, 8 S. Ct. 1030, holding statute fixing maximum Budd v. New York, 143 U. S. 547, 36 L. 257, 12 S. Ct. statute fixing maximum rates for grain elevators, va City Gas, etc., Co. v. Des Moines, 72 Fed. 838, holdi fixing reasonable gas rates, valid; Illinois Cent. R. R. v Ill. 454, 33 N. E. 178, 19 L. R. A. 126, holding statute passenger trains to stop at county seats, valid; Atto v. Old Colony R. R., 160 Mass. 87, 35 N. E. 256, 22 L holding statute requiring railroads to provide mileage on all railroads in State, valid; McGowan v. Railroad, holding statute requiring railroads to ship freight wit after its delivery, valid.

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116 U. S. 352–356, 29 L. 651, STONE v. NEW ORL R. R.

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Approved in Dow v. Beidelman, 125 U. S. 689, 31 L. 1030, holding statute fixing maximum rates, valid; I York, 143 U. S. 547, 36 L. 251, 12 S. Ct. 477, holding maximum rates for grain elevators, valid; Attorney-G Colony R. R., 160 Mass. 87, 35 N. E. 256, 22 L. R. A. statute requiring railroads to provide mileage tickets railroads in State, valid; McGowan v. Railroad, 95 N. ing statute requiring railroad to ship freight within fi its delivery, valid.

116 U. S. 356–366, 29 L. 633, ANDERSON v. SANTA

Municipal acts, unauthorized when committed, ma by legislature; e. g., bond elections, p. 361.

Approved in Confarr v. Santa Anna, 116 U. S. 366, 2 Ct. 418, and Mahomet v. Quackenbush, 117 U. S. 509 S. Ct. 858, both involving same matters; Graham v. R. R., 118 U. S. 170, 30 L. 202, 6 S. Ct. 1014, allowi of place of meeting of corporation by legislature; Be field, 120 U. S. 760, 762, 763, 765, 30 L. 787, 788, 789, 737, 738, allowing ratification of bond election in excess

amount; Utter v. Franklin, 172 U. S. 424, 19 S. Ct. 186, bonds of Arizona Territory may be validated by Congress; State v. Illinois Cent. R. Co., 33 Fed. 771, holding confirmation of acts of railroad equivalent to original authority, and not repealable; Schneck v. Jeffersonville, 152 Ind. 217, 52 N. E. 216, collecting case, bond issue may be legalized where vested rights have not intervened.

Distinguished in Deland v. Platte Co., 54 Fed. 832, disallowing retrospective legislation under Missouri Constitution; Daniells v. Watertown, 61 Mich. 517, 28 N. W. 674, vested rights may not be affected by curative acts.

Courts.— Construction of State law under which rights accrued, will be adhered to by Federal courts, p. 361.

Approved in Bolles v. Brimfield, 120 U. S. 764, 30 L. 788, 7 S. Ct. 38, refusing to follow State decision made long after rights accrued, against settled doctrines; Rollins v. Lake County, 34 Fed. 46, applying rule as to limits on county debts; Braun v. Board of Commissioners, 66 Fed. 479, showing this rule only an apparent exception to rule that State decisions are followed; German Ins. Co. v. Manning, 78 Fed. 909, settled construction of State followed on rights of municipalities to issue bonds; Southern Ry. v. North Carolina R. R., 81 Fed. 602, State decisions in force when leave was made are binding on Federal court; Vermont Loan, etc., Co. v. Dygert, 89 Fed. 124, contract made before construction of statute by State court, Federal court not bound by subsequent decision; Doler v. Board of Commrs., 89 Fed. 261, change of decision by State court invalidating bonds, not followed; Haskett v. Maxey, 134 Ind. 91, 33 N. E. 360, 19 L. R. A. 382, change in construction of statute cannot operate retrospectively so as to impair contracts; Stephenson v. Boody, 139 Ind. 66, 38 N. E. 333, new construction of statute cannot act retrospectively; Town of Hardinsburg v. Cravens, 148 Ind. 9, 47 N. E. 155, no contract being made on faith of decision, and position not changed, last construction of statute is followed; Gray v. National Gas Co., 138 Pa. St. 590, 21 Am. St. Rep. 927, 20 Atl. 967, 12 L. R. A. 293, and n., change in construction of statute does not impair contract made in reliance thereon.

Distinguished in German Bank v. Franklin County, 128 U. S. 539, 32 L. 524, 9 S. Ct. 163, bonds issued without compliance with conditions provided by prior State decision, are invalid in hands of bona fide holders; Miller v. Ammon, 145 U. S. 423, 36 L. 761, 12 S. Ct. 885, following State decision that license ordinance is valid; Central Land Co. v. Laidley, 159 U. S. 111, 40 L. 94, 16 S. Ct. 82, Federal Supreme Court cannot review State construction of statute admitted valid; Jones v. Great Southern, etc., Hotel Co., 79 Fed. 480, 482, rule of following first decisions not applied in construction of radical amendments.

Municipal corporations.— Construction of railroad through township is a "corporate purpose," p. 363.

Approved in Folsom v. Township Ninety-Six, 159 U. S [illegible] 16 S. Ct. 179, collecting cases, applying rule to Sou[illegible] townships.

[illegible] U. S. 366, 29 L. 636, CONFARR v. SANTA ANNA T[illegible]

Adjudged on authority of Anderson v. Santa Anna, su[illegible]

[illegible] U. S. 366-380, 29 L. 652, LITTLE v. HACKETT.

Negligence.— One may recover for negligence of ano[illegible] negligent also, p. 371.

Approved in Missouri, etc., Ry. v. Turley, 85 Fed. 37[illegible] App. 4, disallowing recovery for contributory negligenc[illegible] v. McKay, 69 Miss. 143, 12 So. 448, master cannot reco[illegible] allowed to spread by negligence of his servant; Moak [illegible] Valley Ry., 18 Or. 192, 17 Am. St. Rep. 720, 22 [illegible] R. A. 658, holding contributory negligence is for j[illegible] Bartram v. Sharon, 71 Conn. 688, 71 Am. St. Rep. 226, [illegible] contra.

Master and servant.— One riding in carriage with [illegible] driver is not the master of driver, p. 371.

Negligence of driver of hired conveyance is not imput[illegible] passenger merely directing destination, p. 380.

Approved in Missouri Pac. Ry. v. Texas Pac. Ry., 4[illegible] Evans v. Lake Erie, etc., R. R., 78 Fed. 783, East Te[illegible] Mitchell, 88 Ga. 62, 13 S. E. 856, 14 L. R. A. 282, Holz[illegible] [illegible], 38 La. Ann. 189, 190, 58 Am. Rep. 179, 180, H[illegible] O'Riordon, 155 Mass. 337, 29 N. E. 584, collecting case[illegible] v. Lindell Ry., 29 Mo. App. 508, Becke v. Missouri Pac. R[illegible] [illegible] 13 S. W. 1054, 9 L. R. A. 162, and n., and Crampton [illegible] C. 605, 32 S. E. 972, 973 (see dissenting opinion in S. [illegible] C. 608, 32 S. E. 973), all applying rule to passengers in [illegible] conveyances; Union Pac. Ry. v. Lapsley, 51 Fed. 178, 4 U. S [illegible] L. R. A. 802, Pyle v. Clark, 79 Fed. 748, 49 U. S. App. [illegible] S. C., 75 Fed. 646), Town of Knightstown v. Musgrov[illegible] [illegible] 9 Am. St. Rep. 829, 18 N. E. 453, collecting cases [illegible] town of Garner, 75 Iowa, 319, 9 Am. St. Rep. 490, 39 N [illegible] R. A. 154, and n., Leavenworth v. Hatch, 57 Kan. 61, [illegible] App. 311, 45 Pac. 66, Philadelphia, etc., R. R. v. Hogel'a [illegible] 7 Atl. 109 (see note in 57 Am. Rep. 494), Follman v [illegible] 35 Minn. 527, 29 N. W. 320 (see note in 57 Am. Rep. 491 [illegible] Buccawen, 64 N. H. 364, 367, 368, 10 Am. St. Rep. 412, [illegible] Atl. 692, 694, 695, and Ouverson v. Grafton, 5 N. Dak. 29[illegible] [illegible] all applying rule to guest in private conveyance; [illegible] etc., Ry. v. Wright, 54 Ohio St. 194, 43 N. E. 691, 32 L. [illegible] applied to one riding uninvited on private conveyance; Chicago, etc., Ry., 59 Fed. 425, 426, contributory negligen[illegible]

does not defeat husband's right of action for his damage; Robinson v. Detroit, etc., Nav. Co., 73 Fed. 894, 43 U. S. App. 190, negligence of tug is not imputable to a passenger; Kowalski v. Chicago, etc., Ry., 84 Fed. 588, negligence of father driving team is not imputable to his child with him; Munger v. Sedalia, 66 Mo. App. 632, negligence of husband driving carriage is not imputed to wife; Elyton Land Co. v. Mingea, 89 Ala. 527, 7 So. 666, negligence of driver of hosecart not imputable to firemen thereon, though fellow servants; Schindler v. Railway, 87 Mich. 417, 49 N. W. 676, negligence of parents should not be imputed to infants; New York, etc., R. R. v. New Jersey, etc., Ry., 60 N. J. L. 348, 38 Atl. 832, 43 L. R. A. 853, action of bailor for negligence against third person, not barred by negligence of servants of bailee; Bunting v. Hogsett, 139 Pa. St. 376, 23 Am. St. Rep. 196, 21 Atl. 33, 12 L. R. A. 270, negligence of carrier not imputed to passenger; Garteiser v. Galveston, etc., Ry., 2 Tex. Civ. App. 236, 21 S. W. 633, negligence of master is not imputable to servant; New York, etc., R. R. v. Cooper, 85 Va. 943, 9 S. E. 322 (see dissenting opinion in S. C., 85 Va. 951, 9 S. E. 325), applied to passenger on ferry-boat; Sears v. Seattle, etc., Street Ry., 6 Wash. 236, 33 Pac. 393, carrier liable to passenger for negligence occurring through concurring negligence of third party; Perez v. Railroad, 47 La. Ann. 1397, 17 So. 871, applied to passengers in tally-ho, hiring it for a certain destination; Hardy v. Shedden Co., 78 Fed. 613, 47 U. S. App. 367, 37 L. R. A. 39, servant hired out cannot recover from general master for negligent appliance supplied by hirer; Byrne v. Kansas City, etc., R. R., 61 Fed. 610, 22 U. S. App. 220, 24 L. R. A. 698, and Scarborough v. Alabama Midland Ry., 94 Ala. 500, 10 So. 317, both holding master not liable for negligence of servants under control of another.

Cited also in Louisville, etc., R. R. v. East Tennessee, etc., Ry., 60 Fed. 994, 22 U. S. App. 102, arguendo; dissenting opinion in Mullen v. Owosso, 100 Mich. 107, 108, 58 N. W. 664, 23 L. R. A. 694, majority holding negligence of driver imputable to his guest. See the following valuable notes: 54 Am. Rep. 135, 57 Am. Rep. 506, 16 Am. St. Rep. 254, 43 Am. St. Rep. 438, 54 Am. St. Rep. 75, 10 Am. St. Rep. 419.

Modified in State v. Boston, etc., R. R., 80 Me. 446, 15 Atl. 40, guest in team has some duty, but has not same degree of responsibility as driver, and negligence is not imputed; Dean v. Pennsylvania R. R., 129 Pa. St. 522, 523, 15 Am. St. Rep. 736, 737, 18 Atl. 719, 720, 6 L. R. A. 144, 145, and n., affirming rule that negligence is not imputed, but holding guest liable for not keeping lookout or requesting driver to stop.

Distinguished in Minster v. Citizens' Ry., 53 Mo. App. 280, negligence of gripman is imputed to conductor, being under his control.

116 U. S. 380–386, 29 L. 593, MOWER v. FLETCHER.

Public lands.— Pre-emptioner cannot get title to State school lands selected in disputed territory, p. 385.

Approved in **Durand v. Martin, 120 U. S. 369, 30 L**
589, applying rule; **Garrard v. Silver Peak Mines, 94**
Buena Vista, etc., **Co. v. Tulare Oil, etc., Co., 67 Fed. 2**
ing listing of **lands to State under Federal grant ca**
tioned collaterally; **Bullock v. Rouse,** 81 Cal. 595, 22 I
ing public land **in actual possession** of one person,
pre-emption or **homestead by another**; Mower v. Kemp
1918, 8 So. 832, **holding lands listed** to State under
not susceptible **to pre-emption**; Goodwin v. McCabe, 7
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230, Weeks v. **White, 41 Kan.** 572, 21 Pac. 601, an
Bush, 6 Wyo. **361, 45 Pac. 492,** arguendo.

116 U. S. 386-392, **29 L. 667, STEBBINS v. ST. ANNE.**

Equity.— Two **alternative** claims, in both of whic
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116 U. S. 392-393, **29 L. 671, JOHNSON v. WILKINS.**

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116 U. S. 393-394, **29 L. 671, WELLS v. WILKINS.**

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116 U. S. 394-398, **29 L. 674, HUNT v. UNITED STAT**

Army and **navy.— Naval** officer's promotion **delaye**
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promotion must **be at or near proper time, p. 397.**

Not cited.

116 U. S. 398-401, **29 L. 675, UNITED STATES v. WA**

Courts.— R. S., §§ 847, 828, giving Circuit Court c
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Courts.— Under R. S., §§ 847, 828, Circuit Court c
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Approved in **Phillips v. United States, 33 Fed. 164,**
States, 35 Fed. 889, **Rand v. United States, 36 Fed. 67**
v. United States, **40 Fed. 221, United States v. Rand,**

. S. App. 230 (affirming S. C., 48 Fed. 358), and United States v. ox, 128 U. S. 233, 32 L. 467, 9 S. Ct. 64, all applying rule; United tes v. Harmon, 147 U. S. 276, 37 L. 167, 13 S. Ct. 330, Gayer v. ited States, 33 Fed. 627, and Harmon v. United States, 43 Fed. , arguendo.

Distinguished in Strong v. United States, 34 Fed. 22, Calvert v. ited States, 37 Fed. 762, M'Kinstry v. United States, 40 Fed. 819, rvin v. United States, 44 Fed. 412, and United States v. Ewing, U. S. 147, 35 L. 390, 11 S. Ct. 745, all holding commissioner not itled to such fees, under later statute.

U. S. 401–402, 29 L. 676, EX PARTE BROWN.

Mandamus will not lie to territorial court dismissing cause lack proper assignment of errors, p. 402.

Distinguished in Hollow Parker, 131 U. S. 225, 33 L. 124, 9 S. Ct. , issuing mandamus to compel court to hear appeal, where notice s sufficient.

Mandamus lies to compel court to take jurisdiction, not to con- its discretion, p. 402.

Approved in Ex parte Parker, 120 U. S. 743, 30 L. 820, 7 S. Ct. , issuing mandamus to compel court to take jurisdiction of ap- l, where sufficient notice was given; Craig v. Leitensdorfer, 123 S. 209, 31 L. 122, 8 S. Ct. 95, holding remedy to compel land ce to hear appeal is by mandamus, and not in equity; In re nsylvania Co., 137 U. S. 453, 34 L. 739, 11 S. Ct. 141, refusing ndamus to Circuit Court to hear cause remanded to State court; re Morrison, 147 U. S. 26, 37 L. 65, 13 S. Ct. 250, refusing man- nus to District Court, dismissing libel for want of jurisdiction; te v. Young, 31 Fla. 601, 34 Am. St. Rep. 44, 12 So. 675, 19 L. R. 38, refusing mandamus to judge refusing to hear cause because s disqualified by interest; State v. King, 32 Fla. 419, 13 So. 892, sing mandamus to correct error committed while court was rcising jurisdiction; State v. Philips, 97 Mo. 343, 10 S. W. 859, 3 . A. 480, and n., issuing mandamus to inferior court erroneously nissing appeal; State v. Eddy, 10 Mont. 324, 25 Pac. 1037, issu- mandamus to compel justice of the peace to order garnishee to fy.

U. S. 402–404, 29 L. 677, UNION PAC. RY. v. UNITED STATES.

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pproved in Nashua, etc., R. Corp. v. Boston, etc., R. Corp., 61 242, 21 U. S. App. 50, holding appeal from proceedings subse- nt to mandate from Supreme Court brings up only matters fol- ng the mandate.

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116 U. S. 404–408, 29 L. 680, GIBBINS v. DIST
LUMBIA.

Tax.— Exemption of churches in District of Col
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District of Columbia.— Congress may exempt or
special classes of property in District, p. 408.

Approved in Shoemaker v. United States, 147 U. S
13 S. Ct. 391, holding United States has full munici
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District of Columbia, 170 U. S. 52, 42 L. 946, 18 S.
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before justice of the peace in District of Columbia;
76 Wis. 477, 45 N. W. 529, holding State tax on est
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116 U. S. 408–410, 29 L. 679, FLETCHER v. HAMLI

Courts.— Cases advanced under § 3, rule 32, Supre
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Approved in Brooks v. Clark, 119 U. S. 513, 30 L. 4
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10 S. Ct. 77, all on one side must be residents of
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485, rule applied to substituted party; Guarantee C
Bank, 95 Va. 483, 28 S. E. 910, removal must be by
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116 U. S. 410–418, 29 L. 671, EUREKA, ETC., CAN
PERIOR COURT OF YUBA COUNTY.

Courts.— If Federal question was possibly involv
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Approved in Kaukauna Co. v. Green Bay, etc., C
269. 35 L. 1009, 12 S. Ct. 176, considering Federal
pleadings or opinion; McQuade v. Trenton, 172 U. S
293, case dismissed where question not in record,
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mont, 144 U. S. 348, 36 L. 461, 12 S. Ct. 703, majo
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Contempt.— In California, where proper corporat
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116 U. S. 418–423, 29 L. 669, O'REILLY v. CAMPBELL.

On appeal from territorial Supreme Court, in absence of statement or findings, only question is sufficiency of pleadings, p. 420.

Cited in Bassett v. United States, 137 U. S. 502, 34 L. 763, 11 S. Ct. 166, arguendo.

Mines.— In contest over claim, objection that plaintiffs not citizens cannot be first raised on appeal, p. 420.

Approved in Billings v. Aspen Min., etc., Co., 52 Fed. 250, 10 U. S. App. 322, title can be defeated on ground of alienage only by government; Jackson v. Dines, 13 Colo. 93, 21 Pac. 919, no issue as to alienage arising below is not considered on appeal; Thomas v. Chrisholm, 13 Colo. 108, 21 Pac. 1020, right of corporation to locate should be alleged; Keeler v. Trueman, 15 Colo. 147, 25 Pac. 312, allegation of citizenship is necessary in proceeding to determine adverse claims.

Appeal.— Findings are not strictly construed, but suffice if justifying judgment, though not precise, p. 421.

Approved in Morgan v. Eggers, 127 U. S. 66, 32 L. 59, 8 S. Ct. 1042, applied where order embraces both findings and judgment; United States v. Tinsley, 68 Fed. 434, 25 U. S. App. 267, holding opinion of court sufficient which impliedly finds all necessary facts, where only questions of law arise on plaintiff's pleadings; McKibbon v. Brigham, 18 Utah, 87, 55 Pac. 68, judgment in accord with correct findings not disturbed for incorrect conclusions of law.

Mines.— Discovery and appropriation are source of title to mining claims; development is condition of continued possession, p. 423.

Cited in Honaker v. Martin, 11 Mont. 96, 27 Pac. 398, discussing requisites of resuming work on mine.

Mines.— Location of vein by mere notice will not prevail against later different location unobjected to, p. 422.

Approved in dissenting opinion in Mining Co. v. Mining Co., 5 Utah, 80, 86, 11 Pac. 538, 542, majority holding first locator, having apex of vein, within surface lines of claim for part of way, and never departing entirely, owns entire between end lines.

116 U. S. 423–427, 29 L. 677, CARRICK v. LAMAR.

Mandamus will only lie to control ministerial executive acts; hence not on question of survey of shifting river island, p. 426.

Approved, arguendo, in Ruhm v. United States, 66 Fed. 536, and United States v. Pearson, 24 Blatchf. 455, 32 Fed. 310.

Miscellaneous.— St. Louis v. Rutz, 138 U. S. 251, 34 L. 951, 11 S. Ct. 346, merely referring to island as not stationary.

116 U. S. 427-435, 29 L. 682, COFFEY v. UNITED STA

Appeal.—Questions raised by demurrer and as to j will be considered, though no exceptions appear, p. 432.

Courts.—Circuit Court has jurisdiction over suits for under internal revenue laws, p. 433.

Approved in Coffey v. United States, 116 U. S. 442, 2 S. Ct. 448, applied in similar case.

Internal revenue.—General verdict on information counts must be upheld if one count good, p. 433.

Approved in Coffey v. United States, 116 U. S. 442, 29 Ct. 448, approved and applied in similar case; Friedenstei States, 125 U. S. 231, 234, 31 L. 740, 741, 8 S. Ct. 841, 8 to seizure of diamonds for violation of customs laws.

Internal revenue.—Prosecution of revenue fraud, un § 3257, need not aver particulars, p. 435.

Searches and seizures.—General admiralty rules of pl ply to suits for forfeiture on land, p. 435.

Approved in Coffey v. United States, 117 U. S. 233, 29 Ct. 717, proceedings governed by admiralty and not in a § 914, R. S.

Internal revenue.—In information under R. S., § 32 averments unnecessary, p. 435.

Internal revenue.—Effect of new matter in answer, o tion for forfeiture, stated, p. 435.

116 U. S. 436-445, 29 L. 684, COFFEY v. UNITED STA

Appeal.—Insufficiency of information cannot be raised objected denial of motion for judgment non-obstante, p. 44

Appeal.—Insufficiency of information cannot be first appeal where defendant answers it, p. 442.

Approved in Friedenstein v. United States, 125 U. S. 230 8 S. Ct. 843, defective information curable by motion or d waived or cured by verdict.

Internal revenue.—One good count is sufficient to u dict of forfeiture to United States, p. 442.

Internal revenue.—Acquittal of defendant, prosecuted ing revenue laws bars forfeiture under same statute, p. 4

Approved in Boyd v. United States, 116 U. S. 634, 29 S. Ct. 534, on proceeding to forfeit goods in customs case, not be compelled to be witness against himself, or produ State of Iowa v. Chicago, etc., R. R., 37 Fed. 501, 3 L. and n., suit against railroad for extortion is criminal a

movable, though proceedings are civil; United States v. Butler, 38 Fed. 499, acquittal on indictment for selling liquor, is conclusive adjudication on subsequent trial for perjury; State of Texas v. Day Land, etc., Co., 41 Fed. 230, recovery in civil action, of fine for unlawfully grazing cattle, is essentially criminal, and not removable; United States v. One Distillery, 43 Fed. 852, corporate officer, convicted for violation of internal revenue law, bars forfeiture of corporate property; United States v. Shapleigh, 54 Fed. 132, 133, 134, 12 U. S. App. 26, suit under § 3490, R. S., for forfeiture for presenting false claims against United States, is criminal in its nature; Cooper v. Commonwealth, — Ky. —, 51 S. W. 790, 45 L. R. A. 217, acquittal of offense bars prosecution for perjury for denying it; Origet v. United States, 125 U. S. 247, 31 L. 747, 8 S. Ct. 850, arguendo.

Distinguished in United States v. Zucker, 161 U. S. 478, 479, 482, 40 L. 778, 779, 780, 16 S. Ct. 642, 643, in forfeiture proceeding, under customs act, owner cannot demand to be confronted with witnesses; Stone v. United States, 167 U. S. 184, 186, 187, 188, 42 L. 130, 131, 17 S. Ct. 780, 781, 782, affirming S. C., 64 Fed. 671, 29 U. S. App. 32, acquittal for taking timber, no bar to suit for value of same; United States v. Jædicke, 73 Fed. 103, acquittal of postmaster for making false returns, is no bar to suit on bond for amount shown due government; State of Iowa v. Caywood, 96 Iowa, 373, 65 N. W. 387, acquittal for larceny does not bar prosecution for perjury for denying larceny; United States v. Three Copper Stills, 47 Fed. 497, 500, conviction under § 3257, R. S., for illicit distilling does not bar forfeiture of distillery; United States v. Olsen, 57 Fed. 582, 583, 585, forfeiture of vessel for landing Chinese, is no bar to indictment of owner.

Judgment by court of concurrent jurisdiction is conclusive of specific point, but also of incidental matters, if by court of exclusive jurisdiction, p. 445.

116 U. S. 446-461, 29 L. 691, WALLING v. MICHIGAN.

Commerce.— State tax on liquor sales, by non-residents, without similar tax on domestic sales, is void, p. 454.

Approved in Leisy v. Hardin, 135 U. S. 121, 34 L. 136, 10 S. Ct. 688 (dissenting opinion in S. C., 135 U. S. 152, 34 L. 147, 10 S. Ct. 699), holding State statute, prohibiting sale of intoxicating liquors, void as to sale in original imported packages; United States v. Hopkins, 82 Fed. 538, 540, holding live-stock exchange an illegal monopoly under Federal statute; State v. Deschamp, 53 Ark. 493, 14 S. W. 653, holding statute prohibiting sale of wine, except that made from grapes grown by seller, void; dissenting opinions in Rhodes v. Iowa, 170 U. S. 428, 42 L. 1097, 18 S. Ct. 670, majority holding State regulation of liquor transportation, void as to interstate transportation; Vance v. Vandercook Co., 170 U. S. 457, 42 L. 1107, 18 S. Ct.

681, majority holding State regulation of importatio
void. See 25 Am. St. Rep. 880, 27 Am. St. Rep. 558, 1
Distinguished in Coe v. Errol, 116 U. S. 526, 29 L. 718
holding tax on goods awaiting shipment out of the
New York v. Roberts, 171 U. S. 662, 19 S. Ct. 60 (disse
in S. C., 171 U. S. 675, 19 S. Ct. 74), holding tax on fo
tions doing business within State, valid; Kohn v. Mel
435, holding statute restricting liquor licenses to certa
citizens of State, valid.

Commerce.— State tax, discriminating against prod
States, is void, p. 455.

Approved in Swift v. Sutphin, 39 Fed. 640, In re Ba
646, and Minnesota v. Barber, 136 U. S. 325, 34 L. 460,
all holding State statute requiring inspection, in that St
before slaughter, void; Brimmer v. Rebman, 138 U. S.
11 S. Ct. 214, affirming 41 Fed. 870, statute requiring
meat slaughtered more than 100 miles from place
Vandercook Co. v. Vance, 80 Fed. 793, holding State
importation of liquors, void, where their sale is per
State; Rodgers v. Kent Circuit Judge, 115 Mich. 443,
holding tax on peddlers, discriminating against non-re
dissenting opinion in New York State v. Roberts, 171
S. Ct. 75, majority holding tax on foreign corporation
ness within State, valid. See 27 Am. St. Rep. 563, no
Distinguished in State v. Richards, 32 W. Va. 353,
L. R. A. 708, and n., and Emert v. Missouri, 156 U. S
L. 436, 15 S. Ct. 373, both holding non-discriminating ta
of domestic and imported goods, valid; American H
Shaffer, 68 Fed. 755, State v. Long, 95 N. C. 587, 59
and Ex parte Hanson, 11 Sawy. 659, 28 Fed. 129, all
discriminating tax on all drummers, valid; Preston
Fed. 863, holding State tax on all persons selling ce
newspapers, valid.

Commerce.— Power of Congress is exclusive in al
quiring uniform rules, p. 455.

Commerce.— Non-action by Congress leaves comm
melled, and State regulation, except local, is void, pp.

Approved in Pickard v. Pullman Southern Car Co.,
29 L. 790, 6 S. Ct. 642, holding State tax on sleeping-ca
interstate transportation; Fecheimer v. Louisville, 84
W. 68, State v. Rankin, 11 S. Dak. 149, 76 N. W. 301,
lins, 80 Va. 319, and Robbins v. Shelby Taxing Dist.,
30 L. 696, 7 S. Ct. 594, all holding State tax on drum
resident business houses, void; Philadelphia, etc., Ste
Pennsylvania, 122 U. S. 346, 30 L. 1205, 7 S. Ct. 1125,

x on gross receipts of steamship company, derived from foreign
d interstate transportation, void; Scott v. Donald, 165 U. S. 94,
L. 643, 17 S. Ct. 270, and Bowman v. Chicago, etc., Ry. Co., 125
S. 508, 31 L. 715, 8 S. Ct. 1066 (dissenting opinion in S. C., 125 U.
517, 518, 31 L. 718, 8 S. Ct. 711), both holding statute regulating
portation of intoxicating liquors within State, void; Leloup v. Port
Mobile, 127 U. S. 648, 32 L. 314, 8 S. Ct. 1384, holding city license
x on interstate telegraph company, void; Leisy v. Hardin, 135
S. 108, 34 L. 132, 10 S. Ct. 684 (dissenting opinion in S. C., 135
S. 147, 34 L. 145, 10 S. Ct. 697), holding State statute prohibiting
le of intoxicating liquors, void as to sale in original imported
ckages; Mobile, etc., R. Co. v. Sessions, 28 Fed. 594, holding State
gulation of interstate freight rates, void; In re Barber, 39 Fed.
0, holding statute prohibiting sale of meat, unless inspected within
ate before slaughter, void; United States v. Hopkins, 82 Fed. 537,
lding live-stock exchange an illegal monopoly under Federal
atute; Ames v. People, 25 Colo. 510, 511, 55 Pac. 726, holding
ate tax on peddlers of goods manufactured outside State, void;
ullard v. Northern Pac. R. R., 10 Mont. 180, 25 Pac. 122, 11 L. R. A.
0, and n., holding Federal statute prohibiting discrimination by
mmon carriers, valid; Lumberville Bridge Co. v. Assessors, 55
J. L. 584, 26 Atl. 713, 25 L. R. A. 137, holding State tax on
rporation engaged in interstate business, valid; Singer Mfg. Co.
Hardee, 4 N. Mex. 177 (682), 16 Pac. 607, holding State statute
escribing conditions for foreign corporations doing business there,
ld; dissenting opinions in Adams Express Co. v. Ohio, 165 U. S.
4, 41 L. 700, 17 S. Ct. 314, majority holding property of corpora-
ons engaged in interstate commerce, taxable by State where
tuated; Vance v. Vandercook Co., 170 U. S. 465, 42 L. 1110, 18
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quors, void. See 59 Am. Rep. 269, and 27 Am. St. Rep. 550, notes.
Distinguished in Emert v. Missouri, 156 U. S. 322, 39 L. 438, 15
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mestic and imported goods, valid; Louisville, etc., R. R. v. Ken-
cky, 161 U. S. 700, 40 L. 859, 16 S. Ct. 723, holding State prohibi-
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L. R. A. 661 (dissenting opinion in S. C., 128 Ind. 590, 28 N. E. 87,
L. R. A. 663), holding State regulation of transportation of
tural gas in pipes, valid; Myers v. Baltimore County, 83 Md. 389,
Am. St. Rep. 352, 35 Atl. 145, 34 L. R. A. 311, holding tax on
ttle brought within State for sale and export, valid; People v.
ng, 74 Mich. 590, 42 N. W. 142, holding tax on goods brought
thin State for sale in original packages, valid; Waterbury v.
wton, 50 N. J. L. 539, 14 Atl. 607, holding statute prohibiting sale
colored oleomargarine, valid as to sale in original imported pack-
es; Bagg v. Railroad, 109 N. C. 283, 284, 26 Am. St. Rep. 573, 574,
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[illegible] to ship freight within five days, valid; [illegible] Providence, etc., R. R., 15 R. I. [illegible], 4 Atl. [illegible] prohibiting railroad discrimination, valid [illegible] Gulf, etc., Ry. v. Dwyer, 75 Tex. [illegible], 16 Am. [illegible] 1002, 7 L. R. A. [illegible], holding State statute [illegible] roads refusing to deliver freight on payment [illegible]

Constitutional law.— Police power cannot [illegible] Federal Constitution, or powers of Federal [illegible]

Approved in Bowman v. Chicago, etc., Ry. [illegible] L. 710, 8 S. Ct. 704, holding statute regula[illegible] intoxicating liquors within State, void; Brennan [illegible] 300, 38 L. 722, 14 S. Ct. 832, holding State ta[illegible] mers, void; Vandercook Co. v. Vance, 80 F[illegible] Scott, 67 Fed. 857, both holding statute pro[illegible] liquors by citizens of State, void; Graffty v. [illegible] 57 Am. Rep. 154, 8 N. E. 612, holding tax o[illegible] goods, void; State v. Lichtenstein, 44 W. [illegible] holding tax on solicitor for orders for liqu[illegible] outside State, void.

Distinguished in Mugler v. Kansas, 123 U[illegible] Ct. 298, holding State prohibition of manuf[illegible] its limits, of intoxicating liquors, valid; Plu[illegible] 155 U. S. 470, 39 L. 226, 15 S. Ct. 157, hold[illegible] sale of oleomargarine, to prevent fraud, val[illegible] Co. v. James, 162 U. S. 654, 40 L. 1106, 16 S[illegible] regulation of telegraph companies, valid a[illegible] from without the State.

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116 U. S. 461–472, 29 L. 688, LONDON [illegible] DRENNEN.

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Partnership.— Persons cannot be made pa[illegible] their intention is contra, p. 472.

Approved in Duden v. Maloy, 63 Fed. 1[illegible] arguendo.

116 U. S. 472–473, 29 L. 696, PENNSYLVAN[illegible] ETC., R. R.

Courts.— Supreme Court, of its own mot[illegible] briefs on jurisdictional question not raised, [illegible]

Not cited.

6 U. S. 474–482, 29 L. 697, UNITED STATES v. REDGRAVE.

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Distinguished in Crenshaw v. United States, 134 U. S. 109, 33 L. 9, 10 S. Ct. 434, holding this statute valid, and applicable to naval det on sea duty, not yet fully graduated.

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6 U. S. 483–485, 29 L. 700, UNITED STATES v. PERKINS.

Army and navy.— Graduate cadet engineer is officer in navy, not bject to discharge without cause, p. 484.

Approved in United States v. McCrory, 91 Fed. 296, 63 U. S. App. 2, holding letter carriers in postal service, officers of United States. e 63 Am. St. Rep. 191, note.

United States.— Congress may restrict removal of officers whom has authorized executive heads to appoint, p. 485.

Approved in Butler v. White, 83 Fed. 582, enjoining removal of venue officers protected by civil service act; State v. Denny, 118 d. 407, 21 N. E. 261, 4 L. R. A. 87, State, etc. v. Denny, 118 Ind. 5, 21 N. E. 279, 4 L. R. A. 74, Moll v. Sbisa, 51 La. Ann. 292, 25 . 142, and State v. Moores, 55 Neb. 527, 76 N. W. 190, 41 L. R. A. 9, arguendo.

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U. S. 485–491, 29 L. 701, LAUGHLIN v. DISTRICT OF COLUMBIA.

Bills and notes.— Payment to indorsee in blank of District of lumbia warrants, discharges district, p. 489.

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Approved in Gleason v. District of Columbia, 127 U. S. 135, 138, L. 93, 94, 8 S. Ct. 1119, 1121, disallowing recovery under similar ditions.

U. S. 491–499, 29 L. 703, DUNPHY v. RYAN.

Frauds, Statute of.— Denial of contract effectually sets up plea statute, p. 495.

pproved in M'Donald v. Yungbluth, 46 Fed. 837, Buhl v. Stens, 84 Fed. 926, Feeney v. Howard, 79 Cal. 532, 535, 12 Am. St. . 167, 170, 21 Pac. 987, 988, 4 L. R. A. 829, 830, and Salomon v. Rae, 9 Colo. App. 26, 47 Pac. 410, all allowing such defense er denial.

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Distinguished in Walters v. McGuigan, 72 Wis. [illegible] holding terms of contract are not strained to br[illegible] of frauds.

Frauds, Statute of, cannot be relaxed to prot[illegible] land, under void oral agreement to sell, p. [illegible].

Approved in Fideler v. Norton, 4 Dak. 272, 3[illegible] performance takes case out of statute, if it will [illegible] tiff not to carry it out; McMillen v. Pratt, 89 Wis. [illegible] no action for damages lies for breach of oral agre[illegible] ship to buy land; Seymour v. Cushway, 100 Wi[illegible] Rep. [illegible], 76 N. W. 773, fraud is not established [illegible] oral contract for partnership to buy standing tim[illegible]

[illegible] U. S. [illegible], 29 L. 706, OBERTEUFFER v.

Customs duties.—By act of 1883, coverings [illegible] packed, are not dutiable unless in invoice price, [illegible]

Approved in Badger v. Cusimano, 130 U. S. 42, [illegible] 432, duties determined by actual market value; [illegible] sell, 152 U. S. 630, 38 L. 577, 14 S. Ct. 734, conce[illegible] covering and cost of packing berries; Magone v. [illegible] S. 606, 35 L. 1131, 12 S. Ct. 391, and Appeal of Sla[illegible] both holding boxes containing matches, not duti[illegible] v. Thurber, 28 Fed. 59, boxes for matches may n[illegible] used for some other purpose than transportati[illegible] Magone, 34 Fed. 121, boxes containing matches, u[illegible] tion, and also otherwise, are not dutiable; Mor[illegible] 33 Fed. 245, only market value of goods, per se, [illegible] States v. Leggett, 66 Fed. 301, 302, 26 U. S. A[illegible] are not unusual coverings of Roquefort cheese, a[illegible] under act of 1890; Rœbling v. United States, 7[illegible] invoice shows something not dutiable may be inc[illegible] show how much there is, no reduction; Robert[illegible] U. S. 26, 33 L. 239, 10 S. Ct. 8, arguendo.

Customs duties.—Objection to charges on p[illegible] appraisement, is properly by protest, p. 515.

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ort entered; United States v. Passavant, 169 U. S. 21, 42 L. 646, 8 S. Ct. 221, charges added to dutiable value of goods, may be at-acked by protest; Hermann v. United States, 84 Fed. 151, though ppraisement is conclusive, inclusion of something not part of arket price may be re-examined on protest.

16 U. S. 517–529, 29 L. 715, COE v. ERROL.

State has jurisdiction of persons and things within it, not belong-ng to another jurisdiction, p. 524.

Approved in Van Brocklin v. State of Tennessee, 117 U. S. 179, 9 L. 855, 6 S. Ct. 685, lands held by United States cannot be taxed y States.

Taxation.— State may tax personalty therein, of non-resident, lso taxed elsewhere, p. 524.

Approved in Pullman Car Co. v. Pennsylvania, 141 U. S. 23, 35 L. 16, 11 S. Ct. 878 (see dissenting opinion in S. C., 141 U. S. 31, 35 . 619, 11 S. Ct. 881), collecting cases, foreign railroad corporation ay be taxed on capital stock on ratio of mileage within State; av. Soc. v. Multnomah County, 169 U. S. 427, 42 L. 805, 18 S. Ct. 94, State may tax mortgages of lands therein, though owned by on-residents; Winkley v. Newton, 67 N. H. 83, 36 Atl. 612, 35 L. R. . 757, ice belonging to non-resident, awaiting transportation at ndefinite time, may be taxed; Kelley v. Rhoads, 7 Wyo. 265, 51 Pac. 00, 39 L. R. A. 602, sheep grazing in State may be taxed, though eturned for assessment to another State. See 62 Am. St. Rep. 449, 50, 451, note.

Commerce.— Goods en route through a State, though delayed herein, are not there taxable, p. 525.

Approved in State v. Judge, 44 La. Ann. 777, 11 So. 76, law re-uiring different coaches for colored persons, is void as to inter-ate passengers. See 62 Am. St. Rep. 476, note.

Distinguished in Transit Co. v. Lynch, 18 Utah, 389, 55 Pac. 642, ilway cars, leased by foreign corporation, may be taxed, though ngaged in interstate commerce.

Commerce.— Goods collected for export are not yet exports pro-cted against State tax, p. 525.

Approved in United States v. Knight, 156 U. S. 13, 39 L. 329, 15 S. t. 254 (see dissenting opinion in 156 U. S. 41, 39 L. 339, 15 S. Ct. 4), affirming 60 Fed. 310, sugar monopoly not inhibited by act 1890, having no direct relation to interstate commerce; Cutting Florida Ry., 46 Fed. 644, shipment to agent within State for mediate reshipment, is interstate commerce; In re Greene, 52 d. 113, act of 1890 does not control combinations merely owning stilleries in various States; Dueber Watch Case, etc., Co. v. oward, etc., Co., 66 Fed. 642, 35 U. S. App. 16, combination whose

wares may be sold in other States, does not violate
United States v. Addyston Pipe, etc., Co., 85 Fed. 297,
769, 771, contracts in restraint of soliciting order for
to be brought from another State, are invalid under
United States v. Boyer, 85 Fed. 434, act of Congress,
spection of live cattle about to be slaughtered and the
void: State v. Harrub, 95 Ala. 184, 186, 188, 36 Am. St.
288, 10 So. 753, 754, 755, 15 L. R. A. 764, 765, State
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83 Me. 242, 23 Am. St. Rep. 779, 22 Atl. 161, 13 L. R.
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General, 46 N. J. Eq. 275, 19 Am. St. Rep. 398, 19 Atl.
tions transacting business in other States may be tax
Pennsylvania Tel. Co., 48 N. J. Eq. 93, 27 Am. St. Re
847, telephone messages to other States cannot be sto
tax is not paid; Houston Nav. Co. v. Insurance Co., o
89 Tex. 6, 59 Am. St. Rep. 20, 32 S. W. 890, 30 L. R.
ment on barge, for delivery to steamers, to be carried
is interstate commerce; Norfolk, etc., R. R. v. Common
752, 57 Am. St. Rep. 829, 24 S. E. 838, 34 L. R. A. 10
cars en route for another State, are subject to Sunday l
etc., Ry. v. Becker, 35 Fed. 886, arguendo. See 27
552, note.

Commerce.— Goods for export, at depot ready for
taxable as part of general mass of State property, p. 5

Approved in Turpin v. Burgess, 117 U. S. 506, 507,
S. Ct. 836, excise on tobacco before removal from f
duty on exports; Philadelphia, etc., Steamship Co. v.
122 U. S. 346, 30 L. 1205, 7 S. Ct. 1125, State tax on
of steamer running between States, is void; Kidd v.
U. S. 24, 32 L. 351, 9 S. Ct. 11, State may prohibit m
intoxicants, even for export; Lehigh, etc., R. R. v.
145 U. S. 202, 36 L. 675, 12 S. Ct. 808, railroad may be
business, though road is engaged in interstate commer
Lumber Co. v. Willetts, 118 Ill. 564, 9 N. E. 257, logs
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State v. Indiana, etc., Oil, Gas, Min. Co., 120 Ind. 578,
6 L. R. A. 582, and n., State cannot prevent export o
Myers v. Baltimore County, 83 Md. 389, 391, 55 Am.
354, 35 Atl. 145, 34 L. R. A. 311, 312, cattle brought to
for day or so, and sold outside of State, may be taxe
Riley, 32 Neb. 503, 506, 29 Am. St. Rep. 452, 455, 49 N

State may prohibit manufacture of liquor to be exported; Lumberville Bridge Co. v. Assessors, 55 N. J. L. 535, 26 Atl. 713, 25 L. R. A. 137, collecting cases, allowing license fee on corporations, irrespective of its business; Rothermel v. Meyerle, 136 Pa. St. 264, 20 Atl. 587, 9 L. R. A. 368, and n., license of peddlers, purchasing with intent to export, is valid; Kelley v. Rhoads, 7 Wyo. 263, 51 Pac. 599, 39 L. R. A. 601, live-stock brought in State to be grazed, may be taxed; dissenting opinions in Wabash, etc., Ry. v. Illinois, 118 U. S. 589, 30 L. 255, 7 S. Ct. 20, majority holding State short-haul law, void as to interstate commerce; People v. Hawkins, 157 N. Y. 22, 51 N. E. 264, 42 L. R. A. 499, majority holding law requiring convict labor goods to be so labelled, invalid. See 27 Am. St. Rep. 564, and 32 Am. St. Rep. 474, 475, notes.

Commerce.— Imports, still in original packages, are not taxable; otherwise, if at destination and not discriminated against, p. 527.

Approved in Coal Co. v. Sheriff, 40 La. Ann. 228, 8 Am. St. Rep. 521, 3 So. 644, goods from other States may be taxed before unloaded; Titusville v. Brennan, 143 Pa. St. 650, 24 Am. St. Rep. 584, 22 Atl. 895, 14 L. R. A. 102, and n., city ordinance, forbidding soliciting without license, is valid, if not discriminating against other States.

116 U. S. 529–538, 29 L. 712, IRON SILVER MIN. CO. v. CHEESMAN.

Mines.— Under R. S., § 2322, owner of vein may follow same outside side lines, so far as traceable, p. 531.

Approved in Butte, etc., Min. Co. v. Societe Anonyme Des Mines, 23 Mont. 192, 58 Pac. 113, applying rule in determining right to follow vein; dissenting opinions in Mining Co. v. Mining Co., 5 Utah, 74, 96, 11 Pac. 535, 542, and South End, etc., Co. v. Tinney, 22 Nev. 63, 35 Pac. 105, majority, in both cases, applying rule in determining title to mine. See 58 Am. St. Rep. 265, note.

Distinguished in Montana Co. v. Clark, 42 Fed. 629, holding rule not applicable, where end lines of claim are not parallel; Jones v. Prospect, etc., Co., 21 Nev. 348, 352, 31 Pac. 644, 646, holding mining patent does not convey veins which apex outside of boundary lines.

Trial.— Where charge is full and clear, other instructions asked may be refused, p. 532.

Mines.— Vein, or lode, means distinct zone of mineralized rock, though uneven in size and richness, p. 534.

Approved in Iron, etc., Co. v. Mike, etc., Co., 143 U. S. 404, 36 L. 204, 12 S. Ct. 545 (see dissenting opinion in S. C., 143 U. S. 421, 36 L. 210, 12 S. Ct. 551), Book v. Justice Min. Co., 58 Fed. 126, Mont. Cent. Ry. v. Migeon, 68 Fed. 813, 816, Meydenbauer v. Stevens, 78 Fed. 790, Illinois Silver, etc., Co. v. Rapp, 7 N. Mex. 342, 34 Pac. 145 (see dissenting opinion in 7 N. Mex. 346, 34 Pac. 546), Reynolds

v. Iron, etc., Min. Co., 116 U. S. 695, 29 L. 777, 6
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81, 22 Pac. 499, and United States v. Iron, etc., Min
680, 32 L. 574, 9 S. Ct. 198, both applying rule i
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Mines, 23 Mont. 200, 58 Pac. 115, and King v. Amy,
9 Mont. 565, 24 Pac. 202, both applying rule in deter
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412, 39 Pac. 464, applying rule in determining superio
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ing continuity of vein not affected by intervening b
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540, and Shreve v. Copper, etc., Min. Co., 11 Mont. 3
320, 324, majority, in both cases, applying rule in de
to mine. See 58 Am. St. Rep. 273, note.

116 U. S. 538–540, 29 L. 725, CENTRAL R. R. v. BO

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116 U. S. 541–548, 29 L. 720, TYRE, ETC., CO. v. S

Appeal.— Where Circuit Court makes special findi
stipulated will be disregarded on appeal, p. 545.

Approved in Fort Worth City Co. v. Smith Bridge
300, 38 L. 169, 14 S. Ct. 341, stipulation as to evide
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Customs duties.— Collector's and secretary of trea
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Customs duties.— Under R. S., § 2504, "steel-wir
for locomotives, are dutiable at 45 per cent., p. 547.

Approved in Saltonstall v. Birtwell, 150 U. S. 420,
S. Ct. 170, reversing S. C., 39 Fed. 384, pieces of
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116 U. S. 548–550, 29 L. 719, OTIS v. OREGON STEA

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State court's opinion will not be examined, p. 550.

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116 U. S. 550–566, 29 L. 729, BARRY v. EDMUNDS

Courts.— Circuit Court has jurisdiction of Federal
$500, under act of 1875, p. 558.

Approved in Crystal Springs Land, etc., Co. v. L
Fed. 154, Federal jurisdiction attaches in attempt by

: property without due process of law; dissenting opinions in **nnessee v. Union, etc., Bank,** 152 U. S. 472, 38 L. 518, 14 S. Ct. **0, majority holding jurisdiction** must appear in plaintiff's state **ent, under act of 1888;** Fergus Falls v. Fergus Falls Water Co., **Fed. 877, 879, 36 U. S.** App. 480, majority holding mere allega- **n that law impairs obligation** of contract, does not give juris- **ction.**

Appeal.— Dismissal of suit because not a Federal question, in- **lves only legal discretion,** reviewable on appeal, p. 559.

Approved in **Wetmore v.** Rymer, 169 U. S. 118, 42 L. 683, 18 S. . 294, reviewed by Supreme Court.

Courts.— Facts must be conclusive to justify dismissal because **Federal question; suit** for official trespass, involving Federal **ghts, was improperly dismissed,** p. 559.

Approved in Hartog v. Memory, 116 U. S. 591, 29 L. 726, 6 S. Ct. **1, evidence on which court** acts must be pertinent to issue, and **pear of service; Deputron** v. Young, 134 U. S. 252, 33 L. 929, 10 **Ct. 544, refusing to dismiss;** Scott v. Donald, 165 U. S. 89, 41 L. **9, 17 S. Ct. 268, applied to** unlawful seizure by officer, under color **unconstitutional statute;** Wetmore v. Rymer, 169 U. S. 120, 122, **3, 42 L. 684, 685, 18 S.** Ct. 295, 296, sustaining jurisdiction on **ound that more than jurisdictional** amount is shown; Blackburn **Portland Gold Min. Co.,** 175 U. S. 574, 20 S. Ct. 223, applied to **pute over mining claim;** Platt v. Phœnix Assur. Co., 37 Fed. 730, **ere allegations of damage** and claims of recovery exceed juris- **tional amount, motion to** remand denied; Imperial Refining Co. **Wyman, 38 Fed. 577, 3 L.** R. A. 506, and n., amendment of defend- **'s pleading to raise question** of jurisdiction must be granted after **l begun; Foster v. Cleveland,** etc., Ry., 56 Fed. 436, burden of **wing want of diversity** of citizenship, when sufficiently alleged, **on defendant; Bank of** Arapahoe v. Bradley, etc., Co., 72 Fed. **, 36 U. S. App. 519, dismissing** case for colorable demand in case **goods sold; Gubbins v.** Laughtenschlager, 75 Fed. 621, disallow- **amendment withdrawing** admissions of citizenship years after **ring; Stillwell, etc., Co.** v. Williamson Oil, etc., Co., 80 Fed. **70, when court must determine** conflicting testimony or disputed **stions of law to determine** amount in dispute, it has jurisdiction; **fet v. Quine, 95 Fed.** 200, retaining jurisdiction in suit to re- **in destruction of flume;** dissenting opinions in Lehigh Mining, **Co. v. Kelly, 160 U. S.** 353, 354, 40 L. 454, 16 S. Ct. 318, majority **ing transfer to foreign** corporation created to bring suit, suit **ld be dismissed; Whelan** v. New York, etc., R. Co., 35 Fed. 865, **R. A. 75, and n., arguendo.**

ppeal.— In suits not ex contractu, plaintiff's demand is amount **ontroversy, unless colorable,** p. 561.

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trover, and other damage is less than jurisdiction
is dismissed; Simon v. House, 46 Fed. 318, 320, 321,
where undisputed evidence, on plea to jurisdiction,
land claimed less than $2,000, suit dismissed; Peele
Fed. 786, 2 U. S. App. 40, amount claimed in g
jurisdiction, in suit for account, and sets aside set
etc., Co. v. Southern Ry., 88 Fed. 806, taking amo
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demanded in nuisance case, fixes jurisdiction; Ban
v. Bradley, etc., Co., 72 Fed. 870, 871, 36 U. S. Ap
case dismissed for colorable demand, in case of goo
v. Utah, etc., Machinery Co., 82 Fed. 210, where c
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recovered, question is not determined on ex parte
ward v. Nordberg Mfg. Co., 85 Fed. 6, 54 U. S. App.
ing to remand suit on quantum meruit, with ad dam
Robinson v. West Virginia, etc., Co., 90 Fed. 771, s
by stockholder, for value of his stock, must equal $
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92 Fed. 464), where claims in good faith for dama
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768, one result of judgment prayed for involves $2
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Damages.— Exemplary damages are recoverable
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Approved in Denver, etc., R. Co. v. Harris, 122 U
1148, 7 S. Ct. 1290, one injured in forcible seizure o
recover punitive damages; Fell v. Northern Pac.
253, allowing exemplary damages against master fo
act of servant; Norfolk, etc., R. R. v. Anderson, 90 V
Rep. 888, 17 S. E. 759, allowing exemplary damage
road ratifying conductor's act; Mayer v. Frobe, 40 W
22 S. E. 59, 61, allowing exemplary damages for u
liquor to husband.

Distinguished in Lake Shore, etc., Ry. v. Prentice,
37 L. 101, 13 S. Ct. 263, corporation not liable for pu
for wanton conduct of employee; New York, etc., Ry.
Fed. 502, 6 U. S. App. 95, imperative manner of con
violence, does not justify punitive damages.

Damages allowable for tort is peculiarly jury's fu

Approved in Clarke v. American Dock, etc., Co., 3
fusing to set aside verdict for excessive damages;
etc., Ry., 44 Fed. 45, 49, verdict for $2,500 for death
child, not set aside; Fell v. Northern Pac. R. R., 44 F
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not disturbed unless outrageous.

Miscellaneous.— McCullough v. Virginia, 172 U. S. 106, 19 S. Ct. 135, and Commonwealth v. McCullough, 90 Va. 598, 19 S. E. 114, both referring to case as one of coupon cases.

116 U. S. 567-572, 29 L. 727, CHAFFIN v. TAYLOR.

Appeal.— After reversal of State court judgment, rejoinder raising the same questions, is improper, p. 572.

Appeal.— Matters decided on one writ of error, cannot be raised on second, p. 572.

Approved in Northern Pac. R. R. v. Ellis, 144 U. S. 464, 36 L. 506, 12 S. Ct. 726, decision that first appeal settled matters, involves no Federal question; Great Western Tel. Co. v. Burnham, 162 U. S. 344, 40 L. 993, 16 S. Ct. 852, in Wisconsin, second appeal is affirmed, if questions have been adjudicated, and is not dismissed; Panama R. R. v. Napier Shipping Co., 166 U. S. 284, 41 L. 1005, 17 S. Ct. 574, on certiorari to Circuit Court of Appeals, questions on all appeals considered; Thompson v. Maxwell Land, etc., Co., 168 U. S. 456, 42 L. 541, 18 S. Ct. 123, applied on error to territorial court; Alabama, etc., R. R. v. Carroll, 84 Fed. 777, 52 U. S. App. 454, applied in Circuit Court of Appeals; Wabash, etc., Ry. v. Peterson, 115 Ill. 601, parol evidence not admissible to show prior appeal was not on merits; Rœsel v. State, 62 N. J. L. 869, 41 Atl. 834, holding writ of error should be quashed; Holleran v. Meisel, 91 Va. 148, 21 S. E. 659, collecting cases, applied to construction of legal character, of certain papers; Furth v. Snell, 13 Wash. 665, 43 Pac. 936, where evidence on retrial is substantially same, former adjudication declaring it insufficient, controls; Hart v. Stribling, 25 Fla. 445, 6 So. 456, arguendo.

Distinguished in Metcalf v. Watertown, 68 Fed. 861, 34 U. S. App. 107, judgment upon mandate of appellate court, determining questions not covered thereby, is subject to review.

Miscellaneous.— McGahey v. Virginia, 135 U. S. 676, 679, 34 L. 309, 310, 10 S. Ct. 977, 978, and McCullough v. Virginia, 172 U. S. 106, 19 S. Ct. 135, both referring to cited case as coupon case.

116 U. S. 572-584, 29 L. 735, ROYALL v. VIRGINIA.

Constitutional law.— Fee precedent to license to practice law is a "tax" for which Virginia bound herself by contract, to receive State coupons, p. 578.

Approved in Sands v. Edmunds, 116 U. S. 587, 29 L. 739, 6 S. Ct. 517, applying rule to license tax for attorney; Royall v. Virginia, 121 U. S. 104, 30 L. 883, 7 S. Ct. 826, same as cited case; McGahey v. Virginia, 135 U. S. 679, 680, 34 L. 310, 10 S. Ct. 978, referred to as one of coupon cases.

Taxation.— Tender is equivalent to payment for purpose of legal proceedings, p. 579.

Attorney's license is an occupation tax, where issu
one, and not part of police power, pp. 579–582.

Mandamus.— Officer's duty to issue license, if mi
enforceable by mandamus, p. 582.

Licenses.— If officer, under void law, refuse business
properly applying, may continue business without, p. 58

Approved in Mallan v. Bransford, 86 Va. 678, 10 S. E
ing, if money is paid it cannot be recovered.

Constitutional law.— Law punishing want of license,
tract required State to accept coupons therefor, impai
p. 583.

Distinguished in Commonwealth v. Jones, 82 Va. 791,
86, 90, holding act of 1886, receiving coupons for identi
requiring money payment, valid.

Miscellaneous.— McCullough v. Virginia, 172 U. S. 10
135, referred to as coupon case; United States v. Boyer,
without application.

116 U. S. 585–587, 29 L. 739, SANDS v. EDMUNDS.

Adjudged with Royall v. Virginia, supra, q. v.

Miscellaneous.— McCullough v. Virginia, 172 U. S. 10
135, and McGahey v. Virginia, 135 U. S. 679, 34 L. 31
978, referred to as coupon cases.

116 U. S. 588–592, 29 L. 725, HARTOG v. MEMORY.

Courts.— By act of 1875, only plea in abatement was
to combat record, diverse citizenship or court sua sponte,

Approved in Hewitt v. Story, 14 Sawy. 80, 39 Fed. 16
to jurisdiction may not be entered after answer to merit
v. Lyons, 27 Fed. 404, jurisdiction appearing on record,
parties can only be raised by sworn plea or exceptions;
Galloway, 35 Fed. 469, and Imperial Refining Co. v.
Fed. 576, 578, 3 L. R. A. 505, 506, and n., both holding
merits waives plea to jurisdiction; Foster v. Cleveland
56 Fed. 436, burden of proof of defeating jurisdiction is
ant; Gubbins v. Laughtenschlager, 75 Fed. 620, 623,
withdrawing admissions of citizenship to defeat jurisdi
lowed after hearing; Nat. Masonic Accid., etc. v. Spar
227, 49 U. S. App. 686, 687, general denial is plea to
waives jurisdiction; dissenting opinion in Lehigh Min.,
Kelly, 160 U. S. 353, 40 L. 454, 16 S. Ct. 318, majority ho
fer to foreign corporation to give jurisdiction, suit is

Courts.— Where diverse citizenship properly pleaded
cannot, after trial, dismiss, because testimony contra, p

Approved in Gubbins v. Laughtenschlager, 75 Fed
amendment withdrawing admission of citizenship, to d

tion, disallowed after hearing; dissenting opinion in Less v. Eng-
n, 85 Fed. 477, 481, 56 U. S. App. 27, 33, majority directing Circuit
urt to dismiss bill not showing jurisdictional amount; Mason v.
llagham, 82 Fed. 689, 53 U. S. App. 540, arguendo.

Appeal.— Evidence on which Circuit Court dismisses, must be
rtinent, and of record, to be reviewable on appeal, p. 591.

Approved in Wetmore v. Rymer, 169 U. S. 118, 42 L. 683, 18 S.
. 294, evidence must create a legal certainty.

Court, if suspecting its jurisdiction is imposed on, may institute
quiry sua sponte, p. 591.

Approved in Morris v. Gilmer, 129 U. S. 326, 327, 32 L. 694, 9 S.
. 292, where record shows no jurisdiction, Supreme Court reverses,
th order to dismiss; Wetmore v. Rymer, 169 U. S. 122, 42 L. 684,
S. Ct. 296, evidence must create legal certainty; Imperial Refin-
g Co. v. Wyman, 38 Fed. 577, 3 L. R. A. 506, and n., answer on
erits waives plea to jurisdiction; Simon v. House, 46 Fed. 319,
int may be raised by affidavits or depositions; The John C.
reeney, 55 Fed. 541, motion to dismiss libel in rem, may be made
er full hearing on merits; Lehigh Min., etc., Co. v. Kelly, 64 Fed.
3, where corporation is organized for purpose of making jurisdic-
n, case dismissed; Less v. English, 85 Fed. 474, 56 U. S. App. 23
e dissenting opinion in S. C., 85 Fed. 480, 56 U. S. App. 32),
ecting Circuit Court to dismiss case, not showing jurisdictional
ount; Levinski v. Middlesex Bk. Co., 92 Fed. 459 (see dissent-
g opinion in S. C., 92 Fed. 466), petition in State court, disclosing
isdictional amount, sustaining exceptions to items does not de-
t Federal jurisdiction; Wonderly v. Lafayette Co., 150 Mo. 648,
S. W. 748, 45 L. R. A. 390, bonds assigned to get judgment in
deral court, it is set aside in State court.

Courts.— On objection to its jurisdiction by court, sua sponte,
intiff is entitled to hearing, p. 592.

Distinguished in Davis v. Kansas City, etc., R. R., 82 Fed. 364,
d as having no application.

U. S. 593–598, 29 L. 723, SHEPARD v. CARRIGAN.

Patentee, introducing new elements in his claim, after first rejec-
n, cannot, thereafter, drop them to catch infringer, p. 597.

pproved in Sutter v. Robinson, 119 U. S. 541, 30 L. 496, 7 S. Ct.
applied to apparatus for resweating tobacco; Crawford v. Hey-
ger, 123 U. S. 607, 31 L. 274, 8 S. Ct. 408, collecting cases, applied
mprovement for inserting staples; Hendy v. Miner's Iron Works,
U. S. 376, 32 L. 209, 8 S. Ct. 1279, ore stamp feeder, described
h cylinder, not smooth, does not cover one that is; Roemer v.
dle, 132 U. S. 317, 33 L. 383, 10 S. Ct. 99, collecting cases, applied
ombined lock and handle on travelling bags; Yale Lock Co. v.

Berkshire Bank, 135 U. S. 379, 34 L. 183, 10 S. Ct. 896, c
be enlarged on reissue; Dobson v. Lees, 137 U. S. 265, 8
S. Ct. 73, reissue cannot include matter once intentiona
Dobson v. Lees, 30 Fed. 627, reissue broader than ori
valid, particularly where this was originally refused;
kins, 52 Fed. 208, 214, 6 U. S. App. 200, no constructi
reissue to cover rejected claims; Corbin Cabinet Lock
Lock Co., 150 U. S. 40, 37 L. 990, 14 S. Ct. 29, acq
rejection of broad claim for lock, precludes constructi
rejected portion; Knapp v. Morss, 150 U. S. 225, 37 L.
Ct. 82, claims must be read and interpreted with refe
jected claims; Morgan Envelope Co. v. Albany Paper C
429, 38 L. 502, 14 S. Ct. 629, acquiescence in rejection
to claim benefit thereof; La Rue v. Western Electric Co.
22, 28 Fed. 87, instrument, without elements thereo
infringe combination; Boland v. Thompson, 23 Blatchf.
635, remedy for rejection is appeal, and not reissue;
Rocker Spring Co., 77 Fed. 431, 47 U. S. App. 125,
rejection should be made by appeal, and not by at
broaden amended claims; Electrical, etc., Co. v. Julien
38 Fed. 122, where, in device, patentee claims one e
cannot claim two; United States Axle, etc., Co. v. Wur
430, applied to patent for axle lubricator; Smith v. Pit
Co., 42 Fed. 150, communications to patent office, restri
cannot be disregarded, in suit for infringement; Cellul
v. Cellonite, etc., Co., 42 Fed. 906, patent only secure
asked for and accepted; Nat., etc., Machine Co. v. Willi
194, 12 L. R. A. 110, and n., claim for cigar-buncher,
referring to drawing, is strictly construed, in view o
Lane v. Park, 49 Fed. 458, applied to plows with soft
plates; Coll v. Seneca, 56 Fed. 156, where patentee doe
from rejection, he is restricted to the narrow claim;
etc., Mach. Co. v. Aultman, 58 Fed. 778, applying rule
cence in rejection of claims, reopened under reissue
Johnson v. Olsen, 61 Fed. 833, rule applies where rejec
narrower, as well as broader than those allowed; Wo
etc., Co. v. Deering, 66 Fed. 550, sheaf carriers, describ
jointed, not infringed by one double-jointed; Wheaton v
Fed. 842, 44 U. S. App. 118, applied to can-heading ma
Sanitary, etc., Co. v. Elwood, 73 Fed. 485, where cert
of combination are declared necessary, omission is no i
Missouri Lamp, etc., Co. v. Stempel, 75 Fed. 588, ap
extinguisher; Stearns v. Russell, 85 Fed. 225, 54 U.
applied to pill-dipping device; Truman v. Holmes, 87
U. S. App. 748, collecting cases, applied to breaking c
St. Louis Car Co., 90 Fed. 669, 62 U. S. App. 282, rul
car trucks, whether objections of patent office were v

r not; dissenting opinion in Westinghouse v. Boyden Power Brake Co., 170 U. S. 582, 42 L. 1152, 18 S. Ct. 728, majority holding Westinghouse fluid pressure automatic brake, not infringed.

Distinguished in Yale Lock Mfg. Co. v. New Haven Sav. Bank, 2 Fed. 171, where patent office called a "double disc" a "single disc," party is not precluded by claiming former in reissue; Wirt v. Brown, 32 Fed. 286, language of patent, not ambiguous, cannot be overriden by letter of solicitor; Reece Button, etc., Mach. Co. v. Globe Button-Hole, etc., Co., 61 Fed. 969, 21 U. S. App. 244, collecting cases, rule not applied where no direct issue of novelty, and amendments were only incidental; M'Cormick Harvesting, etc., Co. v. Aultman, 69 Fed. 399, 37 U. S. App. 299, rule not applied where reissue is applied for, but not carried to point of surrender of old patent, and acceptance of new.

Patents.— MacDonald's fluted or plaited dress protector, is not infringed by one not fluted or plaited, p. 597.

116 U. S. 599–605, 29 L. 740, MING v. WOOLFOLK.

Fraud.— Action of deceit involves intentional untruth, resulting intentionally in alteration of condition, and loss, p. 602.

Approved in Belmont Min. Co. v. Costigan, 21 Colo. 477, 42 Pac. 649, holding complaint herein sufficient; Runge v. Brown, 23 Neb. 622, 37 N. W. 663, defendant cannot allege plaintiff had no right to rely on his representation. See 18 Am. St. Rep. 561, note.

Fraud.— Deceit does not lie, if act induced would have been done anyhow, and caused no loss, p. 602.

116 U. S. 605–609, 29 L. 744, LIEBKE v. THOMAS.

Bankruptcy.— Notice of composition to holder of accommodation note, is notice of bankruptcy, p. 607.

Bankruptcy.— Composition discharges all save fiduciary debts, just as bankruptcy discharge does, p. 608.

Evidence.— Which is surety and which principal, on note, can be shown by parol, as between parties, p. 608.

Not cited.

116 U. S. 609–615, 29 L. 742, JONES v. SIMPSON.

Evidence.— Vendor's admissions after sale, of purpose to defraud his creditors, are admissible as res gestæ, p. 611.

Approved in Sonnentheil v. Mœrlein Brewing Co., 172 U. S. 415, 19 S. Ct. 238, and State v. Durant, 53 Mo. App. 500, both admitting declarations of vendor; Toms v. Whitmore, 6 Wyo. 229, 44 Pac. 57, collecting cases, discussing when declarations of vendor are admitted.

Fraudulent conveyances.— If vendee guilty of b
void, irrespective of consideration paid, p. 612.

Approved in Jewell v. Knight, 123 U. S. 434, 31
195, in absence of statute, debtor may prefer cre
goods received with intent to defraud creditors; He
ney, 47 Fed. 760, president, having notice of inso
tempts to conceal cash, bank is no bona fide ta
Collins, 50 Fed. 743, 4 U. S. App. 406, instruction th
have actual notice of fraud, is erroneous; Treusc
54 Fed. 878, 6 U. S. App. 403, approving instruction

Fraudulent conveyances.— After vendor's fraud s
must show bad faith of vendee paying valuable c
614.

Approved in Bamberger v. Schoolfield, 160 U. S.
16 S. Ct. 229, party alleging must prove fraud; W
59 Fed. 73, 74, 19 U. S. App. 307, Ross v. Wellman
Pac. 403, and Casey v. Leggett, 125 Cal. 670, 58 Pa
ing to fraudulent conveyance.

116 U. S. 616–641, 29 L. 746, BOYD v. UNITED S

Searches.— Law declaring allegations provable
papers, confessed by non-production, violates fou
p. 621.

Approved in In re Pac. Ry. Commission, 12 Saw
250, holding Pacific railway commission cannot co
of private books and papers of officers of railroad
gore, 96 Fed. 562, holding State court cannot
revenue collector to produce records from his offic

Distinguished in Chastang v. State, 83 Ala. 30, 3
evidence of concealed weapon, properly admitted.

**Searches and seizures of stolen, forfeited, or du
lawful, but not of one's private papers, p. 623.**

Approved in Counselman v. Hitchcock, 142 U. S.
12 S. Ct. 204, holding witness before grand ju
alleged violation of interstate commerce act, need n
tions which might criminate him; United States v.
75 Fed. 97, refusing to order production of pape
render party liable to criminal prosecution; Hoove
81 Fed. 482, holding refusal to deliver mail, unde
addressee conducts lottery, void; United States v. B
holding witness cannot be compelled to give self-in
dence before pension examiner; Ryder v. Batem
refusing to order production of deed in adversary's
fore hearing; United States v. Wong Quong Won
holding letters unlawfully seized, cannot be used ag

proceedings to deport him; Thurston v. Clark, 107 Cal. 290, 40 Pac. 437, holding officer cannot be compelled to be witness against himself, in proceedings to remove him for wrongdoing; Langdon v. People, 133 Ill. 397, 24 N. E. 877, holding papers lawfully seized in defendant's office, admissible in prosecution for forgery; Lester v. People, 150 Ill. 421, 41 Am. St. Rep. 382, 23 N. E. 389, holding order compelling party to give his books to third party for inspection by adversary for indefinite time, void; State v. Newman, 96 Wis. 267, 71 N. W. 441, and Glennon v. Britton, 155 Ill. 245, 246, 40 N. E. 598, 599, both holding searches and seizures of gaming implements, valid; Newberry v. Carpenter, 107 Mich. 570, 61 Am. St. Rep. 348, 65 N. W. 531, 31 L. R. A. 164 (dissenting opinion in S. C., 107 Mich. 578, 65 N. W. 534, 31 L. R. A. 167), holding seizure of defendant's property, for use as evidence against him in criminal case, invalid; Farrow v. Springer, 57 N. J. L. 354, 31 Atl. 216, holding search warrant, issued for stolen goods, legal; Ex parte Wilson, — Tex. Cr. —, 47 S. W. 1000, holding witness before grand jury cannot be compelled to answer questions, or produce paper which might incriminate him; Tucker v. United States, 151 U. S. 169, 38 L. 114, 14 S. Ct. 301, Spies v. People, 122 Ill. 232, 3 Am. St. Rep. 445, 12 N. E. 909, and State v. Boomer, 103 Iowa, 114, 72 N. W. 426, arguendo. See 32 Am. St. Rep. 644, 41 Am. St. Rep. 392, and 61 Am. St. Rep. 355, 356, notes.

Distinguished in In re Storror, 63 Fed. 566, holding messages in hands of telegraph company, subject to seizure by grand jury investigating crimes of senders and receivers of messages; Starchman v. State, 62 Ark. 540, 36 S. W. 940, holding burglar's tools, found on defendant's premises, admissible against him; State v. Griswold, 67 Conn. 306, 34 Atl. 1047, 33 L. R. A. 229, holding papers taken from defendant's premises, admissible on prosecution for arson; State v. O'Connor, 3 Kan. App. 598, 43 Pac. 860, and Williams v. State, 100 Ga. 518, 519, 28 S. E. 626, 627, 39 L. R. A. 271, 272, both holding articles seized on defendant's premises without warrant, admissible in criminal prosecution; Siebert v. People, 143 Ill. 582, 583, 32 N. E. 434, State v. Pomeroy, 130 Mo. 498, 32 S. W. 1004, and Gindrat v. People, 138 Ill. 107, 109, 111, 27 N. E. 1086, all holding evidence obtained by unlawful seizure, admissible on criminal prosecution; State v. Atkinson, 40 S. C. 372, 42 Am. St. Rep. 885, 18 S. E. 1025, and State v. Van Tassel, 103 Iowa, 15, 72 N. W. 500, both holding papers of defendant, surreptitiously obtained, admissible in criminal prosecution; People v. Lauder, 82 Mich. 125, 46 N. W. 960, holding indictment valid, although founded partly on defendant's testimony before grand jury; State v. Davis, 108 Mo. 669, 32 Am. St. Rep. 641, 18 S. W. 895, holding druggist's prescriptions may be seized and used as evidence against druggist; St. Joseph v. Levin, 128 Mo. 593, 49 Am. St. Rep. 580, 31 S. W. 102, holding statute requiring pawnbrokers to keep record-book open

to police inspection, valid; People v. Spiegel, 143 N. Y. 285, holding seizure and admission of defendant's book no objection was made.

Constitutional law.— Revenue law declaring allegat from private papers, confessed by non-production, vi and fifth amendments, pp. 632, 638.

Approved in Counselman v. Hitchcock, 142 U. S. 58 12 S. Ct. 206, reversing S. C., 44 Fed. 270, holding w grand jury, investigating violation of interstate comme not answer questions which might criminate him; In Commission, 12 Sawy. 579, 599, 32 Fed. 254, 267, ho railway commission cannot compel production of priv railroad officers; dissenting opinions in Brown v. Walk 615, 40 L. 827, 16 S. Ct. 657, majority holding immunit witnesses before interstate commerce commission, d of right to refuse to answer; State ex rel. v. Simmo Co., 109 Mo. 127, 18 S. W. 1126, 15 L. R. A. 678, a requiring corporate officers to disclose whether trust lated. See 61 Am. St. Rep. 353, note.

Distinguished in Potter v. Beal, 49 Fed. 795, appointi look over papers in national bank, and turn over pri president.

Constitutional law.— Fourth and fifth amendments a related, p. 633.

Cited in dissenting opinion in Brown v. Walker, 16 40 L. 828, 16 S. Ct. 658, majority holding immunity witnesses before interstate commerce commission, depr right to refuse to answer.

Actions.— Forfeiture proceedings for owner's offens fraudulent imports, are criminal, although in form civi

Approved in Lees v. United States, 150 U. S. 480, 48 14 S. Ct. 165, holding action to recover penalty for im contract laborers, criminal; Stone v. United States, 16 42 L. 131, 17 S. Ct. 782, holding indictment for cuttin public lands, no bar to action to recover its value; Stat etc., R. R., 37 Fed. 500, 3 L. R. A. 557, and n., holdi enforce statutory penalty against railroad, for extorti State v. Day Land, etc., Co., 41 Fed. 230, holding actio statutory penalty for grazing cattle on public land, crim States v. Shapleigh, 54 Fed. 131, 134, 12 U. S. App. 26, to action to enforce penalty for presenting false claim ag States; United States v. Two Barrels Whiskey, 96 Fed. rule to action against property used to defraud inter Ex parte Gould, 99 Cal. 362, 37 Am. St. Rep. 59, 33 L. R. A. 752, holding contempt proceedings, for viol

junction, criminal; Thurston v. Clark, 107 Cal. 289, 40 Pac. 437, holding proceedings to remove public officer for wrongdoing, criminal; Osborn v. First Nat. Bank, 154 Pa. St. 135, 26 Atl. 289, holding action to recover penalty from national bank for usury, criminal; dissenting opinion in Friedenstein v. United States, 125 U. S. 238, 31 L. 742, 8 S. Ct. 846, majority applying rule, in action to condemn goods, for evading duties. See 32 Am. St. Rep. 645, note.

Distinguished in United States v. Zucker, 161 U. S. 478, 40 L. 779, 16 S. Ct. 642, holding, in action to recover value of imported goods claimed as forfeited, defendants need not be confronted with government's witnesses; Fish v. Manning, 31 Fed. 340, holding action for penalties for stamping patented articles, without consent of patentee, civil; United States v. A Lot of Jewelry, etc., 59 Fed. 690, 691, holding allegations need not be proved beyond reasonable doubt, in such cases; Levy v. Superior Court, 105 Cal. 608, 610, 611, 38 Pac. 967, 29 L. R. A. 818, 820, and n. (dissenting opinion in S. C., 105 Cal. 616, 618, 38 Pac. 970, 29 L. R. A. 821, 824, and n.), holding statute allowing administrator to recover property embezzled from decedent's estate, remedial, and not penal.

Constitutional guaranties of person and property should be liberally construed, p. 635.

Approved in Monongahela Nav. Co. v. United States, 148 U. S. 325, 37 L. 467, 13 S. Ct. 626, applying rule, in construing fifth amendment to Constitution, in action to condemn land; Interstate Commerce Comm. v. Brimson, 154 U. S. 479, 38 L. 1058, 14 S. Ct. 1134, holding witness before interstate commerce commission, protected by all constitutional guaranties; United States v. Sweeney, 95 Fed. 449, In re Debs, 158 U. S. 594, 39 L. 1106, 15 S. Ct. 910, affirming S. C., 64 Fed. 753, both holding Federal court can punish infraction of its injunction against obstruction of mails and interstate commerce; Gulf, etc., Ry. v. Ellis, 165 U. S. 154, 41 L. 667, 17 S. Ct. 256, holding statute compelling railroads to pay attorney's fees in certain actions, void; Bram v. United States, 168 U. S. 543, 42 L. 574, 18 S. Ct. 187, holding involuntary confession not admissible against defendant accused of murder; United States v. Wong Kim Ark, 169 U. S. 654, 42 L. 893, 18 S. Ct. 459, holding Chinese born in United States, of parents permanently domiciled therein, a citizen of United States; United States v. Denicke, 35 Fed. 410, holding practice of post-office inspectors, of stripping and searching accused clerk without warrant, unlawful; United States v. Bell, 81 Fed. 843, 849, holding witness cannot be compelled to give self-incriminating evidence before pension examiner; North Bloomfield Gravel Min. Co. v. United States, 88 Fed. 678, 59 U. S. App. 400, applying rule to property rights of United States, and enjoining obstruction of river; Ryder v. Bateman, 93 Fed. 34, refusing to order production of deed in adversary's possession, before hearing;

Ex parte Hurn, 92 Ala. 110, 25 Am. St. Rep. 32, 9 So. 51
124, and n., holding money taken by officer from prison
attachment, under Alabama code; City of Pueblo v. S
22, 46 Am. St. Rep. 278, 36 Pac. 792, 24 L. R. A. 396,
to provision against taking property for public use,
pensation; Newberry v. Carpenter, 107 Mich. 572, 61
349, 65 N. W. 532, 31 L. R. A. 165 (dissenting opinion
Mich. 580, 65 N. W. 535, 31 L. R. A. 167), holding seizu
ant's property for use as evidence against him in crim
unlawful and unreasonable seizure; State v. Markusc
158, 64 N. W. 938, holding contempt proceedings, wit
jury, valid; In re Smith, 9 Wash. 90, 37 Pac. 313, h
providing for location of county roads, without submi
of compensation to jury, void; dissenting opinion
Ting v. United States, 149 U. S. 744, 37 L. 923, 13 S.
jority holding Chinese exclusion act valid; Penn. R.
chant, 119 Pa. St. 574, 13 Atl. 705, majority holding
liable to adjacent property-owner for indirect injurie
lawful operation; Brown v. Walker, 161 U. S. 635, 40
Ct. 654, majority holding immunity granted to wit
interstate commerce commission, deprives them of ri
to answer; Levy v. Superior Court, 167 U. S. 177, 42
Ct. 770, United States v. Price, 96 Fed. 961, Cooper v.
611, 11 Am. St. Rep. 85, 6 So. 111, 4 L. R. A. 767, and
v. Clancy, 20 Mont. 501, 52 Pac. 268, arguendo.

Forfeiture proceedings for fraud on customs, ent
all privileges of one criminally accused, p. 638.

Approved in The City of Norwich, 118 U. S. 504, 3
Ct. 1162, holding limitation of liability for collision,
proceedings in rem, against ship, as well as in pers
owner.

Distinguished in United States v. Zucker, 161 U. S
L. 779, 16 S. Ct. 642, 643, holding, in action to rec
imported goods, claimed as forfeited, defendants nee
fronted with government's witnesses.

116 U. S. 642–660, 29 L. 755, NORTHERN PAC. R. R. v

Jury.— Allowance of challenge of juror, where a
juror is selected, is not error, p. 646.

Approved in Hayes v. Missouri, 120 U. S. 71, 30 L
352, holding statute allowing more peremptory challeg
capital cases in large cities than elsewhere, valid; B
Jersey, 175 U. S. 175, 20 S. Ct. 78, holding State metho
jury, valid; Southern Pac. Co. v. Raub, 49 Fed. 702,
84, applying rule and refusing to review discretion of
passing on juror's qualifications; Wooten v. State, 99 T

41 S. W. 815, and Territory v. Roberts, 9 Mont. 14, 22 Pac. 133, refusing new trial where juror was improperly excluded, but impartial jury tried case; Woolfolk v. State, 85 Ga. 90, 11 S. E. 820, arguendo.

Trial.— Remission of part of verdict may be exacted by court, as consideration for denying new trial, p. 646.

Approved in Kœnigsberger v. Richmond Silver Min. Co., 158 U. S. 82, 39 L. 893, 15 S. Ct. 756, Kennedy v. Oregon Short Line Ry., 18 Utah, 329, 54 Pac. 989, Ohio River R. Co. v. Blake, 38 W. Va. 724, 18 S. E. 958, and Arkansas Cattle Co. v. Mann, 130 U. S. 73, 74, 32 L. 855, 856, 9 S. Ct. 459, all applying rule and holding such proceeding not error; Smith v. Pittsburgh, etc., Ry., 90 Fed. 787, holding court should not set aside verdict as excessive, unless clearly unfair; Texas, etc., R. R. v. Syfan, 91 Tex. 567, 568, 44 S. W. 1066, applying rule to Texas Court of Civil Appeals; Scaife v. Western, etc., Land Co., 87 Fed. 311, 59 U. S. App. 34, and Nelson v. Railroad, 49 La. Ann. 501, 21 So. 639, arguendo.

Master is not liable for servant's injuries, caused by fellow servant's negligence, p. 647.

Approved in Baltimore, etc., R. R. v. Baugh, 149 U. S. 388, 37 L. 781, 13 S. Ct. 922, holding railroad not liable to fireman injured through negligence of engineer; Northern Pac. R. R. v. Hambly, 154 U. S. 357, 38 L. 1013, 14 S. Ct. 985, holding railroad not liable to day laborer working on culvert, and injured through negligence of engineer and conductor of train; New England R. R. v. Conroy, 175 U. S. 334, 20 S. Ct. 89, holding railroad not liable for injury to brakeman, through negligence of conductor; Easton v. Houston, etc., Ry., 32 Fed. 895, 896, holding railroad not liable for injury to section-hand on hand-car, run into by train; Van Avery v. Union Pac. Ry., 35 Fed. 41, holding locomotive engineers fellow servants, and railroad not liable for negligent injury; The Queen, 40 Fed. 696, applying rule and holding seamen and officers on ship, fellow servants; Stockmeyer v. Reed, 55 Fed. 261, denying recovery for negligence of foreman, while acting as fellow servant; Pike v. Chicago, etc., R. Co., 41 Fed. 98, holding bridge watchman and conductors and engineer not fellow servants; Baltimore, etc., R. R. v. Andrews, 50 Fed. 781, 6 U. S. App. 75, 17 L. R. A. 192, holding brakeman on one train, fellow servant of engineer and conductor on another, and applying rule; New York, etc., R. R. v. Hyde, 56 Fed. 198, 5 U. S. App. 443, holding yard clerk and train crew fellow servants, and applying rule; Northern Pac. R. R. v. Hogan, 63 Fed. 106, 27 U. S. App. 184, holding brakeman and conductor fellow servants, and applying rule; Hermann v. Port Blakely Mill Co., 71 Fed. 855, holding mate and employee loading vessel, fellow servants, and applying rule; Colo. Coal, etc., Co. v. Lamb, 6 Colo. App. 263, 40 Pac. 254, holding mine boss, appointed as required by statute,

and miner, fellow servants, and applying rule; El
etc., Ry., 5 Dak. 539, 541, 41 N. W. 760, 761, 3 L. R
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8 Utah, 133, 30 Pac. 306, holding foreman of gang t
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and machinery, and cannot delegate this duty, p. 6

Approved in Texas, etc., Ry. v. Cox, 145 U. S. 6
S. Ct. 909, awarding damages to brakeman for i
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600, 14 S. Ct. 757, awarding damages for inju
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L. 630, 15 S. Ct. 496, both holding railroad lia
employee, through defective cars; Texas, etc., Ry
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cure rope; The Maharajah, 40 Fed. 786, holding s
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Distinguished in Atchison, etc., R. R. v. Meyers, 76 Fed. 446, 46 U. S. App. 226, and Atchison, etc., R. R. v. Myers, 63 Fed. 798, 24 U. S. App. 295, both holding railroad not liable for injury to switchman by defects in foreign car, of which he was warned; Chesapeake, etc., R. R. v. Hennessey, 96 Fed. 716, and Alabama, etc., R. R. v. Carroll, 84 Fed. 786, 788, 52 U. S. App. 470, 473, both refusing recovery for injury to brakeman, through defective couplings, which he was required to inspect; Bennett v. Northern Pac. R. R., 2 N. Dak. 116, 49 N. W. 408, 13 L. R. A. 468, and n., refusing recovery to brakeman, where rule required him to inspect couplings before using them; Stewart v. Toledo Bridge Co., 15 Ohio C. C. 610, refusing recovery to employee injured through latent defects in scaffold; Johnson v. Chesapeake, etc., Ry., 38 W. Va. 211, 18 S. E. 574, and Darracott v. Chesapeake, etc., R. R., 83 Va. 294, 5 Am. St. Rep. 270, both refusing recovery to brakeman injured while coupling moving cars, against rules.

Master is liable for servant's injury from defective machinery, unless same could not have been foreseen, p. 652.

Approved in Washington, etc., R. R. v. McDade, 135 U. S. 569, 40 L. 241, 10 S. Ct. 1049, refusing recovery to employee guilty of contributory negligence; Fink v. Des Moines Ice Co., 54 Iowa, 326, 51 N. W. 157, Chesson v. Lumber Co., 118 N. C. 67, 23 S. E. 923, and Hines Lumber Co. v. Ligas, 172 Ill. 319, 64 Am. St. Rep. 41, 50 N. E. 226, all holding employer liable for injury through defective scaffold.

Railroad is liable for employee's injury from defective cars, if it has no inspector, or he is negligent, p. 652.

Approved in Carpenter v. Mexican Nat. R. R., 39 Fed. 317, instructing jury that brakeman, injured through negligence of car-inspector, may recover; Southern Pac. Co. v. Lafferty, 57 Fed. 542, 15 U. S. App. 193, awarding damages for death of brakeman, through insufficient number of employees to take care of engines; Cincinnati, etc., R. R. v. McMullen, 117 Ind. 444, 10 Am. St. Rep. 71, 20 N. E. 289, Ohio, etc., Ry. v. Pearcy, 128 Ind. 208, 27 N. E. 481, and

Felton v. Bullard, 94 Fed. 736, all holding railroad liable for injury to brakeman, through defective car, negligently inspected by car-inspector; Morton v. Railroad, 81 Mich. 431, 46 N. W. 113, holding railroad liable for death of brakeman, caused by breaking of defective brake-chain.

Distinguished in Atchison, etc., R. R. v. Myers, 63 Fed. 799, 24 U. S. App. 295, holding railroad not liable for injury to switchman by defects in foreign car, of which he was warned.

Master's non-liability for fellow servant's act, in "same general business," means same department, p. 653.

Common law.— Code declaring common law abrogated, does not prevent reference thereto in explaining terms, p. 654.

Approved in Viterbo v. Friedlander, 120 U. S. 726, 30 L. 782, 7 S. Ct. 972, holding former statutes embodied in code, may be referred to, to aid interpretation.

Railroad brakeman, failing to use ordinary care, or notice obvious defects, cannot recover for injuries, p. 655.

Approved in Kane v. Northern Cent. Ry., 128 U. S. 95, 32 L. 341, 9 S. Ct. 17, holding question of contributory negligence should be left to jury, when not conclusively established; Davidson v. Southern Pac. Co., 44 Fed. 481, and Carpenter v. Mexican Nat. R. R., 30 Fed. 318, both applying rule in instructing jury; Southern Pac. Co. v. Johnson, 64 Fed. 958, 29 U. S. App. 201, refusing recovery for death of engineer who went out on running board of locomotive while in motion; Overman Wheel Co. v. Griffin, 67 Fed. 662, 33 U. S. App. 147, holding plaintiff cannot recover unless deceased used care of ordinary prudent man under similar circumstances; Clyde v. Richmond, etc., R. R., 72 Fed. 124, 25 U. S. App. 642, refusing recovery for death of brakeman while climbing ladder on box-car, while train was moving; Beall v. Pitts, etc., Ry., 38 W. Va. 539, 534, 18 S. E. 731, 732, refusing recovery to brakeman injured by using brake which he knew was defective.

116 U. S. 661-664, 29 L. 763, PRESTON v. MANARD.

Patent for combination hose-reel and device to permit passage of water, is void for previous knowledge, p. 664.

Approved in Jones v. Clow, 39 Fed. 788, applied to heating apparatus, being mere aggregation of two prior patents; Steiner Fire, etc., Co. v. Adrian, 59 Fed. 136, 16 U. S. App. 409, affirming S. C., 52 Fed. 736, applied to chemical fire extinguisher.

116 U. S. 665-671, 29 L. 770, VICKSBURG, ETC., R. R. v. DENNIS.

Courts.— Effect of State law, creating a contract, will be determined by Supreme Court for itself, p. 667.

Approved in Bryan v. Board of Education, 151 U. S. 650, 38 L. 302, 14 S. Ct. 469, holding contract herein not impaired; Mobile,

etc., R. R. v. Tennessee, 153 U. S. 495, 38 L. 797, 14 S. Ct. 971, collecting cases, retaining jurisdiction to review validity of charter, alleged impaired; Shelby County v. Union, etc., Bank, 161 U. S. 151, 40 L. 652, 16 S. Ct. 558, refusing to follow State decisions on construction of exemption; Douglas v. Kentucky, 168 U. S. 502, 42 L. 556, 18 S. Ct. 204, collecting cases, refusing to follow State decision that lottery grant is irrevocable. See 66 Am. St. Rep. 335, note.

Distinguished in New Orleans Water Works v. Louisiana Sugar Co., 125 U. S. 37, 31 L. 614, 8 S. Ct. 751, collecting cases, where State court gives no effect to law alleged to impair contract, but holds right claimed was not conferred, case is dismissed.

Taxing power is never presumed relinquished, p. 668.

Approved in Given v. Wright, 117 U. S. 655, 29 L. 1024, 6 S. Ct. 910, acquiescence in imposition of taf for sixty years, waives an exemption; Chicago, etc., R. R. v. Guffey, 120 U. S. 575, 30 L. 734, 7. S. Ct. 696, exemption of stock of railroad does not apply to branch road; New Orleans City, etc., Co. v. New Orleans, 143 U. S. 195, 36 L. 122, 12 S. Ct. 406, agreement to pay real estate tax, does not preclude license tax; Schurz v. Cook, 148 U. S. 409, 37 L. 503, 13 S. Ct. 649, holding tax herein not invalid; Winona, etc., Land Co. v. Minnesota, 159 U. S. 529, 40 L. 249, 16 S. Ct. 84, land exempt till sold and conveyed, ceases to be on transfer of full equitable title; Bank of Commerce v. Tennessee, 161 U. S. 146, 40 L. 649, 16 S. Ct. 460, tax to be paid by corporation for each share in lieu of all others, exempts them in hands of stockholders; Ford v. Delta, etc., Land Co., 164 U. S. 666, 41 L. 592, 17 S. Ct. 232, collecting cases, exemption does not extend to land subsequently acquired, and not used in business; Yazoo, etc., R. R. v. Thomas, 65 Miss. 562, 5 So. 109, similar to cited case; Dow v. Railroad, 67 N. H. 49, 36 Atl. 535, collecting cases, applied to surrender of repealing power of legislature; State Board, etc. v. Paterson, 50 N. J. L. 430, 14 Atl. 612, right of repeal reserved in charter, includes tax exemption; Railroad v. Alsbrook, 110 N. C. 149, 161, 14 S. E. 654, 658, exemption of main roads does not extend to branch; Lee v. Sturges, 46 Ohio St. 159. 19 N. E. 563, 2 L. R. A. 558, exemption of stock, where corporation pays tax, does not apply to foreign corporation; Railroad v. Harris, 99 Tenn. 694, 43 S. W. 117, exemption from tax on stock, road, etc., does not exempt from privilege taxation; Western Union Tel. Co. v. Harris, — Tenn. —, 52 S. W. 753, payment of privilege tax in lieu of others, does not preclude further privilege tax; State v. Harshaw, 76 Wis. 240, 45 N. W. 312, exemption of lands for year, to be given to railroad at various stages of completion, begins to run at date of statute; Bank v. Memphis, 101 Tenn. 167, 46 S. W. 561, arguendo.

Distinguished in Tennessee v. Whitworth, 117 U. S. 143, 29 L. 886, 6 S. Ct. 658, exemption of constituent railroads passes to consolidation; New Mexico v. United States Trust Co., 172 U. S. 185, 19 S.

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Mines.— Owner of claim may follow vein beyond the side, but not the end lines, p. 694.

Mines.— Where placer applicant possesses also lode, he should so state and make proper payments, p. 696.

Approved in Mining Co. v. Campbell, 17 Colo. 274, 29 Pac. 515, rules in regard to placer claims do not apply to veins.

Mines.— Placer patent carries all minerals within its boundaries if no vein is then known, p. 696.

Approved in Sullivan v. Iron, etc., Min. Co., 143 U. S. 433, 36 L. 215, 12 S. Ct. 556 (also see concurring opinion in 143 U. S. 441, 36 L. 218, 12 S. Ct. 559), vein need not be located to be known to exist; Noyes v. Mantle, 127 U. S. 352, 353, 32 L. 170, 8 S. Ct. 1134, 1135, where vein is located, marked and notice recorded, it is "known to exist," though applicant for placer patent has no actual knowledge; Dahl v. Raunheim, 132 U. S. 262, 33 L. 325, 10 S. Ct. 75, general verdict for placer claimant determines lode was not known to exist; Lake Superior, etc., Co. v. Cunningham, 155 U. S. 374, 39 L. 190, 15 S. Ct. 110, collecting cases, patent for lands previously reserved from sale, void; dissenting opinion in Iron, etc., Co. v. Mike, etc., Co., 143 U. S. 418, 36 L. 209, 12 S. Ct. 551, majority holding vein herein was known to exist.

Mines.— Applicant for placer patent, not claiming known lode within its boundaries, has no right thereto, p. 696.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT OCTOBER TERM, 1885

P. P. PICKARD, Comptroller of the Treasury of the STATE OF TENNESSEE, *Plff. in Err.*,

v.

PULLMAN SOUTHERN CAR COMPANY.

(See S. C. Reporter's ed. 34-51.)

Constitutional law — interstate commerce — license or privilege tax on cars employed in.

Section 6 of the Act of the Legislature of Tennessee of March 16, 1877, imposing a license or privilege tax on sleeping cars not owned by roads upon which they are run in that State, is invalid in so far as it affects interstate commerce.

[No. 933.]

Argued Jan. 25, 26, 1886. Decided Mar. 1, 1886.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

The history and facts of the case appear in the opinion of the court.

Messrs. **J. B. Heiskell, Thomas L. Dodd,** *S. A. Champion, B. J. Lea, Atty-Gen. of Tennessee,* and *Jas. M. Head,* for plaintiff in error:

All state questions have been eliminated by the decision in the case of *Pullman Southern Car Co.* v. *Gaines,* 3 Tenn. Ch. 587, and the only contentions now before this court are contained in the federal questions involved.

Stone v. *Wis.* 94 U. S. 183 (Bk. 24, L. ed. 103); *Fairfield* v. *Gallatin Co.* 100 U. S. 52 (Bk. 25, L. ed. 546); *Burgess* v. *Seligman,* 107 U. S. 34 (Bk. 27, L. ed. 365); *Railroad Co.* v. *Gaines,* 97 U. S. 709 (Bk. 24, L. ed. 1094).

The contract between the Pullman Southern Car Company and the various railroad companies is not a contract of hiring or leasing cars by the railroad companies, the business being done by the defendants and not by the railroad companies.

The running and using of cars for sleeping purposes only, not owned by the railroads on which they are run or used, is not interstate commerce, the regulation of which is placed by the Constitution of the United States under the control of Congress; nor does the regulation of this occupation, such as is imposed by the privilege tax in question, interfere with transportation or commerce among the States.

Sinnot v. *Davenport,* 22 How. 227 (63 U. S. bk. 16, L. ed. 243); *Gibbons* v. *Ogden,* 9 Wheat. 210 (22 U. S. bk. 6, L. ed. 73); *Foster* v. *Davenport,* 22 How. 244 (63 U. S. bk. 16, L. ed. 248); *Crandall* v. *Nevada,* 6 Wall. 35 (73 U. S. bk. 18, L. ed. 745); *Osborne* v. *Mobile,* 16 Wall. 481 (83 U. S. bk. 21, L. ed. 471); *Tax on Railway Gross Receipts,* 15 Wall. 284 (82 U. S. bk. 21, L. ed. 164); *Wiggins Ferry Co.* v. *East St. Louis,* 107 U. S. 365 (Bk. 27, L. ed. 419); *Moran* v. *New Orleans,* 112 U. S. 69 (Bk. 28, L. ed. 653); *Pullman Southern Car Co.* v. *Gaines,* 3 Tenn. Ch. 587; *Dun* v. *Cullen,* 13 Lea, 202; *Lightburne* v. *Taxing District,* 4 Lea, 219.

A tax laid upon the instruments of commerce is not a tax upon commerce itself. See authorities above cited.

It is a well settled rule, long adhered to by this court, that a construction given by state courts of last resort to legislative enactments and provisions of state constitutions ought, as a rule, to be followed in the federal courts.

R. R. Co. v. *Gaines* and *Stone* v. *Wisconsin, supra.*

Messrs. **Edward S. Isham** and **O. H. Lochrane,** for defendant in error:

The business of the Pullman Southern Car Company is interstate commerce; and this is not an occupation which States may declare to be a privilege.

French v. *Baker,* 4 Sneed, 193. See also, *Mayor of Columbia* v. *Guest,* 3 Head, 414; *Jenkins* v. *Ewin,* 8 Heisk. 456; *Home Ins. Co.* v. *Augusta,* 50 Ga. 530; *Mayor of Columbia* v. *Beasly,* 1 Humph. 232.

The question is not upon the limitations upon the taxing powers of the State, but upon its power to declare the business of this Company, as carried on upon and across its territory, a privilege, or to forbid it altogether.

Transportation Co. v. *Wheeling,* 99 U. S. 273 (Bk. 25, L. ed. 412).

The power of the States, whether exerted in the form of taxation or otherwise, is still further limited, so as not to deny or impair any rights belonging to citizens of the United States, as such, by virtue of the Constitution.

Crandall v. *Nevada,* 6 Wall. 35 (73 U. S. bk. 18, L. ed. 745).

The transportation of passengers or merchandise through a State or from one State to another is a subject of the exclusive jurisdiction of Congress; and a State cannot directly tax

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[illegible] —*Constitutional law; regulation of commerce; power of Congress and of the States.* See [illegible] Ferry Co. v. Pennsylvania, *ante,* 158, *note.*

persons or property passing through it, or tax them indirectly by levying a tax upon their transportation.

State Freight Tax, 15 Wall. 232 (82 U. S. bk. 21, L. ed. 146). See also *Almy* v. *California*, 24 How. 169 (65 U. S. bk. 16, L. ed. 644); *Woodruff* v. *Parham*, 8 Wall. 123 (75 U. S. bk. 19, L. ed. 383).

The Pullman Southern Car Company, a corporation of Kentucky, has no domicil in Tennessee and is not personally subject to its jurisdiction for purposes of taxation.

See *Delaware Railroad Tax*, 18 Wall. 211 (85 U. S. bk. 21, L. ed. 888).

Mr. Justice **Blatchford** delivered the opinion of the court:

[35]

Section 28 of article II of the Constitution of Tennessee, of 1870, contains these provisions: "All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. But the Legislature shall have power to tax merchants, peddlers, and privileges in such manner as they may from time to time direct.

On the 16th of March, 1877, the Legislature of Tennessee passed an Act, entitled "An Act Declaring the Mode and Manner of Valuing the Property of Telegraph Companies for Taxation, and of Taxing Sleeping Cars" (Laws of 1877, chap. 16, p. 26), the 6th section of which provided as follows: "That the running and using of sleeping cars or coaches on railroads in Tennessee, not owned by the railroads upon which they are run or used, is declared to be a privilege; and the companies owning and running or using said cars or coaches are required to report, on or before the first day of May of each year, to the comptroller, the number of cars so used by them in this State; and they shall be required to pay to the comptroller, by the first of July following, $50 for each and every of said cars or coaches used or as run over said roads; and if the said privilege tax herein assessed be not paid as aforesaid, the comptroller shall enforce the payment of the same by distress warrant."

Under this Act the Comptroller of the State claimed that there was due from the Pullman Southern Car Company, a corporation of Kentucky, to the State, for each of the years 1878, 1879 and 1880, a privilege tax of $50 on each one of thirty-eight sleeping cars run and used on railroads in Tennessee and not owned by the railroad companies on whose roads they were used, but owned by the Pullman Company. The aggregate amount of the taxes claimed was $5,700; and the Comptroller instituted proceedings to collect them from that Company, which, under the provisions of a statute of the State, paid the money under protest, and it was paid into the state treasury, with notice to the Comptroller that it was paid under protest; and the Company, within the time prescribed by the statute, and in August, 1881, brought an action at law against the Comptroller to recover the $5,700 in the Circuit Court of the United States for the Middle District of Tennessee.

[36]

The declaration alleges, among other things, that the sleeping cars, for the running or use of which the taxes were claimed and collected, were not run or used by the plaintiff during any one of the years 1878, 1879 or 1880, but were run and used by certain railroad companies in Tennessee, though they were owned during that time by the plaintiff, which permitted those railroad companies to run and use them under certain contract stipulations; that the sleeping cars so run and used were, during the whole of the years 1878, 1879 and 1880, employed by them in interstate commerce, being run into and through Tennessee, from and into other States, transporting passengers from other States into or across Tennessee, or from Tennessee into other States; and that, therefore, such taxes and the collection thereof were illegal and contrary to the Constitution of the United States. There was a demurrer to the declaration, raising, among other things, the question above stated, but, on a hearing, the demurrer was overruled, the opinion of the court being delivered by *Mr. Justice* Matthews. 22 Fed. Rep. 276. The conclusion arrived at in the opinion, which accompanies the record, was that the levying of a privilege tax on the running and using on railroads in Tennessee, of sleeping cars not owned by those railroads, was, as applied to such cars when employed in interstate transportation, a regulation of commerce among the States, and contrary to the Constitution of the United States and, therefore, void. Leave being given to the defendant to plead over, *nil debet* was pleaded, and the issue was tried by the court without a jury, by a written stipulation between the parties, which embodied an agreed statement of facts, on which the cause was heard.

The agreed statement sets forth that the plaintiff is a Kentucky corporation, having its chief office and place of business at Louisville; and that, since 1872, it has been engaged, at Louisville, in manufacturing railway cars, known as drawing room cars and sleeping cars, and in hiring those cars to various railroad companies in Tennessee and other States, under the following form of contract:

"This indenture, made this 19th day of June, A. D. 1872, between the Louisville and Nashville Railroad Company, the party of the first part, and the Pullman Southern Car Company, of the second part: Whereas, the said party of the second part is now engaged in the business of manufacturing railway cars, known as drawing room and sleeping cars, under certain patents belonging to them, and of hiring the same to railroad companies, and receiving therefor income and revenue by the sale to passengers of seats and berths, and accommodations therein; and whereas the said party of the first part is desirous of availing itself of the use on and over its lines of road, of the cars constructed under the sleeping and drawing-room car patents now the property of said second party, and also of connections by means of said cars with other lines of railroad, whereon said cars are now operated by said second party; now this contract witnesseth: That the said party of the second part, in consideration of

the covenants and agreements of the party of first part, hereinafter mentioned to be by them kept and performed, hereby agrees with the said party of the first part, that they will furnish drawing-room cars and sleeping cars to be used by said party for the transportation of passengers, sufficient to meet the requirements of travel on and over their line of railroad, and on and over all lines of railroad which they now control, or may hereafter control, by ownership, lease or otherwise, the said cars so furnished to be satisfactory to the general superintendent of the first party.

2. The said party of the second part agrees that they will keep the carpets, upholstery and bedding of each of the said cars in good order and repair, and renew and improve the same when necessary, at their own expense, excepting repairs and removals made necessary by accident or casualty; it being understood that the said first party shall repair all damages to said cars, of every kind, occasioned by accident or casualty, during the continuance of this agreement.

3. The said party of the second part hereby agrees, at their own expense and cost, to furnish one or more *employés* as may be needful, upon each of said cars, whose duties shall be to collect fares for the accommodations furnished in said cars, and generally to wait upon passengers therein, and provide for their comfort.

4. The said party of the first part hereby agrees that the general officers of said second party, and the *employés* named in article third of this agreement, shall be entitled to free passage over the lines of the first party, when they are on duty for the second party.

5. The party of the second part hereby agrees that the general officers of the first party shall be entitled to free passes in any of the cars furnished by said second party under this agreement.

6. It is hereby mutually agreed that the said *employés* of the second party named in article third of this agreement shall be governed by and subject to the rules and regulations of the said first party, which are, or may be, adopted from time to time, for the government of their own *employés;* and in the event of any liability arising against said first party for personal injury, death, or otherwise of any *employé* of said second party, it is hereby distinctly understood and agreed that the said first party shall be liable only to the same extent they would be if the person injured was an *employé* in fact of said first party, and for all liability in excess thereof shall be indemnified and paid by said second party.

7. The party of the first part, in consideration of the use of the aforesaid cars, hereby agrees to haul the same on the passenger trains on their line of road, and on all roads which they now control or may hereafter control by ownership, lease or otherwise; and also on all passenger trains on which they may, by virtue of contracts or running arrangements with other roads, have the right to use such cars in such manner as will best accommodate passengers desiring the use of said cars; and the said party of the first part shall, at their own expense, furnish fuel for the cars and materials for the lights, shall wash and cleanse said cars, and shall also keep said cars in good order and repair, including renewals of worn out parts, and all things appertaining to said cars, necessary to keep them in first class condition, except such as are provided for in article second of this agreement. [39]

8. The party of the first part agrees to furnish said party of the second part, at convenient points, room and conveniences for airing and storing bedding.

9. The said party of the first part further agrees that the said party of the second part shall be entitled to collect from each and every person occupying said cars, such sums for said occupancy as may be usual on competing lines furnishing equal accommodations; and that such rules and regulations shall be agreed upon as will most favor the renting of seats and couches in said cars.

10. The party of the first part hereby agrees to permit the party of the second part to place their tickets for seats and couches for sale in such of the railroad ticket offices as may be desired by said second party, and such services shall be performed by and as part of the general duties of the ticket agents, and without charge to the party of the second part; proceeds of such sales to be at the risk of said second party.

11. The party of the first part hereby agrees that said second party shall have the exclusive right, for a term of fifteen years from the date hereof, to furnish for the use of the first party drawing-room or parlor cars and sleeping cars, including reclining-chair cars, on all the passenger trains of said first party, and over their entire lines of railroad, and on all railroads which they now control or may hereafter control, by ownership, lease or otherwise; and also on all passenger trains on which they may, by virtue of contracts or running arrangements with other roads, have the right to use such cars, and that they will not contract with any other parties to run said class of cars on or over said lines of road during said period of fifteen years.

The said second party, for the consideration aforesaid, hereby guarantees said first party against all damages of whatsoever kind which may be by said first party incurred in consequence of any infringement of patent rights in the construction and use of any of said cars which may be used by said second party upon the lines of said first party under this arrangement, it being the meaning and intent of this article that the said second party shall secure said first party against all manner of expenditures which may be incurred by said first party in consequence of any litigation connected with alleged infringements of patent rights for the interior arrangements of said cars, and that they will pay off and discharge all judgments obtained at any time against said first party on account of such infringements. [40]

12. It is mutually agreed between the parties hereto, that in case either of said parties shall at any time hereafter fail to keep and perform any of the covenants herein contained to be by them respectively kept and performed, then, and in that case, after written notice shall have been given to the defaulting party thereto of the default complained of, if the said defaulting party shall refuse or neglect to make good,

keep and perform such unfulfilled covenants and conditions of this agreement within a reasonable time after such notice, the other party shall be at liberty to declare this contract ended and no longer in force."

The agreed statement further sets forth that the plaintiff has never had any branch office or establishment of any kind in Tennessee, unless the fact that the plaintiff has placed its tickets for sale with railway agents in that State constitutes the offices of such agents branch offices or establishments of the plaintiff; that it has never had any ticket agents of its own in Tennessee, except in so far as the ticket agents of the railway companies with whom the tickets of the plaintiff have been placed for sale may be regarded as the agents of the plaintiff; that the plaintiff has never had any other agents, officers or *employés* in Tennessee, except the conductors and porters which it furnishes with its cars, under its contracts with the railroad companies; that the cars furnished by the plaintiff under those contracts constitute all the property owned by it in Tennessee, and the business done by it under those contracts, such as it is, is the only business done by it in Tennessee; that the cars [41] furnished by it under those contracts, with the exception of two sleeping cars running between Nashville and Memphis, are used in transporting passengers from other States into or across Tennessee, and from points in Tennessee to points in other States; that the same cars also transport passengers from points in Tennessee to other points in that State whenever they properly apply for such transportation, but the number of such passengers bears an inconsiderable proportion to the other passengers transported in those cars; that those cars run into, out of or across Tennessee, making such stops as the trains to which they are attached make; that, in the case of passengers traveling across Tennessee, or from points out of it to points in it, their sleeping-car tickets are purchased and paid for before they enter Tennessee; but in the case of passengers from points in Tennessee to points in other States, or in Tennessee, the tickets are purchased and paid for in Tennessee; that the railroad companies of Tennessee with whom such contracts were made were duly chartered by that State or organized or operated under its laws, with power to transport passengers for hire; that they are taxed by that State on the value of their roads, rolling stock and other tangible property, and also on the value of their franchises; that from March 16, 1877, to the present time, the Memphis and Charleston Railroad Company, and the East Tennessee, Virginia and Georgia Railroad Company, both of them Tennessee corporations, have owned sleeping cars which they have run and used during that time as sleeping cars upon their respective roads; and they have not been required by the State to pay any tax for running or using said sleeping cars upon their roads, except in so far as such a tax may have been included in the tax assessed on the value of their franchises; and that the thirty-eight cars before mentioned included the two cars run between Nashville and Memphis.

The agreed statement sets forth the other facts hereinbefore contained, necessary to a recovery; and, on the 29th of December, 1884, a judgment was entered, which states that the cause was heard on an agreed statement of facts, and that it is thereby made a part of the record at large in the cause, and that the court found the issue joined in favor of the plaintiff. It then sets forth the material facts contained in the agreed statement, and awards a judgment for $5,400, for the taxes on the thirty-six cars, and for $1,089.90 interest, and for costs; assigning as a reason that the State had no power to impose a privilege tax on the plaintiff for running or using the thirty-six cars in the State, the tax being a regulation of commerce between the States, and therefore a violation of the Constitution of the United States. To reverse this judgment the defendant has sued out a writ of error.

The point upon which the final judgment was rendered in the case was the one considered and adjudged in the decision given on the demurrer to the declaration. The tax was not a property tax, because, under the Constitution of Tennessee, all property must be taxed according to its value, and this tax was not measured by value, but was an arbitrary charge. What was done by the plaintiff was taxed as a privilege, it being assumed by the state authorities that the Legislature had the power, under the Constitution of Tennessee, to enact the 6th section of the Act of 1877, and that the plaintiff had done what that section declared to be a privilege. By the decisions of the Supreme Court of Tennessee, cited in the opinion of the circuit court on the demurrer, it is held that the Legislature may declare the right to carry on any business or occupation to be a privilege, to be purchased from the State on such conditions as the statute law may prescribe, and that it is illegal to carry on such business without complying with those conditions. In this case, the payment of the tax imposed was a condition prescribed, without complying with which what was done by the plaintiff was made illegal. The tax was imposed as a condition precedent to the right of the plaintiff to run and use the thirty-six sleeping cars owned by it, as it ran and used them on railroads in Tennessee. The privilege tax is held by the Supreme Court of Tennessee to be a license tax, for the privilege of doing the thing for which the tax is imposed, it being unlawful to do the thing without paying the tax. What was done by the plaintiff in this case, in connection with the use of the thirty-six cars, if wholly a branch of interstate commerce, was made by the State of Tennessee unlawful unless the tax should be paid, and, to the extent of the tax, a burden was placed on such commerce; and upon principle the tax if lawful might equally well have been large enough to practically stop altogether the particular species of commerce.

What was that commerce? The plaintiff, by its contract, furnished sleeping cars to the railroad company, to be used by the latter "for the transportation of passengers," sufficient in numbers to meet the requirements of travel on the road. The plaintiff kept in order and renewed the carpets, upholstery and bedding of the cars, except repairs and renewals made necessary by accident or casualty; but all damages to the cars by accident or casualty were repaired by the railroad company. The plaintiff furnished *employés* on each car to collect fares for the accommodations furnished by the car, and to

wait upon passengers and provide for their comfort. Those *employés* were governed by the rules adopted by the railroad company to govern its own *employé*, and the railroad company was liable for personal injury to, or the death of, any such *employé* of the plaintiff, to the same extent only as if such *employé* was in fact an *employé* of the railroad company, and the latter was indemnified by the plaintiff for all liability in excess thereof. The railroad company carried free on its line such *employés* of the plaintiff and its general officers when on duty for it; and the plaintiff carried free in the cars it so furnished the general officers of the railroad company. In consideration of the use of such cars, the railroad company hauled them on the passenger trains on its line, in such manner as best accommodated passengers desiring to use the cars, and furnished, at its own expense, fuel for them and materials for the lights, and washed and cleansed them, and kept them in good order and repair, including renewals of worn out parts, and all things appertaining to them, necessary to keep them in first class condition, with the exceptions before specified in regard to carpets, upholstery and bedding, and furnished room and conveniences for airing and storing bedding. The plaintiff collected from every person occupying the car compensation for its accommodations in seats and couches. The railroad company permitted the plaintiff to place its tickets for seats and couches on sale in the ticket offices of the railroad company, the sale to be a part of the general duties of the ticket agents of the latter, and to be without charge to the plaintiff, but the proceeds of sales to be at its risk. The contract was made an exclusive one for fifteen years, and the plaintiff agreed to protect the railroad company against all liability for the infringement of any patent in the construction and use of the cars, and there was a provision for the termination of the contract by either party on a breach of it by the other.

On these facts, the cars in question were cars for the transportation of the passengers who occupied them, in their transit into or through or out of Tennessee. They were used by the railroad company for such transportation, and it received the transit fare or compensation. For purposes of transit, it dealt with the cars as it would with cars owned by itself. It hauled them, furnished fuel and materials for lights, washed and cleansed them, kept them in repair, renewed worn-out parts, repaired all damages to them by accident or casualty, and even repaired and renewed carpets, upholstery and bedding damaged or destroyed by accident or casualty; all at its own expense and without charge to the plaintiff, leaving to the plaintiff only to make good the ordinary wear and tear of the sitting and sleeping conveniences, and allowing it to have the compensation for such conveniences, and furnishing it free of charge with all facilities for selling seats and couches.

The tax was a unit, for the privilege of the transit of the passenger and all its accessories. No distinction was made in the tax between the right of transit, as a branch of commerce between the States, and the sleeping and other conveniences which appertained to a transit in the car. The tax was really one on the right of transit, though laid wholly on the owner of the car. So, too the service rendered to the passenger was a unit. The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit, the car, so far as it was engaged in interstate commerce, was not taxable by the State of Tennessee; because the plaintiff had no domicil in Tennessee and was not subject to its jurisdiction for purposes of taxation; and the cars had no *situs* within the State for purposes of taxation and the plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable, by way of license or privilege.

The case of *Atty-Gen.* v. *London, etc. R. Co.* in the court of appeal, 6 Q. B. Div. 216, before *Lord Chief Justice* Coleridge, and *Lords Justices* Baggallay and Brett, affirming the judgment of the Exchequer Division, 5 Ex. Div. 247, is instructive in the above point of view, as to the subject in hand. There, the railway company attached to its night trains sleeping carriages for the accommodation of such of its first class passengers as might choose to avail themselves of it. For the use of these carriages they were charged an extra sum in addition to the ordinary first class fare. Besides couches with pillows, sheets and blankets, each carriage contained a lavatory, and other conveniences. Passengers using such carriage were not disturbed during the night by demands for their tickets, and, if they arrived at their destination in the night, the passengers were allowed to remain in their beds until the morning. Under a statute imposing a percentage duty "upon all sums received or charged for the hire, fare or conveyance of passengers" on any railway, the government claimed and was allowed the duty on the extra sum charged for the use of the sleeping carriage. The court of appeal, by *Lord* Coleridge, said: "We regard the additional accommodation afforded by the sleeping carriages as differing in no essential particular from the superior accommodation afforded by a second class carriage over a third, or by a first class carriage over both. If the company issued tickets to all passengers alike, at the price charged to passengers traveling in third class carriages, and then issued tickets, at corresponding prices, to those desiring to travel in a higher class of carriage, it could hardly be contended that duty would not be payable upon the prices paid for such second ticket. The passenger who is content to travel in a third class or second class carriage in the day, might well desire to travel in a carriage of a higher class by night; and in like manner a passenger ordinarily traveling by day in a first class carriage might desire the additional accommodation at night of a sleeping carriage. No separate charge is made in the present case; the charge, though written on a separate ticket, is in our opinion part of one charge for the conveyance of the passenger in a particular way and is, therefore, a part of the charge for the conveyance of a passenger received and charged for such conveyance."

[47]

That case is in harmony with the views before taken in regard to the present case. The fare paid by the interstate passenger to the rail-

road company, and that paid to the plaintiff, added together, were merely a charge for his conveyance in a particular way, and there was really but one charge for the transit, though
[48] the total amount paid was divided among two recipients. The service was a single one, of interstate transit, with certain accommodations for comfort, and what was paid to the plaintiff was part of a charge for the conveyance of the passenger.

The views above expressed are in harmony with numerous decisions which have been made by this court on the subject to which they relate. In *Almy* v. *California*, 24 How. 169 [65 U. S. bk. 16, L. ed. 644], a stamp tax had been imposed by the State on bills of lading for the transportation of gold or silver from any point within the State to any point without it, and was held by this court to be invalid; and in *Woodruff* v. *Parham*, 8 Wall. 123, 138 [75 U. S. bk. 19, L. ed. 382, 386], it was said by this court, *Mr. Justice* Miller delivering its opinion, that that stamp tax "was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with the freedom of transit of goods and persons between one State and another, which is within the rule laid down in *Crandall* v. *Nevada*, 6 Wall. 35 [73 U. S. bk. 18, L. ed. 745], and with the authority of Congress to regulate commerce among the States."

In the *State Freight Tax Case*, 15 Wall. 232, 281 [82 U. S. bk. 21, L. ed. 146, 163], it was said that a State cannot tax persons for passing through or out of it; that interstate transportation of passengers is beyond the reach of a State Legislature; and that a tax upon it amounts to a tax upon the passengers transported.

In *Railroad Co.* v. *Maryland*, 21 Wall. 456, 472 [88 U. S. bk. 22, L. ed. 678, 684, *Mr. Justice* Bradley, in speaking for the court said that a State cannot impose a tax or duty on the movements or operations of commerce between the States, because it would be a regulation of such commerce "in a matter which is essential to the rights of all, and, therefore, requiring the exclusive legislation of Congress," being "a tax because of the transportation," and "therefore, virtually, a tax on the transportation."

The decisions in the various cases in this court on the subject of a tax by a State on the bringing in of passengers from foreign countries, and which are collected and commented on by *Mr. Justice* Miller, in delivering the opinion of this court in the *Head Money Cases*, 112 U. S. 580, 591 [Bk. 28, L. ed. 798, 801], show it to be a settled matter that to tax the transit of passengers from foreign countries or between the States, is to regulate commerce.

The principles which governed the decisions
[49] in *Welton* v. *Missouri*, 91 U. S. 275 [Bk. 23, L. ed. 347]; *Guy* v. *Baltimore*, 100 U. S. 434 [Bk. 25, L. ed. 743] and *Moran* v. *New Orleans*, 112 U. S. 69 [Bk. 28, L. ed. 653], holding unlawful the state taxes in those cases on interstate commerce in merchandise, are equally applicable to the tax in this case on the transit of passengers. The rule which governs the subject is accurately and tersely stated by *Mr. Justice* Field, in delivering the opinion of the court, in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 211 [*ante* 158, 163]: "While it is conceded that the property in a State, belonging to a foreign corporation engaged in foreign or interstate commerce, may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as an interference with and an obstruction of the power of Congress in the regulation of such commerce." The case of *Telegraph Co.* v. *Texas*, 105 U. S. 460 [Bk. 26, L. ed. 1067], in regard to a state tax on telegraphic messages sent out of a State, is a kindred case. The whole subject, in reference to a state tax imposed for selling goods brought into a State from other States, was recently fully considered by this court in *Walling* v. *Michigan*, 116 U. S. 455 [*ante*, 694]. And in that case *Mr. Justice* Bradley, speaking for the court, says: "We have also repeatedly held that so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that such commerce shall be free and untrammeled." See *Welton* v. *Missouri*, [*supra*]; *Machine Co.* v. *Gage*, 100 U. S. 676, 678 [Bk. 25, L. ed. 755]; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697 [Bk. 26, L. ed. 238, 239]; *Gloucester Ferry Co.* v. *Pennsylvania*, and *Brown* v. *Houston*, 114 U. S. 196, 204, 622, 631 [*ante*, 158, 257], where the cases on that point are collected.

It is urged that the decision of the circuit court in this case was inconsistent with the rulings in *Osborne* v. *Mobile*, 16 Wall. 479 [83 U. S. bk. 21, L. ed. 470], and in *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365 [Bk. 27, L. ed. 419]. It becomes necessary, therefore, to examine those cases.

In *Osborne* v. *Mobile*, Osborne was an agent, at Mobile, Alabama, of a Georgia corporation, an express company, and, as such, transacted at Mobile a general express business within and extending beyond the limits of Alabama. An ordinance of the City of Mobile required an annual license fee of $500 to be paid by every express company doing business in Mobile, and having a business extending beyond the limits of Alabama, while every express company doing business within the limits of the State was required to pay a license fee of only $100, and every such company doing business within the city was required to pay a license fee of only $50. A fine was prescribed for a violation of the ordinance. Osborne violated it and was fined. The legality of the tax was upheld. *Chief Justice* Chase, in delivering the opinion of the court, cited the *State Freight Tax Case*, 15 Wall. 232 [82 U. S. bk. 21, L. ed. 146], decided at the same term, as holding "that the State could not constitutionally impose and collect a tax upon the tonnage of freight taken up within its limits and carried beyond them, or taken up beyond its limits and brought within them; that is to say, in other words, upon interstate transportation," "because it was, in effect, a restriction upon interstate commerce, which by the Constitution was designed to be entirely free." The tax on the Georgia Express Company was upheld as a tax "upon a business carried on within the City of

Mobile." Osborne was a local agent, personally subject to the taxing jurisdiction of the State, as representing his principal, and the tax was on the general business he carried on; and the subject of the tax was not, as here, the act of interstate transportation. In *Osborne* v. *Mobile*, the court drew the distinction between the case before it and the *State Freight Tax Case*. The present case falls within the latter.

In *Wiggins Ferry Co.* v. *East St. Louis*, the decision was that the State had power to impose a license fee, upon a ferrykeeper living in the State, for boats which he owned and used in conveying from the State passengers and goods across a navigable river to another State; and that the levying of a tax on such boats, or the exaction of a license fee in respect of them, by the State in which they had their *situs*, was not a regulation of commerce within the meaning of the Constitution. In the case at bar the plaintiff was not a Tennessee corporation and had no domicil in Tennessee; and the sleeping cars in question, as before said, had not any *situs* in Tennessee for the purposes of taxation.

The question involved in this case was before the Court of Chancery of Tennessee in *Pullman Southern Car Co.* v. *Gaines*, 3 Tenn. Ch. 587, on the same facts, as to the privilege tax for 1877. That court held, and it is stated that the Supreme Court of Tennessee on appeal affirmed its ruling, that this privilege tax, as to such of the cars as passed and repassed through the State and did not abide in it, was not amenable to the objection that it interfered with interstate commerce. The view taken was that the property of the foreign corporation, used in Tennessee, could be taxed as property or by an excise on its use; and that the tax in this case was not directly on the object of commerce, or directly aimed at commerce. We have given to the views set forth by the Tennessee Chancery Court the consideration due to the judgments of that tribunal, but are unable to concur in its conclusion.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

STATE OF TENNESSEE, *Appt.*,
v.
PULLMAN SOUTHERN CAR COMPANY.

(See S. C. Reporter's ed. 51, 52.)

Constitutional law—interstate commerce—license or privilege tax on cars employed in.

Section 6 of the Act of the Legislature of Tennessee of March 16, 1877, as amended by the Act of April 7, 1881, imposing a license or privilege tax on sleeping cars, not owned by the roads upon which they are run in that State, is invalid in so far as it affects interstate commerce.

[No. 936.]

Argued Jan. 25, 26, 1886. Decided Mar. 1, 1886.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. **J. B. Heiskell, Thomas L. Dodd,** *S. A. Champion, B. J. Lea, Atty-Gen. of Tennessee,* and *Jas. M. Head,* for appellant.

Messrs. **Edward S. Isham** and **O. H. Lochrane,** for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Chancery Court of Davidson County, Tennessee, on December 15, 1883, by the State of Tennessee [52] against the Pullman Southern Car Company, a Kentucky corporation. The questions involved are the same as those disposed of in *Pickard* v. *Pullman Southern Car Company* [*ante*, 785]. The bill sets forth the Act of Tennessee of March 16, 1877, and alleges that from 1877 the Company had run sixty sleeping cars instead of thirty-eight, each year; and ought to have paid as a privilege tax for each car for each of the years 1877, 1878, 1879 and 1880, $50, making $12,000; whereas it had paid only $7,276.41; and that, by an Act passed April 7, 1881 (Laws of 1881, chap. 149, p. 202), the privilege tax was increased to $75 a year, for each car, making due for the years 1881 and 1882, $9,000. The bill prays for a discovery and an account and for judgment.

The defendant removed the suit into the Circuit Court of the United States for the Middle District of Tennessee, and then answered the bill. The answer raises the same questions which were adjudged in the other suit, and on the same facts. The case was heard on bill and answer. The decree gave a recovery for $300 and interest for the taxes for 1881 and 1882 on the two cars which ran wholly within Tennessee, but dismissed the bill in all other respects. The plaintiff appealed to this court from all of the decree except that part which awarded a recovery. For the reasons assigned in the opinion in the other suit, the decree in this case is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as reorganized), *Appt.*, [1]
v.
SOUTHERN EXPRESS COMPANY.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, *Appt.*,
v.
SAME.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, *Appt.*,
v.
WILLIAM B. DINSMORE, as President of the ADAMS EXPRESS COMPANY, and as a Shareholder Therein.

(See S. C. "*Express Cases*" Reporter's ed. 1—34.)

Railroads—whether common carriers of express carriers.

1. In the absence of some special statute there is no law, or usage having the force of law, which requires railroad companies to furnish express facilities to all express companies which may demand them.

2. Although railroad companies are not common carriers of express carriers, it seems that it is their duty to furnish the general public with reasonable express facilities.

3. The regulation of the question at issue in this case is legislative in character, not judicial.

[Nos. 22, 26, 55.]

Argued Nov. 3, 4, 5, 6, 1885. Decided Mar. 1, 1886.

APPEALS from the Circuit Courts of the United States for the Eastern District of Arkansas, the Eastern District of Missouri and the District of Kansas, respectively.

The history and facts of the case appear in the opinion of the court. See also the following case modifying the decrees herein.

Messrs. **James O. Broadhead, B. C. Brown, John F. Dillon, Morgan & McFarland, Wager Swayne and Sidney Bartlett,** for appellants:

This case opens up the entire question whether at common law transportation companies can have any exclusive rights that do not equally belong to individual shippers.

Whether these companies can claim exclusively a car or a portion of a car for their freight; whether they can demand that their own messenger shall receive, handle and distribute their freight; whether they are permitted solely to increase their revenues and to diminish those of the railway, to pack parcels and conceal their nature and value from the railroad; or whether, as individual shippers do, they must pay on them as such parcels; whether they can demand exclusive advantages for their agents, wagons and freight in and about the depots and stations of the railroads, and such as are not and cannot be accorded to individual shippers; and whether they can demand that all their freight shall be carried as tonnage freight without reference to size or value of parcels, or without reference to its classification; and that this freight should be carried upon passenger trains without reference to bulk, see:

Sargent v. *Boston & L. R. R.* 115 Mass. 416; *Cambloz* v. *Philadelphia & R. R. R. Co.* 4 Brewst. 563; *Jencks* v. *Coleman*, 2 Sumner, 224; *The D. R. Martin*, 11 Blatchf. 233; *Barney* v. *Oyster Bay & H. S. Co.* 67 N. Y. 302; *Fitchburg R. R. Co* v. *Gage*, 12 Gray, 393; *Regina* v. *London & S. W. R. Co.* 41 E. C. L. 670, 1 Q. B. (1 Ad. & E.) 579: *Great Western Ry. Co.* v. *Sutton* 4 H. L. Cas. L. R. 237, and English authorities therein cited and reviewed.

The express companies ask and the decree establishes a discrimination in their favor, to the injury of the railroad companies.

Relief is asked in this case, not with reference to single or specific acts, but with reference to a continuing and complicated business arrangement, necessarily subject from day to day to changes and modifications. Such an arrangement it is not competent judicially to create and regulate.

Atchinson, T. & S. F. R. R. Co. v. *Denver & N. O. R. R. Co.* 110 U. S. 675 (Bk. 28, L. ed. 295).

So far as the rights of the plaintiff are concerned, they must be based upon usage or custom which is uniform, general and well understood. They can derive no aid from considerations of public policy. No doctrine of the law is better settled than that no custom or usage, however general, can be put in evidence to vary or control the express terms of a contract.

Sleght v. *Rhinelander*, 1 Johns. 192; *Barlow* v. *Lambert*, 28 Ala. 704; *Corwin* v. *Patch*, 4 Cal. 204; *Sigsworth* v. *McIntyre*, 18 Ill. 126; *Sanford* v. *Rawlins*, 43 Ill. 92; *Randall* v. *Batch*, 12 Pick. 107; *Macomber* v. *Parker*, 13 Pick. 175; *Wheeler* v. *Nurse*, 20 N. H. 220; *Sweet* v. *Jenkins*, 1 R. I. 147.

"A custom or usage cannot control the established principles of law."

Strong v. *Bliss*, 6 Met. 393; *Hone* v. *Mutual L. Ins. Co.* 1 Sandf. 137; *Dewees* v. *Lockhart*, 1 Tex. 535.

"A usage of factors to pledge the goods of their principal is void, being against a general rule of law."

Newbold v. *Wright*, 4 Rawle, 195.

"So a custom of the trade of Philadelphia to allow interest on goods sold after six months."

Henry v. *Risk*, 1 Dall. 265 (1 U. S. bk. 1, L. ed. 130).

"A practice or usage in opposition to the common law, however general it may be, has no force in this country on the ground of custom because not immemorial."

Harris v. *Carson*, 7 Leigh, 632; *Winder* v *Blake*, 4 Jones (N. C.) 332.

"The usage of banks in Connecticut to regard drafts drawn on them, payable at a day certain, as checks and so not entitled to grace, cannot control the general rules of law."

Bowen v. *Newell*, 8 N. Y. 190.

"A custom to treat a sale at thirty days as a sale for cash is void."

Chapman v. *Devereux*, 32 Vt. 616;

Courts of justice cannot, either at law or in equity, establish by a species of judicial legislation legal rights or impose obligations which may be dictated by considerations of public policy, and which are in conflict with the statute or the common law.

The province of courts of justice is to ascertain rights and give remedies for their violation, and not to originate them.

Chicago, M. & St. P. R. R. Co. v. *Ackley*, 94 U. S. 179 (Bk. 24, L. ed. 99); *Peik* v. *Chicago, & N. W. R. Co.* 94 U. S. 178 (Bk. 24, L. ed. 98).

Messrs. **John A. Campbell, George F. Edmunds, Clarence A. Seward** and *F. E. Whitfield*, for appellees:

The defendants are *quasi* public corporations, created for the purpose of conducting the business of common carriers of passengers and property upon their lines of railway, and for no other purpose. As such they are engaged in a public service.

Hannibal & St. Jo. R. R. Co. v. *Swift*, 13 Wall. 270 (79 U. S. bk. 20, L. ed. 423); *Messinger* v. *Pa. R. R. Co.* 8 Vroom, 531; *Chicago & N. W. R. Co.* v. *People*, 56 Ill. 330; *Coggs* v. *Bernard*, Ld. Raym. 909; *McDuffee* v. *Portland, etc. R. R.* 52 N. H. 447; *Baxendale* v. *Great W. R. R. Co.* 5 C. B. N. S. 336; *Sanford* v. *Catawissa, W. & E. R. R. Co.* 24 Pa. St. (12 Harr.) 380; *Munn* v. *Illinois* and *Chicago, C. B. & Q. R. R. Co.* v. *Iowa*,

94 U. S. 130, 161 (Bk. 24, L. ed. 86, 95); *Great W. R. R. Co* v. *Burns*, 60 Ill. 284; *Garton* v. *Bristol & E. R. Co.* 1 Best & Sm. 162; *Peoria & R. I. Co.* v. *Coal V. M. Co.* 68 Ill. 489.

The necessities of the express business accurately determine what railway facilities are needed therefor; and when that fact is determined, it is the legal duty of the railways to afford such facilities, in accordance with their corporate duty to transport freight and passengers. How such freight and passengers are to be transported is determined by usage and custom; and when such usage and custom have existed, as in this country, in relation to express companies, for over forty years, they become a part of the contract between the railway and the public, which this court can protect and enforce, as well upon the ground of estoppel and of vested rights, as of usage and custom.

Martel v. *St. Louis*, 94 Ill. 67; *Society, etc.* v. *Lehigh V. R. Co.* 32 N. J. Eq. 346; *Hale* v. *Union Mut. F. Ins. Co.* 32 N. H. 299; *Wilder* v. *St. Paul*, 12 Minn. 192. See also *Blakemore* v. *Glamorganshire Canal Navigation*, (1 Myl. & K. 162).

A railway company is bound to act with impartiality and cannot lawfully prefer one express company to the exclusion of another.

Parker v. *Bristol & E. R. Co.*, 6 Exch. 702; *Chicago & N. W. R.* v. *People*, 56 Ill. 380; *Garton* v. *Bristol & E. R. Co.*, 6 C. B. N. S. 639; *Re Palmer*, Eng. L. R. 6 C. P. 194; *New Eng. Exp. Co.* v. *Maine C. R.* 57 Me. 196; *Bennett* v. *Dutton*, 10 N. H. 481; *Finnie* v. *Glasgow & S. W. R. Co.*, 34 Eng. L. & E. 21; *Parker* v. *Great Western R. R. Co.*, 11 C. B. (2 J. Scott), 545; *Marriott* v. *London & S. W. R. Co.*, 1 C. B. (1 J. Scott), N. S. 498; 5 J. Scott, N. S. 336; *Bazendale* v. *North D. R. Co.* 3 C. B. N. S. 324; *Chicago, B. & Q. R. R. Co.* v. *Iowa*, 94 U. S. 161 (Bk. 24, L. ed. 95); *Riley* v. *Horne*, 5 Bing. 217; *N. J. Steam Nav. Co.* v. *Merchants Bank*, 6 How. 382 (47 U. S. bk. 12, L. ed. 483).

The bills in these cases proceed upon the allegation that the railroad companies have never held themselves out as willing or ready to undertake the conduct of an express business, but by usage and custom have always surrendered the same to the express companies.

The law of usage and custom justified the demands of the express companies.

U. S. v. *Arredondo*, 6 Pet. 714 (31 U. S. bk. 8, L. ed. 557; *Wilcocks* v. *Phillip's Exr.* 1 Wall. Jr. 68; *Gibson* v. *Culver*, 17 Wend. 305; *Cole* v. *Goodwin*, 19 Wend. 256; *Walker* v. *Jackson*, 10 M. & W. 168; *Barnes* v. *Foley*, 5 Burr. 2711; *Atchison, T. & S. F. R. R. Co.* v. *Denver & N. O. R. R. Co.* 110 U. S. 682 (Bk. 28, L. ed. 297).

It is not necessary for the relief sought that the parties claiming it should cite precedents therefor.

Hamilton v. *Whitridge*, 11 Md. 145; *Morris* v. *McCulloch*, 1 Ambl. 424; *Sawyer* v. *Vernon*, 1 Vern. 267; *Wright* v. *Simpson*, 6 Ves. Ch. 720; *Pusley* v. *Freeman*, 3 D. & E. 63; *Submarine Tel. Co.* v. *Dickson*, 10 Jur. N. S. 129; *Wilson* v. *Hudson*, L. R. 7 Exch. 87; *Dyett* v. *Pendleton*, 8 Cow. 737; *Osborn* v. *Bank of U. S.* 9 Wheat. 841 (22 U. S. bk. 6, L. ed. 229).

A railway company cannot lawfully perform the express business.

The simple transportation of property on a railway is but a small percentage—40 per cent—of the express business. The remaining 60 per cent is of business done off the lines of railway, and is of a character not included even by implication in the right to transport passengers and goods, wares and merchandise [illegible] prescribed line.

Such service cannot lawfully be required from or performed by a railway company.

Am. M. U. Exp. Co. v. *Wolf*, 79 Ill. 430; *Am. U. Exp. Co.* v. *Robinson*, 72 Pa. St. 274; *Thomas* v. *Boston & P. R. R. Co.* 10 Met. 477; *Whitbeck* v. *Holland*, 45 N. Y. 17, and 55 Barb. 443; *Hoagland* v. *Hannibal & St. J. R. R. Co.* 39 Mo. 451; *St Joseph* v. *Saville*, 39 Mo. 460; *People* v. *Chicago & A. R. R. Co.* 55 Ill. 95; *Mayor of Macon* v. *Macon & W. R. R. Co.* 7 Ga. 221; *Abbott* v. *Baltimore & R. S. Packet Co.* 1 Md. Ch. 542; *Citizens Bank* v. *Nantucket S. Co.* 2 Story, 17; *Collender* v. *Dinsmore*, 55 N. Y. 200; *Bland* v. *Southern Exp. Co.* 1 Hughes, 345; *Knapp* v. *United States & C. Exp. Co.* 55 N. H. 348; *Whitney* v. *Merchants U. Exp. Co.* 104 Mass. 152; *Palmer* v. *American Exp. Co.* 51 N. Y. 416; *American Exp. Co.* v. *Haire*, 21 Ind. 4.

A railroad company's monopoly extends only to the collection of tolls for railway transportation, pure and simple, and depends for its existence solely upon the express grant in its charter, and its obligations extend only to the discharge of its charter duties.

Camden & A. R. & T. Co. v. *Briggs*, 2 Zab. 623; *Camblos* v. *Philadelphia & R. R. R. Co.* 4 Brewst. 564; *Perrine* v. *Chesapeake & Del. Canal Co.* 9 How. 172 (50 U. S. bk. 13, L. ed. 93).

If railway companies may lawfully conduct the express business they cannot give themselves exclusive or preferential facilities therefor.

See *Sanford* v. *Catawissa W. & E. R. R. Co.* 24 Pa. St. 380; *McDuffee* v. *Portland & R. R. R. Co.* 52 N. H. Rep. 430; *New England Exp. Co.* v. *Maine C. R. Co.* 9 Am. L. Reg. N. S. 728; *Marriott* v. *London & S. W. R. Co.* 1 C. B. N. S. 498; *Parkinson* v. *Great Western R. Co.* L. R. 6 C. P. 554; *Garton* v. *Bristol & E. R. Co.* 6 C. B. N. S. 639; *Bazendale* v. *North Devon R. Co.* 3 C. B. N. S. 324; *Bazendale* v. *Great Western R. Co.* 5 C. B. N. S. 345; *Re Palmer and The London B. & S. C. R. Co.* L. R. 6 C. P. 194; *Southern Exp. Co.* v. *L. & N. R. R. Co.* 4 Fed. Rep. 481.

The court as a court of equity has the power by its final decree to determine what compensation can lawfully be demanded of the Express Company by the defendants, subsequent to the rendition of the decree.

Mayor of London v. *Mayor of Kings Lynn*, 1 Bos. & Pul. 492; *Haines* v. *Taylor*, 10 Beav. 78; *Duke of Bridgewater* v. *Edward*, 6 Brown, P. C. 363; *Mayor of Malden* v. *Coates*, 4 Madd. 447; *Marshall* v. *Walmsley*, 4 Madd. 105, 110 *note; Stevelly* v. *Murphy*, 2 Ir. Eq. 448; *Ball* v. *Montgomery*, 2 Ves. 191; *Morley* v. *Rennoldson*, 2 Hare, 587; *Brown* v. *Martyn*, 2 J. & La. T. 333; *Manly* v. *Hawkins*, 1 Dru. & Wal. 363; *Bogg* v. *Midland R. Co.* L. R. 4 Eq. Cas. 310; *Lamb* v. *Walker*, L. R. 3 Q. B. Div. 389; *Libby* v. *Rosekrans*, 55 Barb. 214; *Fisher* v. *Fisher*, 32 Iowa, 21.

The presumption of law is that the circumstances which exist at the time when the final decree is made will continue sufficiently to render the decree continually equitable, and

until new circumstances are brought to the attention of the court.

Scales v. *Key*, 11 Ad. & El. 819; 1 Greenl. Ev. Par. 41; 2 Whart. Ev. 1254. See also *Bond* v. *Hopkins*, 1 Sch. & Lef. 428, 429; *Randall* v. *Howard*, 2 Black, 585 (67 U. S. bk. 17, L. ed. 269); *Shepherd* v. *Payne*, 12 C. B. N. S. 429; *Mills* v. *Mayor of Colchester*, Law Rep. 2 C. P. 476; *Canada S. R. Co.* v. *International Bridge Co.* 8 Fed. Rep. 198.

In conclusion we hold:

1. That the defendants are quasi public corporations, and as such are charged with the performance of public duties.

2. That the court has power to determine and control the manner in which such duties shall be performed, and to enforce their performance.

3. That among such duties is the duty of affording to the express business all the facilities which it requires, and which usage and custom have defined and sanctioned.

4. That such facilities are to be afforded for a just and reasonable compensation.

5. That the court has lawful power to fix and determine, upon the evidence before it, the just and reasonable compensation to be paid *in presenti;* and, upon the coming in of the master's report, to fix a like rate *in futuro*.

[2] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

These suits present substantially the same questions and may properly be considered together. They were each brought by an Express Company against a Railway Company, to restrain the Railway Company from interfering with or disturbing in any manner the facilities theretofore afforded the express company for doing its business on the railway of the railway company.

1. THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

This suit was begun May 21, 1880, and the business of the Express Company is thus described in the bill:

"Your orator, the Southern Express Company, is a corporation duly created, organized and now existing under the laws of the State of Georgia, for the purpose and with the powers [3] necessary thereto, of receiving and forwarding upon railroads, steam vessels and other vehicles of rapid transportation, in a safe and secure manner, and with the greatest practical expedition, in the special care and custody of its own *employés*, and at destination personally delivering packages of money or currency, gold and silver bullion, bonds, bank notes, deeds and other valuable papers, jewels, silks, laces and other articles of great value, requiring for their security extraordinary care and precaution, and also parcels of goods, wares and merchandise, requiring great dispatch or careful handling, and also fruit, vegetables, fresh meats, fish, oysters, fish spawn and other articles liable to decay or other injury from delay; and also live animals requiring particular care and attention during transportation; and also for receiving and forwarding for collection bills, notes, drafts and accounts, and receiving and returning payment thereof; and also for receiving and forwarding all articles of trade and commerce, with the bills and charges of the shipper thereto attached, to be collected of the consignee on delivery of such articles, and returned to shipper; and in so doing to afford the public under a single contract, and on assured responsibility, safe, reliable and speedy transportation from and to all points accessible only over two or more railroads, and generally to perform for the public all offices that by usage are incident to the class of carriers now well known, recognized and designated by the public as 'express carriers.'"

The St. Louis, Iron Mountain & Southern Railway Company is a railway corporation existing in the States of Missouri and Arkansas, formed by the consolidation of the St. Louis & Iron Mountain Railroad Company, the Cairo & Fulton Railroad Company, and the Cairo, Arkansas & Texas Railroad Company. Its railway extends from St. Louis, and from a point on the Mississippi, opposite Cairo, through Missouri and Arkansas, by way of Little Rock, to Texarkana, on the boundary between Arkansas and Texas, with certain branches.

On the 30th of April, 1872, and before the consolidation, the St. Louis & Iron Mountain Company entered into a contract in writing, with Adams Express Company, by which the Railway Company agreed to furnish the express company "one half the baggage car on each of its passenger trains on main line and branches for carrying express freight," and also "the use of a part of the baggage car on accommodation trains between St. Louis and Potosi to an extent not in excess of the amount allowed in passenger trains." The cars were not to be loaded with over 7,000 pounds at any one time, and the Railway Company agreed that each of the cars should run each way daily on the passenger trains. The Company also agreed that it would "prohibit its conductors, agents and baggage masters from transporting on its passenger trains, or from accepting compensation for any matter except extra baggage;" and further, that it would not "permit any person or company to do an express business on its passenger trains on any better terms or for any less payment than that given the Adams Express Company." In consideration of this service the Express Company agreed to pay $125 a day, and a proportional increase for every ten miles operated by it on an extension of the railroad, "for the transportation of its messengers with safes and package chests, and an average amount of freight not exceeding 10,000 pounds per day," and an agreed rate for all freights in excess of that amount. The Express Company also agreed "to carry all money and other valuables for the said Railroad Company to and from points on the line of its road free of charge, and for such matter as may be sent to or received from points off the line to charge the Railroad Company not exceeding two thirds the rate charged the public." It was also stipulated that "the Railroad Company should be exempt and indemnified by said Express Company against all loss or damage to goods or money transported by said Express Company;" and that settlements should "be made on or before the tenth day of each month for the business of the preceding month." The contract also contained this clause: "This agreement to remain in full force one year from the first day of May, 1872, and thereafter until

thirty days' notice shall be given by either party to the other, of its desire to discontinue the same."

On the first of February, 1874, also before the consolidation, the Southern Express Company entered into a contract in writing with the Cairo & Fulton Railroad Company, and the Cairo, Arkansas & Texas Railroad Company, by which the Railroad Companies agreed to furnish the Express Company "one third of the room in the baggage car on each passenger train over the Cairo & Fulton road and the Cairo, Arkansas & Texas road, for the carriage of express matter not to exceed 6,000 pounds per day for each car." This contract also contained provisions similar to that between the Adams and St. Louis & Iron Mountain Companies as to the regulation of the duties of conductors, agents and baggage-masters, and the privileges of other persons for doing an express business on passenger trains. The Southern Company agreed to pay for the transportation of its messengers, with safes and package chests, and an average amount of express matter not to exceed 6,000 pounds per car, $50 a day to the Cairo & Fulton Company, and $10 a day to the Cairo, Arkansas & Texas Company, and an agreed rate for all excess over 6,000 pounds. There were also other provisions as to the carriage of money packages and valuables by the Express Company for the Railroad Companies, and as to the details of the business, at the end of which was the following: "This contract to remain in force until terminated on either party giving the other sixty days' notice of its intention to thus withdraw therefrom."

The consolidation took place May 16, 1874, and the two Express Companies continued their business upon the road under their respective contracts until April 1, 1878, when the Adams Company, with the assent and permission of the consolidated Railway Company, relinquished its business on the line to the Southern Company, and that Company thereafter conducted the whole express business on the entire line under the two contracts.

On the 26th of March, 1880, the Railroad Company having come to the conclusion to change the mode of doing the express business over its line, gave the Express Company the stipulated notice for a termination of the existing contracts. All efforts by the Express Company to secure facilities for a continuation of its business over the road having failed, this suit was brought, and the prayer of the bill is:

"1. That during the pendency of this suit, the defendant, its officers, agents, servants and *employés* may be restrained and enjoined by a proper preliminary or provisional order or injunction, and until the further order of the court, from interfering in any manner with or disturbing in any manner the enjoyment by the Southern Express Company of the facilities now accorded to it by the said defendant, upon its lines of railway, for the transaction of the business of the said Southern Express Company, and of the express business of the public confided to its care; and from interfering with any of the express matter or messengers of the Southern Express Company; and from excluding or ejecting any of its express matter or messengers from the depots, cars and lines of the said defendant, as the same have been heretofore and are now enjoyed and occupied by the said Southern Express Company, and from refusing to receive and transport, in like manner as the said defendant is now doing, over its lines of railway, the express matter and messengers of the said Southern Express Company; and from interfering with or disturbing the business of the said Southern Express Company, or its present relations in reference thereto, with the said defendant in any way or manner whatsoever; and so long as the said Southern Express Company shall be willing and ready, and offer to pay, according to all legal rates therefor.

"2. That if any dispute or disagreement shall arise between the parties hereto during the pendency of this suit, and before a final decree herein upon the question of what is a lawful or reasonable compensation to be paid by your orator to the defendant for the transportation of express matter, your orator may be permitted to bring the same by way of interlocutory application to this court for its decision; and that, pending the inquiry thereon, the preliminary injunction heretofore prayed may be continued, to the same purport, tenor and effect as if the prayer for the same were here repeated.

"3. That the said defendant may be decreed by this court to transport at all times the express matter, safes and messengers of the said Southern Express Company by the same trains and with the same accommodations thereon, and in its depots and stations as it may transport its own express matter or as it may accord to itself; and that the said defendant may be decreed so to transport the said express matter, [7] safes and messengers of the said Southern Express Company, at and for the statutory tolls and compensation in that behalf by law provided; and that the said defendant may be decreed to make a reasonable rebate or reduction to be fixed and determined by this honorable court, from its charges to the said Southern Express Company by reason of its performance of said accessorial service, as above specified, so long as the said Southern Express Company shall offer to conform to all the reasonable rules and regulations of the said defendant, and to pay all lawful charges for the transaction of its said business.

"4. That a permanent injunction may issue herein to the same purport and effect as is hereinbefore prayed in regard to said provisional or preliminary injunction.

"5. That your orator may have such other relief or such further or different relief herein, with its costs, as to the court may seem meet."

The Railway Company answered the bill and, among other things, avers as follows:

"38. Defendant further avers that it does not claim and never has claimed a right to exclude the transportation of the express matter of the complainant from the lines of defendant's railway, and has always been willing and is now willing to carry and transport any freight or express matter of complainant that it may offer to defendant. Defendant claims the right to carry and transport what is called express matter in the spaces in its express cars selected by itself, and under the supervision, care, and control of its own *employés*, and has refused and does refuse to complainant the right to have

allotted to itself any particular space in defendant's express cars for its exclusive use, or to permit its messengers to ride in the express cars and to take charge of complainant's express freight."

2. THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY.

This suit was begun by the same Express Company on the 11th of June, 1880. The Memphis & Little Rock Railroad Company is a railroad corporation formed by the reorganization of a former corporation of the same name, owning and operating a railroad in Arkansas between Little Rock and a point on the Mississippi River opposite Memphis. On the 26th of May, 1871, before the reorganization, and while the railroad of the present Company was owned and operated by the original corporation, that corporation entered into a written contract with the Southern Express Company by which the Railroad Company was to furnish the Express Company with one end of a baggage car for express service when convenient, and, if not, a box car. For this the Express Company was to pay for each hundred pounds of freight carried at certain agreed rates, and to assume all risks of the transportation of express matter, except such damage as arose from the gross neglect or carelessness of the Railroad Company. This agreement also contained other stipulations for the regulation of the conduct of the parties under it, and at the end was this: "This agreement takes effect June 1, 1871, and may be terminated by either party on thirty days' notice." After the reorganization no new contract was made, but the Express Company continued business on the road under the old contract without objection by the reorganized company until June 2, 1880, when it was notified that, as the Railroad Company had "determined to transport all express matter and transact all express business on its own account, and through and by its own officers and agents, on and after the fourteenth of June," all contracts or arrangements existing between the Companies would terminate on that day. The notice concluded as follows: "We shall be glad to receive, transport and deliver any express matter you or your Company may think proper to entrust to us, at reasonable rates and in conformity to law." This suit was brought in consequence of that notice, and the prayer of the bill is substantially like that against the St. Louis, Iron Mountain & Southern Company.

[8]

This Company also answered the bill, and among other things is the following:

"It says that the fact is that when it purchased the road it now operates, May 1, 1877, it found complainant on the road with all its investments made and its agencies and business routes established, and that respondent tacitly permitted complainant to continue its business over its road. But it is now able, ready and willing to do the express carrying business over its road for itself and for the benefit of its own stockholders, and desiring to take the business into its own hands it gave complainant the notice mentioned and copied in the bill. It repeats here what is said in that notice; that it is ready and willing to carry for complainant in the same manner and upon the same terms that it carries for all other shippers. It submits that this is the extent of its duty toward complainant, and no injunction of this court is necessary to compel it to discharge that duty. It submits that complainant has no privilege or right which is not common to all shippers, and it repeats that what it does for others it will freely and in its proper order do for complainant. None of the privileges claimed by complainant are accorded by respondent to any other shipper, and no other even asks such privileges. Respondent denies that it must give complainant the same privileges or facilities that it enjoys itself, for that would be to surrender to complainant a part of its corporate rights and privileges, and also to surrender to complainant the control of a part of its cars and business. All that it is required to do for complainant is to receive and carry for it in the same manner and at the same rates it does for others. In the conduct of its business, express and all other, it receives freights from the shippers, giving therefor a receipt or bill of lading, takes the freight into its own possession, loads it itself into its cars, carries it in its own custody; and at the place of destination delivers it to the consignee. All this it is willing, has offered, and again offers, to do for complainant."

[9]

3. THE MISSOURI, KANSAS AND TEXAS RAILROAD COMPANY.

This suit was brought on the 28th of December, 1880, by or on behalf of Adams Express Company, a joint stock association of the State of New York, organized in 1854. The Missouri, Kansas & Texas Railroad Company is a Kansas railroad corporation, owning and controlling lines of railroad from Junction City, Kansas and Sedalia, Missouri, to Parsons, Kansas, thence southerly to a crossing of the Arkansas River; and from Holden, Missouri, on the Missouri Pacific Railroad, westerly to Paoli, on the Missouri River, Fort Scott & Gulf Railroad, in all a length of say 473 miles.

The bill in this case contains, among others, the following averments:

"X. After the formation of the Adams Express Company various other express companies were formed for the conduct of the same general business, to be operated in like manner over the public thoroughfares of the country. As the principal railway lines known as 'Trunk Lines' and running in a general direction from east to west, ran in courses generally parallel, the principal express companies existing at the early date aforesaid, namely; the 'Adams,' the 'American,' and the 'United States,' agreed among themselves that they would reach the commercial centers of the country by different railway and steamboat routes, and that they would divide the north and south express business in a manner best calculated for the welfare thereof, and for the best service of the public.

This understanding was generally effectuated, but in various instances two express companies have, at the same time and with permission of the Railway Company, occupied, for a greater or less distance, the same line of railway; and such occupation has not been found incompatible with the harmonious working of such two express companies, and has resulted in a larger income to the Railway Company than it would have received had its line been occupied but by one express company only

and has also afforded the public the opportunity, both upon short and long routes, for the most efficient service and for the competition to which it is lawfully entitled.

"XI. Under the mutual understanding aforesaid the Adams Express Company, as soon as the demands of the public warranted the expenditure, extended its business westward to the Cities of Wheeling, Columbus, Cincinnati, Indianapolis, Louisville and St. Louis, by means of the facilities afforded by the Pittsburg, Cincinnati & St. Louis Railroad and other companies, and thereby made the routes of the said Adams Express Company continuous from Boston, New York, Philadelphia and Pittsburg to the cities last aforesaid; and such continuous routes are now operated by it.

"XII. The said Adams Express Company, under the arrangements and understandings aforesaid, extended its business in a southerly direction, and, as the word 'express' imports, always by the shortest line of communication to all the principal cities in the South—namely: Richmond, Charleston, Savannah, Mobile, Montgomery, New Orleans, Memphis and other places—and in so doing was always afforded by those occupying the public office of a common carrier all necessary facilities therefor, and which facilities were by said carriers increased to the said Adams Express Company in proportion with the increase of the demands of the public therefor.

"XIII. The Adams Express Company has always, in the conduct of its business, paid and now pays to the common carriers whom it employs a just and reasonable compensation, satisfactory to them, for the facilities afforded, and has itself always charged the public only a just and reasonable compensation for the express services performed for it.

"XIV. In the conduct of its business, as aforesaid, the Adams Express Company has always represented and now represents that portion of the public which desires to avail itself, in the transmission of its property and valuables, of the pecuniary responsibility of the express company, and of the safeguards and checks which it has originated, provided and enforced for the safe custody of the property committed to its care.

"XV. The Adams Express Company conducted its business, as aforesaid, until the commencement of hostilities, in 1861, when, by reason of the derangements of commercial intercourse then ensuing, and for other controlling reasons of a public character then generally known, it was obliged to discontinue its organization and business in the Southern States, and it thereupon withdrew from the same, and sold so much of its good will and its equipment as then there existed to the Southern Express Company, a corporation created, as this plaintiff is informed and believes, under and pursuant to the laws of the State of Georgia; and since then the express business in the principal Southern States has been, and is now, conducted by the said Southern Express Company, under said charter, by which it is expressly authorized to conduct the same, and which said charter gives a legislative description of the kind and character of business to be done by said Company as an express company, and to a copy of which the plaintiff craves leave to refer.

"XVI. After the cessation of the hostilities aforesaid an arrangement was made, and which is now in force, between the said Adams Express Company and the said Southern Express Company, for the general regulation of the transportation of property coming from the territory of the one into the territory of the other, and by which property received by the Adams Express Company, destined for points within the territory of the Southern, and property received within the territory of the Southern, destined to points within the territory of the Adams Express Company, or reached by its connections, is interchanged at certain specified points, and upon a basis of charge proportioned to the distance traversed in the territory of either. In case of such interchange of express matter within such territory, the express company originally receiving the same remains liable to the public for the value thereof until delivered to the consignee.

"XVII. Since the said understanding and arrangement, the Adams Express Company has made such interchanges with the said Southern Express Company, and now makes the same, at Richmond, Lynchburg, and Danville, Virginia; Chattanooga, Tennessee; Cairo, Illinois, and Paducah, Kentucky; and has not, itself, since then either delivered or received express matter directly south of such points, but the territory so directly south thereof has been operated by the said Southern Express Company alone."

On the 23d of November, 1871, the Adams Express Company and the Missouri, Kansas and Texas Company entered into the following contract:

"This agreement, made this 23d day of November, A. D. 1871, between Missouri, Kansas and Texas Railway Company, by R. S. Stevens, its general manager, party of the first part, and the Adams Express Company, by————, party of the second part, witnesseth:

* * * * * * * *

"1. The Missouri, Kansas and Texas Railway Company will furnish for the use of the Adams Express Company one car each way on [13] its line from Sedalia, Missouri, via Parsons, Kansas, to Junction City, Kansas, to be hauled on a passenger train each day that a passenger train is to run over the line. The car to be used exclusively by the Adams Express Company, but not to carry at any one time an excess of seven tons of freight; the charges by the Express Company to its patrons to be not less than one and one half first class rates of the Missouri, Kansas & Texas Railway Company at the time, as per its freight tariff. The Railway Company will also furnish from Parsons south to the Arkansas River the necessary accommodations in its baggage car, and also similar accommodations in a baggage car on the Holden line on one train each way. The express car, as well as all express matter carried over the road in any baggage or other car, to be in charge of one agent or messenger of the Express Company on each train, who is to be carried free.

"2. All express matter from points on or north of the Missouri Pacific Railroad, and all that comes from any point beyond or east of St. Louis, via that city, for points on the line of the Missouri, Kansas & Texas Railway or beyond, is to be brought on the said line at Se-

dalia; and no business for this road is to be done, or freight of any kind to be received or delivered at Vinita, except such as originated at or is destined to points on the Atlantic and Pacific railroad south and west from Franklin, Missouri.

"3. As part compensation to the Railway Company, for the privileges furnished by it, as herein provided, the Express Company will pay to the Railway Company monthly $100 per day for each and every day that trains are run over the railway or any part thereof.

"4. As part consideration, it is also agreed that the Express Company shall carry the money and valuable packages belonging to the Railway Company over the line of the Missouri, Kansas & Texas Railway free of charge, and for all matter going to or coming from points beyond the line of the Missouri, Kansas & Texas Railway, the Express Company will charge not exceeding two thirds of its regular rate for such business. The superintendents and agents for [14] said Express Company, whenever it is necessary to supervise the business, to have the privilege of traveling over the line of said road free; passes for such free passage to be furnished on application of the superintendent of the Express Company for this division.

"5. The Railway Company agree, further, that they will not carry freight or packages for pay in their baggage cars on passenger trains, nor allow their conductors or baggage masters or other *employés* to do so, during the existence of this agreement, nor will they allow any other company, firm or person the privilege of carrying freight on their passenger trains at any less rate of payment per day, or any greater weight in a car, or upon any better terms in any way than is granted to said Express Company under this agreement.

"6. It is understood that as the line of the Missouri, Kansas & Texas Railway is extended south from the Arkansas River, similar accommodations will be furnished for an express business, as herein above provided, at a reasonably increased cost, to be paid by the Express Company, as shall hereafter be agreed upon.

"7. This agreement to take effect on the first day of December, A. D. 1871, and continue in force for one year thereafter, and until thirty days' notice shall have been given to the other by the party desiring to terminate same."

Under this contract the Adams Company carried on its business over the railroad line, without objection from the Railroad Company, until December 1, 1880, when the Railroad Company notified the Express Company that it would be expected to retire from the operation of its business on that road January 1, 1881, as, on and after that date, the business would be done by or for the Railroad Company. This suit was brought after the service of that notice, and the prayer of the bill is substantially like that in the other cases.

The Railroad Company at first answered the bill, and testimony was taken; but before a final hearing the answer was withdrawn and a demurrer substituted.

In each of the cases a preliminary injunction was granted, and from that time until now the [15] Express Companies have occupied the roads the same as before the suits, but in connection with the Railroad Companies, as carriers of express matter, or with some other express company to which the privilege of doing an express business over the line had been granted by the Railroad Company.

A large amount of testimony was taken, and on the final hearing a decree was entered in each of the cases, one of which is as follows:

"I. That the express business, as fully described and shown in the record, is a branch of the carrying trade that has by the necessities of commerce and the usages of those engaged in transportation become known and recognized so as to require the court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

"II. That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept while in transit in the immediate charge of the messenger or agent of such express company.

"III. That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which it is to be carried, and to deny to them the right to the custody of the property while so carried would be destructive of the express business and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.

"IV. That the defendant, its officers, agents and servants have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's Company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof unless such inspection be granted or such knowledge be afforded.

"V. That it is the duty of the defendant to carry the express matter of the plaintiff's Company and the messengers or agents in charge thereof at a just and reasonable rate of compensation; and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

"VI. That on and subsequent to the first day of May, 1877, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant's lines, and such as are specifically in the bill herein set forth; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn; and that it was the intention and purpose of the defendant to exclude the plaintiff's Company from its lines on and after the 21st day of June, 1880; that such intention and purpose were restrained by the preliminary injunction order of the court, which said injunction order was afterwards modified, as appears in the record.

"VII. That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent and upon the same trains that said defendant may accord to itself or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to the plaintiff on all its passenger trains.

"VIII. That the plaintiff keep and render monthly a true account of the services performed for it by defendant, and pay therefor at the rate hereinafter specified, on or before the —— of each month, after the date hereof, for the business of the month preceding; and that the defendant has no right to require prepayment for said express facilities, or payment therefor at the end of every train, or in any other manner than as is herein provided; and that plaintiff execute and deliver to the defendant a bond in the sum of $25,000, conditioned well and faithfully to make such payments as are herein provided, and with surety to be approved by a judge of the court.

"IX. That it is and was the duty of said defendant to afford and to have afforded such facilities to the plaintiff as herein specified, for a just and reasonable compensation.

"X. Whereas, it is alleged by complainant that since the commencement of this suit and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter; therefore, it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a master to take proof and report thereon.

"XI. That the defendant, its officers, agents, servants and *employés*, and all persons acting under their authority, be and they hereby are permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff of the facilities provided for in this decree, to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it for the transaction of the business of the plaintiff, and of the express business of the public confided to its care; and from interfering with any of the express matter or messengers of the plaintiff; and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars or lines of the said defendant, as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff; and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport, for itself or for any other express company, over its lines of railway, the express matter and messengers of the said plaintiff; and from interfering with or disturbing the business of the said plaintiff in any way or manner whatsoever, the said plaintiff paying for the services performed for it by the defendant monthly, as herein prescribed, at a rate not exceeding 50 per centum more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation or for private individuals, reserving to either party the right at any time hereafter to apply to this court according to the rules in equity proceedings for a modification of this decree as to the measure of compensation herein prescribed.

"XII. It is further ordered, adjudged and decreed that defendant pay the costs to be taxed herein, and that an execution or a fee bill issue therefor. And the said defendant enters herein its prayer for appeal, which prayer is granted." [18]

The decrees in the other cases differ from this only in matters of detail.

The cases are now here for review on these appeals.

The evidence shows that the express business was first organized in the United States about the year 1839. The case of *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344 [47 U. S. bk. 12, L. ed. 466], grew out of a loss by the burning of the steamboat Lexington on Long Island Sound in January, 1840, of $18,000 in gold and silver coin while in charge of Wm. F. Harnden, an express carrier, for transportation from New York to Boston. In the report of this case is found a copy of one of the earliest advertisements of the express business as published in two of the Boston newspapers in July, 1839. It is as follows:

"Boston and New York Express Package Car.—Notice to Merchants, Brokers, Booksellers, and all Business Men.

"Wm. F. Harnden, having made arrangements with the New York & Boston Transportation and Stonington & Providence Railroad Companies, will run a car through from Boston to New York, and *vice versa*, *via* Stonington, with the mail train daily, for the purpose of transporting specie, small packages of goods, and bundles of all kinds. Packages sent by this line will be delivered on the following morning, at any part of the city, free of charge. A responsible agent will accompany the car, who will attend to purchasing goods, collecting drafts, notes and bills, and will transact any other business that may be intrusted to him.

"Packages for Philadelphia, Baltimore, Washington, New Haven, Hartford, Albany and Troy will be forwarded immediately on arrival in New York.

"N. B.—Wm. F. Harnden is alone responsible for any loss or injury of any articles or property committed to his care; nor is any risk assumed by, or can be attached to, the Boston and New York Transportation Company, in whose steamers his crates are to be transported, in respect to it or its contents at any time." [19]

The report also contains a copy of the contract between Harnden and the New Jersey Steam Navigation Company, the owner of the Lexington, dated the first of August, 1839, for the facilities to be afforded Harnden for his business on the steamers of that company. This contract was similar to one made a short time before with the Boston & New York Transportation Company, a company which became merged in the New Jersey Steam Navigation Company, August 1, 1839; and it provided that Harnden, in consideration of $250 per month, was to have the privilege of transporting in the steamers of the Company between New York and Providence, via Newport and Stonington, not to exceed once each day from New York and from Providence, "one wooden crate of the dimensions of five feet by five feet in width and

height, and six feet in length (contents unknown)." It was also stipulated and agreed that "the said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the said New Jersey Steam Navigation Company, will not, in any event, be responsible either to him or his employers for the loss of any goods, wares, merchandise, notes, bills, evidences of debt, or property of any and every description, to be conveyed or transported by him in said crate, or otherwise, in any manner, in the boats of the said company." It was also further provided that Harnden should attach to all his advertisements for business, and to his bills of lading, notices in the form of that at the foot of his advertisement, a copy of which is given above, and that he should not violate any of the provisions of the postoffice laws, or interfere with the Navigation Company in its transportation of letters or papers, or carry powder, matches or other combustible materials of any kind calculated to endanger the safety of the boats or the property or persons on board. At the end was this clause: "And that this contract may be at any time terminated by the New Jersey Steam Navigation Company, or by the said Harnden, upon one month's notice given in writing."

[20] Such was the beginning of the express business which now has grown to an enormous size, and is carried on all over the United States and in Canada, and has been extended to Europe and the West Indies. It has become a public necessity, and ranks in importance with the mails and with the telegraph. It employs for the purposes of transportation all the important railroads in the United States; and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long settled habits of business, and interfering materially with the conveniences of social life.

In this connection it is to be kept in mind that neither of the Railroad Companies involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The controversy, in each case, is not with the public, but with a single Express Company. And the real question is not whether the railroad companies are authorized by law to do an express business themselves; nor whether they must carry express matter for the public on their passenger trains in the immediate charge of some person specially appointed for that purpose; nor whether they shall carry express freights for express companies as they carry like freights for the general public; but whether it is their duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads, the same in all respects as those they provide for themselves or afford to any other express company.

When the business began railroads were in their infancy. They were few in number and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies, and it is no doubt true, as alleged in each of the bills filed in these cases, that "no railroad company in the United States * * * has ever refused to transport express matter for the public, upon the application of some express company, of some form of legal constitution. Every railway company * * * has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of that class of matter which is known as express matter." Express companies have undoubtedly invested their capital and built up their business in the hope and expectation of securing and keeping for themselves such railway facilities as they needed; and railroad companies have likewise relied upon the express business as one of their important sources of income.

But it is neither averred in the bills nor shown by the testimony that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and in fact it was conceded upon the argument, that down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in these records, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. In some of the States statutes have been passed which, either in express terms, or by judicial interpretation, require railroad companies to furnish equal facilities to all express companies (Gen. Laws N. H., c. 163, sec. 2; Rev. Stat. Maine, 494, sec. 134), but these are of comparatively recent origin, and thus far seem not to have been generally adopted.

In Missouri, by the Constitution, railways are "declared public highways, and railroad companies common carriers." The General Assembly is also required "to pass laws to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger tariffs on the different railroads in this State," and "to pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties." Art. XII., sec. 14. And by section 23 it is provided that "no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise, and no railroad company, or any lessee, manager, or *employé* thereof shall make any preference in furnishing cars or motive power." We have not been referred to any statute of the State which does more than reproduce these constitutional provisions in substantially the same general language.

Article XVII., sec. 1, of the Constitution of

Arkansas provides that "all railroads, canals, and turnpikes shall be public highways, and all railroad and canal companies shall be common carriers." Secs. 3, 5 and 6 of the same article are as follows:

"Sec. 3. All individuals, associations and corporations shall have equal rights to have persons and property transported over railroads, canals and turnpikes, and no undue or unreasonable discrimination shall be made in charges for, or in facilities for transportation of freight or passengers within the State, or coming from or going to any other State.

"Sec. 5. No president, director, officer, agent or *employé* of any railroad or canal company shall be interested, directly or indirectly, in the furnishing of material or supplies to such company, or in the business of a common carrier of freight or passengers over the works owned, leased, controlled or worked by such company, nor in any arrangement which shall afford more advantageous terms or greater facilities than are offered or accorded to the public.

"Sec. 6. No discrimination in charge or facilities for transportation shall be made between transportation companies and individuals, nor in favor of either, by abatement, drawback or otherwise; and no railroad or canal company, or any lessee, manager, or *employé* thereof, shall make any preference in furnishing cars or motive power."

The legislation of this State has not, so far as we have been advised, extended the operation of these constitutional provisions in a way to affect the questions now to be decided.

In Kansas the following statute is in force:

"Sec. 55. Every railway corporation in this State which now is, or may hereafter be, engaged in the transportation of persons or property, shall give public notice of the regular time of starting and running its cars, and shall furnish sufficient accommodations for the transportation of all such passengers, baggage, mails and express freight as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junction of other roads, and at the several stopping places; and they are hereby required to stop all trains carrying passengers at the junction or intersection of other railways a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight from the trains or railways so connecting or intersecting, or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting and intersecting roads whenever the same shall be delivered to them." Comp. Laws Kansas (1879), 225, c. 23.

The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other *employé* of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the express man in charge. As the business to be done is "express," it implies access to the train for loading at the latest, and for unloading at the earliest convenient moment.

All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied; the particular trains that can be used; the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited; and as has been seen that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business, unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security.

The inconvenience that would come from allowing more than one express company on a railroad at the same time was apparently so well understood both by the express companies and the railroad companies that the three principal express companies, the Adams, the American and the United States, almost immediately on their organization, now more than thirty years ago, by agreement divided the territory in the United States traversed by railroads among themselves; and since that time each has confined its own operations to the particular roads

which, under this division, have been set apart for its special use. No one of these companies has ever interfered with the other, and each has worked its allotted territory, always extending its lines in the agreed directions as circumstances would permit. At the beginning of the late civil war the Adams Company gave up its territory in the Southern States to the Southern Company, and since then the Adams and the Southern have occupied, under arrangements between themselves, that part of the ground originally assigned to the Adams alone. In this way these three or four important and influential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying when these suits were brought, 155 railroads, with a milage of 21,216 miles; the American 200 roads with a milage of 28,000 miles, and the Southern 95 roads, with a milage of 10,000 miles. Through their business arrangements with each other, and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted [26] unhesitatingly by all who need their services. The good will of their business is of very great value, if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their own profits and the better their means of serving the public. In making their investments and in extending their business they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time.

The territory traversed by the railroads involved in the present suits is part of that allotted in the division between the express companies to the Adams and Southern Companies, and in due time after the roads were built these companies contracted with the railroad companies for the privileges of an express business. The contracts were all in writing, in which the rights of the respective parties were clearly defined, and there is now no dispute about what they were. Each contract contained a provision for its termination by either party on notice. That notice has been given in all the cases by the railroad companies, and the express companies now sue for relief. Clearly this cannot be afforded by keeping the contracts in force, for both parties have agreed that they may be terminated at any time by either party on notice; nor by making new contracts, because that is not within the scope of judicial power.

The exact question then is, whether these Express Companies can now demand as a right what they have heretofore had only as by permission. That depends as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The constitutions and the laws of the States in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express companies in the way that under some circumstances they may be able without inconvenience to carry one company. In Kansas, the Missouri, Kansas & Texas Company must furnish sufficient accommodations for the transportation of all such express freight as may be offered, and in each of the States of Missouri, Arkansas and Kansas railroad companies are probably prohibited from making unreasonable discriminations in their business as carriers, but this is all.

Such being the case, the right of the Express Companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines.

In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads, unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The Express Companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts; and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the Railroad Company. They were willing to begin and to expand their business upon this understanding,

and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular Express Companies must be carried notwithstanding the termination of their special contract rights.

The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts, which established the duty of the railroad company upon the one side, and fixed the liability of the express company on the other, the court, in decreeing the carriage, was substantially compelled to make for the parties such a contract for the business as in its opinion they ought to have made for themselves. Having found that the railroad company should furnish the express company with facilities for business, it had to define what those facilities must be; and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. In this way, as it seems to us, "the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves," and that, we said in *Atchison, Topeka & S. F. R. R. Co.* v. *Denver & N. O. R.R. Co.* 110 U. S. 678 [Bk. 28, L. ed. 294], followed at this term in *Pullman's Palace Car Co.* v. *Missouri Pac. R. Co.* 115 U. S. 587 [*ante*, 499], could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The Legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts; but, unless a duty has been created either by usage, or by contract, or by statute, the courts cannot be called on to give it effect.

The decree in each of the cases is reversed and the suit is remanded, with directions to dissolve the injunction, and, after adjusting the accounts between the parties for business done while the injunctions were in force, and decreeing the payment of any amounts that may be found to be due, to dismiss the bills.

Reversed.

Mr. Justice **Matthews** took no part in the decision of these cases.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Miller** dissenting:

When these cases were argued before *Circuit Judge* McCrary and myself at St. Louis, after due consideration and consultation with him and *Judge* Treat of the District Court, I announced certain propositions as the foundations on which the decrees should be rendered. These were afterwards entered in the various circuits to which the cases properly belonged and, I believe, in strict accordance with the principles thus announced.

I am still of opinion that those principles are sound, and I repeat them here as the reasons of my dissent from the judgment of the court now pronounced in these cases. [30]

They met the approval of *Judge* McCrary when they were submitted to his consideration. They were filed in the court in the following language:

"1. I am of opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

"That, while it is not possible to give a definition in terms which will embrace all classes of articles usually so carried, and to define it with a precision of words of exclusion, the general character of the business is sufficiently known and recognized as to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

"That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which, to a greater or less degree, attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise and the like.

"2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it, and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation.

"3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier; but that when loss or injury occurs, the liability depends upon the exercise of due care, skill and diligence on the part of the railroad company.

"4. That, under these circumstances, there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier. [31]

which, under this division, have been set apart for its special use. No one of these companies has ever interfered with the other, and each has worked its allotted territory, always extending its lines in the agreed directions as circumstances would permit. At the beginning of the late civil war the Adams Company gave up its territory in the Southern States to the Southern Company, and since then the Adams and the Southern have occupied, under arrangements between themselves, that part of the ground originally assigned to the Adams alone. In this way these three or four important and influential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying when these suits were brought, 155 railroads, with a milage of 21,216 miles; the American 200 roads with a milage of 28,000 miles, and the Southern 95 roads, with a milage of 10,000 miles. Through their business arrangements with each other, and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted [26] unhesitatingly by all who need their services. The good will of their business is of very great value, if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their own profits and the better their means of serving the public. In making their investments and in extending their business they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time.

The territory traversed by the railroads involved in the present suits is part of that allotted in the division between the express companies to the Adams and Southern Companies, and in due time after the roads were built these companies contracted with the railroad companies for the privileges of an express business. The contracts were all in writing, in which the rights of the respective parties were clearly defined, and there is now no dispute about what they were. Each contract contained a provision for its termination by either party on notice. That notice has been given in all the cases by the railroad companies, and the express companies now sue for relief. Clearly this cannot be afforded by keeping the contracts in force, for both parties have agreed that they may be terminated at any time by either party on notice; nor by making new contracts, because that is not within the scope of judicial power.

The exact question then is, whether these Express Companies can now demand as a right what they have heretofore had only as by permission. That depends as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The constitutions and the laws of the States in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express companies in the way that under some circumstances they may be able without inconvenience to carry one company. In Kansas, the Missouri, Kansas & Texas Company must furnish sufficient accommodations for the transportation of all such express freight as may be offered, and in each of the States of Missouri, Arkansas and Kansas railroad companies are probably prohibited from making unreasonable discriminations in their business as carriers, but this is all.

Such being the case, the right of the Express Companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines.

In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads, unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The Express Companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts; and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the Railroad Company. They were willing to begin and to expand their business upon this understanding,

whom both railroad companies and the express men are intended to serve. If other courts should follow ours in this doctrine, the evils to ensue will call for other relief.

It is in view of amelioration of these great evils that, in dissenting here, I announce the principles which I earnestly believe *ought* to control the actions and the rights of these two great public services.

Field, *J.*—I agree with Mr. Justice **Miller** in the positions he has stated, although in the cases just decided I think the decrees of the courts below require modification in several particulars; they go too far. But I am clear that railroad companies are bound, as common carriers, to accommodate the public in the transportation of goods according to its necessities, and through the instrumentalities or in the mode best adapted to promote its convenience. Among these instrumentalities express companies, by the mode in which their business is conducted, are the most important and useful.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

On April 9, 1886,

Mr. Chief Justice **Waite** announced the following order:

In pursuance of a stipulation of counsel for the respective parties, filed in these cases, it is ordered by the court that the decrees entered by this court in these cases be and they are hereby amended, by adding thereto the following:

It is further ordered that said reversal shall be without prejudice to the proceeding already had in adjusting the accounts between the parties of the business done while the injunction therein granted by that court was in force, but not to fix any particular standard of compensation in respect of the transactions in question; and proceed with the adjusting of such accounts and to make proper orders for the speedy adjusting of the same, to the end that just compensation may be made to the defendant below on dismissing said bill for services performed pending the suit; and to that end the master heretofore appointed therein, or such other master as the court may appoint in his place, may consider all the proofs relevant thereto heretofore taken in the cause, whether before or since a final hearing, and such other proofs as may be adduced relating to the extent and value of the service rendered by the defendant below for the complainant, and the payments made on account thereof, and relating to such other matters necessary to be inquired into in order to adjust said accounts between the various parties, to the end that a proper final decree may be entered in accordance with the opinion of this court.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHNSON HAGOOD, Comptroller-General of the STATE OF SOUTH CAROLINA; R. S. PORCHER, County Treasurer of OCONEE COUNTY; and SAMUEL E. MOORE, County Treasurer of ANDERSON COUNTY, *Appts.*, [52]

v.

JOHN P. SOUTHERN AND JAMES P. LOW, Assignees of the BLUE RIDGE RAILWAY COMPANY IN SOUTH CAROLINA a Bankrupt.

JOHNSON HAGOOD, Comptroller-General of the STATE OF SOUTH CAROLINA; S. L. LEAPHART, Treasurer of the STATE OF SOUTH CAROLINA; P. C. GAILLARD, County Treasurer of CHARLESTON COUNTY; W. H. GIBBES, County Treasurer of RICHLAND COUNTY; H. F. ALEXANDER, County Treasurer of OCONEE COUNTY; and WILLIAM McGUKIN, County Treasurer of ANDERSON COUNTY, *Appts.*,

v.

AMOS D. WILLIAMS.

(See S. C. Reporter's ed. 52-71.)

Constitutional law—state statutes—contracts between State and railroad company—payment of taxes in state scrip—action against state officers—State as a party.

1. The Taxes of the Blue Ridge Railroad Company are not payable in the revenue bond scrip, issued by the State of South Carolina in exchange for the bonds of the Company guaranteed by the State.
2. The holder of the revenue bond scrip, issued under the Act of the Legislature of South Carolina of March 2, 1872, has no legal right to have such scrip received for taxes unless he owes taxes for which it is receivable. There is no breach of contract until a tender for taxes due from the holder has been refused.
3. Where a State is not only the real party to the controversy, but the real party against which relief is sought, the nominal defendants being its officers and agents without any personal interest in the subject matter, the suit is substantially within the prohibition of the Eleventh Amendment.
4. There is a clear distinction between actions to compel the officers of a State by affirmative action to perform an obligation which belongs to the State in its political capacity, and actions against defendants, who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs under color of authority which is unconstitutional and void.

[Nos. 108, 109.]

Argued Jan. 12, 13, 1886. Decided Mar. 1, 1886.

APPEALS from the Circuit Court of the United States for the District of South Carolina.

The facts appear in the

Statement of the case by *Mr. Justice* **Matthews:**

These two cases were heard together in the circuit court upon the same testimony, and the same decree passed in each. The facts, common to both, are as follows: [53]

By an Act of the General Assembly of South Carolina, passed September 15, 1868, entitled "An Act to Authorize Additional Aid to the

Blue Ridge Railroad Company in South Carolina," the State, by a guaranty indorsed thereon, pledged its faith and funds to the payment of the principal and interest of bonds to be issued by the railroad company, to the amount of $4,000,000. The bonds authorized by the Act, with the guaranty indorsed, were in fact issued.

On March 2, 1872, an Act of the General Assembly of South Carolina was passed, entitled "An Act to Relieve the State of South Carolina of all Liability for its Guaranty of the Bonds of the Blue Ridge Railroad Company by providing for the securing and destruction of the same."

The preamble to this Act recites the issue of the bonds, the fact of the guaranty indorsed, the liability of the State on account thereof, and the desire of the State to withdraw them and thus relieve itself. It then proceeds to require that all such bonds then held by the [54] financial agent of the State, as security for advances of money made to the Railroad Company by the State, shall be delivered up and canceled, releasing the Railroad Company from all liability on account of such advances.

It then provides that, upon the surrender by the Company to the State of the balance of the issue of $4,000,000 of said bonds, issued and guarantied as aforesaid, the state treasurer should issue in lieu thereof, to the amount of $1,800,000, certificates of indebtedness, styled revenue bond scrip, expressing that the sum mentioned therein is due by the State of South Carolina to bearer and that the same will be received in payment of taxes and all other dues to the State, except special tax levied to pay interest on the public debt. The Act also provides as follows:

"Sec. 4. That the faith and funds of the State are hereby pledged for the ultimate redemption of said revenue bond scrip, and the county treasurers are hereby required to receive the same in payment of all taxes levied by the State, except in payment of special tax levied to pay interest on the public debt; and the state treasurer and all other public officers are hereby required to receive the same in payment of all dues to the State; and still further to provide for the redemption of said revenue bond scrip, an annual tax of three mills on the dollar, in addition to all other taxes, on the assessed value of all taxable property in the State, is hereby levied, to be collected in the same manner and at the same time as may be provided by law for the levy and collection of the regular annual taxes of the State; and the state treasurer is hereby required to retire, at the end of each year from their date, one fourth of the amount of the treasury scrip hereby authorized to be issued, until all of it shall be retired, and to apply to such purpose exclusively the taxes hereby required to be levied.

"Sec. 5. That if any such revenue bond scrip is received in the treasury for the payment of taxes, the treasurer be and he is hereby authorized to pay out such revenue bond scrip in satisfaction of any claim against the treasury, except for interest that may be due on the public debt."

[55] The exchange contemplated by this Act was effected; private individuals holding the guarantied bonds as collateral security for loans of money to the Railroad Company surrendered them and accepted, in lieu thereof, revenue bond scrip at the lower rate. In this way, Amos D. Williams, the appellee in one of these causes, became and remains the holder of $165,000 of revenue bond scrip, for which he surrendered $417,000 of guarantied bonds; and Edward B. Wesley became the holder of $1,005,000 of revenue bond scrip, for which he advanced in cash $844,925, with which were redeemed $2,902,000 of guarantied bonds, also surrendered to the State. Wesley became, by leave of court, a party complainant with Williams in his bill, before final decree. Subject to the lien of Wesley for the payment of his cash advance as above stated, the assignees in bankruptcy of the Blue Ridge Railroad Company, who are appellees in the other cause, claim to own the revenue bond scrip held by Wesley as collateral security for his advance. Other bonds of said Railroad Company guarantied by the State, by like exchanges, were surrendered by other holders, who received and hold corresponding amounts of said revenue bond scrip, and who have come in, under the bill of Williams, which was filed on behalf of himself and all others in like interest choosing to do so, and have proved their claims before a master, so that the whole issue of $4,000,000 of said bonds, except about $4,000 thereof, are shown to have been surrendered to the State and canceled, on the faith of said revenue bond scrip.

After the consummation of these transactions, the Legislature of the State of South Carolina, by an Act passed March 18, 1872, abolished the office of state auditor, and vested his powers in the comptroller-general; and by an Act approved October 22, 1873, repealed the fourth section of the Act of March 2, 1872, providing for an annual tax of three mills on the dollar for the redemption of the revenue bond scrip, and also forbade the comptroller to levy any tax for any purpose whatever, unless expressly thereafter authorized to do so by statute.

On December 22, 1873, it also passed an Act forbidding any state or county officer to accept payment of taxes in revenue bond scrip.

In a similar case between the same parties, in which the complainant's bill was dismissed without prejudice, and reported as *Williams* v. *Hagood*, 98 U. S. 72 [Bk. 25, L. ed. 51], it was said by this court:

"This legislation was manifestly inconsistent with the undertaking of the State expressed in the Act of March 2, 1872, and in the revenue bond scrip issued thereunder; and its constitutionality and obligatory force would be a legitimate subject for consideration if the complainant had placed himself in a position to invoke our judgment. But he has not. His bill does not aver that he has been injured or will be injured by this legislation, or by any act or neglect of the comptroller-general or the county treasurer. It does not aver that the comptroller-general has neglected or refused to perform every duty imposed upon him by the statute under which the revenue bond scrip was issued, nor even that he threatens such neglect or refusal. It does not aver that the county treasurer has refused or even threatened to refuse receiving the complainant's scrip or any scrip in payment of taxes or dues to the State, other than taxes levied to pay the interest on the state debt. It does not aver any demand from

the state treasury or any tender to the county treasurer. Its object is plainly to obtain from this court a declaration that the legislative Acts of October 22 and December 22, 1873, are unconstitutional, because impairing the obligation of the contract made by the Act of 1872, and the certificates thereby authorized and thereunder issued, and this without any averment that the complainant will be injured by them. The question presented to the court is, therefore, merely an abstract one, such an one as no court can be called upon to decide; and the bill shows no equity in the complainant. Hence, it was properly dismissed in the court below and it must be dismissed here, but without prejudice to the complainant's right to bring and prosecute another suit when he shall be in a condition to exhibit an equity in himself."

To supply the omissions of his former bill, it is alleged by the complainant in the present one that in April, 1879, he tendered the said certificates of indebtedness, amounting to about $166,000, to the treasurer of the State of South Carolina and demanded payment thereof, which was refused; and that thereupon, having advised the defendant Hagood, the Comptroller-General of the State, of this refusal of payment by the State treasurer, he requested the Comptroller-General "from time to time, to prepare and transmit to the several county auditors all such forms and instructions as he might deem necessary for collection, in the same manner and at the same time as had been provided by law for the levy and collection of the regular annual taxes of the State for the current fiscal year, the taxes provided to be levied by the fourth section of the aforesaid Act of the General Assembly for the redemption of said scrip, which class of duties, your orator avers, were duties imposed upon the Comptroller-General by the said Act of March 2, 1872;" but that the said Comptroller-General has neglected and refused to comply with said request.

It is also alleged in the bill that the revenue bond scrip, prior to the passage of the Acts of the Legislature complained of, had a market value equal to 70 per cent of its face value, according to which the complainant could dispose of the same to parties desiring to use the same in payment of taxes levied by the State of South Carolina, and that the complainant lately disposed of a quantity of said scrip, on a conditional sale that it could be so used in payment of taxes; but that the county treasurers of the different counties of the State, among others of the Counties of Charleston, Oconee, Anderson and Richland, have refused and continually refuse to receive the said revenue bond scrip in payment of taxes; and that thereby the said revenue bond scrip has ceased to have any market value.

It is not averred, however, in the bill that either of the complainants, Williams or Wesley, had ever tendered revenue bond scrip in payment of taxes due from either of them; but in the bill filed by Southern and Low, as assignees in bankruptcy of the Blue Ridge Railroad Company, an averment of that character is made.

In that bill it is alleged that the Blue Ridge Railroad Company is indebted to the State of South Carolina for taxes on its property for the year 1872 in the sum of $10,845.33, none of said taxes being special taxes levied to pay the interest on the public debt, of which $7,541.22 was payable to the treasurer of Oconee County, and $3,304.11 to the treasurer of Anderson County, to each of whom tenders had been duly made of said revenue bond scrip by said Railroad Company in payment of said taxes, but the same were refused. [58]

The prayer of the bill in the case of Williams is "that the Act of the Legislature of the State of South Carolina of the 2d March, 1872, may be decreed a contract binding the State of South Carolina and affecting the said State with an obligation to do and perform, or cause to be done and performed, the several matters and things therein stipulated and set forth to be done and performed by the said State, through its officers and agents; particularly so much of the said Act as provides for the levy of a tax to retire the said certificates of indebtedness, and to receive the same in payment of taxes and other dues to the State, except the tax levied to pay interest on the public debt; that the several parties holding or claiming to hold the said treasury certificates of indebtedness, *bona fide* and for value, may be called in and admitted to prove the same before a proper person to be appointed for that purpose; that the whole amount of such treasury certificates of indebtedness may be ascertained; that the repeal of the provisions of the said Act of the 2d of March, 1872, by the Legislature may be declared unconstitutional, null and void, because such repeal impairs the obligation of the contract between the State of South Carolina and your orator, and all other parties who are *bona fide* holders of such treasury certificates of indebtedness; that for the purpose of defending itself in such manner as it may be advised to be proper, the State may be allowed, upon the application of its attorney-general in its behalf, to be made a party to these proceedings; that, upon the ascertainment of the amount of the treasury certificates of indebtedness, proper process may be decreed against the state treasurer to perform the duties enjoined upon him by the fourth section of the Act of March 2, 1872; that is to say, to redeem the aforesaid treasury certificates of indebtedness, otherwise called revenue bond scrip, tendered by your orator to the said state treasurer; and that he may be required to receive the same in payment of all dues to the State, except interest on the public debt; and that proper process may be issued against the Comptroller-General, requiring him to perform the duties enjoined upon him under and pursuant to the different sections of said Act of March 2, 1872; and for that purpose that he from time to time be decreed to prepare and transmit to the several county auditors all such forms and instructions as may be proper and lawful for levying and collecting, or either, in the same manner and at the same time as has been provided by law for the levy and collection of the regular annual taxes of the State for the current fiscal year, the taxes levied by the fourth section of the aforesaid Act of the General Assembly for the redemption of said scrip; that the county treasurers of the said State be required to receive such treasury certificates of indebtedness as may be established as a claim under the contract created by the said Act, in [59]

tender of taxes and dues to the State, except interest on the public debt; that in cases where such tender is made, the county treasurer refusing to receive the same shall be prevented by injunction from selling property or otherwise enforcing the payment of the said tax; that a mandatory injunction may be issued out of this honorable court, requiring the Comptroller-General to cease from refusing to levy the tax for retiring the said treasury certificates of indebtedness, and the county treasurers to cease from refusing to receive the same for taxes and dues to the State, except to pay the interest on the public debt, and for such other and further relief as to Your Honors shall seem meet," etc.

The relief prayed for in the bill of the assignees of the Blue Ridge Railroad Company included also a prayer "that the defendants, the county treasurers, may be decreed to receive the said revenue bond scrip in payment of the said taxes due by your orators to the State of South Carolina; that on their refusal to do so they may be enjoined from enforcing the said taxes by selling the property of your orators, or in any other manner; and that on such refusal the lien of said taxes on the property of your orators may be declared to be discharged."

The revenue bond scrip was of different denominations, varying from $1 to $5,000, and was in the form following:

[60] "$100.00. No. 91. $100.00.

Revenue Bond Scrip.

THE STATE OF [Palmetto Tree] SOUTH CAROLINA.

COLUMBIA, S. C., *March* —, 1872.

Receivable as one hundred dollars in payment of all taxes and dues to the State, except special tax levied to pay interest on public debt.

NILES G. PARKER, State Treasurer.

One hundred dollars. One hundred dollars.

[On each side of scrip:]

One hundred dollars. Act, March, 1872."

In the case of *State, ex rel. etc.* v. *Hoge, Comptroller-General*, 4 S. C. 185, the Supreme Court of that State decided, April 18, 1873, that the certificates of revenue bond scrip issued under the Act of March 2, 1872, were void, as being bills of credit within the prohibition of the Constitution of the United States; the design and intention to create by means of them a circulating medium and currency being inferred from the whole scope of the Act, and the form and circumstances of the emission.

Decrees were entered in the two causes, which, after reciting the findings of fact and conclusions of law reached by the circuit court, proceed as follows:

"It is therefore ordered:

"I. That it be referred to James E. Hagood, Esq., clerk of this court, as special master, to take proof of the claims of all parties other than the said Amos D. Williams and Edward B. Wesley (whose claims are hereby adjudged as established), holding or claiming to hold any of said revenue bond scrip, *bona fide* and for value, who may, on contributing *pro rata* to the expense of such reference and this action, prove their claims. And that said special master do ascertain and report the total outstanding amount of such treasury certificates of indebtedness.

"II. That for the purpose of defending itself the State of South Carolina may, at its option and in such manner as it may be advised to be proper, be allowed, upon the application of the attorney-general of said State on its behalf, to be made a party to these proceedings.

"III. That upon the ascertainment of the amount of said treasury certificates of indebtedness outstanding, proper process do issue out of and under the seal of this court against the state treasurer of the State of South Carolina for the time being, and his successors in office, compelling and requiring him and them to perform the duties enjoined upon the incumbent of that office by the fourth section of the Act of 2d March, 1872, to wit: to redeem the said treasury certificates of indebtedness, and compelling and requiring him and them to receive the same in payment of all taxes and other dues to the State, except the special tax levied to pay interest on the public debt; that proper process do issue out of and under the seal of this court against the Comptroller-General of the State of South Carolina for the time being and his successors in office, compelling and requiring him and them to perform the duties enjoined upon that officer by the different sections of the Act of second March, 1872, and compelling and requiring him from time to time to prepare and transmit to the several county auditors all such forms and instructions as may be proper and lawful for levying and collecting, in the same manner as the annual taxes, the taxes required by the fourth section of the Act of 2d March, 1872; and that proper process do issue out of and under the seal of this court compelling and requiring the different county treasurers of the State of South Carolina for the time being, and their successors in office, to receive such treasury certificates of indebtedness in payment of all taxes due to the State of South Carolina, except the special tax levied to pay interest on the public debt. And in all cases where a tender of said treasury certificates of indebtedness is made, and the same refused, an injunction may issue restraining the county treasurer so refusing from selling property, or in any manner enforcing payment of said taxes.

"IV. Any party to these suits may apply at the foot of this decree for further orders in the premises."

From these decrees the present appeals have been prosecuted, and the two causes have been argued as one.

Messrs. **Charles Richardson Miles**, *Atty-Gen. of South Carolina*, and *Leroy F. Youmans*, for appellants.

Messrs. **Dennis McMahon, Thomas S. Cavender** and **James H. Rion**, for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

No specific provision is made in these decrees for the redemption of the revenue bond scrip in which the assignees of the Blue Ridge Railroad Company claim an interest, nor any direction to the treasurers of the counties in which its taxes are due to receive the scrip in payment therefor from the Company; but the command of

the decrees is broad enough to include such relief in their favor. But it is difficult to conceive on what theory of the relation between the Railroad Company and the State it can be maintained. The revenue bond scrip was issued by the State in exchange for the bonds of the Railroad Company guarantied by the State, and in order that by their surrender and cancellation the State might be relieved from its liability on that account. The State was surety for the Railroad Company and not debtor to it and was not liable to it, either upon the guaranty or the certificates of indebtedness issued in lieu thereof. Neither was available as a demand against the State, except in the hands of a holder for value; and neither constituted a contract until value had thus passed, as a consideration for the promises of the State. The Railroad Company is certainly not such a holder, and its assignees in bankruptcy are in no better position. As between the Railroad Company and the State, the former is primarily liable for any debt represented by the revenue bond scrip, or for which it is held by others as security, and is bound to indemnify the State against loss on account of its suretyship. To authorize the Railroad Company to pay its taxes in these certificates is simply to exonerate it from taxation; and to compel payment of them to it is to reverse the order of the obligation, by compelling the surety not only to become principal debtor to strangers but to convert its debtor into a creditor.

No other parties to these suits, including those who have merely proved their claims before the master under the order of reference, have made any tender of revenue bond scrip in payment of specific taxes due from them; and, so far as the contract is that such payment may be made, no breach is shown. The discredit cast upon the scrip by the general refusal to accept it by the tax collectors of the State, and the depreciation in value occasioned thereby, are not actionable injuries. In this aspect, the case falls precisely within that of *Marye* v. *Parsons*, 114 U. S. 325 [*ante*, 205], and does not materially differ from the case as made on the previous bill of Williams, and decided in *Williams* v. *Hagood*, 98 U. S. 72 [Bk. 25, L. ed. 51]. So far as the instrument contains a promise that it will be received in payment of taxes, it is a contract with the holder for the time being, who has taxes to pay; and although such a stipulation, faithfully executed, would give commercial value to the paper, in whosesoever hands it may happen to be, it cannot be said as a matter of law that the contract is broken, until it has been tendered for taxes due from a holder and been refused, nor that the legal right of the holder is threatened, unless he is in a situation to make a present tender for that purpose. He has no legal right to have this scrip received for taxes unless he owes taxes for which it is receivable; and in order that it may be used for the payment of the taxes of another, he must transfer it to the new holder, and that would devest himself of all right to enforce a contract to which he is no longer a party and in which he has ceased to have a legal interest.

But it is urged with earnestness and zeal that the complainants, Williams and Wesley, are entitled to so much of the relief prayed for as in effect would operate to compel the Comptroller-General of the State to execute in their favor the provisions of the Act of March 2, 1872, relating to the levy, collection and application of the tax pledged by the fourth section of that Act to the redemption of the revenue bond scrip. The ground on which that relief is based of course is that the Act of March 2, 1872, must still be regarded as subsisting, notwithstanding the subsequent formal repeal by the Legislature, which must be treated as null and void, because it impairs and destroys the obligation of the contract between the holders of these certificates of indebtedness and the State of South Carolina. Treating the repealing Acts, then, as of no force, the inference is drawn that the duty of the officers of the State remains as declared and defined by the Act of March 2, 1872; and its performance may be enforced by judicial process in behalf of everyone having a legal interest in the subject.

It is to be borne in mind, however, that the State of South Carolina denies the existence and validity of the alleged contract. It asserts that the revenue bond scrip was issued in violation of the Constitution of the State, which provides, Art. IX., sec. 7, that public debts may be contracted for the purpose of defraying extraordinary expenditures; sec. 10, that no scrip, certificate or other evidence of state indebtedness shall be issued, except for the redemption of stock, bonds or other evidences of indebtedness previously issued; and sec. 14, that any debt contracted by the State shall be by loan on state bonds, of amounts not less than $50 each, on interest, payable within twenty years after the final passage of the law [66] authorizing such debts. It asserts that the guaranty by the State of the original bonds of the Blue Ridge Railroad Company was illegal and void, because made in violation of express statutory conditions which, it alleges, were never repealed, as was claimed by the holders of them; and that, consequently, the revenue bond scrip was without consideration, which, appearing on the face of the law itself, deprived the certificates of all validity in whatever hands they might be found. It further asserts that the revenue bond scrip in question is void, as being in violation of that provision of the Constitution of the United States (art I., sec. 10,) which declares that no State shall emit bills of credit, contending that these certificates, on the face of the instrument and of the law creating it, appear manifestly designed to circulate as money in the ordinary transactions of business.

It thus appears that a distinct issue is made by the State of South Carolina with the holders of this revenue bond scrip; and the controversy between them and the State involves the very question of the existence and obligation of the alleged contract. This controversy the State has undertaken to settle for itself. By its legislative department it has repealed the statutes authorizing its officers to execute the contract on its behalf, and forbidden the levy, collection and appropriation of taxes for the payment of the scrip. Through its judicial department it has declared, as between itself and its officers, that the instruments themselves

are unconstitutional and void and without obligation. To this judgment, however, no holder of the scrip was a party, and of course it concludes no one.

The peculiarity of the alleged contract deserves to be noted. The instrument, looked at as the sole evidence of the obligation, contains no promise whatever to pay money. It declares simply that it is receivable for the amount of money named, in payment of taxes and dues to the State, except special tax to pay interest on public debt. If it be read as containing the law which authorized its issue, it is a contract that it shall be redeemed, one fourth of the whole amount each year, out of taxes specially to be levied for that purpose. Although styled in the law "certificates of indebtedness," there is no agreement generally to pay a named sum at a given time, in the usual form of public securities for the payment of money, nor even an express acknowledgment of an existing debt.

[67]

The controversy in which the validity and obligation of the scrip are involved is the subject of the present suits. The complainants as holders of this scrip, in behalf of themselves and of all other holders choosing to take part, are seeking to obtain by judicial process its redemption by the State, according to the terms of the statute in pursuance of which it was issued, by the levy, collection and appropriation of special taxes pledged to that purpose, as they claim, by an irrepealable law, constituting a contract protected from violation by the Constitution of the United States. And such are the decrees which have been rendered according to the prayer of the bills. These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses; and except with that consent it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed; the one required to perform the decree and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

[68]

The case comes thus directly within the authority of *Louisiana* v. *Jumel*, 107 U. S. 711 [See Bk. 27, L. ed. 448]. It was there said, p. 721 [451*]: "The question then is whether the contract can be enforced, notwithstanding the Constitution, by coercing the agents and officers of the State, whose authority has been withdrawn in violation of the contract, without the State itself in its political capacity being a party to the proceedings. The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done." And, p. 727 [454]: "The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question, until the bonds, principal and interest, were paid in full; and that too in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power, in their administration of the finances of the State."

If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in federal tribunals, it is difficult to conceive the frame of one which would be If the State is named as a defendant it can only be reached either by mesne or final process through its officers and agents; and a judgment against it could neither be obtained nor enforced, except as the public conduct and government of the ideal political body called a State could be reached and affected through its official representatives. A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the State according to the dictates and decrees of the court, is if anything can be a judicial proceeding against the State itself. If not, it may well be asked what would constitute such a proceeding?

In the present cases the decrees were not only against the defendants in their official capacity, but, that there might be no mistake as to the the nature and extent of the duty to be performed, also against their successors in office.

The principle which governs in these cases

*See this page for certified copy of record.

must be carefully distinguished from that which ruled in *Osborn* v. *Bank of the United States*, 9 Wheat. 738 [22 U. S. bk. 6, L. ed. 204]; *Davis* v. *Gray*, 16 Wall. 203 [83 U. S. bk. 21, L. ed. 447]; *Board of Liquidation* v. *McComb*, 92 U. S. 531 [Bk. 23, L. ed. 623]; and *Allen* v. *B. & O. R. R. Co.* 114 U. S. 311 [*ante*, 200] a distinction which was pointed out in *Louisiana* v. *Jumel*, *ubi supra*, and in *Cunningham* v. *Macon and Brunswick R. R. Co.* 109 U. S. 446 [Bk. 27, L. ed. 992]. The rule for such cases was well stated by *Mr. Justice* Bradley in *Board of Liquidation* v. *McComb*, *ubi supra*, as follows: "A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it." And on the other hand, the rule for that class of cases was stated by the *Chief Justice* in *Louisiana* v. *Jumel*, *ubi supra*, in these words: "The officers owe duty to the State alone, and have no contract relations with the bondholders. They can only act as the State directs them to act, and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the State, or that they should have any control over this fund except to keep it like other funds in the treasury and pay it out according to law. They can be moved through the State, but not the State through them." In such cases, as was said by *Chief Justice* Marshall in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 858 [22 U. S. bk. 6, L. ed. 204, 232]: "The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants, whether they are to be considered as having a real interest, or as being only nominal parties."

A broad line of demarkation separates from such cases as the the present, in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the State in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void. Of such actions at law for redress of the wrong, it was said by *Mr. Justice* Miller, in *Cunningham* v. *Macon & Brunswick R. R. Co.*, *ubi supra*: "In these cases he is not sued as or because he is the officer of the government, but as an individual; and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." Of such cases that of *United States* v. *Lee*, 106 U. S. 196 [Bk. 27, L. ed. 171], is a conspicuous example; and it was upon this ground that the judgment in *Poindexter* v. *Greenhow*, 114 U. S. 270 [*ante*, 185], was rested. And so the preventive remedies of equity, by [71] injunction, may be employed in similar cases to anticipate and prevent the threatened wrong, where the injury would be irreparable, and there is no plain and adequate remedy at law, as was the case in *Allen* v. *B. & O. R. R. Co.*, 114 U. S. 311 [*ante*, 200], where many such instances are cited.

The defendants in the present cases, though officers of the State, are not authorized to enter its appearance to the suits and defend for it in its name. The complainants are not entitled to compel its appearance, for the State cannot be sued without its consent. And the court cannot proceed to the determination of a cause and controversy, to which the State is an indispensable party, without its presence. This, however, the circuit court has in fact done; and its decrees undertake to dispose of the matter in controversy, and enforce the judgment of the court against the State through its officers, in a suit to which it is not a party. The suggestion that it has had the opportunity and the invitation to appear is immaterial, for it has a constitutional right to insist on its immunity from suit.

For these reasons the decrees of the Circuit Court are reversed, and the causes are remanded, with instructions to dismiss the bills of complaint. And it is so ordered.

Mr. Justice **Field** and *Mr. Justice* **Harlan**, while adhering to the views expressed by them in their dissenting opinions in *La.* v. *Jumel*, 107 U. S. 726, 748 [Bk. 27, L. ed. 453, 461], admit that the doctrines of that case require a reversal of the judgment in this case.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

LEATHER MANUFACTURERS' NATIONAL BANK, *Plff. in Err.*, [96]

v.

EDMOND CHARLES MORGAN ET AL.,

(See S. C. Reporter's ed. 96-122.)

Banking—account stated—estoppel—practice—question for jury.

1. When a bank depositor sends his pass book to the bank to be written up, it is his duty upon its return, either in person or by duly authorized agent, to examine the account and vouchers returned within a reasonable time and give to the bank timely notice of any objections thereto. If he fails so to do, he may be estopped from questioning the conclusiveness of the account.

2. If the examination is made by an agent, it must be done in good faith and with ordinary diligence; and where such agent himself commits forgeries which mislead the bank and injure the

Liability of banks for general deposits. See Planters Bank v. Union Bank, 83 U. S., bk. 21, 473, *note*.

depositor, the latter is not protected, in the absence of at least reasonable diligence in supervising the conduct of the agent.

3. In this case it was error to direct a verdict for the plaintiffs, as the questions: whether the depositor is estopped, whether the bank exercised due caution before paying the altered checks and whether a certain check was indorsed in blank or for deposit, are for the jury.

[No. 45.]

Argued Nov. 3, 1885. Decided March 1, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. **Charles M. Da Costa** and **Noel B. Sanborn,** for plaintiff in error:

The contract between a bank and its depositor is the plain one of debtor and creditor. It has no element of trust; its character is in no sense fiduciary. Consequently, the transactions of a bank with its depositors are governed exactly by the same rules as control ordinary contract relations.

Thompson v. *Riggs*, 5 Wall. 663 (72 U. S. bk. 18, L. ed. 704); *Bank of Republic* v. *Millard*, 10 Wall. 152 (77 U. S. bk. 19, L. ed. 897); *Phœnix Bank* v. *Risley*, 111 U. S. 125 (Bk. 28, L. ed. 374).

The bank is bound to know at its peril the signature of its depositor. As to the filling in or body of the check, it owes no such duty, and it is only called upon to exercise ordinary care.

2 Dan. Neg. Inst. 3d ed. § 1654 a; *Espy* v. *Bank of Cincinnati*, 18 Wall. 604 (85 U. S. bk. 21, L. ed. 947).

It is not asserted that an altered check is any the less a forgery because not capable of easy detection. There was no negligence on the part of the Bank in honoring these checks, which were actually signed by its depositor and the body of each of which was actually in the same handwriting of all his genuine checks. The Bank, therefore, could only ascertain its mistake, or in that particular verify any of its acts, by inquiry of its depositor. He and he alone had the means of settling that question conclusively.

Moreover, as soon as the Bank honored these checks they became the property of Mr. Cooper. He had the legal right to demand their possession; the Bank, until delivery to him, only holding them as his agent.

Morse, Banks, etc. 2d ed. pp. 323, 324; Walker, Banking Law, 90, 91; Grant, Law of Banking, 3d ed. p. 84.

For the purpose of obtaining his checks and of having his account balanced, the depositor at reasonable intervals returns his pass book to the bank. The account is then written up in this book.

The universal course of banking business makes these balancings the only general mode of stating and adjusting accounts between bankers and their depositors.

Any man of ordinary prudence in the conduct of his affairs would certainly make an examination of the vouchers returned.

Each respective balancing would become an account stated, unless objected to within a reasonable time, and be binding as such.

Wiggins v. *Burkham*, 10 Wall. 129 (77 U. S. bk. 19, L. ed. 884); Grant, Law of Banking, 3d ed. 228.

It may thus be asserted that there is a duty growing out of the relations of the bank and its depositor which calls for an examination of the account and vouchers returned.

Hardy v. *Chesapeake Bank*, 51 Md. 562; *Dana* v. *Nat. Bank Republic*, 132 Mass. 158; *American Nat. Bank* v. *Bushey*, 45 Mich. 140.

There was ample evidence from which the jury could have properly inferred and found negligence on the part of Mr. Cooper.

Ordinary care and attention would have led to early detection; and having the means of knowledge, Cooper's actual knowledge or gross negligence in not knowing will be presumed.

Wood v. *Carpenter*, 101 U. S. 135 (Bk. 25, L. ed. 807); *Dannmeyer* v. *Coleman*, 8 Sawyer, 51, 58; *Angle* v. *North West Life Ins. Co.* 92 U. S. 330 (Bk. 23, L. ed. 556).

Plaintiff in error does not contend that neglect or failure to examine the account so settled and balance struck and the vouchers returned would of itself constitute a bar to the depositor's subsequently, on discovering a mistake in the account, asserting his right to establish that mistake and recovering from the bank the amount thereof. Ordinarily, any delay of the depositor will not prejudice the bank, and the only effect of his apparent acquiescence will be to create an account stated, with the burden of proof on the depositor to impeach it. But if by reason of the delay or by reason of any negligence on the part of the depositor, the bank sustains substantial additional damage or loss, which it otherwise would not have sustained, the depositor is estopped from denying, what his conduct reasonably implies, viz.: that the account was correct and the vouchers his genuine checks.

In the doctrine of account stated, if an element of estoppel exist, the account becomes unimpeachable.

Wharton v. *Anderson*, 28 Minn. 301; *Lockwood* v. *Thorne*, 18 N. Y. 285; *Morgan* v. *Chicago, etc. R. R. Co.* 96 U. S. 716 (Bk. 24, L. ed. 743); *Gregg* v. *Von Phul*, 1 Wall. 274 (68 U. S. bk. 17, L. ed. 536).

Under the principle of estoppel, a man may even adopt and ratify a forgery, as he may, of course, do so by express agreement.

Union Bank v. *Middlebrook*, 33 Conn. 95; *Howard* v. *Duncan*, 3 Lans. (N. Y.) 174; *Greenfield Bank* v. *Crafts*, 4 Allen, 447; *Charles River Nat. Bank* v. *Davis*, 100 Mass. 413; *Forsyth* v. *Day*, 46 Me. 177; *Continental Nat. Bank* v. *Nat. Bank Commonwealth*, 50 N. Y. 575.

Cooper did not personally examine the pass book and return the checks. He devolved that duty upon his agent, Berlin; and he must consequently be presumed to have knowledge of every fact which an examination of the pass book and vouchers would have disclosed. This is unquestionably so, within the maxim, of almost universal application: *Qui facit per alium facit per se.*

Fitzherbert v. *Mather*, 1 T. R. 15; *Kennedy* v. *Green*, 3 Mylne & K. 699; *Dana* v. *Nat. Bank Republic*, 132 Mass. 156; 19 Am. Law Review, p. 83; *Verona Central Cheese Co.* v. *Murtaugh*, 50 N. Y. 314.

See, also, on the general rule as to the effect

of knowledge by the agent: *Dresser* v. *Norwood*, 17 C. B. N. S. 466; *Bennett* v. *Buchan*, 76 N. Y. 386; *Hoover* v. *Wise*, 91 U. S. 308 (Bk. 23, L. ed. 392); *Smith* v. *Ayer*, 101 U. S. 320 (Bk. 25, L. ed. 955); *Horn* v. *Nichols*, 1 Salk. 289; *Le Neve* v. *Le Neve*, 3 Atk. 646; *S. C.* 1 Vesey, Sr. 64; *Lickbarrow* v. *Mason*, 2 T. R. 70; *Merchants Bank* v. *State Bank*, 10 Wall. 604 (77 U. S. bk. 19, L. ed. 1008).

Three cases in the New York Court of Appeals were relied on by the plaintiffs below, as entitling them to the direction to the jury to find a verdict in their favor. We may anticipate their citation in this court. They are: *Weisser's Admrs.* v. *Denison*, 10 N. Y. 68; *Welsh* v. *German American Bank*, 78 N. Y. 424; *Frank* v. *Chemical Nat. Bank*, 84 N. Y. 209.

In the first two cases it was apparently held that the depositor owed no duty to examine his pass book and vouchers, but the last case, *Frank* v. *Chemical Nat. Bank*, decided in 1881, does recognize that there is some duty in that regard.

These decisions, whatever their purport may be, are not binding on this court; for,

(*a*) They are upon doctrines of commercial law and general jurisprudence, as to which it is both the right and duty of this court, within well settled principles, to exercise its own judgment.

(*b*) They are opposed to the principles enunciated by this court in *U. S. Bank* v. *Bank of Ga.* 10 Wheat. 333 (23 U. S. bk. 6, L. ed. 334); and by the Supreme Court of Massachusetts in *Gloucester Bank* v. *Salem Bank*, 17 Mass. 33.

(*c*) They are opposed to the better considered cases, directly in point, of *Dana* v. *Nat. Bank Republic*, 132 Mass. 158; *Hardy* v. *Chesapeake Bank*, 51 Md. 562; *American Nat. Bank* v. *Bushey*, 45 Mich. 140.

Mr. **John M. Bowers**, for defendants in error:

A bank paying a forged or altered check is liable to the depositor therefor for the full amount if forged, and to the raised amount if altered.

The balancing of the depositor's account, and the rendition of the vouchers, including the altered ones, only make an account stated. The depositor is not bound, personally, to examine the same. If the examination be confided to a clerk, it is sufficient. If this clerk uses his position to perpetrate forgery, the loss is still on the bank.

Weisser's Admrs. v. *Denison*, 10 N. Y. 68; *Welsh* v. *German American Bank*, 78 N. Y. 424; *Frank* v. *Chemical Nat. Bank*, 84 N. Y. 209; *Manufacturers Nat. Bank* v. *Barnes*, 65 Ill. 69; Morse, Banks, p. 358; *First Nat. Bank* v. *Tappan*, 6 Kan. 456.

The only effect of an account stated is to cast the burden of proof upon the complaining party to show fraud, error or mistake. This is the doctrine of all the above cases, and of the following:

First Nat. Bank v. *Whitman*, 94 U. S. 343 (Bk. 24 L. ed. 229); *Manhattan Co.* v. *Lydig*, 4 Johns. 377; *Philips* v. *Belden*, 2 Edwards, Ch. 1. *Kinsman* v. *Barker*, 14 Vesey, 578; *Bullock* v. *Boyd*, 2 Edwards, Ch. 293; *Barrow* v *Rhinelander*, 1 Johns. Ch. 550.

The same rule applies in law and equity.

Perkins v. *Hart*, 11 Wheat. 237 (24 U. S. bk. 6, L. ed. 463); 1 Story, Eq. Jur. §§ 523, 528, 529.

Even the acknowledgment by the depositor or maker that the forged signature is genuine does not cut him off from recovery, if such an acknowledgment be made after the bank has paid the money.

Hall v. *Huse*, 10 Mass. 40; *Salem Bank* v. *Gloucester Bank*, 17 Mass. 1; *Barber* v. *Gingell*, 3 Esp. 60.

A bank is liable to its depositor for any material alteration in a check drawn thereon.

Hall v. *Fuller*, 5 B. & C. 750.

Nor is the depositor bound to suspect that the person with whom he deals will commit forgery whenever the opportunity arises; and therefore it is not necessary for a person drawing a check to exclude the possibility of any addition or alteration. It is sufficient to fill in the ordinary way.

Société Générale v. *Metropolitan Bank*, 27 Law Times, N. S. 849.

The alteration of a check is the same thing as its forgery.

White v. *Continental Bank*, 64 N. Y. 316; *Marine Nat. Bank* v. *Nat. City Bank*, 59 N. Y. 77. See *Coote* v. *Bank U. S.* 3 Cranch, C. C. 50-95; *Wood* v. *Steele*, 6 Wall. 80 (73 U. S. bk. 18, L. ed. 725); *Crawford* v. *West Side Bank*, 100 N. Y. 50; *S. C.* 1 Cent. Rep. 253; *Oddie* v. *Nat. City Bank*, 45 N. Y. 735.

The principal is only bound by acts of his agent while acting in the course of an employment affecting a third person.

It is held that his duty is performed when he does his best to supply skillful and competent persons to perform the different services required.

Warner v. *Erie R. Co.* 39 N. Y. 468; *Wright* v. *N. Y. Cent. R. R. Co.* 25 N. Y. 562; *Baulec* v. *N. Y. & H. R. R. Co.* 62 Barb. 623.

The only duty that the depositor owes is to acquaint the bank with the fact of the forgery as soon as he learns it.

White v. *Continental Nat. Bank*, 64 N. Y. 316; *Corn Exchange Bank* v. *Nassau Bank*, 91 N. Y. 74.

There is no estoppel:

(*a*) Estoppel *in pais* can only avail where the position of the parties is changed.

(*b*) Each forgery was an independent one. Each payment was a wrongful one on the part of the bank. They have no right to claim that they would have ceased doing wrong if the depositor had informed them of the wrongful acts of their clerks.

(*c*) The plea cannot avail because there is no evidence to show that, had the Bank had earlier knowledge, it could have recouped against the forger.

Ketchum v. *Duncan*, 96 U. S. 659 (Bk. 24, L. ed. 868); *Dezell* v. *Odell*, 3 Hill, 222; Herman, Estoppel, pp. 8, 334, 335; *People* v *Brown*, 67 Ill. 435; *Martin* v. *Zellerbach*, 38 Cal. 300; *McKenzie* v. *British Linen Company*, House of Lords, 44 Law Times, N. S. 431.

The defendant in error was entitled to a direction in his favor on his second cause of action.

The indorsement was plain and was a special indorsement, and reads: "For deposit in Leather Manufacturers National Bank to the

credit of W. B. Cooper, Jr., Agent for Ashburner & Co." The indorsement was restrictive. The Bank could only make one use of the check, namely: credit the account of Ashburner & Co. with the proceeds.

Lee v. *Chillicothe Bank*, 1 Bond, 387; *First Nat. Bank* v *Reno Co. Bank*, 8 Fed. Rep. 257.

With the indorsement in question on the check Berlin could make no use of it for his own benefit. The indorser could recover against any person who made or assisted Berlin to make any use of it except to credit the depositor's account.

Hook v. *Pratt*, 78 N. Y. 371; *Claflin* v. *Wilson*, 51 Iowa, 15; *Fawcett* v. *Nat. Life Ins. Co.* 97 Ill. 9; *Sigourney* v. *Lloyd*, 8 B. & C. 622; *Treuttel* v. *Barandon*, 8 Taunt. 100; *White* v. *Miners Nat. Bank*, 102 U. S. 658 (Bk. 26, L. ed. 251); *Mechanics Bank* v. *Valley Packing Co.* 4 Mo. App. 200; 70 Mo. 643.

Mr. Justice **Harlan** delivered the opinion of the court:

[97] The defendants in error, subjects of the Queen of Great Britain and partners under the name of Ashburner & Co. brought this action to recover a balance alleged to be due on a deposit account opened at the Leather Manufacturers National Bank of New York City, in the name of "Wm. B. Cooper, Jr., Agent for Ashburner & Co." The main dispute is as to the right of the depositor to question the account rendered by the Bank, so far as it charges him with certain checks which he signed, but which, before payment, were materially altered by his clerk, without his knowledge or assent. The claim of the plaintiffs is, that, after deducting all payments to them or for their use, there was due to them, April 8, 1881, the sum of $9,996.38, for which they ask judgment. They also ask judgment, upon a second cause of action, for the sum of $280.97, the amount of a check which, it is contended, was indorsed specifically for deposit to the credit of their agent, and was not placed to his credit. The Bank denies its liability upon either cause of action, except for the sum of $141.91, which it contends is the entire balance due to the plaintiffs on March 22, 1881.

[98] Numerous requests for instructions, in behalf of the Bank, were denied; and, under the order of the court, the jury returned a verdict, upon which judgment was entered in favor of the plaintiffs for the sum of $10,741.09. To this action of the court exception was duly taken, and the Bank brings the case here for review.

The record contains a large amount of testimony, the details of which cannot well be embodied in this opinion, but the more important facts and circumstances which the evidence tended to establish and upon which the decision of the case must turn are those which will be now stated.

1. One Berlin entered the service of Cooper on the first day of January, 1878, when about seventeen years of age. He and his family were well known to his employer. From that date until March, 1881, as confidential clerk, he had the entire management of Cooper's office, kept his books, and had full charge of the account which Cooper, as agent of Ashburner & Co., kept with the defendant. With the knowledge and under the direction of Cooper he filled up all checks drawn upon that account, entering on the stub of the check book the date and amount of each check, the name of the payee and the purpose for which it was drawn. He states in his deposition that he was well known to the teller of the defendant Bank, and as the representative of Mr. Cooper.

2. Pursuant to Cooper's instructions, or in the regular course of business, he filled up certain checks between September 11, 1880, and February 13, 1881, which, being signed by his employer and delivered to him, were altered by him before they were taken from the office. The alterations were by erasure and by rewriting the body of the checks, and were made, he states, "with great care, and could not be detected without very careful scrutiny, or a very close examination." The teller of the Bank testifies that the checks when presented by Berlin were always carefully examined by him as to signature, amount, date and indorsement; and that there was nothing about them to excite suspicion or to suggest alteration or erasure. Upon the checks so altered, Berlin received from the Bank the "full raised amount," out of which he paid to Cooper or to his use the several amounts for which they were originally drawn, and appropriated the balance to the discharge of gambling debts which he had contracted. The entries in the check book were made by Berlin and were correct; but he "forced the footings of the stubs" by making false additions equal to the increase of the altered checks.

3. The numbers and dates of the altered checks and the nature of the several alterations are as follows:

No. of check.	Date of check.	Character of alteration.
8356	Sept. 11, 1880.	Check to cash or bearer, raised from $90 to $500.
8377	Sept. 28, 1880.	Check to cash or bearer, raised from $10 to $400.
8424	Oct. 30, 1880.	Check to cash or bearer, raised from $105 to $405.
8481	Nov'r 8, 1880.	Check to cash or bearer, raised from $17.25 to $600.25.
8468	Nov'r 26, 1880.	Check to cash or bearer, raised from $10 to $1,000.
8480	Dec. 10, 1880.	Check to order of Marston & Son, raised from $7.75 to $700.25, and the words "or bearer" written in after payee's name.
8492	Dec. 13, 1880.	Check to order of C. H. Clayton, raised from $15 to $1,500, and words "or bearer" written in after payee's name.
8498	Dec. 24, 1880.	Check to cash or bearer, raised from $80 to $600.
8501	Dec. 28, 1880.	Check to order of W. S. Daland, raised from $24.08 to $1,000, Daland's name erased, and that of Julius Brandies inserted, and words "or bearer" written in after payee's name.
8504	Dec. 31, 1880.	Check to cash or bearer, raised from $80 to $400.
8508	Jan'y 5, 1881.	Check to cash or bearer, raised from $10 to $2,000.
8518	Jan'y 14, 1881.	Check to order of Charles G. Hanks, raised from $33.60 to $1,100, words "or bearer (duty)" written in after payee's name, and "14th" erased and "27th" written over it.
8550	Feb'y 13, 1881.	Check to order of W. S. Daland, raised from $17.72 to $100.72, and words "or C. Clifford Berlin," written in after payee's name, and date changed to February "14."

4. Cooper's pass book was written up at the Bank October 7, 1880, November 19, 1880, and January 18, 1881, and a balance struck, showing to his credit on those dates, respectively, $10,821.64, $4,568.68 and $5,566.61. Upon each occasion, the book was returned with all checks that had been paid subsequent to the previous balancing, including the altered checks. Across the face of the pass book, on the first balancing, was written "62 vouchers returned;" on the second "79 vouchers returned;" and on the last "66 vouchers returned." Each time the pass book was returned, with the vouchers, Berlin destroyed such of the checks in the lot as he had altered. He remembers to have shown the rest of the vouchers to Cooper on the balancing of October 7, 1880, but does not remember of pursuing that course on the other occasions.

5. Berlin states that Cooper was in the habit of examining his check book from time to time. It is clear that the latter knew of these balancings; for he testifies that his account with the Bank "was balanced from time to time, which was done by the Bank writing up the pass book, and returning the checks that had been paid by it; that when the pass book was so returned it went to the clerk, Berlin, who then balanced the check book, that being one of the duties imposed upon him; that the witness took no part in such balancings, but Berlin generally showed him the vouchers that were returned, because he used to like to look at them; but he never gave Berlin any particular instructions so to do. That he was in the habit of looking over his check book and kept track of the balance, which, during the months of August, September, November and December, 1880, and January, 1881, he understood to be about $10,000; and that, when he asked Berlin as to the balance, his answer agreed with about what he supposed was in the Bank." He also knew the object of such balancings; for he testifies "that he had been a dealer with the defendant Bank for upwards of eighteen years, and that he knew that it was its custom, as well as the custom of all banks, to balance at intervals the pass books of its depositors and to return the same when balanced, accompanied by the checks drawn by the depositor and charged to the account, as the vouchers of the Bank for such payments."

6. Cooper states that the forgeries were discovered by him "about the first or second day of March, 1881." Berlin, having stayed away from the office for a day, he compared his pass book with the stubs of the check book, and ascertained that a certain number of checks, appearing on the stubs, were not charged against him in his pass book, and did not appear to have been returned by the bank; while others, which appeared on the pass book to have been charged against and returned to him, did not appear, by the stub of the check book, to have ever been drawn. He "thereupon sent his pass book to the Bank to be balanced, and it was balanced on March 2, 1881; and among the vouchers then returned were the aforesaid checks 8518 and 8550, which had been altered from their original amounts." This, he states, was the first knowledge he had of the forgeries. After receiving the last balancing, he "then notified the Bank that his clerk had absconded and that alterations had taken place; and requested them not to pay any more of his checks, the bodies of which were filled up in the handwriting of his clerk, Berlin." Whether this notification was given as soon as he saw those two checks, or on the same day, or after the expiration of several days, the record does not show.

7. Cooper admits that if on any of the several balancings he had made such examination of his check book and pass book as was done on March 1, 1881, he would have "easily discovered" that his account had been charged with altered checks; and that for the previous five or ten years he knew of various means adopted by bankers and merchants to prevent the raising or alteration of checks, but he had not employed or used any of them. Upon one occasion, the date not given, he discovered, by adding up the "footings of the check book," an error, and spoke to Berlin about it. The latter having replied that it was very seldom he was caught in a mistake, Cooper believed him and looked no further into the matter.

Cooper did not surrender the altered checks, except 8518 and 8550, because they had been destroyed by his clerk. The teller states that the latter one came through the clearing-house, while the former was not, when paid, in the condition in which it appeared to be at the time of the trial. After the lapse of time and frequent handling, the alteration, he said, was now apparent.

It was upon this state of case, substantially, that the circuit court instructed the jury to find for the plaintiffs upon both causes of action.

The court below, as shown by its opinion, proceeded upon the ground that Cooper was under no duty whatever to the Bank to examine his pass book and the vouchers returned with it, in order to ascertain whether his account was correctly kept. For this reason, it is contended, the Bank, even if without fault itself, has no legal cause of complaint, although it may have been misled to its prejudice by the failure of the depositor to give timely notice of the fact (which, by ordinary diligence, he might have discovered on the occasion of the several balancings of the account) that the checks in question had been fraudulently altered. This view of his obligations does not seem to the court to be consistent with the relations of the parties, or with principles of justice. [106]

While it is true that the relation of a bank and its depositor is one simply of debtor and creditor, *Phœnix Bank* v. *Risley*, 111 U. S. 125, 127 [Bk. 28, L. ed. 374, 375], and that the depositor is not chargeable with any payments except such as are made in conformity with his orders, it is within common knowledge that the object of a pass book is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his pass book to be written up and returned with the vouchers is, therefore, in effect, a demand to know what the bank claims to be the state of his account. And the return of the book, with the vouchers, is the answer to that demand, and in effect imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either

sanction or repudiate it. In *Devaynes* v. *Noble*, 1 Merivale, 531, 535, it appeared that the course of dealing between banker and customer, in London, was the subject of inquiry in the high court of chancery as early as 1815. The report of the master stated, among other things, that for the purpose of having the pass book "made up by the bankers from their own books of account, the customer returns it to them from time to time as he thinks fit; and, the proper entries being made by them up to the day on which it is left for that purpose, they deliver it again to the customer, who thereupon examines it and, if there appears any error or omission, brings or sends it back to be rectified; or if not, his silence is regarded as an admission that the entries are correct." This report is quite as applicable to the existing usages of this country as it was to the usages of business in London at the time it was made. The depositor cannot, therefore, without injustice to the bank, omit all examination of his account, when thus rendered at his request. His failure to make it or to have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a pass book. It was observed in *First Nat. Bank etc.* v. *Whitman*, 94 U. S. 346 [Bk. 24, L. ed. 281], although the observation was not, perhaps, necessary in the decision of the case, that the ordinary writing up of a bank book, with a return of vouchers or statement of accounts, precludes no one from ascertaining the truth and claiming its benefit. Such undoubtedly is a correct statement of a general rule. It was made in a case where the account included a check in respect to which it was subsequently discovered that the name of the payee had been forged. But it did not appear that either the bank or the drawer of the check was guilty of negligence. The drawer was not presumed to know the signature of the payee; his examination of the account would not necessarily have disclosed the forgery of the payee's name; therefore his failure to discover that fact sooner than he did was not to be attributed to want of care. Without impugning the general rule that an account rendered which has become an account stated, is open to correction for mistake or fraud, *Perkins* v. *Hart*, 11 Wheat. 256 [24 U. S. bk. 6, L. ed. 468]; *Wiggins* v. *Burkham*, 10 Wall. 132 [77 U. S. bk. 19, L. ed. 886], other principles come into operation, where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself or to have it made in good faith, by another for him; by reason of which negligence the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could and would have taken had such notice been given. In other words, parties to a stated account may be estopped by their conduct from questioning its conclusiveness.

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The doctrine of estoppel by conduct has been applied under a great diversity of circumstances. In the consideration of the question before us aid will be derived from an examination of some of the cases in which it has been defined and applied. In *Morgan* v. *R. R. Co.* 96 U. S. 720 [Bk. 24, L. ed. 744], it was held that a party may not deny a state of things which by his culpable silence or misrepresentations he has led another to believe existed, if the latter has acted upon that belief. "The doctrine," the court said, "always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." In *Continental Nat. Bank* v. *Nat. Bank of the Commonwealth*, 50 N. Y. 583, it was held not to be always necessary to such an estoppel that there should be an intention, upon the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. "Indeed," said Folger, *J.*, "it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who is estopped. And it has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop. *Gaylord* v. *Van Loan*, 15 Wend. 308." The general doctrine, with proper limitations, was well expressed in *Freeman* v. *Cooke*, 2 Exch. 658, and in *Carr* v. *London & N. W. R. Co.* L. R. 10 C. P. 307. In the first of those cases it was said by Parke, *B.*, for the whole court, that "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect." And in the other case, Brett, *J.*, speaking for the court, said: "If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist." See also *Manufacturers & Traders Bank* v. *Hazard*, 30 N. Y. 229; *Blair* v. *Wait*, 69 N. Y. 116; *McKenzie* v. *British Linen Co.* 6 App. Cas. 101; *Miles* v. *McIlwraith*, 8 App. Cas. 133; *Cornish* v. *Abington*, 4 H. & N. 549.

Upon this doctrine, substantially, rests the decision in *Bank of U. S.* v. *Bank of Ga.* 10 Wheat. 340, 343 [23 U. S. bk. 6, L. ed. 337], where the question was as to the right of the Bank of Georgia to cancel a credit given to the Bank of the United States, in the general account the latter kept with the former, for the face value of certain bank notes purporting to be genuine notes of the Bank of Georgia, and which came to the hands of the other bank in the regular course of business and for value. The notes were received by the Bank of Georgia as genuine, but being discovered nineteen days thereafter to be counterfeits, they were tendered back to the Bank of the United States, which refused to receive them. This court held that

the loss must fall upon the Bank of Georgia. *Mr. Justice* Story, who delivered the opinion of the court, after observing that the notes were received and adopted by the Bank of Georgia as its genuine notes, and treated as cash, and that the bank must be presumed to use all reasonable care, by private marks and otherwise, to secure itself against forgeries and impositions, said: "Under such circumstances, the receipt by a bank, of forged notes purporting to be its own, must be deemed an adoption of them. It has the means of knowing if they are genuine; if those means are not employed, it is certainly evidence of a neglect of that duty which the public have a right to require. And in respect to persons equally innocent, where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burthening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank in payment of such notes, which its own acts have deliberately assumed to be genuine. If this doctrine be applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time." "Even," he added, "in relation to forged bills of third persons received in payment of a debt, there has been a qualification engrafted on the general doctrine that the notice and return must be within a reasonable time; and any neglect will absolve the payee from responsibility." It was, therefore, held that as the Bank of Georgia could by ordinary circumspection have detected the fraud, it must account to its depositor according to the entry made in its books at the time of receiving the notes.

The same principle was recognized in *Cooke v. U. S.* 91 U. S. 396 [Bk. 23, L. ed. 242]. One of the questions there was as to the effect on the rights of the government, of the receipt by an Assistant Treasurer of the United States, in New York, of certain treasury notes, indorsed by the holders to the order of the Secretary of the Treasury for redemption in accordance with an Act of Congress, and which notes, when examined at the Treasury Department, were ascertained to be forgeries, of which prompt notice was given. This court, speaking by the *Chief Justice*, said: "It is undoubtedly also true, as a general rule of commercial law, that when one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly, perhaps, the adoption of the paper as genuine by its apparent maker. * * * He must repudiate as soon as he *ought* to have discovered the forgery; otherwise he will be regarded as accepting the paper. Unnecessary delay under such circumstances is unreasonable; and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not." Again; "When, therefore, a party is entitled to something more than a mere inspection of the paper before he can be required to pass finally upon its character—as, for example, an examination of accounts or records kept by him for the purpose of verification—negligence sufficient to charge him with a loss cannot be claimed until this examination ought to be completed. If, in the ordinary course of business, this might have been done before payment, it ought to have been, and payment without it will have the effect of an acceptance and adoption. * * * What is reasonable must in every case depend upon circumstances; but, until a reasonable time has in fact elapsed, the law will not impute negligence on account of delay."

This court, in the two cases last cited, refers with approval to *Gloucester Bank v. Salem Bank*, 17 Mass. 33. In that case it appeared that the Salem Bank exchanged with the Gloucester Bank, for value, certain bank notes which purported to be, and which both banks at the time believed to be, the genuine notes of the Gloucester Bank, and which the latter bank did not, until about fifty days after the exchange, discover to be forgeries. The question was whether the Salem Bank was bound to account for the value of the notes so ascertained to be counterfeit. *Chief Justice* Parker, speaking for the whole court, observed that, the parties being equally innocent and ignorant, the loss should remain where the chance of business had placed it, and that in all such cases the just and sound principle of decision was that if the loss can be traced to the fault or negligence of either party, it should be fixed upon him. He said: "And the true rule is that the party receiving such notes must examine them as soon as he had opportunity, and return them immediately. If he does not he is negligent; and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received; but certainly with more strength when the party receiving them is the one purporting to be bound to pay. For he knows better than any other, whether they are his notes or not; and if he pays them or receives them in payment and continues silent, after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own."

These cases are referred to for the purpose of [112] showing some of the circumstances under which the courts, to promote the ends of justice, have sustained the general principle that where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth (which he has the means, by ordinary diligence, of ascertaining) and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct. This principle commends itself to our judgment as both just and beneficent; for, as observed by the Supreme Court of Ohio in *Ellis v. Ohio Life Ins. & T. Co.*, 4 Ohio St. 667, while in the forum of conscience there may be a wide difference between intentional injuries and those arising from negligence, yet no man conducts himself "quite as absolutely in this world as though he was the only man in it; and the very existence of society depends upon compelling everyone to pay a proper regard for the rights and interests of others. The law, therefore, proceeding upon the soundest principles of morality and public policy, has adapted a large number of its rules and remedies to the enforcement of this duty. In almost every de-

partment of active life rights are in this manner daily lost and acquired; and we know of no reason for making the commercial classes an exception."

Recurring to the facts of this case: there was evidence tending to show, we do not say beyond controversy, that Cooper failed to exercise that degree of care which, under all the circumstances, it was his duty to do; he knew of the custom of the defendant to balance the pass books of its depositors and return their checks "as vouchers" for payments; yet he did not examine his pass book and vouchers to see whether there were any errors in the account to his prejudice; and therefore he could give no notice of any. Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor [113] omitted all examination of his account. But if by such care and skill they could not have discovered the forgeries, then the only person unconnected with the forgeries who had the means of detecting them was Cooper himself. He admits that by such an examination as that of March, 1881, he could easily have discovered them on the balancings of October 7, 1880, November 19, 1880, and January 18, 1881. If he had discovered that altered checks were embraced in the account, and failed to give due notice thereof to the bank, it could not be doubted that he would have been estopped to dispute the genuineness of the checks in the form in which they were paid; upon the principle stated by *Lord* Campbell in *Cairncross* v. *Lorimer*, 3 Macq. 827, 830, that "If a party has an interest to prevent an act being done, has full notice of its being done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license." This, however, could not be, if, as claimed, the depositor was under no obligation whatever to the bank to examine the account rendered at his instance, and notify it of errors therein in order that it might correct them and, if necessary, take steps for its protection by compelling restitution by the forger. But if the evidence showed that the depositor intentionally remained silent, after discovering the forgeries in question, would the law conclusively presume that he had acquiesced in the account as rendered, and infer previous authority in the clerk to make the checks, and yet forbid the application of the same principle where the depositor was guilty of neglect of duty in failing to do that, in reference to the account, which he admits would have readily disclosed the same fraud? It seems to the court that the simple statement of this proposition suggests a negative answer to it.

There was also evidence tending to prove, we do not say conclusively, that the depositor gave, practically, no attention to the account rendered by the Bank, except to that one rendered March 2, 1881; that very slight diligence would have disclosed the fact that the vouch- [114] ers, which he knew to be in the possession of his clerk, were not all that the account upon its face showed had been returned; and that he intrusted the entire business to an inexperienced boy, in whose integrity he seemed to place implicit confidence, and of whose conduct he neglected to exercise that supervision which ordinary prudence suggested as both necessary and proper. Upon one occasion, as we have seen, he discovered an error in the footings of the check book, and failed to look farther, because of the assurance of his clerk that he was seldom caught in a mistake. He was in the habit of looking over his check book and keeping track of his balance in bank; and yet he did not observe that he was improperly charged in the balancing of October 7, 1880, with checks for $500 and $400; in that of November 19, 1880, with checks for $405 and $600.25; and in that of January 18, 1881, with checks for $1,000, $700.25, $1,500, $600, $1,000, $400 and $2,000. He finally discovered, in March, 1881, that there was something radically wrong in his account, and sent his pass book to the Bank to be balanced, without intimating, so far as the record shows, that he had then discovered anything to excite suspicion or to call for explanation. The book having been balanced and returned to him on March 2, 1881, he then notified the Bank that his clerk had absconded, and forbade the payment of any more checks the bodies of which were in Berlin's handwriting. Whether the clerk had absconded and left the State prior to this sending of the pass book to the Bank does not appear. But when next heard of, so far as the record shows, he was at Wilmington, Delaware, in June, 1881, when and where he gave his deposition, *de bene esse*, in behalf of his former principal. The numerous checks which he confesses to have forged have been destroyed; and the Bank is thereby put at disadvantage upon any issue as to the fact of forgery, or as to whether the checks may not have been so carelessly executed at the time they were signed by the depositor as to have invited or given opportunity for these alterations by his confidential clerk. *Van Duzer* v. *Howe*, 21 N. Y. 531, 538; *Redlich* v. *Doll*, 54 N. Y. 234, 238; *Young* v. *Grote*, 4 Bing. 253; *Greenfield Savings Bank* v. *Stowell*, 123 Mass. 196, 202. Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the Bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to the Bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the Bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the Bank. An inquiry as to the damages in money actually sustained by the Bank, by reason of the neglect of the depositor to give notice of the forgeries, might be proper if this were an action by it to recover damages for a violation of his duty. But it is a suit by the depositor, in effect, to falsify a stated

account, to the injury of the Bank, whose defense is that the depositor has, by his conduct, ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration and payment from the person committing the forgeries was, in itself, a valuable one, it is sufficient if it appears that the Bank, by reason of the negligence of the depositor, was prevented from promptly and, it may be, effectively exercising it. *Continental Nat. Bank* v. *Nat. Bk. Commonwealth*, 50 N. Y 585, 591; *Voorhis* v. *Olmstead*, 66 N. Y. 113, 118; *Knights* v. *Wiffen*, L. R. 5 Q. B. 660; *Casco Bank* v. *Keene*, 53 Maine, 103; *Fall River Nat. Bank* v. *Buffinton*, 97 Mass. 499.

It seems to us that if the case had been submitted to the jury and they had found such negligence upon the part of the depositor as precluded him from disputing the correctness of the account rendered by the Bank, the verdict could not have been set aside as wholly unsupported by the evidence. In their relations with depositors, banks are held, as they ought to be, to rigid responsibility. But the principles gov-
[116] erning those relations ought not to be so extended as to invite or encourage such negligence by depositors in the examination of their bank accounts as is inconsistent with the relations of the parties or with those established rules and usages, sanctioned by business men of ordinary prudence and sagacity, which are or ought to be known to depositors.

We must not be understood as holding that the examination by the depositor, of his account, must be so close and thorough as to exclude the possibility of any error whatever being overlooked by him. Nor do we mean to hold that the depositor is wanting in proper care when he imposes upon some competent person the duty of making that examination and of giving timely notice, to the bank, of objections to the account. If the examination is made by such an agent or clerk in good faith and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. But when, as in this case, the agent commits the forgeries which misled the bank and injured the depositor and, therefore, has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination; without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily upon the principal, cannot be deemed the equivalent of performance by the latter. While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business.

It was insisted in argument that the grounds upon which the circuit court proceeded are sustained by the settled course of decision in the highest court of New York, as manifested in *Weisser* v. *Denison*, 10 N. Y. 70; *Welsh* v. *German-American Bank*, 78 N. Y. 421, and *Frank* v. *Chemical National Bank*, 84 N. Y. 213. We are also referred to *Manufacturers Nat. Bank* v. *Barnes*, 65 Ill. 69, and *Nat Bank* v. *Tappan*, 6 Kan. [117]
456, 467. There are, it must be conceded, some expressions in the first two cases which, at first glance, seem to justify the position of counsel. But it is to be observed, in reference to the case of *Weisser* v. *Denison*, that it is said in the opinion of the court that, as the bank had not taken any action, nor lost any rights, in consequence of the silence of the depositor, the only effect of such silence was to cast the burden upon him to show fraud, error, or mistake in the account rendered by the bank. From *Welsh* v. *German-American Bank*, it is clear that the comparison by the depositor of his check book with his pass book would not necessarily have disclosed the fraud of his clerk; for the check when paid by the bank was, in respect of date, amount, and name of payee, as the depositor intended it to be, and the fraud was in the subsequent forgery by the clerk of the payee's name. As the depositor was not presumed to know, and as it did not appear that he in fact knew, the signature of the payee, it could not be said that he was guilty of negligence in not discovering, upon receiving his pass book, the fact that his clerk or some one else had forged the payee's name in the indorsement.

The latest expression of the views of the Court of Appeals of New York is in *Frank* v. *Chemical Nat. Bank*. From what is there said it is evident that that learned tribunal does not give its sanction to the broad proposition that a depositor who obtains periodical statements of his account, with the vouchers, is under no duty whatever to the bank to examine them, and give notice, within a reasonable time, of errors discovered therein. The court in that case, speaking by *Judge* Andrews, who delivered the opinion in *Welsh* v. *German-American Bank*, refers to *Weisser* v. *Denison*. After observing that it was unnecessary to restate the grounds of that decision, and adverting to the argument that where a pass book was kept which was balanced from time to time and returned to the depositor with the vouchers for the charges made by the bank, including forged checks, the latter is under a duty to the bank [118]
to examine the account and vouchers, with a view to ascertain whether the account is correct, he proceeds: "It does not seem to be unreasonable, in view of the course of business and the custom of banks to surrender their vouchers on the periodical writing up of the accounts of depositors, to exact from the latter some attention to the account when it is made up, or to hold that the negligent omission of all examination may, when injury has resulted to the bank, which it would not have suffered if such examination had been made and the bank had received timely notice of objections, preclude the depositor from afterwards questioning its correctness. But where forged checks have been paid and charged in the account and returned to the depositor, he is under no duty to the bank to so conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the vouchers personally, and is himself deceived by the skillful charac-

ter of the forgery, his omission to discover it will not shift upon him the loss which, in the first instance, is the loss of the bank. Banks are bound to know the signatures of their customers; and they pay checks purporting to be drawn by them at their peril. If the bank pays a forged check it commits the first fault. It cannot visit the consequences upon the innocent depositor who, after the fact, is also deceived by the simulated paper. So if the depositor, in the ordinary course of business, commits the examination of the bank account and vouchers to clerks or agents, and they fail to discover checks which are forged, the duty of the depositor to the bank is discharged, although the principal, if he had made the examination personally, would have detected them. The alleged duty, at most, only requires the depositor to use ordinary care; and if this is exercised, whether by himself or his agents, the bank cannot justly complain, although the forgeries are not discovered until it is too late to retrieve its position or make reclamation from the forger."

In *Manufacturers Nat. Bank* v. *Barnes*, the Supreme Court of Illinois, while expressing its approval of the decision in *Weisser* v. *Denison*, shows that the bank was itself guilty of negligence in paying checks drawn by the depositor's clerk; for it had in its possession, placed there by the depositor, written evidence that the authority of the clerk to draw checks against the depositor's account was restricted [119] to a designated period, which had expired when the checks there in dispute were paid. Nor does the case cited from the Supreme Court of Kansas militate against the views we have expressed, although it refers with approval to *Weisser* v. *Denison*. The question there was as to the right of the bank to charge the depositor with the amount of a certain forged acceptance. The court found that the depositors were not guilty of neglect, and gave notice of the forgery as soon as it was discovered.

An instructive case is that of *Dana* v. *Nat. Bank of the Republic*, 132 Mass. 156, 158, where the issue was between a bank and its depositor in reference to a check which the latter's clerk altered after it had been signed and before it was paid by the bank. The court said that the plaintiffs, who were the depositors, owed to the bank "the duty of exercising due diligence to give it information that the payment was unauthorized; and this included not only due diligence in giving notice after knowledge of the forgery, but also due diligence in discovering it. If the plaintiffs knew of the mistake, or if they had that notice of it which consists in the knowledge of facts which, by the exercise of due care and diligence, will disclose it, they failed in their duty; and adoption of the check and ratification of the payment will be implied. They cannot now require the defendant to correct a mistake to its injury, from which it might have protected itself but for the negligence of the plaintiffs. Whether the plaintiffs were required, in the exercise of due diligence, to read the monthly statements or to examine the checks, and how careful an examination they were bound to make, and what inferences are to be drawn, depend upon the nature and course of dealing between the parties, and the particular circumstances under which the statements and checks were delivered to them." So in *Hardy* v. *Chesapeake Bank*, 51 Md. 562, which was also a case where checks forged by the confidential clerk of the depositor had been paid by the bank, and, as shown by the pass book, were charged to his account. The court upon an elaborate review of the authorities, said, upon the general question, that "There is a duty owing from the customer to the bank to act with that ordinary diligence and care that prudent business men generally bestow on such cases, in the examination and comparison of the debits and credits contained in his bank or pass book, in order to detect any errors or mistakes therein. More than this, under ordinary circumstances, could not be required."

What has been said applies mainly to the issue between the parties in relation to the altered checks embraced in the balancings of October and November, 1880, and January, 1881. The case in reference to checks 8518 and 8550 presents a somewhat different aspect. Cooper, we infer from the evidence, became aware, on March 2, 1881, when these checks were returned with his pass book, balanced as of that date, that they were forgeries. But it is not clear from the evidence at what time, or on what day, he gave the Bank notice of that fact, or generally of the fact that there had been alterations in his checks. It may be that the account rendered on March 2, 1881, did not, by reason of any unnecessary delay, become an account stated, as to items subsequent to the balancing of January 18, 1881; and consequently there may be no ground to charge the depositor with negligence in not giving due notice to the Bank of the alleged alterations of those two checks.

It remains only to consider the action of the court below in reference to the second cause of action. Touching this branch of the case the essential facts are: Cooper, on August 25, 1880, in his capacity as "Agent for Ashburner & Co.," made his check upon the Leather Manufacturers National Bank for $280.97, payable to the order of "W. B. Cooper, Jr., Agent." On the side of the check were the printed words "Wm. B. Cooper, Agent." Across its face was the word "Gold." Upon the back of the check, before it was indorsed, were the following words, printed or stamped:

For deposit in
Leather Manf's Nat. Bank
to the credit of

Ag't for Ashburner & Co.

Cooper indorsed the check in question by writing "W. B. Cooper, agent," on the line immediately below the words "Leather Manf's Nat. Bank," that is, on the line occupied by the words "to the credit of," and so as almost to obliterate the latter words. Thus indorsed, the check was delivered by Cooper to Berlin for the purpose, as the former states, of having it deposited to his credit, as agent of Ashburner & Co. Berlin presented it at the Bank and received the money on it, but never accounted therefor to his principal. When Cooper first discovered that his clerk collected the amount of that check does not appear. He makes no statement on that subject.

The peremptory instruction to find against the Bank upon this cause of action was, perhaps, based mainly upon the assumption that the indorsement imported a direction to place the amount of the check to the credit of Cooper, as agent for Ashburner & Co. But there is ground to contend that such was not the intention of Cooper. Evidently he had, for use, a stamp by which he could print the foregoing words upon checks which he desired placed to his credit, as agent for Ashburner & Co., leaving a blank line for his own signature. The object of this was to save time and writing. It might be asked why should he, as agent for Ashburner & Co., draw a check payable to his own order as such agent, and then direct the Bank, by his indorsement as agent, to place the money to the credit of himself, as agent for Ashburner & Co.; with one hand taking the money out of his account, as agent, and with the other putting it back immediately into the same account? And it might be argued that if he intended, by his indorsement, to direct the money to be placed to the credit of himself, as agent of Ashburner & Co., he would have written his name in the blank line underneath the words "to the credit of;" but that, to prevent any such disposition of the money, he obliterated the operative words in the stamped lines on the back of the check by writing his name across the words "to the credit of," thus making, what the Bank claims was intended, an indorsement in blank, entitling the bearer of the check to receive the money. Or, if his purpose was to take out of his account, as agent, the sum specified in his check, and at the same time show that the money was not to be used by him for his personal benefit, but for his principals, what he did would naturally effect that object. If the indorsement was made in such manner as fairly to indicate that it was intended to be in blank, the loss should fall on the depositor whose negligence caused the mistake. These observations are not intended as an expression of opinion as to the weight of evidence upon this branch of the case. They are intended only to show that the case, as to the check for $280.97, was not clearly for the plaintiffs, and ought to have been submitted to the jury.

It results from what has been said that the court erred in peremptorily instructing the jury to find for the plaintiffs. Both causes of action are peculiarly for a jury to determine, under such instructions as may be consistent with the principles announced in this opinion. Whether the plaintiffs are estopped, by the negligence of their representative, to dispute the correctness of the account as rendered by the Bank from time to time is, in view of all the circumstances of this case, a mixed question of law and fact. As there is, under the evidence, fair ground for controversy as to whether the officers of the Bank exercised due caution before paying the altered checks, and whether the depositor omitted, to the injury of the Bank, to do what ordinary care and prudence required of him, it was not proper to withdraw the case from the jury. *R. R. Co.* v. *Stout*, 17 Wall. 663 [84 U. S. bk. 21, L. ed. 749] and *Cooke* v. *U. S.*, *Wiggins* v. *Burkham*, *Dana* v. *Nat. Bank of the Republic*, and *Hardy* v. *Chesapeake Bank*, *ubi supra*.

The judgment is reversed and the cause remanded for a new trial and for further proceedings in conformity with this opinion.

Mr. Justice **Blatchford** did not sit in this case or take any part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ROGERS WRIGHT, Assignee in Bankruptcy of JOHN BYRNE and FRANK P. BYRNE, Late Partners Doing Business as the KENTUCKY and GREAT EASTERN RAILROAD CONSTRUCTION COMPANY, *Appt.*,

v.

KENTUCKY AND GREAT EASTERN RAILWAY COMPANY, FARMERS LOAN AND TRUST COMPANY ET AL.

FARMERS LOAN AND TRUST COMPANY, *Appt.*,

v.

ROGERS WRIGHT, Assignee in Bankruptcy of JOHN BYRNE and FRANK P. BYRNE, Late Partners Doing Business as the KENTUCKY and GREAT EASTERN RAILWAY CONSTRUCTION COMPANY, KENTUCKY and GREAT EASTERN RAILWAY COMPANY ET AL. [72]

(See S. C. Reporter's ed. 72-96.)

Railroads—construction of contracts—mortgage.

1. The Kentucky and Great Eastern Railroad Construction Company acquired no ownership of or lien on the constructed road between Newport and Catlettsburgh, under its contract of May 22, 1873, with the Kentucky and Great Eastern Railway Company for the construction of the road.

2. The Construction Company's contract was subject to the contract of January 15, 1873, between the owners of the Maysville and Big Sandy Railroad and the Kentucky and Great Eastern Railway Company for a conditional sale of said property to the Railway Company, of which contract the Construction Company had notice.

3. Under the mortgage executed by the Kentucky and Great Eastern Railway Company on February 15, 1872, the Farmers' Loan and Trust Company, as mortgagee, took only such rights as the mortgagor had or subsequently obtained, as against the vendors of the Maysville and Big Sandy Railroad; and the mortgagor never having obtained title to said road, the mortgagee was therefore bound by the forfeiture under the conditional sale, especially as it did not take steps to set it aside within a reasonable time; and as to any rights of way acquired by the mortgagor along the line of the Maysville and Big Sandy road other than those purchased from the owners of said road, the cross bill is not so drawn nor the evidence such that they can be subjected to the mortgage in this proceeding.

[Nos. 117, 118.]

Argued Jan. 15, 18, 19, 1886. Decided Mar. 1, 1886.

CROSS appeals from the Circuit Court of the United States for the District of Kentucky.

The case is stated by the court.

Mr. **C. L. Raison, Jr.**, for assignee.

Mr. **Aaron F. Perry**, for Maysville and Big Sandy Railroad Company.

Messrs. **John A. Campbell** and *Sewell Sergeant*, for Farmers Loan and Trust Co

[73] *Mr. Justice* **Blatchford** delivered the opinion of the court:

On the 18th of December, 1850, the Legislature of Kentucky, by special Act (Laws of 1850, Vol. 2, chap. 96, p. 73), created a corporation known as the Maysville and Big Sandy Railroad Company (hereinafter called the Big Sandy Company), with power to construct and maintain a railroad, commencing at or near the City of Maysville, Kentucky, and running thence to the big Sandy River, by such route as might be found practicable. The Act gave authority to the Counties of Mason, Lewis and Greenup, and to any town in any of those counties, to subscribe to the stock of the Company, when authorized by a majority of the voters of the county or town, the proposition to be submitted to them by the directors of the Company: and the issue of bonds by the counties and towns in aid of the railroad was provided for. This indicated that the route of the road was expected to run through the counties above named. Maysville is in Mason County, on the south bank of the Ohio River. Lewis County adjoins Mason on the east, and Greenup adjoins Lewis on the east. All three of them lie along the south bank of the Ohio River. The next county in Kentucky east of Greenup is Boyd, and the Big Sandy River, after being for some distance the boundary between Kentucky and West Virginia, empties into the Ohio River in Boyd County, only a short distance eastward of the line between Greenup and Boyd Counties. For the railroad to reach the Big Sandy River it was necessary it should pass for a short distance through Boyd County.

The Company was organized and began the construction of the road in 1853; and, after expending a considerable sum of money, claimed to have been $300,000, it became financially embarrassed and suspended the work permanently in 1854. To secure certain of its creditors, it executed one or more mortgages to them on its road and all its franchises and chartered privileges.

By an Act of the Legislature of Kentucky, approved February 17, 1866 (Laws of 1866, chap. 755, p. 664), those mortgages were de-
[74] clared to be legal; and authority was given to foreclose them by proceedings in the Mason Circuit Court, with power to that court to sell the road, with all its property, rights of property, franchises and chartered privileges at public sale; and the Act provided that the purchasers at the sale, after it had been approved by the court, should be invested with the title to the road and all its franchises and chartered privileges; and should have power to reorganize the Company under its charter and, for the purposes of its charter, to "make contracts with individuals, corporations and other railroad companies for the building, completion and operation of said road, or any part thereof." The foreclosure proceedings were had in 1869, resulting in a decree and a sale thereunder, at which M. Ryan, H. Taylor, Elizabeth Gray, W. H. Wadsworth, John B. Poyntz and John G. Hickman, trustee of Charles B. Coons, deceased, became the purchasers of what the Act of 1866 authorized to be sold; and a deed of it was made to them, but was not recorded until 1875.

On the 21st of March, 1870, the Legislature of Kentucky, by a special Act (Laws of 1870, Vol. 2, chap. 867, p. 545), created a corporation known as the Kentucky and Great Eastern Railway Company, hereinafter called the Great Eastern Company. The tenth section of that Act gave power to the Company to construct a railway from such point or points in the Cities of Covington and Newport as it might select, thence through the Counties of Campbell, Kenton, Pendleton, Bracken, Harrison, Fleming, Nicholas, Robertson, Bourbon, Clark, Montgomery, Menifee, Bath, Rowan, Powell, Wolfe, Morgan, Carter, Lawrence, Johnson, Magoffin, Breathitt, Floyd, Pike and Letcher, or such of them as it might choose, to any point or points on the boundary line between the States of Kentucky and Virginia that it might select. The route thus indicated for the road, by naming those counties, carried it far to the southward of the south line of Boyd County and of any road running from Maysville through Mason, Lewis, Greenup and Boyd Counties to the Big Sandy River. The tenth section of the Act also authorized the Company "to construct such branch railroads to their main trunk road in or through such counties" as it might deem proper. Provision was made, in section 16, and following sections, for subscriptions by counties, precincts, cities and towns to the stock of the Company, and for the issuing of bonds to pay therefor. Section 41 provided as follows: "That the president and directors of said Company may, with the assent of the holders of a majority in value of the stock in said Company, purchase and hold any other railroad in this or any other State; and may subscribe stock in or aid in the building of any other road, in or out of this State, whenever, in their judgment, it may be to the interest of the said Railroad Company to do so. They may sell the said railway or lease the same; and may build branches from said road and branches from said branches. That said Company may connect its said road or any of its branches with the railroad of any other company, in or out of this State, and may lease and operate any railroad connecting with the road or branches of said railway; and it may consolidate with and make running and operating arrangements with any other railroad company, upon such terms as may be agreed on by the contracting parties." By sections 44 and 45 it was provided that the Company might issue its bonds for $1,000 each, to an amount not exceeding $15,000,000, to be secured by "a mortgage or deed of trust conveying said railroad and its property franchises to a trustee or trustees."

The Great Eastern Company was organized in June, 1871. On the 15th of July, 1871, the owners of the Big Sandy road made the following written proposition, signed by all of them, to the Great Eastern Company: "To the Kentucky and Great Eastern Railroad Co.: The owners of the Maysville and Big Sandy Railroad propose to accept $57,097 for the road and all its rights and franchises held by them under their purchase, payable in cash or bonds of the County of Mason, or other good security. Should the payments be made in the bonds of the County of Mason, they will take the payments in such proportion as their debt bears to the sum voted by the County of Mason and the issuance of those bonds by the county to the

Kentucky and Great Eastern Company. But it is hereby stipulated that upon the acceptance of this proposition by the Kentucky and Great Eastern road, no unnecessary delay shall occur in taking the vote of the County of Mason upon their subscription to the Railroad Company. This proposition to remain open for acceptance for thirty days from 15th day of July, 1871; the work on the road to commence in good faith in six months from the 15th July, or this article to be void."

It is manifest that in this proposition the owners of the Big Sandy property were providing for the completion of the Big Sandy road, under the charter of the Big Sandy Company and the Act of 1866; for the only authority for the issuing of bonds of the County of Mason was that given by the charter of the Big Sandy Company; and by the proposition the bonds of that county, to be taken in payment, were bonds to be issued for a subscription to stock by that county; and the work which was to commence in six months was work on the Big Sandy road.

The executive committee of the Great Eastern Company accepted this proposition and reported it to the board of directors of that Company, at a meeting held by them; and it was, on the 23d of August, 1871, approved by that board. On the 24th of August, 1871, the board adopted a resolution "that the question of submitting the proposition to the various counties between Newport and Catlettsburgh, for subscriptions to the stock of the company, be referred to the executive committee, with full powers vested in them to proceed and carry such propositions into effect." Newport is on the Ohio River, in Campbell County, and Catlettsburgh is on the Big Sandy River, in Boyd County, and the counties between Newport and Catlettsburgh are Campbell, Pendleton, Bracken, Mason, Lewis, Greenup and Boyd, all lying on the south bank of the Ohio River. Maysville is in Mason County, about half way between the east and west lines of that county.

In the fall of 1871 Mason County voted to subscribe $400,000, and Lewis County voted to subscribe $100,000, to the stock of the Great Eastern Company, the subscriptions to be paid in the bonds of those counties.

There is no satisfactory evidence that any work on the road between Maysville and Catlettsburgh, or on the old line of the Big Sandy Company, was commenced within six months from the 15th of July, 1871, or that even surveying on that line was done within that time.

On the 15th of February, 1872, the Great Eastern Company executed a mortgage to the Farmers Loan and Trust Company, hereinafter called the Trust Company, a corporation of New York, as trustee. That mortgage recites as follows: "Whereas, the said Kentucky and Great Eastern Railway Company, the party of the first part, has been duly chartered and organized, under and by virtue of the laws of the Commonwealth of Kentucky, with power to locate, construct, equip and operate a line of railway within the said Commonwealth of Kentucky, from the City of Newport, in Campbell County, State of Kentucky, upon, along and near the southern bank of the Ohio River, in said State of Kentucky, to a point on the state line between the State of Kentucky and West Virginia, at or near Catlettsburgh, Boyd County, State of Kentucky, a distance of one hundred and forty-six miles, be the same more or less." It then states that the company, "for the purpose of constructing, equipping and completing its aforesaid line of railway," has determined to issue its bonds for an amount "not exceeding $15,000 per mile for the whole length of said railway in the State of Kentucky," being in all $2,190,000, and to secure the payment of said bonds "by a first mortgage upon the aforesaid railroad, franchises, and all the property, real and personal, rights and interests, now owned and possessed" by it in the State of Kentucky, or which it "may hereafter acquire therein." It then mortgages to the Trust Company "all and singular the entire line of the Kentucky and Great Eastern Railway Company's railroad, extending from the said City of Newport, in the State of Kentucky, to said point in said State, on the state line between the States of Kentucky and West Virginia, as hereinbefore described, as the same is now or may hereafter be located and constructed by the said party of the first part, with the right of way, and all the real and personal property, rights and interests of the said party of the first part to the said line of railway in the State of Kentucky, whether the same is now owned or possessed or may hereafter be acquired by the said party of the first part, and all the privileges [78] and franchises of the said party of the first part, for the holding, operating and maintaining its said line of railway." The mortgage trust was accepted by the trustee, in writing, March 5, 1872, and the mortgage was recorded in October, 1872, in Campbell, Pendleton and Bracken Counties; in November, 1872, in Lewis and Greenup Counties; and in January, 1873, in Boyd County.

By an Act of the Legislature of Kentucky, passed March 27, 1872, it was provided (§ 1) that section 10 of the Act of March 21, 1870, be amended so as to authorize the Great Eastern Company "to construct said road through the Counties of Mason, Lewis, Greenup and Boyd; and the said Kentucky and Great Eastern Railway Company are hereby invested with all the rights, privileges and franchises necessary, as contained in their said charter, to construct their main stem line of railway through said counties, except as hereinafter provided." Section 2 provided that whenever the Company should desire to submit any vote to the qualified voters of either of the four counties above named, "for any subscriptions to the capital stock of said railway or any branch thereof," it should be submitted under the provisions of section 16 of the Act of March 21, 1870, and not otherwise. Section 2 concluded with this proviso: "*Provided, further*, That said Kentucky and Great Eastern Railroad Company shall, previous to constructing their said road east of Maysville, through Mason County, and on through the Counties of Lewis, Greenup and Boyd, purchase and pay for the Maysville and Big Sandy Railroad, or make such arrangements with the owners of said Maysville and Big Sandy Railroad as shall be satisfactory to each of said owners." Sections 5 and 6 were as follows: "Sec. 5. The president and directors of said Railroad Company shall have no authority, either under this charter or the charter of the Maysville and Big Sandy Railroad Com-

pany, to submit to voters of any county the question of a subscription by a county to the capital stock of said Company; but said subscription may alone be submitted by the county court. Sec. 6. Nothing in this Act shall be construed as making valid the votes in the Counties [79] of Lewis and Mason, upon the propositions voted on in said counties to subscribe to the capital stock in said counties."

Undoubtedly because of the concluding proviso of section 2 of the Act of March 27, 1872, and of the fact that any agreement growing out of the proposition of July 15, 1871, was considered to be at an end, a resolution was adopted at a meeting of the board of directors of the Great Eastern Company, on the 10th of February, 1873, authorizing the president of the Company, then Nathaniel Sands, "to contract with the officers and owners of the Maysville and Big Sandy Railroad Company, for the purchase and transfer of said road to the Kentucky and Great Eastern Railway Company."

Prior to this, and on the 15th of January, 1873, all of the six owners of the Big Sandy property, except Poyntz (the Bank of Kentucky having succeeded to the interest of Ryan), had executed the following instrument:

"*Whereas*, the General Assembly of the Commonwealth of Kentucky passed an Act entitled 'An Act to Authorize the Sale of the Maysville and Big Sandy Railroad, and providing for the organization of a new company under its charter to construct said road,' approved February 17, 1866; *and whereas*, said road was duly sold by a decree of the Mason Circuit Court in pursuance to the provisions of said Act, and was purchased by M. Ryan, H. Taylor, Elizabeth Gray, W. H. Wadsworth, John B. Poyntz, and John G. Hickman, trustee of Charles B. Coons, deceased, and the sale and purchase was duly confirmed by said court; *and whereas*, the said parties as sole owners and corporators, having reorganized the said Railroad Company, under their purchase and said Act of the Legislature, did, on the 15th day of July, 1871, propose to sell and transfer to the Kentucky and Great Eastern Railroad Company all the property, rights and franchises of the said Maysville and Big Sandy Raiload Company held by them as the sole owners, stockholders, corporators and officers of same, for the sum of ($57,007) fifty-seven thousand and seven dollars, payable in cash or bonds of the County of Mason, or other good security, in the way pointed out by the written proposition of that date, which was [80] duly accepted by said Kentucky and Great Eastern Railway Company; *and whereas*, the said M. Ryan (and his assignee, the Bank of Kentucky), H. Taylor, Elizabeth Gray, W. H. Wadsworth, John G. Hickman, trustee of Charles B. Coons, deceased, are desirous to faithfully carry out said contract, and recognize its binding force, and for the purpose of securing the construction of the Maysville and Big Sandy road under its charter and that of the Kentucky and Great Eastern Railway Company, and with such modifications and explanations as may the better secure the interests of said proposers, and of said Maysville and Big Sandy Railroad Company, the Kentucky and Great Eastern Railway Company thereto consenting:

Now it is agreed, by M. Ryan and the Bank of Kentucky, his assignee, H. Taylor, Elizabeth Gray, W. H. Wadsworth, and John G. Hickman, trustee of Charles B. Coons, deceased, being all the owners, stockholders and corporators of said Maysville and Big Sandy Railroad Company, except John B. Poyntz (who does not unite in or subscribe to this instrument), they being, however, all the officers of said Railroad Company and the owners of nearly all of its stock, property, rights and and franchises, that they will sell and do hereby offer to sell, on the terms and conditions hereinafter named, all their rights, title and interests in and to the stock held by them in the said Maysville and Big Sandy Railroad Company, and in and to its road bed, bridges, material, rights of way and property of all kinds whatsoever, and in and to the franchises and charter of said Company, so far as they have any power or authority, in law or equity so to do, as owners, stockholders, corporators and officers of said company, owning the large majority of the stock, for the sum of $57, 065, with interest after the rate of 6 per cent per annum, until paid, from this date; and that they will, on full payment, transfer and convey the property, stock, rights and franchises aforesaid, so far as they lawfully can, by any and all instruments necessary or proper in the premises; the stock, ownership and rights of the said John B. Poyntz in said Company not being included herein, but left to stand upon the original proposition signed by him as aforesaid. And the said Kentucky aud Great Eastern Railway Company, wishing to assert and maintain the said contract of July 15, 1871, but willing to furnish any additional guaranty in its power to the aforesaid parties for compliance therewith, now hereby binds and obliges itself to accept the foregoing offer, and to pay to said parties making the same the the sum of $57,065 aforesaid, with interest from the 15th day of January, 1873, until paid, in installments of the bonds of Mason County, subscribed or which may be subscribed to its capital stock, to be delivered to said parties as received by said Railway Company, in amounts bearing the same ratio to the sum herein agreed to be paid as the installments of bonds from time to time delivered by said county to said Railway Company bear to the whole number of bonds subscribed by said county as aforesaid, until the whole of said sum of $57,065 and interest shall be fully paid. And it is agreed by said Kentucky and Great Eastern Railway Company that if, from any cause, said bonds or any installments thereof shall not be delivered to said Railway Company by said county, and by reason thereof said bonds or any installment thereof cannot be paid to said parties as herein agreed, then, in that case, and to the extent of such failure, said Railway Company shall make payment to said parties in cash, within one hundred and twenty days from the time such bonds should have been delivered by said county to the Railway Company, and, upon failure to deliver either bonds or cash, as aforesaid, to said parties, then this contract to be null and void. And it is further agreed, as this contract is made to secure the construction of the line of said Big Sandy road to Portsmouth by the Kentucky and Great

Eastern Railway Company, that said Company shall, within one hundred and twenty days from this date, commence the construction of said road in good faith, and shall continue to prosecute said construction in a reasonably diligent and effectual manner and the failure to commence the construction as aforesaid, or, after commencing, the failure to prosecute the the same, as aforesaid, for the space of two hundred and forty days, shall, in either event, render this contract void; and whenever this contract, by its terms, shall become void, then, upon the happening of such event, said parties representing the Maysville and Big Sandy Railroad Company and their own interests may enter and take possession of the road, property, rights and franchises herein described and conditionally sold. It is finally expressly agreed that this offer to sell and transfer on full payment shall not admit, under any circumstances, of the intervention of any prior lien on the rights, franchises and property aforesaid in favor of other parties, a lien being now and always retained thereon in favor of the parties aforesaid until payment in full shall be made. In testimony whereof, all of the parties have hereunto signed, this 15th day of January, 1873."

On the 11th of June, 1873, the proposition so made was accepted by the Great Eastern Company, by the signature of Sands, as its president, to this memorandum at its foot:

"The foregoing proposition is accepted by the Kentucky and Great Eastern Railway Company, which hereby agrees to purchase said property on the terms and conditions expressed above."

On the 22d of May, 1873, at a meeting of the board of directors of the Great Eastern Company, a contract which had before been made by it for the construction of the road was canceled with the consent of the contractors, and a resolution was adopted authorizing the president to execute a new contract, similar in terms with the prior one, "with Frank Byrne, doing business under the name of Kentucky and Great Eastern Railroad Construction Company."

On the same day, the contract was executed by the Great Eastern Company and Byrne, as follows:

"This agreement, made and entered into by and between the Kentucky and Great Eastern Railway Company, by its president, under the authority of the board of directors, party of the first part, and Frank P. Byrne, of Ohio, doing business as railroad builder, under the name and style of the 'Kentucky and Great Eastern Railroad Construction Company,' or their assigns, parties of the second part, witnesseth:

That the said parties of the second part, for and in consideration of the payment in hand of one dollar, received and hereby acknowledged, and for the further stipulations, covenants and agreements of the said party of the first part, hereinafter mentioned, hereby agree and bind themselves to construct, finish and equip, or cause to be constructed, finished and equipped, the line of railway designated by the charter of said party of the first part, to be known as the Kentucky and Great Eastern Railway, located along the banks of the Ohio River, in the State of Kentucky, commencing at the City of Newport and extending to Catlettsburgh, on the Big Sandy River, being about one hundred and forty-six (146) miles, by such route as may be necessary to fulfill the conditions of any donations to said party of the first part, or any subscriptions to the capital stock of said party of the first part, by municipal, county or other corporations, or by individuals, as authorized by law, the construction of said road to commence as soon as the right of way therefor shall be procured by the said party of the first part, and the necessary subscriptions voted by the counties along the line; and the work shall be prosecuted so as to have the same completed ready for the running of trains by the 15th day of February, 1878, or as much sooner as it can be done by said parties of the second part. Said construction shall be carried on and made in good and workmanlike manner, with timber structures for crossings or trestling, and the track laid with iron rails not less than fifty-six pounds to the yard, lineal, for main track, and fifty-four pounds to the yard, lineal, for side-tracks. The equipment shall be such as may be necessary to accommodate the business that may be offered said road on its completion.

In consideration of the covenants and agreements aforesaid of said parties of the second part, the said party of the first part hereby agrees and binds itself as follows, to wit:

First. That it will procure and furnish to said parties of the second part, free of cost, and in time to complete said road by the period hereinbefore fixed, the right of way of said road, and also such other property as it is authorized by the laws of Kentucky to procure by purchase or condemnation, for any purpose connected with the construction of bridges, embankments, excavations, spoil banks or borrow pits, turnouts, depots, engine-houses, shops, turntables, water stations, or other things necessary to the completion and maintenance of said road. [84]

Second. That it will transfer and deliver to said parties of the second part, or cause to be transferred and delivered to them, all the money, bonds of municipal corporations and counties, or other property or evidences of obligation which have been given or issued, or which may be hereafter given or issued, in payment of any subscription to the capital stock of said party of the first part, or which may have been or may hereafter be given by way of donation, including lands to the said party of the first part; the said transfer and delivery to be made when and as the conditions upon which such subscriptions or donations may be or may have been made are complied with.

Third. That it will, in part payment of the work of construction agreed to be performed as aforesaid by said parties of the second part, issue or transfer and deliver, or cause to be delivered and transferred, to said parties of the second part or their assigns, all of the capital stock of the said party of the first part, issued or to be issued, except so much as may be necessary to maintain, according to the law of the State of Kentucky, the corporate character and powers of the said party of the first part, and such stock as shall have to be issued in payment for the subscriptions to the capital stock of said party of the first part, by the

counties and municipal corporations along the line of said road, equaling in no case the amount held by said party of the second part without their consent. Said issue or transfer of stock to the said parties of the second part to be made in proportionate installments as each or any mile of the track of said road is laid with iron rails, as aforesaid, the said installments, respectively, to be in the proportion to the whole amount as one mile is to the entire length of the road; and each issue or transfer shall be regularly made on the books of said Company, and the certificates for said stock delivered to said parties of the second part or their assigns.

Fourth. That it will, for the consideration aforesaid, further pay to said parties of the second part, or their assigns, the sum of two millions one hundred and ninety thousand [85] ($2,190,000) dollars, in the coupon 7 per cent gold bonds of said party of the first part, secured by mortgage or deed of trust, a first lien upon its corporate property and franchises, which said bonds shall be issued in one series, which shall be for two millions one hundred and ninety thousand ($2,190,000) dollars, in the aggregate, and shall be in such form and on such terms and conditions as may be authorized by law and as may be approved by said parties of the second part. The payment of said mortgage bonds shall be made as follows, to wit: the said parties of the second part shall be entitled to receive, if they so desire, two hundred and fifty thousand ($250,000) dollars of the first mortgage bonds aforesaid in advance of regular payments, as hereinafter stated, giving accountable receipts therefor, which receipts shall be canceled on the completion of the road and final settlement of the bond payments. Regular payments of said bonds shall be made absolutely to said parties of the second part, or their assigns, in *pro rata* installments, respectively, to be in proportion to the whole amount as one mile is to the whole length of the road, except in the purchase of iron rails, when said party of the second part will be entitled to the use of such an amount of bonds (first mortgage) as will be necessary to make such purchase, to use either for absolute payment or as security on time purchase.

Fifth. That it will pay, in further consideration aforesaid, to the parties of the second part or their assigns, for construction of said road, the bonds of the counties along the line of road, issued in payment of the subscription made to the capital stock of the party of the first part, to be not less in amount than one million two hundred thousand ($1,200,000) dollars; the deficit, if any, to be paid in cash or its equivalent.

Sixth. That it will pay, in further consideration aforesaid, to the parties of the second part, in cash or in lieu thereof in an equipment bond, secured by mortgage on the equipment of the road, its earnings and the road itself, if the legal consent of the stockholders can be obtained thereto, for the sum of one million two hundred thousand ($1,200,000) dollars.

[86] Seventh. That it will give and use its corporate credit to aid said parties of the second part in purchasing material or supplying means to carry on the said work; and to that end will issue its notes in the name of said party of the first part, in its corporate capacity, from time to time, as the same may be necessary, and will deliver the same to said parties of the second part, to be used for the purposes aforesaid; and such obligations, if met by said party of the first part, shall be made good by said parties of the second part; and all such notes so issued and delivered to said party of the second part shall be regularly and satisfactorily accounted for.

Eighth. That it further agrees that such parties of the second part have all the earnings of said road during construction, until accepted by said party of the first part.

Ninth. That it will maintain its corporate organization and, through its proper officers and agents, do and perform every act or thing necessary or proper to be performed by it, or in its name, in order to protect the rights and interests of said parties of the second part, their heirs and assigns, as stockholders in said Railway Company, to the extent as hereinbefore provided, and as may be necessary to conform to the requirements of the laws of the State of Kentucky."

The Construction Company represented by Byrne proceeded to do work in constructing the road, and continued until December, 1873, when it ceased work, through pecuniary embarrassment, and never resumed it; being a creditor of the Great Eastern Company, to a large amount, for work done and materials furnished under the contract of May 22, 1873.

On the 19th of April, 1878, Frank P. Byrne and John Byrne were, on their own petition, adjudged bankrupts by the District Court of the United States for the Southern District of Ohio, Frank P. Byrne being described in the petition as "doing business as the Kentucky and Great Eastern Railway Construction Company," and John Byrne as "interested in profits." A. J. Hodder was appointed assignee of the bankrupts; and the proper assignment was executed to him by the register in bankruptcy, on the 22d of May, 1878.

On the 17th of April, 1880, Hodder, as such assignee, filed a petition in equity, in the Circuit Court of Mason County, Kentucky, against the Great Eastern Company, the Trust Company, the Big Sandy Company, sundry former stockholders of that Company, the owners of the interests purchased under the foreclosure sale of 1869, and sundry judgment creditors of the Great Eastern Company. The *gravamen* of the petition is that the Construction Company had, under its contract, expended large sums of money and incurred much debt, in work on part of the line from Maysville to Catlettsburgh, completing about seven miles of it, and purchasing and putting down the iron rails and other materials; that the road and improvements, as far as completed, and all the improvements put upon it by the Construction Company, are the exclusive property of the plaintiff; and no part of the line and improvements, finished or unfinished, was surrendered or delivered by the Construction Company to the Railway Company; that the value of the improvements so put into the road bed and road is $350,000, and they are of a permanent and fixed nature; that the plaintiff has a first and prior lien on the entire line of railway and said improvements for the $350,000; that the labor

performed and materials furnished and improvements made in the construction of the line of railway, by the Construction Company, under its contract, were on the part of the line which the Great Eastern Company acquired from the Big Sandy Company; that, at the time the contract of the Construction Company was made, the Great Eastern Company had possession and exclusive control of the line of railway purchased from the Big Sandy Company, with the consent of that Company and of the defendants who were former stockholders in it; and they knew of the construction contract and of the improvements which were being made under it, and made no objection, but gave express consent; and are estopped from claiming ownership of the line formerly owned by them, and especially as to the improvements made by the Construction Company; that the mortgage to the Trust Company was made after the Great Eastern Company had purchased and taken possession of the Big Sandy road and, as between the Trust Company and the former stockholders of the Big Sandy road, the Trust Company has priority, but its mortgage lien, if any, is inferior to that of the plaintiff; and that the Great Eastern Company has abandoned work on the road, and it is being destroyed. The petition asserts that the plaintiff has a first and prior lien on the entire property of the Great Eastern Company, including road, franchises, rights, privileges, improvements and everything appertaining to the defendant's property, for the $350,000 and interest, and especially a first and prior lien on that part of the line on which the labor was performed, and the materials were furnished and the improvements were made by the Construction Company under its contract, to the value of the same, in case of a sale; that he has no adequate remedy at law; and that the Great Eastern Company is insolvent. The petition prays judgment against the Great Eastern Company for $350,000 and interest; that the plaintiff's claim may be declared a first lien on the road, franchises and improvements, or a first lien on that part of the line known as the old Maysville and Big Sandy Railroad, and on the funds derived from its sale; that a receiver be appointed of all the property; and that the road, franchises and improvements, and all property involved in the controversy, be sold by the court and the proceeds distributed as prayed.

On October 28, 1880, the Trust Company appeared and filed its answer and cross petition. It sets up that the construction contract was void, because several of the directors of the Great Eastern Company who voted to authorize its execution and to ratify it after it was executed, and whose votes were requisite for the purpose, were partners in the Construction Company. It avers that, under the contract, as soon as the materials and improvements were placed on the line of the railway they became the property of the Great Eastern Company; and the lien of the mortgage to the Trust Company attached to them and became the first lien on them. It denies the alleged ownership and lien of the plaintiff, and avers that the improvements made were surrendered and delivered to the Great Eastern Company. It asserts a first lien, on behalf of the Trust Company, and the holders of bonds secured by the mortgage, as against the plaintiff and as against the former owners of the Big Sandy franchises and property and as against the other defendants, on the property and franchises of the Great Eastern [89] Company and the Big Sandy Company, and on the improvements made by the Construction Company. It sets up the agreements of July 15, 1871, and January 15, 1873; and avers that, after the first one was made, the Great Eastern Company began work in good faith on the road from Newport to Catlettsburgh, including all the line of the Big Sandy road, and executed the mortgage to the Trust Company; and that, under the mortgage which authorized $2,190,000 of bonds, $448,000 were issued to persons for materials furnished and work done in and about the building of the railway, and for money procured and expended for that purpose. It alleges that a default in the payment of interest on the bonds has occurred, under the terms of the mortgage, and its conditions have become operative; and the Trust Company is entitled to have possession of the mortgaged property and to have it sold, to pay the whole amount of the principal and interest due on the bonds issued. It prays that the plaintiff be decreed to have no lien or one inferior to that of the Trust Company; that the property, rights and franchises of the Great Eastern Company, including those of the Big Sandy Company, be sold, and the bondholders be first paid in full; and that a receiver be appointed of all the property.

On the same day, the Trust Company filed in the state court a petition and bond for the removal of the cause into the Circuit Court of the United States for the District of Kentucky, on the ground of diversity of citizenship; but no transcript of the record from the state court appears to have been certified until December 4, 1880, nor filed in the federal court until two days later; and meantime proceedings went on in the state court.

On the 10th of November, 1880, Wadsworth and others filed in the state court an answer to the petition of Hodder. It alleges that the Construction Company did not perform the construction contract; that the road and improvements are not the property of the plaintiff; that it it is not true they were to remain the property of the Construction Company until they were surrendered or delivered to the Great Eastern Company or paid for by it; that the plaintiff does not own and has no lien on [90] any part of the property or franchises or line or road of the Big Sandy Company, or of any improvements thereon, or on any part of the line of the Great Eastern Company; that by the agreement of July 15, 1871, the Great Eastern Company, then having no right to construct a line of railway in the Counties of Mason, Lewis, Greenup and Boyd, and having no line in those counties, arranged with the stockholders of the Big Sandy Company to buy their stock and property rights in that company, and to construct the Big Sandy line from Maysville to Catlettsburgh; that neither that agreement nor the one of January 15, 1878, was performed by the Great Eastern Company; that the Construction Company had knowledge of the terms of those agreements at the date of the construction contract; that after the Construction Company stopped work, the Big Sandy

Company took possession of that part of the line on which the work had been done, and had always been in possession of the rest of the line; and that the Great Eastern Company, after the agreement of January 15, 1878, came to an end, surrendered to the Big Sandy Company the property on the line of that Company. It denies that the Great Eastern Company is indebted to the Construction Company.

After the transcript of the record was filed in the federal court, Wadsworth and others made a motion to remand the cause, which was denied. The plaintiff then filed a demurrer to the cross bill of the Trust Company, and Wadsworth and others, and Poyntz, filed separate demurrers to the answer and cross bill of the Trust Company. In June, 1881, the court sustained the demurrers and gave the Trust Company leave to amend the cross bill.

In the decision on the demurrers (7 Fed. Rep. 793), these points were ruled: (1.) It was not necessary that the stockholders of the Great Eastern Company should authorize the execution of the mortgage to the Trust Company. (2.) The president could legally acknowledge in Ohio the execution of the mortgage. (3.) The cross bill sufficiently averred that the bonds were held by *bona fide* holders. (4.) The application to foreclose was not premature. (5.) At the date of the mortgage, the Great Eastern Company had no right to [91] build the mortgaged road from Newport to Catlettsburgh, unless as a branch of its main stem. (6.) There is nothing in the mortgage or the cross bill indicating that any part of the line mortgaged is a branch of the main road authorized to be built, but the mortgage describes the mortgaged line as the "main line." (7.) The Great Eastern Company had no right to acquire the Big Sandy property without the assent of the holders of a majority in value of its stock, and the cross bill does not allege such assent. (8.) Under the terms of the mortgage and the allegations of the cross bill, the Big Sandy property was not intended to be mortgaged as future acquired property.

On the 12th of July, 1881, the Trust Company filed an amended cross bill, in which it alleged that the purchase made by the agreement of July 15, 1871, was made with the consent and approval of the several stockholders of the Great Eastern Company, or a majority in number and interest of them, and was authorized and accepted by them; and that the line of the Great Eastern Railway, as it existed when the mortgage was executed, acknowledged and delivered, was located and ran through the seven counties in which the mortgage was recorded. The prayer of the amended cross bill, asks that out of the proceeds of sale the unpaid purchase money of the Big Sandy property be paid before the bondholders are paid.

On the 30th of July, 1881, the plaintiff filed an amended bill, conforming to the Equity Rules of the federal court, and asking for a reformation of the contract of May 22, 1873, if necessary, so as to make it provide that the Construction Company be and remain the sole owner of the improvements put on the line of the railroad, until paid for. The amended bill also claims a substitution of the plaintiff in the claims of the Great Eastern Company against the Big Sandy Company and Wadsworth and his associates, to the amount of his claim.

On the same day the plaintiff demurred to the cross bill and amended cross bill of the Trust Company. On the 5th of September, 1881, the Great Eastern Company demurred to the same. On the same day the Trust Company answered the amended bill. On the 29th of September, 1881, Wadsworth and others and the Big Sandy Company answered the amended bill, and also the amended cross bill. There were then exceptions by the plaintiff to the answer of the Trust Company to the amended bill, and to the answer of the Big Sandy Company to that bill. All of these exceptions and demurrers were, on hearing, overruled, in December, 1881. On the 6th of February, 1882, the plaintiff answered the amended cross bill of the Trust Company. Issues being joined on all the answers, proofs were taken and the plaintiff's amended bill was taken as confessed by the defendants who had not answered it, including the Great Eastern Company. The cause was heard on pleadings and proofs, and a decision rendered, on which a decree was made August 8, 1882, the material parts of which are as follows:

"The case having been fully argued by counsel and submitted to the court, and the court, being fully advised in the premises, finds and decrees, that no just claim for relief is shown against the Maysville and Big Sandy Railroad Company, or against the the Bank of Kentucky, William H. Wadsworth, John G. Hickman, assignee of Charles B. Coons, John B. Poyntz, Elizabeth Gray, executrix of Hamilton Gray, deceased, C. B. Childs, as shareholder in said Maysville and Big Sandy Railroad Company, H. L. Wilson, administrator of Harrison Taylor, deceased, as shareholders or part owners of said Maysville and Big Sandy Railroad Company, or otherwise, or against any of the other defendants; and that said amended bill is dismissed, with costs to be taxed; that no just claim for relief is shown against any of the before mentioned defendants, or any of the defendants, under the amended cross bill of the Farmers Loan and Trust Company, except or other than the mortgage asserted in said amended cross bill may be shown to cover the line of railroad of the Kentucky and Great Eastern Railway Company lying west of the west line of Mason County, Kentucky, and the franchises of said Railroad Company as organized, as to which excepted property the complainant in said amended cross bill is allowed time until the next term of this court to make a further showing and prepare for the approval of the court such decrees as he may be advised, but, as to all other claims of relief under said amended cross bill it is dismissed, with costs to be taxed; without prejudice, however, to the right of said Farmers Loan and Trust Company to bring such other suit, if any, as it shall be advised, to recover any rights of way which may have been acquired by or for the Kentucky and Great Eastern Railway Company, for its line of railroad east of the west line of Mason County, other than such rights of way as were acquired by or for the Maysville and Big Sandy Railroad Company, under its charter or by the exercise of its franchises, and which rights of way, if

any such there are, may be found to be covered and included in the mortgage by said Kentucky and Great Eastern Railway Company to the said Farmers Loan and Trust Company."

From that decree the plaintiff and the Trust Company took separate appeals to this court. Since the cases came into this court Rogers Wright has been appointed assignee in bankruptcy, in place of Hodder, and been substituted in the appeals.

The circuit court, in its opinion, on final hearing, reached the following conclusions: even if the construction contract is valid, the plaintiff has no lien on the road bed or what was put upon it, either by that contract or by possession, or under any statute of Kentucky. The work on the road was not commenced in good faith, within six months from July 15, 1871, under the contract of that date. Neither Poyntz nor the other parties can take advantage of his refusal to unite in the contract of January 15, 1873. Mr. Sands was authorized to make that contract, and the Great Eastern Company took possession of the Big Sandy property under it. The Construction Company had actual notice of the terms and conditions of that contract, when it entered into the construction contract. The parties making the conditional sale provided for by the contract of January 15, 1873, declared the contract to be void, according to its terms, and re-entered into possession of their property; and their right to do so was recognized by a resolution of the board of directors of the Great Eastern Company; and, as the Construction Company made its contract with actual notice of the terms and conditions of the conditional purchase from the Big Sandy owners, the construction contract was subject to those terms and conditions, and the Construction Company and the Great Eastern Company are bound by them. The grading, iron, ties, culverts, etc., and all that had become a part of the road bed of the Big Sandy road, went with it when it was retaken. The plaintiff shows no reason for not enforcing this forfeiture. If the Construction Company is to be regarded as a company distinct from the Great Eastern Company, having interests adverse to it, then, in view of the evidence, and of the principles laid down in *Wardell* v. *R. R. Co.* 103 U. S. 651 [Bk. 26, L. ed. 509], the construction contract should not be enforced. The plaintiff cannot have relief in this suit, even in respect to rights of way which the Big Sandy Company did not own, or in respect to that part of the track which was relocated. *The bill must be dismissed.*

In respect to the cross bill, the agreement of July 15, 1871, is shown to have been made with the assent of the holders of a majority of the stock of the Great Eastern Company. If the language of the mortgage embraces the property rights which the Great Eastern Company had at the date of the mortgage, and those subsequently obtained under the contract of January 15, 1873, still only such rights as the Great Eastern Company had were conveyed; and the mortgagee took subject to the same conditions as the Great Eastern Company. When the mortgage was made, the contract of July 15, 1871, had become voidable at the option of the Big Sandy owners; the contract of January 15, 1873, was made before any of the mortgage bonds were issued, and the mortgagee took only those rights which the mortgagor had, as against the persons who made a conditional sale of the Big Sandy road. The mortgagee cannot separate the contract of July 15, 1871, from that of January 15, 1873, but must take them as the mortgagor took them. The title was never in the mortgagor, and when the Big Sandy Company resumed the possession of its property, under the contracts, the mortgagee was bound thereby. If the mortgagee had, within a reasonable time, sought to set aside the forfeiture and to be allowed the benefit of any enhancement in the value of the property by reason of improvements, this might have been allowed; but as the work stopped in 1873, and the mortgagee could have sought a remedy under the mortgage at any time after that year, the delay has been unreasonable. The delay would not have been so material if the provisions in the contract of [95] January 15, 1873, for re-entry, had been made solely to secure the purchase money; but the speedy construction of the road was a reason, if not the chief one, why the original owners retained the right to declare the contract void and to re-enter into possession. As to any rights of way which the Great Eastern Company obtained along the line of the Big Sandy road, other than those purchased from the Big Sandy Company, although Wadsworth and his associates are not entitled to them, the cross bill is not so drawn nor the evidence such that those rights can be subjected to the mortgage in this proceeding.

This comprehensive statement of the conclusions reached by the circuit court, as indicating the views it took of the facts and the law in this case, may be taken as an announcement of the results at which this court has arrived, in affirmance of the decree of the circuit court in all particulars. It is necessary to add only a few observations.

By the terms of the contract of January 15, 1873, the purchase money of the Big Sandy property was to be paid in bonds of the County of Mason, or in cash, within specified times; and, on failure to do so, the contract was to become null and void. Mason County never delivered any bonds to the Great Eastern Company, and no payment of bonds or cash was made to the Big Sandy owners. The sale was conditional. No ownership or title passed; and it was expressly provided that until full payment should be made, no prior lien should intervene on the Big Sandy property, as against the lien of the vendors.

The terms of the construction contract are inconsistent with the idea of any ownership of the constructed road by the Construction Company, or any lien on it by that Company. That Company was to have all the money, municipal bonds and property given or issued in payment of subscriptions to stock, and all stock not necessary to maintain the charter or not issued to municipal corporations for subscriptions to stock; and also the $2,190,000 of mort- [96] gage bonds, secured by the mortgage as "a first lien;" and $1,200,000 in an equipment bond, secured by an equipment mortgage. In other words, it was to have everything except the road; and the Great Eastern Company was necessarily to have and own that, so as to be able to give a mortgage on it, as a "first lien."

Nor is there anything in the construction contract suggesting a direct lien in favor of the Construction Company. The provision for giving to that Company all the earnings of the road "during construction" and "until accepted" by the Great Eastern Company, is vague and indefinite; but it cannot be construed as giving a lien, for that would be inconsistent with the whole tenor of the instrument.

Many questions were discussed by counsel at the bar, and in their briefs, and we have given attention to all the views and arguments on the part of the respective appellants; but the considerations above stated, on which the case was disposed of by the circuit court, seem to us to be controlling, and to make it unnecessary to say anything further.

Decree affirmed.

Mr. Justice **Matthews** did not sit in these cases or take any part in their decision.

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[129] STATE OF TENNESSEE, *Plff. in Err.*,

v.

GEORGE K. WHITWORTH, Trustee of DAVIDSON COUNTY, TENNESSEE.

(See S. C. Reporter's ed. 129-139.)

Railroads—exemption of stock from taxation—construction of statutes as contracts.

1. The charter exemption from taxation of the capital stock of the Nashville, Chattanooga and St. Louis Railroad Company applies to its shares of stock in the hands of individual stockholders.

2. In construing statutes which are binding on States as contracts, the words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended they should have.

[No. 935.]

Argued Jan. 22, 1886. Decided Mar. 1, 1886.

IN ERROR to the Circuit Court of the United States, for the Middle District of Tennessee.

The history and facts of the case appear in the opinion of the court. See also the following and related case of *Tennessee* v. *Whitworth*.

Messrs. **S. Watson, J. B. Heiskell, James M. Head,** *B. J. Lea, Atty-Gen. of Tennessee, J. W. Baker,* and *S. A. Champion* for plaintiff in error:

The capital stock of a corporation is a thing distinct from shares of stock, and owned by different persons. The exemption of one does not necessarily exempt the other from taxation.

Farrington v. *Tenn.* 95 U. S. 679 (Bk. 24, L. ed. 559); *Memphis* v. *Ensley*, 6 Baxter, 553; *Nashville Gaslight Co.* v. *Nashville*, 8 Lea, 406; *Van Allen* v. *Assessors*, 3 Wall. 573 and *People* v. *Comrs.* 4 Wall. 258 (70 and 71 U. S. bk. 18, L. ed. 229, 344); *Memphis* v. *Farrington*, 8 Baxter, 539; 1 Desty, Taxation, 353; Burroughs, Taxation, 164, § 83.

It was not the intention of the Legislature, in granting this charter, that the exemption of the capital stock should embrace the shares of stock.

The contract of exemption was made with the Company, and not with the stockholders, the word "Company," being used in the charter.

The words "capital stock" are not used in the charter as synonymous with "shares" of stock.

Morawetz, Corporations, § 83.

There is no substantial distinction between "capital stock" and "capital" as used in the charter.

R. R. Co. v. *Gaines*, 97 U S. 697 (Bk. 24, L. ed. 1091); *Memphis & C. R. R. Co.* v. *Gaines*, 3 Tenn. Ch. 611; *Chattanooga* v. *R. R. Co.* 7 Lea, 561; 1 Desty, Taxation, 353; Burroughs, Taxation, § 83.

Although the shares of stock and the property of the Company be taxed, it yet has a valuable privilege in the exemption of the capital stock.

L. N. R. R. Co. v. *State*, 8 Heisk. 795; *State Railroad Tax Cases*, 92 U. S. 603; (Bk. 23. L. ed. 663); *Farrington* v. *Tenn. supra;* 1 Desty, Taxation, 348.

Mere nonuser of the taxing power by the State does not destroy it or form any reason for not exercising it.

Chicago, B. & Q. R. R. Co. v *Iowa*, 94 U. S. 155 (Bk. 24, L. ed. 94).

Messrs. **Ed. Baxter,** and **Edward H. East,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit in *mandamus* brought by the State of Tennessee, in the Circuit Court of Davidson County, against George K. Whitworth, the Trustee and Tax Collector of that County, to require him to assess for taxation the shares of stock in the Nashville, Chattanooga and St. Louis Railroad Company. After the suit had been begun in the state court it was removed by Whitworth to the Circuit Court of the United States for the Middle District of Tennessee, under the Act of March 3, 1875, chap. 137, 18 Stat. 470, on the ground that the suit was one arising under the Constitution of the United States.

The case is as follows: the Nashville and Chattanooga Railroad Company, now, by consolidation with the Nashville and Northwestern Railroad Company, and a change of name, the Nashville, Chattanooga and St. Louis Railroad Company, was incorporated by the Legislature of Tennessee, December 11, 1845, to buid and operate a railroad. Section 38 of its charter is in these words:

"Sec. 38. The capital stock of said Company shall be forever exempt from taxation; and the road with all its fixtures and appurtenances, including workshops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer."

The Act incorporating the Nashville and Northwestern Railroad Company contained a provision identical with this. The question is whether this provision has the effect of a contract by the State for the exemption from taxation in Tennessee of the shares of the capital stock of the Corporation. The capital stock was by the charter divided into shares of $25 each, to be subscribed for on books opened for that purpose. It was also provided that as soon as

NOTE.—*Exemption of corporation from taxation by charter.* See Tucker v. Ferguson, 89 U. S. bk. 22, 805, *note.* See also *post*, p. 853.

the requisite number of shares had been subscribed "the Nashville and Chattanooga Railroad Company shall be regarded as formed," and "the said subscribers to the stock shall form a body politic and corporate in deed and in law by the name and for the purpose" specified. Fifty cents on each share was to be paid in money at the time of subscribing. Sections 9, 12, 15, 16 and 17 are as follows:

"Sec. 9. As soon as the number of forty thousand shares shall have been subscribed, it shall be the duty of the commissioners appointed to declare the same, to appoint a time for the stockholders to meet in Nashville, and give notice thereof by publication in some of the newspapers of Nashville, at which time and place the said stockholders, in person or by proxy, shall proceed to elect the directors of the Company, and to enact all such regulations, rules and by-laws as may be necessary for the government of the Corporation and the transaction of its business. The persons elected directors at this meeting shall serve for such period, not exceeding one year, as the stockholders may direct; and at this meeting the stockholders shall fix on the day and place or places where the subsequent elections of directors shall be held; and such elections shall thenceforth be annually made. But if the day of annual election should pass without any election of directors, the Corporation shall not be thereby dissolved; but it shall be lawful on any other day to hold and make such election in such manner as may be prescribed by a by-law of the Corporation.

"Sec. 12. The board of directors shall not exceed, in their contracts, the amount of the capital of the Corporation and of the funds which the Company may have borrowed and placed at the disposal of the board; and in case they should do so, the president and directors who may be present at the meeting at which such contract or contracts so exceeding the amount aforesaid shall be made, shall be jointly and severally liable for the excesses, both to the contractor or contractors and the Corporation; *Provided*, That anyone may discharge himself from such liability by voting against such contract or contracts, and causing such vote to be recorded on the minutes of the board, and giving notice thereof to the next general meeting of the stockholders.

"Sec. 15. The board of directors may call for the payment of $24.50 on each share of stock in sums not exceeding $2 in every thirty days; *Provided*, That twenty days' notice be given of such call in at least one public newspaper of the State in which any of the stockholders may reside; and a failure to pay or secure to be paid, according to the rules of the Company, any of the installments so-called, as aforesaid, shall induce a forfeiture of the share or shares on which default shall be so made, and all payments thereon; and the same shall vest in and belong to the Company and may be restored to the owner or owners by the board of directors, if they deem proper, on the payment of all arrears on such shares, and legal interest thereon; or the directors may waive the forfeiture after thirty days' default, and sue the stockholders for the installments due, at their discretion.

"Sec. 16. The stock of said Company may be transferred in such manner and form as may be directed by the by-laws of the said Corporation.

"Sec. 17. The said Company may at any time increase its capital to a sum sufficient to complete the said road, and stock it with everything necessary to give it full operation and effect, either by opening books for new stock, or by selling such new stock, or by borrowing money on the credit of the Company, and on the mortgage of its charter and works; and the manner in which the same shall be done in either case shall be prescribed by the stockholders at a general meeting; and any State or any citizen, corporation or company of this or any other State or country, may subscribe for and hold stock in said Company, with all the rights and subject to all the liabilities of any other stockholder."

On the 21st of January, 1848, but before the Corporation was organized by the election of directors, the charter was amended as follows:

"Sec. 3. *Be it enacted*, That the charter of the Company be further so amended that the said Company be required to estimate and pay semi-annually to the several holders thereof a sum equal to 6 per cent per annum on the capital stock of said Company actually paid in, to be charged to the cost of construction; *Provided*, A majority of the stockholders at their first regular meeting agree thereto."

The circuit court was of opinion that the shares of stock were by the charter exempt from taxation, and gave judgment accordingly. To reverse that judgment this writ of error was brought.

It is apparent from the charter that the subscribers of shares and those claiming under them were to be the holders of the stock of the Corporation; and that the money paid into the treasury upon subscriptions was to be used by the Corporation in building and equipping its railroad. In this way the capital of the Corporation was to be converted into the railroad and its appurtenances. A tax upon the railroad, therefore, after its completion, is necessarily a tax upon the capital, because, practically, the capital and that into which it has been converted are the same. The railroad of the corporation may be worth more than its capital, but all its capital is in its railroad. Such being the case, the taxation of both railroad and capital would be, so far as the corporation is concerned, double taxation. [135]

In *Railroad Companies* v. *Gaines*, 97 U. S. 697 [Bk. 24, L. ed. 1091], it was held that a provision in the charter of the Memphis and Charleston Railroad Company, precisely like that now under consideration, did not exempt the railroad of that corporation and its appurtenances from taxation after twenty years from the time of its completion, even though the capital stock of the corporation had all been invested in the railroad, because, taking the whole section together, it was apparent such was not the intention of the Legislature. The property was taxable, but the capital stock was exempt.

It is no doubt true that the Legislature may make a difference, for the purposes of taxation, between the capital stock of a corporation in in the hands of the corporation itself, and the shares of the same capital stock in the hands of the individual stockholders. That has often been done, and the cases are numerous where [136]

the exemption of shares from taxation has been claimed because of a charter exemption of the capital stock. Notably this was the case with the national banks. The capital stock of such banks invested in United States securities is not taxable by the States, but shares of the stock in the hands of the individual stockholders may be taxed without deduction on account of such an investment. This has been held from the beginning. *Van Allen* v. *Assessors*, 3 Wall. 573 [70 U. S. bk. 18, L. ed. 229]; *Bradley* v. *People*, and *People* v. *Comrs.* 4 Wall. 462, 244 [71 U. S. bk. 18, L. ed. 435, 344]; *Lionberger* v. *Rouse*, 9 Wall. 468 [76 U. S. bk. 19, L. ed. 721]. The capital stock in the hands of the bank is exempt because invested in securities which are not to be taxed (R. S. § 3701); but the shares in the hands of the stockholders are, by the very terms of the Banking Act, put, for the purposes of state taxation, on the same footing as other moneyed capital. R. S. § 5219. This, it was said, showed the intention of Congress to exempt the bank for what was invested in government securities, but to charge the stockholder. In *Farrington* v. *Tenn.* 95 U. S. 679 [Bk. 24, L. ed. 558], the charter of the Union and Planters Bank provided that "Said company shall pay to the State an annual tax of one half of 1 per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes;" and the question was whether this exempted the shares in the hands of the stockholders from any further taxation by the State. The court, three justices dissenting, held that it did, because, as the charter tax was laid on each share subscribed, the further exemption must necessarily have been of the shares in the hands of the holders, although the tax as imposed was payable by the Corporation. In all cases of this kind the question is as to the intent of the Legislature, the presumption always being against any surrender of the taxing power.

In corporations four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it [137] is no doubt within the power of a State, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation. Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall as far as is practicable be laid equally on all; and if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect, but if they do it is because the Legislature has unmistakably so enacted. All presumptions are against such an imposition.

This brings us to an examination of the present charter to see what the Legislature has expressed its intention of doing. "The capital stock of said company" is exempt from taxation. That has been expressly enacted, and the owner or owners of the stock are necessarily relieved from all taxation on this account. The important question is, therefore, Who are the owners of the capital stock of this Corporation within the meaning of the term "capital stock" as used in this charter? Because, in construing statutes which are binding on States as contracts the words employed are, if possible, to be given the same meaning they had in the minds of the parties to the contract when the statute was enacted. In this respect there is no difference between a contract of a State and a contract of a natural person. If the words employed are capable of more than one meaning, that meaning is to be given them which, taking the whole statute together, it is apparent the parties intended they should have.

Returning to the charter, we find that the capital stock is divided into shares. These shares are to be subscribed and paid for; and the money raised in this way constitutes the capital of the Corporation, spoken of in section 12, where it is said: "The board of directors shall not exceed in their contracts the amount of the capital of the Corporation," etc.; and in section 17, where it is provided that "Said Company may at any time increase its capital to a sum sufficient to complete the said road." This capital is to be used by the Corporation to build and equip its road; and if more capital is needed for that purpose it may be raised "by opening books for new stock, or by selling such new stock." The manner of doing this may "be prescribed by the stockholders at a general meeting; and any State or any citizen, corporation or company * * * may subscribe for and hold stock in the said Company, with all the rights and subject to all the liabilities of any other stockholder." § 17. Payments of subscriptions are to be made on each share of stock, and if default is made in a payment when demanded "the share or shares on which default shall be so made and all payments thereon" are forfeited, "and the same shall vest in and belong to the Company," but the board of directors may, if they deem proper, restore them to the "owner or owners," "on payment of all arrears on such shares and the legal interest thereon." § 15. So too, "The stock of said Company may be transferred in such manner and form as may be directed by the by-laws of the Corporation." § 16; and, under the amending Act of 1848, interest was to be paid semi-annually at the rate of 6 per cent per annum "to the several holders thereof * * * on the capital stock of said company actually paid."

From this it is clear to us that while the money paid in by the subscribers of the shares of the capital stock of the Corporation constituted the capital of the Corporation which was to be used in building and equipping the railroad, the stock created by such subscription and payment was to belong to and remain as the property of the several holders of the shares so subscribed and paid for. As was shown in *Railroad Companies* v. *Gaines*, above cited, the words "capital stock of said Company," and the words "the road with all its fixtures and appurtenances," were used in the charter to describe different things. The capital which, upon the payment by the subscribers, belonged to the Corporation has been converted into the railroad and its appurtenances; and it had no separate existence as a taxable thing after the road was built and equipped. But the capital

stock, divided into shares, subscribed and paid for by the persons to whom the shares were originally issued, still has and was by the charter intended to have an existence separate and distinct from the property into which the money paid for it has been converted. It can now be bought, sold and transferred. Its holders and owners are the owners of the corporation. They may meet and elect directors, who are to manage its affairs. The profits of the Corporation are to be divided among them in proportion "to the stock each may hold;" § 30; and upon the dissolution of the Corporation they will be entitled to receive in like proportion the proceeds of what remains of the corporate property after all the corporation debts and liabilities are paid or satisfied. In effect the contributions of subscribers of the shares were stocked as the capital of the corporation. The aggregate of the subscriptions made the aggregate of the stock. Each subscriber owned that part of the stock which his shares represented; and the aggregate of the shares represented the aggregate of the stock. It was evidently called the "capital stock of the Company," because it was the stock which, when subscribed and paid for, furnished the Corporation with the capital to build its road. As capital it belonged to the Corporation; but as stock it belonged to the several holders of the shares into which it was divided. The charter exempted the stock from taxation clearly because the property which represented the stock had been put in its place as a taxable thing. The exemption is of the thing called the "capital stock" divided into shares. As the whole thing is exempt, so must necessarily be its several parts or shares.

It follows that the judgment of the Circuit Court was right, and it is consequently affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court U. S.

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139 STATE OF TENNESSEE, *Plff. in Er.*,
v.
GEORGE K. WHITWORTH, Trustee of DAVIDSON COUNTY, TENNESSEE.

(See S. C. Reporter's ed. 139-150.)

Railroads—consolidation—grant of rights, powers and privileges of another company—exemption of stock from taxation—construction.

1. A grant to a railroad company of all the rights, powers and privileges, or all the powers and privileges of another company, entitles it to the same exemptions from taxation that the other company has. The application of this rule to a statute of Tennessee is not affected by article XI, § 7 of the Constitution of 1834 of that State.

2. Upon the consolidation of two or more railroad companies, under authority of law, the presumption is that the new company has all the powers and privileges of the old companies.

3. Where the Act of consolidation provided that the new company should, for its government, be entitled to all the powers and privileges, and be subject to all the restrictions and liabilities conferred and imposed upon another company, the phrase "for its government" is held to have been intended, not as a limitation of its powers, but for its regulation and control.

4. The capital stock of the Nashville and Decatur Railroad Company is exempt from taxation in Tennessee, although said company resulted from the consolidation of two Tennessee corporations with a corporation of Alabama.

5. The relinquishment of the taxing power is never to be presumed.

[No. 934.]

Argued Jan. 22, 1886. Decided March 1, 1886.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

The history and facts of the case appear in the opinion of the court. See also the preceding and related case of *Tennessee* v. *Whitworth*.

Messrs. **J. B. Heiskell, S. Watson,** *B. J. Lea, Atty-Gen. of Tennessee,* **S. A. Champion,** *J. W. Baker* and **James M. Head,** for plaintiff in error:

The shares of stock in the Nashville and Decatur Railroad Company are not exempt from taxation. It has been decided by the Supreme Court of Tennessee that a grant to one company of the privileges of another does not carry an exemption from taxation.

Wilson v. *Gaines*, 9 Baxter, 546.

This decision is not contrary to the decisions of this court, although the question has never been definitely raised in this court.

Humphrey v. *Pegues*, 16 Wall. 244 (83 U. S. bk. 21, L. ed. 326); *Tomlinson* v. *Branch*, 15 Wall. 460 (82 U. S. bk. 21, L. ed. 189); *South Western R. R. Co.* v. *Georgia*, 92 U. S. 676 (Bk. 23, L. ed. 762); *C. & O. R. R. Co.* v. *Virginia*, 94 U. S. 718 (Bk. 24, L. ed. 310); *Railroad Cos.* v. *Gaines*, 97 U. S. 697 (Bk. 24, L. ed. 1091); *Railroad Co.* v. *Georgia*, 98 U. S. 360 (Bk. 25, L. ed. 186); *Railroad Co.* v. *Hamblen Co.* 102 U. S. 273, and *Wilson* v. *Gaines*, 103 U. S. 417 (Bk. 26, L. ed. 152, 401).

The consolidation of the Central Southern and the Tennessee and Alabama Railroad Companies worked a dissolution of those companies, and thereby destroyed whatever exemption from taxation they may have possessed.

Railroad Co. v. *Georgia, supra; Shields* v. *Ohio*, 95 U. S. 319, and *Railroad Co.* v. *Maine*, 96 U. S. 499 (Bk. 24, L. ed. 357, 836); *St. Louis, etc. Ry. Co.* v. *Berry*, 113 U. S. 465 (Bk. 28, L. ed. 1055.

Whether the consolidation of two or more corporations operates to dissolve them and form a new one is a question of legislative intent.

See authorities last above cited. See also *Tomlinson* v. *Branch*, 15 Wall. 460 (82 U. S. bk 21, L. ed. 189); *Railroad, etc., Co.* v. *Georgia*, 92 U. S. 665 (Bk. 23, L. ed. 757).

The grant of the rights, powers and privileges of one railroad company which has an exemption from taxation, to another, "for its government," does not carry with it immunity from taxation.

Railroad Cos. v. *Gaines*, 97 U. S. 697, 711 (Bk. 24, L. ed. 1091, 1094); *Railroad Co.* v. *Commissioners*, 103 U. S. 4 (Bk. 26, L. ed. 360).

The words "for its government," are words of limitation, and definitely exclude the idea of exemption from taxation.

See authorities last above cited. See also the abstract of the argument as reported in the preceding case.

Messrs. **Ed. Baxter, Edward H. East** and *F. L. Dodd*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

NOTE.—*Exemption of corporation from taxation by charter.* See Tucker v. Ferguson, 89 U. S., bk. 22, L. ed., *note*. See also *ante*, p. 880.

[140] This, like the case between the same parties just decided, is a suit in *mandamus* brought by the State of Tennessee to require the Trustee and Tax Collector of Davidson County to assess for taxation the shares of the capital stock of a railroad company; and the only question not already disposed of is, whether the Nashville and Decatur Railroad Company has the same charter contract for the exemption of its capital stock from taxation as the Nashville and Chattanooga Railroad Company. The facts are these:

The Tennessee and Alabama Railroad Company was incorporated by the Legislature of Tennessee on the 23d of January, 1852, to build a railroad from Nashville, by the way of Franklin, to the line between Tennessee and Alabama in the direction of Florence, Alabama. This company was granted by its charter all the rights, powers and privileges, and subjected to all the liabilities and restrictions conferred and imposed upon the charter of the Nashville and Chattanooga Railroad Company.

The Central Southern Railroad Company was incorporated by the Legislature of Tennessee on the 30th of November, 1853, to build a railroad from a point of intersection with the Tennessee and Alabama Railroad at Columbia, by way of Pulaski, to the Alabama state line, in the direction of Athens and Decatur, Alabama, to connect with any railroad that might be constructed from Decatur to the [141] state line in the direction of Pulaski. This company also was given all the powers and privileges, and subjected to all the restrictions and liabilities prescribed in the charter of the Nashville and Chattanooga Railroad Company.

The Tennessee and Alabama Central Railroad Company was incorporated by the Legislature of Alabama on the 19th of December, 1853, to build a railroad from Montevideo, Alabama, in a northeasterly direction, through Decatur, to some point on the boundary between Alabama and Tennessee, to connect with a railroad leading through Pulaski to Columbia, Tennessee. This company was by its charter authorized to unite and consolidate into one road all or such part of the said road with any railroad that may connect with the said Tennessee and Alabama Central Railroad at the Tennessee line.

Each of these corporations completed its railroad in accordance with the requirements of its charter, and on the 19th of April, 1866, the Legislature of Tennessee passed another Act (Acts of Tenn. 1865-6, pp. 217, 220), §§ 5, 6, 9 and 10 of which are as follows:

"Sec. 5. *Be it further enacted*, That for the purpose of uniting and consolidating the Tennessee and Alabama Railroad Company and the Central Southern Railroad Company into one, the directors of said companies be, and they are hereby, authorized to agree upon the terms thereof, and to adopt all necessary and proper measures, agreements, and obligations to effect the same; *Provided*, Said terms of consolidation, when perfected by the directors of said companies, shall be submitted to a vote of the stockholders of said companies, and if assented to by a majority of the stockholders, the same shall be binding upon said companies; and that thereafter, and upon official report thereof to the president of the respective companies and the comptroller of the State, said consolidated and united companies shall be known and styled the 'Nashville and Decatur Railroad Company,' by which name it shall sue and be sued, and be entitled to all the rights and privileges, and be subject to all the liabilities and restrictions of a body corporate.

"Sec. 6. *Be it further enacted*, That the said Nashville and Decatur Railroad shall, for its government, be entitled to all the rights and privileges, and subject to all the restrictions and liabilities conferred and imposed upon the Nashville and Chattanooga Railroad Company; *Provided*, That no state aid is intended to be extended to said Nashville and Decatur Railroad; *And provided further*, That no new liability to the State of Tennessee is intended to be imposed hereby upon said Tennessee and Alabama Railroad Company and the Central Southern Railroad Company.

"Sec. 9. *Be it further enacted*, That the Tennessee and Alabama Railroad and the Central Southern Railroad, thus consolidated, may, through their directors thus elected, be consolidated with the Alabama and Tennessee Central Railroad, upon such terms as may be agreed upon between them and approved by the stockholders of said roads, to be hereafter known as the Nashville and Decatur Railroad; such terms not to be in conflict in anywise with those herein contained, but may be supplementary or in addition thereto; *Provided*, The consolidation herein provided for be approved by Act of the Legislature of the State of Alabama, heretofore or hereafter passed; and said railroads, thus consolidated, may, by their stockholders, regularly convened, upon thirty days' notice in the Newspapers of Nashville and Huntsville, elect directors to serve them for the term of twelve months, and until their successors shall be elected.

"Sec. 10. *Be it further enacted*, That the capital stock of said united companies shall be the aggregate amount of their respective charters, with the addition thereto of —— dollars; and that this Act shall take effect from and after its passage."

Under the authority of this Act, and of section 22 of the Act to incorporate the Tennessee and Alabama Central Company, the three companies were united and consolidated under the style of the Nashville and Decatur Railroad, upon the terms indicated in the following resolution confirmed at a convention of the stockholders:

"*Resolved*, That under the authority delegated to the executive committee by the respective stockholders of the Tennessee and Alabama, Central Southern, and Tennessee and Alabama Central Railroad Companies, the committee have agreed that the capital stock of each company shall represent the value of its road, and that therefore each of the companies herein mentioned shall surrender to the Nashville and Decatur Railroad Company, all of its rights, franchises and property; the Nashville and Decatur Railroad Company assuming to pay all debts owing by the several companies, and being hereby especially pledged to protect all persons who have made themselves individually liable for the debts of any of the several companies; and that the stockholders of each company shall be entitled to and receive credit

for the same amount of stock in the Nashville and Decatur Railroad Company that they own in any of the several companies; these constituting and comprising the whole basis of settlement."

This union was afterwards confirmed and declared valid by the Legislatures of Tennessee and Alabama. The capital stock of the Nashville and Decatur Company is the aggregate of the stock of all three of the original companies.

Upon these facts the circuit court held that the shares of the capital stock of the Nashville and Decatur Company were exempt from taxation, and gave judgment accordingly. To reverse that judgment this writ of error was brought.

The question whether the capital stock of the Nashville and Decatur Company is entitled to [145] the same exemption as that of the Nashville and Chattanooga Company depends: 1, on whether the grant to the Tennessee and Alabama Company of "all the rights, powers and privileges," and to the Central Southern Company of "all the powers and privileges" of the Nashville and Chattanooga Company, carried with it to the new companies the exemption from taxation provided for in section 38 of the Nashville and Chattanooga charter; and if it did, 2, whether the Nashville and Decatur Company and its stockholders are entitled to the same exemptions as the original Tennessee corporations and their stockholders had.

As early as 1850, before either the charter of the Tennessee and Alabama Company or that of the Central Southern Company was granted, this court said in *Philadelphia & Wilmington R. R. Co.* v. *Md.* 10 How. 394 [51 U. S. bk. 13, L. ed. 469], speaking by *Mr. Chief Justice* Taney, that a statute which authorized the union of two railroad companies and secured to the united company the "property, rights and privileges which that law, or other laws, conferred on them (the separate companies) or either of them," extended to the united company an exemption from taxation in the charter of one of the uniting companies, and this although it was at the same time said that "the taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." p. 398. This has been expressly reaffirmed in *Tomlinson* v. *Branch*, 15 Wall. 460; *Humphrey* v. *Pegues*, 16 Wall. 244 [82 and 83 U. S. bk. 21, L. ed. 189, 326]; *Southwestern R. R. Co.* v. *Ga.* 92 U. S. 676 [Bk. 23, L. ed. 762]; and the correctness of the decision was recognized in *Central R. R. & Bkg. Co.* v. *Ga.* 92 U. S. 665 and *Morgan* v. *La.* 93 U. S. 217 [Bk. 23, L. ed. 757, 860]; *R. R. Companies* v. *Gaines*, 97 U. S. 711 [Bk. 24, L. ed. 1094]; *R. R. Co.* v. *Ga.* 98 U. S. 360 [Bk. 25, L. ed. 186]; *R. R. Co.* v. *Hamblen Co.* 102 U. S. 277; *R. R. Co.* v. [146] *Comrs.* and *Wilson* v. *Gaines*, 103 U. S. 417 [Bk. 26, L. ed. 152, 360, 401]; *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S. 253 [Bk. 27, L. ed. 925]; and *Chesapeake & O. R. R. Co.* v. *Miller*, 114 U. S. 185 [*ante*, 121.]

From this it is clear that under the settled rule of decision in this court, the exemption from taxation, which was one of the rights and privileges of the Nashville and Chattanooga Company, formed part of the charters of the Tennessee and Alabama Company and the Central Southern Company, unless a different rule is to be applied in Tennessee because of a supposed limitation on the popular meaning of the words "rights," "powers" and "privileges" when used in statutes, on account of a peculiar provision of the Constitution of that State. That constitutional provision is as follows:

"The Legislature shall have no power * * * to pass any law granting to any individual or individuals rights, privileges, immunities or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law; *Provided, always*, That the Legislature shall have power to grant such charters of corporations as they may deem expedient for the public good." Const. 1834, art. XI, § 7.

In view of this the Supreme Court of Tennessee decided in effect, at its December Term, 1877, in *Wilson* v. *Gaines*, 9 Baxter, 546, that as the State in its Constitution used in the same connection all the words "rights," "privileges," "immunities" and "exemptions," each of these words must be given in statutory interpretation a meaning so limited as not to include anything expressed by the others; and that when any one of them is found in a statute the Legislature must be conclusively presumed to have used it in this restricted sense. To this we are unable to agree. As has already been seen, the word "privilege," in its ordinary meaning, when used in this connection, includes an exemption from taxation. This court so decided a year before the charter of the Tennessee and Alabama Company was granted, and nearly three years before that of the Central Southern. In fact the Supreme Court of Tennessee does not seem to doubt that such would be its meaning but for the Constitution, for in the opinion it is said: "However comprehensive a meaning may have been given the word 'privilege' by the courts of other States, or by lexicographers, we are constrained to use it in the restricted sense and meaning given it by our laws and the Constitution of the State. * * * A Legislature acting under this Constitution for [147] its powers, and as defining its duties, must be conclusively presumed to have used a word or term of the Constitution in the sense and with the meaning given it by that Constitution." We see nothing in the Constitution which gives to the word "right," or "privilege," or "immunity," or "exemption," any different meaning than that which it has among the people at large. There may be and probably are some immunities and some exemptions which would not be considered as either rights or privileges in the popular acceptation of those terms. It was to reach such immunities and such exemptions, as it seems to us, that this particular form of expression was used in the Constitution; and not to provide that under no circumstances should the word "privilege" in a Statute of Tennessee be held to include a privilege of exemption from taxation. Words in a Constitution, as well as words in a statute, are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary. We find no such reasons in this case, and as an exemption from taxation is a privilege in the popular sense of that term, we feel ourselves compelled to decide that both the

Tennessee and Alabama Company and the Central Southern Company were granted such an exemption by their charters, notwithstanding the contrary opinion of the Supreme Court of Tennessee, which, although entitled to great respect, is not binding upon us as authority under the circumstances of this case.

It only remains to consider whether the Nashville and Decatur Company is entitled to the same exemption. When two railroad companies unite or become consolidated under the authority of law, the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges, and is subject to all the restrictions and liabilities, of those out of which it was created. *Tomlinson* v. *Branch*, 15 Wall. 460 [82 U. S. bk. 21, L. ed. 189]; *Branch* v. *Charleston*, 92 U. S. 682 [Bk. 23, L. ed. 752]; *County of Scotland* v. *Thomas*, 94 U. S. 690, and *Maine Cent. R. R. Co.* v. *Maine*, 96 U. S. 512 [Bk. 24, L. ed. 220, 841]; [148] *Greene County* v. *Conness*, 109 U. S. 104 [Bk. 27, L. ed. 872]. From this it follows that as the capital stock of both the original Tennessee corporations was exempt from taxation, the capital stock of the united or consolidated company formed by the simple aggregation of that of the two old ones, is also exempt, unless it has been provided to the contrary. Is there, then, anything in the statute authorizing the union which rebuts this presumption? We think there is not. The language relied on to show the contrary intention is this: "That the said Nashville and Decatur Railroad shall, for its government, be entitled to all the powers and privileges, and be subject to all the restrictions and liabilities conferred and imposed upon the Nashville and Chattanooga Railroad Company." This is the exact language of the corresponding provision in the charter of the Tennessee and Alabama Company, one of the original companies, save only that the words "for its government" have been added. As we hold that this was sufficient to exempt the capital stock of the original companies from taxation, it follows that the new company is also exempt, unless the added words were intended as a limitation upon the effect of the others.

The rule is imperative that a relinquishment of the taxing power is never to be presumed. *Vicksburg, S. & Pac. R. R. Co.* v. *Dennis*, just decided. Under this rule, it was held in *R. R. Companies* v. *Gaines*, 97 U. S. 711 [Bk. 24, L. ed. 1094], that the capital stock of the Knoxville and Charleston Railroad Company was not exempt from taxation, although by its charter that company was (p. 702) "invested, for the purpose of making and using said road, with all the powers, rights, and privileges, and subject to all the disabilities and restrictions that have been conferred and imposed upon the Nashville and Chattanooga Railroad Company," because (p. 712) "The grant was not of all the rights and privileges of the Nashville and Chattanooga Company, but of such as were necessary for the purpose of making and using the road; or, in other words, the franchises of the company which do not include immunity from taxation." To the same effect is *Annapolis & E. R. R. R. Co.* v. *Comrs.* 103 U. S. 1 [Bk. 26, L. ed. 359], where the Annapo- [149] lis and Elk Ridge Railroad Company was "invested with all the rights and powers necessary for the construction and repair" of its railroad, and for that purpose was to have and use all the powers and privileges, and be subject to all the obligations contained in the enumerated sections of the Baltimore and Ohio charter. This we held "was not a grant of all the powers and privileges of the Baltimore and Ohio Company * * * but only of such as were necessary to carry into effect the objects for which the new company was incorporated;" or, in other words, "such as were necessary to the construction, repair and use of its railroad;" and this did not include the privilege of exemption from taxation.

In all this class of cases the question is one of legislative intent, with a presumption against an intent to grant an exemption from taxation. Here there is no charter of a new corporation with power to build a new railroad. No new taxable property is created. The legislation contemplates nothing more than the making of one railroad corporation out of two old ones, each of which has a completed railroad and the privilege of an exemption of its capital stock from taxation. If nothing at all had been said about the powers and privileges of the new corporation, the presumption would have been that it took all which were possessed by the two original companies at the time of their union. To rebut this presumption it is necessary that a contrary intention should appear. The question is not as to a grant of new powers, but as to the taking away of old ones.

Such being the case, we cannot believe that the phrase "for its government" in the consolidating Act was intended as a limitation on the powers and privileges of the new corporation.

The natural meaning of the word "government" in such a connection is regulation and control, and we think it was used in that sense here. In reality it neither adds to nor takes from the force of the other words, and simply implies that the new corporation shall have the same charter rights and privileges, and be subject to the same charter restrictions and liabilities, as the Nashville and Chattanooga Company. Such were the charters of the old companies, and such was intended to be the charter of the new; no more, no less. As was said in the court below: "The government of the corporation embraces every part of the conduct and business of the company in all its relations to the State, to the general public, to individuals, to its own stockholders," and consequently the grant of powers and privileges for its government was in reality the grant of the powers and privileges of its corporate entity.

The fact that the Tennessee and Alabama Central Company was under the authority of the consolidating statute brought into the consolidated company does not in our opinion alter the case in any material respect. No new taxable property was in fact brought into Tennessee in this way. While it added to the amount of the capital stock of the consolidated company, it was only because of capital actually invested before the consolidation in the Alabama railroad; and, taking the whole statute together, it is apparent to us that the Legislature intended to give the new corporation in Tennessee all the powers and privileges, including exemption from taxation, which the old corporations were entitled to. In fact we do not

understand it is claimed that the rights of the parties, in respect to the present question, are changed because the two original Tennessee companies, after their union, were consolidated with the Alabama corporation.

We conclude, therefore, that the capital stock of the Nashville and Decatur Company is exempt from taxation in Tennessee; and consequently, for the reasons stated in the other case, that the shares cannot be assessed.

The judgment of the court below to that effect is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, *Plff. in Err.*, *v.* GUS. B. OHLE.

(See S. C. Reporter's ed. 123-129.)

Removal of cause—jurisdiction—residence—evidence.

1. The question being whether the plaintiff at a certain time changed his residence from Iowa to Illinois, the jury were correctly told that he did not gain a citizenship in Illinois when he went there unless he in good faith left Iowa and, giving up his residence there, went to Illinois, and actually and in good faith took up his permanent residence in that State at that time.

2. It is not for this court to decide that the jury brought in a wrong verdict under a correct charge, where there was some evidence to support the verdict.

3. An affidavit which was filed by the defendant for the purpose of obtaining an order requiring the plaintiff to give security for costs, on the ground that the plaintiff was a nonresident, was competent evidence against the defendant on the trial of another issue; and the fact that it was sworn to on information and belief affected only its weight and not its competency.

[No. 803.]

Submitted Jan. 25, 1886. Decided Mar. 1, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of Iowa.

The case is stated by the court.

Messrs. N. M. Hubbard, Charles A. Clark and *Whiting S. Clark*, for plaintiff in error.

Messrs. George G. Wright and *S. S. Burdett*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error brought under section 7 of the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137, to reverse an order of the circuit court remanding a case which had been removed from a state court. The suit was brought in a state court of Iowa on the 19th of November, 1883, by Ohle, the defendant in error, described in the petition as a citizen of Illinois, against the Chicago and Northwestern Railway Company, an Illinois corporation, to recover damages for an injury sustained by him while a laborer on a construction train of the Railway Company in Iowa. On the 21st of March, 1884, the Company petitioned for the removal of the suit to the Circuit Court of the United States on the ground that Ohle was a citizen of Iowa, and the Railway Company a citizen of Illinois. The case was docketed in the Circuit Court of the United States May 13, 1884, and the next day, May 14, Ohle moved to remand, because both he and the Company were citizens of the same State. On the 22d of May he was given leave to file a plea in abatement or to the jurisdiction, which he did August 29, 1884, alleging that both he and the Company were citizens of Illinois. Upon this plea issue was joined, and a trial had with a jury, October 30, 1884. On the trial it appeared that at the time of the injury, Ohle was a minor, having his home with his parents, who were citizens of Iowa, residing at Burlington, in that State. While still a minor, he brought suit, by his next friend, in a state court of Iowa, against the Company to recover damages for his injury. This suit was removed by the Company to the Circuit Court of the United States. Before any trial was had, and in April, 1883, Ohle went to Janesville, Wisconsin, to attend school for the purpose of learning telegraphy. In October, 1883, he went from the school to Des Moines, Iowa, to attend a trial of his suit; and the trial resulted in a disagreement of the jury. He then went to visit his parents in Burlington, and stayed about a week. After the disagreement of the jury, he discontinued his suit, and, about the 6th of November, went to Chicago, Illinois, where he remained until about the 27th of November. While he was in Chicago at this time, the present suit was begun, and the simple question presented on the trial of the issue, made by the reply to the plea to the jurisdiction, was whether he had actually and in good faith given up his citizenship in Iowa and acquired a new citizenship in Illinois before this suit was brought. He was the only witness sworn. He testified in substance that when he went to Chicago he intended to make that his home. It is true, in a subsequent part of his testimony, he said this was done so as to prevent the Railroad Company from removing any other suit he might bring in Iowa to the courts of the United States; but, according to his testimony, he then, being of full age, did leave [125] Iowa with the *bona fide* intention of abandoning his citizenship in that State and gaining another in Illinois. He has never gone back to Iowa to reside. He was of age and had the right to abandon one residence and take up another. He took a room in Chicago, and remained there three weeks. Before this was done, the manager of the school in Janesville, where he was being taught, had engaged employment for him in Chicago, which he was to enter upon as soon as he had finished his education. After his suit was brought he went from Chicago to the school in Janesville, with the intention, as he says, of returning when he had got through with his education. He did go back on the 12th of March, 1884, took up the work for which he had been engaged, and remained there all the time doing that work until he was sworn at the trial of the issue on the plea to the jurisdiction in this case. He was examined fully by counsel for both parties. Some things which he testified to had a tendency to prove that he did not, in good faith, go to Chicago with the intention, at that time, of abandoning his citizenship in Iowa and acquiring another in Illinois.

In the course of the trial, also, Ohle offered in evidence an affidavit, filed in the case on behalf of the Company, for the purpose of requir-

ing him to give security for costs because he was a nonresident of Iowa. That affidavit was as follows:

"I, H. G. Burt, being first duly sworn, on oath say: that I am the superintendent of the Iowa Division of the Chicago & Northwestern Railway Company, which includes the main line from Clinton, Iowa, to Council Bluffs, Iowa, together with several branches; that I am acquainted with the facts in regard to the injury of Gus. B. Ohle, for which the above suit is brought, and that the defendant has a good defense to the entire claim made by the plaintiff in said cause, and that the plaintiff is a nonresident of the State of Iowa, as he claims in his petition in this case, and as I believe."

To the introduction of this affidavit the Railway Company objected. This objection was overruled, and an exception taken.

[126] When the evidence was closed the Railway Company asked the court to charge the jury as follows:

"2. In order to acquire a domicil and citizenship in Illinois the defendant must have gone there in November, 1883, with the intention of remaining there permanently then; it was not enough if his intention was to go on to Janesville and finish his education there and then return to Illinois to remain permanently. If such was not his intention his citizenship in Illinois would only date from the time he in fact went there to stay permanently, which, according to his own testimony, was March 13, 1884.

"3. It is shown by the uncontroverted testimony of the plaintiff that he was a citizen of Iowa before he went to Janesville for the temporary purpose of acquiring an education in telegraphy; that in November, 1883, when it is claimed he changed his citizenship, he went to Chicago in the State of Illinois, on his way to Janesville to complete his studies; that he remained in Chicago only temporarily at that time, and did not go to Illinois permanently until March 13, 1884. Under these circumstances the jury are instructed as a matter of law that plaintiff did not become a citizen of Illinois until the date last named, namely: March 13, 1884."

These requests were refused, but the court did charge, among other things, in these words:

"12. Now the point that you are to decide, gentlemen, is this: did the plaintiff, Gus. B. Ohle, at any time leave the State of Iowa for the purpose of taking up, actually and in good faith, his residence and citizenship in Illinois? Now, I use the word residence, meaning this: it would not be sufficient merely to show that he went and resided in the sense of living in Illinois. Residence is evidence of the citizenship. You are ultimately to find whether he became a citizen of Illinois. In deciding that question you have a right to consider what he did in the matter of residence; that is, where he actually lived; the place he occupied, what we ordinarily mean by the term 'living.' Now it is claimed on the part of Ohle that he went to Chicago in November, 1883; that it was his intent to remove to the State of Illinois, and with the purpose of [127] completing his education by going through this school at Janesville, and then pursuing his vocation in life in the State of Illinois. Now, if he did in good faith leave the State of Iowa, give up the citizenship here, going to Chicago, Illinois, with the idea of taking up his citizenship there, did actually do that in good faith, although he may at that time have had it in his mind, and he did actually go to Janesville to complete his education, that would not defeat his acquiring his citizenship in the State of Illinois at the time he actually went there in November; provided you find, remember, gentlemen, that he had the intent at that time, *bona fide*, actual intent, of settling in Illinois. Now, you are to determine this, under the evidence that has been submitted to you; you are to determine whether, at that time, he then had the honest intent of changing his residence. If he did, and he went over there with that purpose, with that intent, and remained in Chicago for whatever time the evidence shows, some two or three weeks, it is for you to determine the question as to that. If that was his object and intent it would justify you in finding that he had acquired a citizenship there. The fact that he then went to Janesville to complete his education would no more defeat his citizenship in Illinois than it would defeat his citizenship in Iowa if he had still retained that citizenship.

"It then remains for you to determine the object and intent that he then had.

"13. Now, it is contended on the part of the defendant that he did not acquire citizenship in Chicago until he went there in March, 1884, after he had completed his schooling in Janesville. Now, if he did not, if that was the first time that he actually went to Chicago with the intent to remain there and take up his citizenship and his residence there, why then you would have to find that that was the time that he lost his citizenship in Iowa and acquired it in Illinois. Therefore, as I say, the question is what was his intent. By way of illustration: if when he went to the City of Chicago in November, 1883, his object and purpose was simply to go through Chicago to Janesville to complete his education, with the intention, some time in the future, after he had completed his education, of going back to Illinois, then he would not acquire his citizenship until he actually went there; but if, when he went in 1883, he went with the intention of actually changing his residence and acquiring a citizenship in Chicago, Illinois, then, if you find that to be the fact, you are justified in finding that at the time he changed his citizenship within the meaning of the questions involved in this case."

The Company in due time excepted to the last paragraph in the charge beginning with the words "By way of illustration" and continuing until the end, and to the refusals to charge as requested.

The jury found that Ohle was a citizen of Illinois when the suit was begun, and the court thereupon remanded the cause. This writ of error was brought to reverse an order to that effect, and the errors assigned are:

1. That the court erred in refusing to charge as requested.

2. That it erred in that part of the charge as given which was excepted to; and

3. That it erred in admitting the affidavit objected to in evidence.

The charge as given covered the requests that were made. It stated clearly to the jury what was necessary, in order to make a change of citizenship; and we are unable to find anything

wrong in the rules which were laid down. The jury were told as distinctly as it could be expressed in words that Ohle did not gain a citizenship in Illinois when he went there on the 6th of November, unless he did in good faith leave Iowa, and giving up his residence there go to Illinois, and actually and in good faith take up his permanent residence in that State at that time. Clearly, this covers the whole case; and as the jury found that he had gained his citizenship in Illinois when the suit was begun, the error, if any, was with the jury in its verdict on the evidence, and not with the court in its charge on the law. There is nothing in the requests to charge that is not in the charge as given, except those parts of the requests which imply a state of facts different from what the jury must have found. There was certainly some evidence that when Ohle went to Chicago on the 6th of November he intended to take up his home there at that time and actually did so. Such being the case, it was not error to refuse to charge the jury that this was not the fact. It is not for us to decide that the jury brought in a wrong verdict under a correct charge, if the record shows, as it does, that there was some evidence to support the finding which was made.

We see no error in the admission of the affidavit in evidence. The affidavit, having been filed in the cause by the Company as a ground for obtaining an order of the court in its favor, was competent evidence against it on the trial of another issue; and the fact that it was sworn on information and belief affected only its weight and not its competency. *Pope* v. *Allis* [*ante*, 393].

After the verdict the court had nothing to do but to remand the suit; its order to that effect is consequently affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

PETER GRAFFAM AND HERBERT F. DOBLE, *Appts.*,
v.
CHRISTINE J. BURGESS.

(See S. C. Reporter's ed. 180-197.)

Judicial sales—inadequacy of price—fraud—redemption—practice.

1. A sale will not be set aside for inadequacy of price, unless such inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness.

2. If, in addition to gross inadequacy, the purchaser has been guilty of any unfairness or has taken any undue advantage, or if the owner or party interested has been misled or surprised, the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem.

3. In judicial sales great inadequacy of price is a circumstance which a court of equity will always regard with suspicion, unless it appears that it was no fault of the buyer.

4. Upon an examination of the entire case this court finds that there was a design on the part of the defendant to mislead the complainant and lull her into security, and thus to prevent her from redeeming the property within the time prescribed by law; and sustains the decree of the court below allowing further time for redemption.

5. In some cases where a matter has not been put in issue with sufficient precision by the bill, or the prayer is not consistent with the case made, a court of equity will permit an amendment at the hearing.

[No. 79.]

Argued Dec. 3, 1885. Decided Mar. 1 1886.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Mr. **A. A. Ranney**, for appellants.

Messrs. **John Lowell** and *John Lowell, Jr.*, for appellee.

Mr. Justice **Bradley** delivered the opinion of the court:

This was a bill in equity filed on the 10th of July, 1880, by Christine J. Burgess, the appellee, against Peter Graffam, Samuel M. Fairfield, Edward B. Newhall, and others, to compel Graffam to deliver up to her certain lands and premises unlawfully held by him, as alleged; and for other and further relief. [181]

The bill alleged that the complainant had for many years been the owner in fee simple of the premises in question, a house and lot in the town of Melrose, Middlesex County, Massachusetts, unincumbered and worth at least $10,000; that complainant generally occupied the property as a summer residence; and when not occupying it herself, rented it out to tenants with the furniture therein; and that her general residence was with her husband in Providence, Rhode Island. It was further alleged that in the fall of 1877 the complainant had some mason work done by Peter Graffam, one of the defendants, the bill for which was $23; that the complainant objected to paying the bill, on the ground that the work was badly done; that in January, 1879, Graffam employed Samuel M. Fairfield, an attorney, one of the defendants, to sue the complainant for this bill, by attachment, in the Middlesex District Court; and that on the 10th of March, 1879, he recovered judgment against her for $28.95 damages and $16.15 costs; that execution was issued on this judgment, and the whole property was sold by the sheriff, at his office in Malden, on the 17th of May, 1879; and that Graffam became the purchaser for $78.10, and the sheriff gave him a deed. That in January, 1879, Edward B. Newhall, a real estate agent, pretending to have a claim of $30 against the complainant for services, employed Fairfield to sue the same; and an attachment was issued and judgment recovered on the same 10th of March, 1879, and execution issued and levied on the interest of complainant remaining in the premises after the sale to Graffam; and that a sale was made of said interest to Newhall on the 18th of August, 1879, for $81.21, and a deed was given to him by the sheriff accordingly. The complainant alleges that neither of these claims was valid against her, and that the parties knew it. That when the levies and sales were made, the complainant had $3,000 worth of furniture and personal property in the house entirely unincumbered; and had a well known agent in the neighborhood, and a tenant in the house until June 1, 1879, after which she occupied it herself until the fall; that she also had an attorney in Massachusetts known to the defendants; but that no notice of such sale was ever communi- [182]

NOTE.—*Sales; inadequacy of price; when set aside for.* See Irwin v. Parham, 58 U. S., bk. 13, 952, *note.*

cated to her, her attorney, agent or tenant That in 1880, from and after the first of May, the complainant expended $1,200 in repairs to the house and grounds; that Graffam and the other defendants meanwhile conspired together to keep her in ignorance of the sale until the year, allowed by the Statute of Massachusetts for redeeming the property, had expired; that in pursuance of this scheme Graffam bought [183] out Newhall, who, by his subsequent purchase, had a right to redeem the property from the sale to Graffam. That the year for redemption having expired on the 17th of May, 1880, on the 22d of June thereafter, Graffam, Fairfield and others, during the temporary absence of the complainant from the house, seized their opportunity, entered upon the premises, broke into the house, and took possession of it in behalf of Graffam, removed all the furniture and other personal property, including the wearing apparel of complainant, of her husband and servant; took possession of her private correspondence and papers, and the sum of $170 in money, and still held possession of all said property at the time of filing the bill, that complainant, on being informed of this proceeding, immediately caused an investigation to be made, and for the first time learned of the sales made under the executions; that she thereupon entered into negotiation with Graffam to try to get a settlement, and offered to pay him all that the property had been sold for, and such reasonable costs and charges as he had sustained; but that he refused any arrangement unless she would pay him $1,100, which he claimed was due him by reason of the large sums he had expended to employ counsel and men to watch and advise him of the complainant's absence, so that he could take possession. The bill states that Graffam still had keepers in possession of the house, who were injuring it by their wanton conduct, and that the complainant was informed that Graffam intended to sell the property, and was soliciting offers for it. An answer under oath was waived. On the 16th of June, 1880, an amendment to the bill was filed, alleging that Graffam, to carry out his fraud, had conveyed the property to one Herbert F. Doble for the nominal consideration of $5,000; and stated several circumstances to show that it was not a *bona fide* transaction. The deed was dated before the filing of the bill, but it was charged that it was not executed until afterwards, and that the date was a false one. Doble was made a party.

The defendants severally answered, but as the answers were not required to be under oath, it is unnecessary to recite them. The parties went into proofs, and the cause was heard before the court below, which, in January, 1882, [184] announced its opinion that the case was one for redemption but not for entire annulment of proceedings and unconditional surrender of the property on account of fraud; therefore, dismissing the bill against all the defendants except Graffam and Doble, the court gave the complainant leave to amend her bill on payment to the defendants of costs and reasonable counsel fees. The complainant amended her bill accordingly, by adding an offer to pay into court the amount of the two judgments recovered against her by Graffam and Newhall, with interest and praying for permission to redeem the property, and that Graffam and Doble might be required to account for rents and profits, and to reconvey to her. This amendment was first objected to and then demurred to; but objections and demurrer being overruled, the defendants filed an answer, setting up that the application to redeem came too late, and that no sufficient offer was made to entitle complainant to redeem; that defendants were entitled to $2,000 for expenses, etc. The complainant paid into court the defendants' costs, $215.45, a counsel fee of $150 allowed by the court, and $181.24, the amount of the two judgments and sales under the same, with interest.

Thereupon, the court made a decree, dated April 21, 1882, whereby, after reciting the payment of the money into court by the complainant, and that the defendants, Graffam and Doble, had collected certain rents and made certain payments, and had made charges for services and for the custody and care of the premises, and that these accounts and items had been submitted directly to the court without reference to a master, and the court having found and declared that the defendants, Graffam and Doble, were sufficiently paid by the rents received by them for all said charges and expenses, it was then decreed as follows, namely: "that the complainant is entitled to redeem the premises without further payments for such redemption; that the said defendants, Graffam and Doble, are entitled to receive the sums already paid into court for their benefit, and to retain the rents received by them; and that the said defendants, Graffam and Doble, make conveyance of the real estate described in the bill to the complainant, free from all incumbrances made or suffered by or through them." It was also referred to a master to determine the form of conveyance to be made pursuant to the decree, to receive said conveyance, duly executed, and to deliver the same to the complainant, and report proceedings. The master reported the form of a deed, which was approved, and the defendants were ordered to execute it. From this decree the defendants, Graffam and Doble, have appealed.

We do not propose to review the evidence in the case in detail. We have carefully examined it and find the principal allegations of the bill to be true; and are convinced that while the complainant was apprised of the suits of Graffam and Newhall instituted against her by attachment, in her absence, in January, 1879, and employed counsel to defend them, yet that she was totally ignorant of the issue of executions on the judgments in those cases, and of the sale of her property under the same, and of the legal rights which Graffam acquired or might acquire, by the lapse of a year's time after the sale. We are satisfied that she was unconscious of the position in which her property stood, and that Graffam knew that she was unconscious of it and endeavored to keep her so, and took an inequitable advantage of her ignorance to get possession of her property and to get her in his power. Even if it be true, as the court below supposed, that the evidence was insufficient to make out a case of conspiracy and fraud that would sustain a decree for unconditional delivery of the property as originally prayed, we think it is abundantly sufficient to justify

the decree which the court below did make, allowing the complainant to redeem upon payment of debt, interest, costs and counsel fees. In our judgment of the case, the defendants ought to be well satisfied with this disposition of the case.

It is a principle of law, as well as of natural justice, that greater consideration and care are due to persons known to be unable to take care of themselves than to those who are fully able to do so. The driver of a team, seeing a child or a woman or a person of known feeble intellect in the street, is bound to exercise greater care and diligence to avoid doing them harm than would be obligatory if it was a grown and capable man. In dealing with a man whose rights, without his knowledge, but which by due diligence he might know, are passing away by lapse of time into another's hands, the latter may, perhaps, justify himself in the eye of the law although not in conscience, in preserving a wary and crafty silence, so as to put his victim off his guard and bring him into his own power; while he would be perfectly inexcusable in taking such advantage of a woman, unskilled in business and unused to the stratagems which are sometimes resorted to by unscrupulous persons.

In view of this just standard of human action, which a court of equity always recognizes, the conduct of the defendant, Graffam, appears in a very unenviable light.

What is the scheme which has been carried out and is now sought to be sustained in this court? Nothing more nor less than to get and keep possession of the complainant's property, worth $10,000, to satisfy a paltry claim of less than $200; and this has been accomplished by keeping from her all knowledge of the device, luling her into security until the year for redemption passed by, having her operations watched and her footsteps dogged, and clandestinely seizing possession in her temporary absence.

It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law.

Considering the amount of the stake to be won, and the overwhelming injury to be inflicted upon an unsuspecting woman, it is difficult to regard with equanimity the proceedings of the defendant as the year of redemption drew to its close, and after it had terminated. The fact is virtually admitted that he kept up a regular corps of spies to watch her movements while she was laying out hundreds of dollars in repairs on the property, in order to find a favorable moment, when she was absent, to take possession of her home; and that he seized such a moment, and did take possession, and removed all her furniture and chattels, even to her clothing and private papers, and virtually turned her into the streets. These admitted facts are enough of themselves to show the animus and intent of the defendant. No man with an honest purpose could have done this, whatever aggravation he may have had relating to the payment of his claim. There were other methods to which he could and would have resorted. A piano or a mirror would probably have satisfied his whole claim.

The pretense that before striking the blow he gave the complainant warning, by calling upon her and telling her that he had bought the premises and that she must settle the case, does not palliate the defendant's conduct, or change its bearing on the case. It was evidently done, not for the purpose of getting his money or getting an arrangement, but to give a better coloring to his proceedings. We only have his story as to what he said. The instructions of his lawyer were "to ask her for a settlement of the claims which he held, and to tell her that unless they were paid immediately he would have to take it out of her property." This is probably what he said; and it was well calculated to mislead the complainant as to her real position and the defendant's intentions and power. She would not understand, from what he said, that her property was in any immediate peril. Why did he not tell her that the property was sold at sheriff's sale, and that the time for redeeming it was about expiring, and that if it expired he could retain the whole property forever? He evidently did not wish it redeemed, for then she would only have had to pay the debts, or the amounts bid. He wanted to get her into his power. He was willing to let her go on and spend some few more hundreds of dollars in repairs. These were certainly all, or mostly, made after the 17th of May. Standing by and seeing her doing this, and letting her go on without informing her of her position and of his rights, considering the character of the respective parties, was itself a fraud

Mr. Brown, the complainant's counsel, having called upon Fairfield, as Graffam's attorney, after the seizure of the premises, to ascertain what arrangement could be made, testifies that the latter demanded for his client $750, and a full discharge of all liability on account of the removal of the personal property; and that one reason assigned by him for demanding such [188] a large amount was that Graffam had spent a great deal of his time in watching the property, and should be paid liberally. The witness continued: "I asked him what was the occasion of watching the property. He said they watched the property to see what Mrs. Burgess was doing with it until the year expired; and that since that he had employed men to watch the property in order to ascertain when Mrs. Burgess was away, so that they could get in and take possession. He said that arrangement continued until the 22d of June, when he received a dispatch at his office in Boston stating that Mrs. Burgess was away; that then he took some person with him from Boston, as a keeper, went to Melrose on the next train, and assisted in opening one of the back windows of the house, and went in and took out the property. I said to him: 'What was the need of your watching the property? Did you not understand that before the year had expired from the date of the sale on the execution of Peter Graffam against Mrs. Burgess, Edward B. Newhall, the purchaser of the right of redemption under the subsequent sale on his execution, was bound to come in and redeem from the sale to Peter Graffam or lose his debt?' To which he replied that he understood that very well; that he advised his client, Peter Graffam, to

purchase the Newhall title by sheriff's sale, and wait until the expiration of the year from the sale to Newhall before the matter was stirred up, and he added (I give his language almost *verbatim*) 'Mr. Brown, we have had trouble enough with this woman, and we never intended that she should redeem this property if we could help it.' * * * He repeated that when they went into this matter they intended to clean her out."

Fairfield denies these expressions, it is true; but they are so consonant with what actually took place that we may suppose that he did not recollect precisely what he did say. Brown says that he caused the conversation to be taken down in short-hand as soon as he returned to his own office. It is true that Fairfield's declarations ought not to be used against Graffam, except when made by him in the course of his business as Graffam's attorney. It is in this point of view that they have been noticed.

[189] The testimony of Conant, the complainant's agent, is significant in this connection. He was in Melrose when the defendant was removing the personal property. He went to the house to see what was the matter. He knew the teamster and the man who was loading the wagon. He says: "I asked the cause of all this trouble. I conversed mostly with a black haired man, who appeared to be the keeper in charge; he told me it was about a mason's bill. I asked him the amount, and also asked him for time to telegraph to Mrs. Burgess, and I would see that the bill was paid within ten minutes. He said, *No, she had had time enough.* This was between 8 and 9 o'clock at night. I stayed there about an hour."

In any light in which Graffam's conduct may be viewed, it is clear that he did not pursue an open, straightforward course. As we view the proofs, he evidently conceived the design of getting the complainant's property for a mere nominal consideration, or else of getting her into his power so as to compel her to comply with any exorbitant demands he might choose to make. He knew she was ignorant of the sale and of the position in which the sale placed her. He stood by and saw her expending large sums of money on the property, in total unconsciousness of his proceedings and of the means of injuring her which he held in his hands. Instead of undeceiving her, he gave her a mere perfunctory notice that if she did not settle the claims which he held he would have to take it out of her property; and pursued just such a course as was calculated to lull instead of exciting any suspicions of the real danger in which she stood, all the time purposing to take possession of the property for his own use as soon as her back was turned, and keeping spies to watch her proceedings, and to find a favorable opportunity of clandestinely slipping into the premises in her absence. If this is not fraud, we should have great difficulty in defining what fraud is.

That the defendant sought to put all possible embarrassments in the way of the redemption of the property is evinced by the device resorted to of getting an assignment of Newhall's claim. Newhall had purchased all the interest of the complainant remaining in the property after the sale to Graffam, which included the right of redemption. The testimony given on this subject by Graffam's counsel, Fairfield, indicates the object of this move. "I formed," says he, "an opinion in the premises that Newhall had a right to redeem the Graffam title or claim; and as I was counsel for both, I stated to Newhall that he had the right if he desired it, and told him and Peter Graffam also that one had better buy the other out and hold both claims. Newhall was not disposed to do it and Graffam was, so I settled the matter in that way."

Then the pretended sale to Doble, at the time and under the circumstances it was made, shows a design to place the property beyond the complainant's reach. It is very obvious, from the evidence, that this was a sham sale. Graffam evidently saw that a day of reckoning was coming, and that the property must be placed out of his hands. A deed was drawn with the nominal consideration of $5,000, first to N. L. Graffam, one of Peter Graffam's counsel in the case. That was abandoned. The deed was changed by erasing N. L. Graffam's name and inserting Doble's, under an arrangement in writing, which writing was called for and promised, but never produced; but we infer from Doble's own testimony that he was to be held harmless. This change was not effected until the 13th of July, 1880, three days after the bill was filed in this case; but the date of the deed is the 6th of July, and the date of the acknowledgment (taken before the attorney Fairfield) is the 7th of July, which of course cannot be the true date, since it is testified that the acknowledgment was not taken until Doble gave his check, which is dated the 13th. Doble testifies that he was to pay $1,600 for the property, the consideration in the deed being $5,000, and the property worth $10,000. The transaction is marked all over with evidences of fraud and simulation.

Looking at the whole case, the traces of design on the part of Graffam to mislead the complainant, to lull her into security and thus to prevent her from redeeming the property, are abundantly manifest; and such design must be assumed as an established fact in the case.

It is hardly necessary to cite authorities on a matter the solution of which depends on the application of such obvious principles of equity and justice. As already perceived, we do not rest our conclusion alone upon the gross inadequacy of the consideration of the sale; but upon that, in connection with the unfair conduct of the defendant in taking advantage of the complainant's ignorance of the sale, and giving her no intelligible notice or intimation of it or of his intended seizure of the property after the year of redemption had passed, but standing by and seeing her expend large sums of money upon it, even after the year had expired. This, we think, presents a case sufficiently strong to justify the action of the court below, at least to the extent to which it went in making the decree appealed from. A few legal propositions, with a reference to the decisions on which they rest, is all that we deem it necessary to state.

It was formerly the rule in England, in chancery sales, that until confirmation of the master's report, the bidding would be opened upon a mere offer to advance the price 10 *per centum*. 2 Daniell, Ch. Pr. 1st ed. 924; 2d ed. by Perkins, 1465, 1467; Sugden, V. & P. 14th ed. 114. But

Lord Eldon expressed much dissatisfaction with this practice of opening biddings upon a mere offer of an advanced price, as tending to diminish confidence in such sales, to keep bidders from attending, and to diminish the amount realized. *White* v. *Wilson*, 14 Ves. 151; *Williams* v. *Attleborough*, Tur. & Rus. 76; *White* v. *Damon*, 7 Ves. 34. *Lord* Eldon's views were finally adopted in England in the Sale of Land by Auction Act, 1867; 30 and 31 Vict. chap. 48, § 7, so that now the highest bidder at a sale by auction of land, under an order of the court, provided he has bid a sum equal to or higher than the reserved price (if any), will be declared and allowed the purchaser, unless the court or judge, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land, either opens the biddings or orders the property to be resold. 1 Sugden, V. & P. 14th ed. by Perkins, 114 note (*a*).

In this country *Lord* Eldon's views were adopted at an early day by the courts; and the rule has become almost universal that a sale will not be set aside for inadequacy of price, unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness; being very much the rule that always prevailed in England as to setting aside sales after the master's report had been confirmed. *Livingston* v. *Byrne*, 11 Johns. 555, 566 (1814); *Williamson* v. *Dale*, 3 Johns. Ch. 290, 292 (1818); *Howell* v. *Baker*, 4 Johns. Ch. 118 (1819); *Tiernan* v. *Wilson*, 6 Johns. Ch. 411 (1822); *Duncan* v. *Dodd*, 2 Paige, 99 (1830); *Collier* v. *Whipple*, 13 Wend. 224, 226 (1834); *Tripp* v. *Cook*, 26 Wend. 143; *Lefevre* v. *Lansing*, 22 Barb. 167, 178; *Seaman* v. *Rigsne*, 1 Green, Ch. 214; *Eberhart* v. *Gilchrist*, 3 Stock. 167; *Campbell* v. *Gardner*, 3 Stock. 423; *Merlatt* v. *Warwick*, 18 N. J. Eq. 108; *Klæpping* v. *Stellmacher*, 21 N. J. Eq. 328; *Wetzler* v. *Schaumann*, 24 N. J. Eq. 60; *Carson's Sale*, 6 Watts, 140; *Suryet* v. *Byers*, Hempst. 715; *Byers* v. *Surget*, 19 How. 303 [60 U. S. bk. 15, L. ed. 670]; *Andrews* v. *Scotton*, 2 Bland, 629; *Glenn* v. *Clapp*, 11 Gill & J. 1; *House* v. *Walker*, 4 Md. Ch. 62; *Young* v. *Teague*, 1 Bailey, Eq. 14; *White* v. *Floyd*, Speers, Ch. 351; *Hart* v. *Bleight*, 3 T. B. Monroe, 278; *Reed* v. *Carter*, 1 Blackf. 410; *Pierce* v. *Kneeland*, 7 Wis. 224; *Montague* v. *Dawes*, 14 Allen, 369; *Drinan* v. *Nichols*, 115 Mass. 358.

From the cases here cited we may draw the general conclusion that if the inadequacy of price is so gross as to shock the conscience, or if in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason, misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud.

In *Howell* v. *Baker*, *ubi supra*, where the case was a sale by a sheriff, grossly inadequate as to price, and was made on a stormy day, and the attorney was the purchaser, and no one was present but him and the sheriff, *Chancellor* Kent held the purchaser as a trustee for both parties, and allowed the debtor to redeem. [193]

In *Klæpping* v. *Stellmacher*, where there was a sheriff's sale for $52, of property worth $2,000, belonging to a party who was ignorant, stupid and perverse, and would not believe that his property would be sold for such a paltry amount, though told that it would be, *Chancellor* Zabriskie, after conceding that mere inadequacy of price at a sheriff's sale is not sufficient ground to set aside a conveyance, added: "But when such gross inadequacy is combined with fraud or mistake, or any other ground of relief in equity, it will incline the court strongly to afford relief. The sale in this case is a great oppression on the complainants. They are ignorant, stupid, perverse and poor. They lose by it all their property, and are ill fitted to acquire more. They are such as this court should incline to protect, notwithstanding perverseness." The chancellor allowed the complainant to redeem the property by paying the purchase price and costs.

Byers v. *Surget*, 19 How. 303 [60 U. S. bk. 15, L. ed. 670] was a case of sheriff's sale at a very grossly inadequate price, and the purchaser was an attorney in the case. *Mr. Justice* Daniel, delivering the opinion of this court, after giving a history of the transaction, said: "Such is the history of a transaction which the appellant asks of this court to sanction; and it seems pertinent here to inquire, under what system of civil policy, under what Code of law or ethics a transaction like that disclosed by the record in this case can be excused or even palliated.'

The two cases cited from the Massachusetts reports were sales by mortgagees; but the principles on which these cases rest are the same as in those of sale by the sheriff or other officer. In *Drinan* v. *Nichols*, the sale was made in apparent good faith, except that the mortgagee knew that the owner had paid the accruing interest to the former owner who had given the mortgage, and expected that he would pay it over to the mortgagee. But this not being done, the mortgagee made the sale, without giving any notice to the owner. The court, speaking through *Judge* Endicott, says: "The mortgagee knew that the plaintiff, as administrator of her husband's estate, intending to protect the interests of his minor children, had actually paid the money through the accustomed channel, and expected it would be paid by Pope to the mortgagee. With such knowledge of the position and expectation of the plaintiffs, a proper execution of the power, and a due regard to the rights and interest of the mortgagor or those having his estate in the premises, required of the mortgagee, when after a reasonable time it became evident that Pope would not pay, that notice should be given to the plaintiff, and a bare compliance with the terms of the power was not sufficient." This case, in its principles, is very analogous to the one now under consideration. [194]

Mr. Kerr, in his treatise on Fraud and Mistake, says: "Inadequacy of consideration, if it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, is a ground for canceling the transaction." Kerr, Fraud, Am. ed. 186. *Chancellor* Desaussure, in the case of *Butler* v. *Haskell*, 4 Des. 651, 697,

on the same subject, says: "I consider the result of the great body of the cases to be, that wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong and in general a conclusive presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, or the distress and necessity of the vendor; and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct."

It is true these observations, both of Mr. Kerr and *Chancellor* Desaussure, were made in reference to private sales between parties and do not strictly apply to judicial sales. But they show that great inadequacy of price is a circumstance which a court of equity will always regard with suspicion, unless it appears by the circumstances of the case or by evidence, that it is no fault of the buyer.

Some technical objections, however, have been raised. It is said that it was error in the court to allow the amendment to redeem. We see no error in this. The case as set out in the original bill was one either for annulling the sheriff's sale and decreeing an unconditional delivery of the property, or for a redemption on payment of the amount due. The original prayer was for the former, and for such other and further relief as to the court should seem meet and the nature of the case might require. The prayer might have been in the alternative, either for an unconditional delivery of the property, or, in case the court should not deem that proper, then for leave to redeem. Had there been an offer to pay the debt, the prayer for general relief would probably have been sufficient to enable the court to decree a redemption. But as the case made by the bill was full to the purpose of such a decree, except the formal offer, and as the proofs supported the bill to that extent at least, we think the court did perfectly right in allowing the amendment to be made. *Lord* Redesdale says: "If upon hearing the cause the plaintiff appears entitled to relief * * * if the addition of parties alone is wanted, an order is usually made for the cause to stand over, with liberty to amend the bill by adding the proper parties; and in some cases where a matter has not been put in issue by bill with sufficient precision, the court has, upon hearing the cause, given the plaintiff liberty to amend the bill for the purpose of making the necessary alteration." Redes. Eq. Pl. 326; and see *The Tremolo Patent*, 22 Wall. 527 [90 U. S. bk. 23, L. ed. 98]. "So the court will sometimes at the hearing permit the prayer of the bill to be amended, so as to make it more consistent with the case made by the plaintiff than the one he has already introduced." 1 Daniell, Ch. Pr. 1st ed., p. 474; Id. 2d ed., 480; and see *Neale* v. *Neales*, 9 Wall. 1 [76 U. S. bk. 19, L. ed. 590]; *Hardin* v. *Boyd*, 113 U. S. 756, 764 [Bk. 28. L. ed. 1141, 1143]. So a formal charge of fraud may be added when it is necessary and has been omitted. *Wamburzee* v. *Kennedy*, 4 Desaus. 480.

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It is also objected that as the bill was originally founded on a charge of fraud and the fraud was not proved, the bill should have been dismissed. It is true the fraud and conspiracy may not have been proved to the extent and in precisely the aspect in which they were charged in the bill, so as to authorize the specific relief originally prayed for; but we think we have shown that very material fraud was proved, sufficient to justify the court in relieving the complainant against the lapse of time for redeeming her land.

Other objections of a technical character are also raised, but we do not deem it necessary to notice them. Our views of the merits of the case are such that, while the complainant has not seen fit to take an appeal, and, therefore, can only ask for an affirmance of the decree, yet that no mere formal objections ought to stand in the way of such affirmance. A decree cannot justly be rendered for the defendants.

The decree of the Circuit Court is affirmed.

Mr. Justice **Miller** dissenting:

In a great many of the States of the Union a period is allowed of from twelve to fifteen months to redeem real estate from sale under execution, by payment of the amount for which it was sold, and interest on that amount. In nearly all these States this right of redemption attaches in sales made under chancery decrees as well as judgments at law.

In such cases, whether the statute, as in Massachusetts, provides that the conveyance shall be made by the sheriff or other officer immediately after the sale, or, as in many of the Western States, only at the end of the time allowed for redemption, the title of the purchaser does not become absolute until that time has expired. In the case before us, it is not denied that the appellant received the sheriff's deed in accordance with the law of the State, and that the appellee failed to redeem within the time allowed.

It is of the utmost importance, where this redemption law prevails, that the right thus granted should be strictly exercised according to the statute. For, in addition to the sanctity which the law concedes to judicial sales, founded on well considered reasons of policy as old as the law itself, the favor of allowing the debtor one year more to save his land, after judgment and sale under execution have fixed his rights, only adds to his obligation to exercise the right thus granted in strict accordance with its terms.

In the case before us the judge who rendered the decree below stated that the conspiracy charged in the bill was not proved, nor did he rely upon any act of fraud; and for that reason he refused to set aside the sale, but permitted, under a new prayer in the bill, the appellee to redeem on payment of the debt, interest and all costs, including fees of counsel. The counsel of appellee in the brief expressly declines to rely upon an actual fraud on the part of Graffam. In our opinion there is no evidence of such misconduct on his part as afforded any ground, in law or equity, to justify appellee in her failure to redeem from the sale. There is no reason why she did not pay the judgment rendered against her, of which she had full notice. Certainly no obstruction was interposed to her exercise of the right of redemption, and no promise made to induce her to forego it. Yet, after Graffam had acquired a complete, legal title under judicial proceedings which

were unimpeachable, the court treats the case as if the whole matter was still *in fieri*, and gives further time for redemption.

I do not deem it appropriate to enter into the discussion of the evidence in this case, but I dissent from the judgment and the opinion of the court as leading to evil results, in discrediting judicial sales and embarrassing the due and just exercise of the right of redemption, by turning it into a question of judicial discretion.

Mr. Justice **Woods**, *Mr. Justice* **Matthews** and *Mr. Justice* **Gray** concur in this opinion.

ROYAL VAN BROCKLIN AND J. F. STACY, *Plffs. in Err.*,

v.

BUTLER P. ANDERSON, Commissioner of Revenue, STATE OF TENNESSEE, COUNTY OF SHELBY, TAXING DISTRICT OF SHELBY COUNTY, AND LAWRENCE LAMB, Receiver and Back Tax Collector of the CITY OF MEMPHIS.

(See S. C. *Van Brocklin* v. *Tennessee*, Reporter's ed. 151-180.)

Constitutional law—exemption of property of the United States from state taxation—sales for direct taxes.

1. The property of the United States is not subject to state taxation.
2. Lands situated in a State, which are acquired by the United States through sales for direct taxes, levied pursuant to Act of Congress, are not subject to state taxation while so owned by the United States.

[No. 957.]

Submitted Nov. 17, 1885. Decided Mar. 1, 1886.

IN ERROR to the Supreme Court of the State of Tennessee.

Statement by *Mr. Justice* **Gray**:

The amended bill in this case was filed in the Chancery Court of Shelby County in the State of Tennessee, by the State and its proper officers and municipalities, against Van Brocklin, Stacy and others, to enforce by sale a lien for state, county and city taxes, assessed for the years from 1864 to 1877 inclusive on lot 21 in block 6; and for the years from 1864 to 1878 inclusive, on lots 13 and 14 in block 13, in Fort Pickering, a suburb of the City of Memphis.

Van Brocklin and Stacy answered that at the times of the assessments of these taxes the lands were the property of the United States, and therefore not subject to taxation under state authority.

The case was heard upon pleadings and proofs, by which it appeared to be as follows: In June, 1864, these three lots, then owned by one Glenn, with other lots, were sold by auction and struck off and conveyed to the United States, under the Act of Congress of June 7, 1862, chap. 98, § 7, 12 Stat. at L. 423, for nonpayment of direct taxes assessed thereon, with a penalty of 50 per cent and interest. The amount so bid for lot 21 was $2.75, and the amount bid for lots 13 and 14, together with other lots not now in question, was $14. In or before 1870, Glenn conveyed the three lots to Van Brocklin, who thereupon took possession of them and kept possession of lot 21 ever since, and of lots 13 and 14 until March 30, 1877. The United States in 1872 brought actions of ejectment against Van Brocklin; and therein, on March 30, 1877, obtained judgments and writs of possession for the three lots and were put in possession of lots 13 and 14. The execution of the writ of possession for lot 21 was suspended until February 8, 1878; and meanwhile, in June, 1877, this lot was redeemed by Van Brocklin in the name of Glenn, from the sale for taxes, by paying $2.75, the amount of the tax, penalty and interest, and was released by the United States. In May, 1878, lots 13 and 14 were sold by the United States and bought by Stacy for the price of $54; and in July, 1878, were conveyed to him by the United States, under the Acts of Congress of June 8, 1872, chap. 337, § 4, 17 Stat. at L. 331, and February 8, 1875, chap. 36, § 26, 18 Stat. at L. 313.

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The chancery court held that the taxes assessed under authority of the State of Tennessee on lot 21 were valid and that those assessed on lots 13 and 14 were invalid, and entered a decree accordingly. Both parties appealed to the Supreme Court of Tennessee, which held that all the taxes assessed under the authority of the State were valid, and entered a decree for the sale of the three lots to pay them. Thereupon Van Brocklin and Stacy sued out this writ of error.

The provisions of the Constitution and laws of Tennessee, referred to in the opinion of that court and in force at the time of the assessment of these taxes, were as follows, by the Constitution of 1870, art. 2, § 28: "All property, real, personal or mixed, shall be taxed; but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes; and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational; and shall except $1,000 worth of personal property in the hands of each taxpayer, and the direct products of the soil in the hands of the producer and his immediate vendee." By the Statutes of 1866-67, chap. 40, and 1867-68, chap. 28, lands of which the exclusive jurisdiction is ceded by the State to the United States for cemeteries, or for public buildings, shall be "exonerated and free from any taxation or assessment, under the authority of this State, or of any municipality therein," while so used. Compiled Laws of 1871, pp. 92, 245 *et seq.* The Statute of 1875, chap. 108, entitled "An Act to Define What Property is by the Constitution Exempt From Taxation, and What the Legislature Under the Power Conferred Upon it does Exempt, and What is Taxable," enacts that "All property, real, personal and mixed, shall be assessed and taxed," with certain exceptions, among which are the following: "All property belonging to the United States, or the State of Tennessee." "All property belonging to any county, city or town, and used exclusively for public or corporation purposes." Acts of 1875, p. 177.

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Messrs. George Gillham and *W. K. Poston*, for plaintiffs in error.

Messrs. J. B. Heiskell and *Lee Thornton*, for defendants in error.

[153] *Mr. Justice* **Gray**, after stating the case as above reported, delivered the opinion of the court:

The question presented by this writ of error is whether lands in the State of Tennessee, which, pursuant to Acts of Congress for the laying and collecting of direct taxes, are sold, struck off and purchased by the United States for the amount of the tax thereon, and are afterwards sold by the United States for a larger sum, or redeemed by the former owner, are liable to be taxed, under authority of the State, while so owned by the United States.

The judgment of the Supreme Court of Tennessee rests upon the position that these lands, although lawfully purchased by the United States, and owned by the United States at the time of being taxed under the laws of the State, were not exempt from state taxation, because they had not been expressly ceded by the State to the United States.

We are unable to reconcile this position with a just view of the rights and powers conferred upon the National Government by the Constitution of the United States. The importance of the subject, and the consideration due to the opinion of that learned court, make it proper to state somewhat fully the grounds of our conclusion.

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In the words of *Chief Justice* Marshall: "The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American People, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but while within those limits, it is a perfect government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely, in order to accomplish the object of its institution." *U. S.* v. *Maurice*, 2 Brock. 96, 109. The United States, for instance, as incident to the general right of sovereignty, have the capacity, within the sphere of their constitutional powers and through the instrumentality of the proper department, to enter into contracts and take bonds, not prohibited by law, and appropriate to the just exercise of those powers, although not expressly directed or authorized to do so by any legislative act; and likewise to take mortgages of real estate to secure the payment of debts due to them, notwithstanding Congress has enacted that "no land shall be purchased on account of the United States, except under a law authorizing such purchase." Act of May 1, 1820, chap. 52 § 7, 3 Stat. at L. 568; R. S. § 3736; *Neilson* v. *Lagow*, 12 How. 98, 107, 108 [53 U. S. bk. 13, L. ed. 909, 913], and cases there cited. So the United States, at the discretion of Congress, may acquire and hold real property in any State, whenever such property is needed for the use of the government in the execution of any of its powers, whether for arsenals, fortifications, light houses, custom houses, court houses, barracks or hospitals, or for any other of the many public purposes for which such property is used; and when the property cannot be acquired by voluntary arrangement with the owners, it may be taken against their will, by the United States, in the exercise of the power of eminent domain, upon making just compensation, with or without a concurrent Act of the State in which the land is situated. *Harris* v. *Elliott*, 10 Pet. 25 [35 U. S. bk. 9, L. ed. 333]; *Kohl* v. *U. S.* 91 U. S. 367 [Bk. 23, L. ed. 449]; *U. S.* v. *Fox*, 94 U. S. 315, 320 [Bk. 24, L. ed. 192, 193]; *U. S.* v. *Jones*, 109 U. S. 513 [Bk. 27, L. ed. 1015]; *U. S.* v. *Great Falls Mfg. Co.* 112 U. S. 645 [Bk. 28, L. ed. 846]; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525, 531, 532 [*ante*, 264, 266].

While the power of taxation is one of vital importance, retained by the States, not abridged by the grant of a similar power to the government of the Union, but to be concurrently exercised by the two governments, yet even this power of a State is subordinate to and may be controlled by the Constitution of the United States. That Constitution and the laws made in pursuance thereof are supreme; they control the Constitutions and laws of the respective States and cannot be controlled by them. The people of a State give to their government a right of taxing themselves and their property at its discretion. But the means employed by the government of the Union are not given by the people of a particular State, but by the people of all the States; and, being given by all for the benefit of all, should be subjected to that government only which belongs to all. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.

Such are the outlines, mostly in his own words, of the grounds of the judgment delivered by *Chief Justice* Marshall in the great case of *McCulloch* v. *Md.* in which it was decided that a statute of the State of Maryland, imposing a tax upon the issue of bills by banks, could not constitutionally be applied to a branch of the Bank of the United States within that

State. 4 Wheat. 316, 425-431, 436 [17 U. S. bk. 4, L. ed. 579, 606, 607, 609].

In *Osborn* v. *Bank of U. S.* 9 Wheat. 738, 859-868 [22 U. S. bk. 6, L. ed. 204, 233, 235] that conclusion was reviewed in a very able argument of counsel, and reaffirmed by the court, and a tax laid by the State of Ohio upon a branch of the Bank of the United States was held to be unconstitutional. See also *Providence Bank* v. *Billings*, 4 Pet. 514, 564 [29 U. S. bk. 7, L. ed. 939]. Upon the same grounds, the States have been adjudged to have no power to lay a tax upon stock issued for money borrowed by the United States, or upon property of state banks invested in United States stock. *Weston* v. *City Council of Charleston*, 2 Pet. 449, 467 [27 U. S. bk. 7, L. ed. 481, 487]; *Bank of Commerce* v. *New York*, 2 Black, 620 and *Bank Tax Case*, 2 Wall. 200 [67 and 69 U. S. bk. 17, L. ed. 451, 793]; *Banks* v. *Mayor*, 7 Wall. 16 [74 U. S. bk. 19, L. ed. 57].

To guard against any misunderstanding of the scope and effect of the decision in *McCulloch* v. *Md.* [*supra*] *Chief Justice* Marshall added: "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State." And in *Osborn* v. *Bank of U.S.* [*supra*], speaking of contractors with the United States, he said: "It is true that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank."

But the only taxes thus spoken of as valid are those upon property not owned by the United States, but either real estate owned by the bank, or bank stock or other property owned by individuals. Throughout the discussion, both by the counsel and by the court, in *McCulloch* v. *Md.* state taxes upon any property of the United States had been treated as not distinguishable in principle from the particular tax whose validity was in controversy. This will be clearly shown by referring to a few passages of the arguments and the opinion.

Not only did each of the counsel for the State of Maryland, Mr. Hopkinson, Mr. Jones and Mr. Martin, make it a corner stone of his argument in support of the validity of the tax on the bank, that the property of the United States as such was not exempt from taxation by the State in which it was situated—4 Wheat. 343, 369, 375 [17 U. S. bk. 4, L. ed. 586, 592, 593], —but the opposing counsel frankly accepted the issue.

Mr. Webster, in opening the argument against the validity of the tax, said: "The Government of the United States has itself a great pecuniary interest in this corporation. Can the States tax this property? Under the Confederation, when the National Government, not having the power of direct legislation, could not protect its own property by its own laws, it was expressly stipulated, that 'No impositions, duties or restrictions should be laid by any State on the property of the United States.' Is it supposed that property of the United States is now subject to the power of the State Governments in a greater degree than under the Confederation? If this power of taxation be admitted, what is to be its limit? The United States have and must have property locally existing in all the States; and may the States impose on this property, whether real or personal, such taxes as they please?" 4 Wheat. 328 [582].

Mr. Pinckney, in the closing argument on the same side, said: "There is no express provision in the Constitution which exempts any of the national institutions or property from state taxation. It is only by implication that the army and navy and treasure and judicature of the Union are exempt from state taxation. Yet they are practically exempt, and they must be, or it would be in the power of any one State to destroy their use. Whatever the United States have a right to do, the individual States have no right to undo." 4 Wheat. 390, 391 [597]. "All the property and all the institu- [158] tions of the United States are, constructively, without the local, territorial jurisdiction of the individual States in every respect and for every purpose, including that of taxation." 4 Wheat. 395 [598].

Chief Justice Marshall, in delivering judgment, covered the whole ground by saying: "If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.

"Gentlemen say, they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it." 4 Wheat. 432 [608].

So in *Weston* v. *City Council of Charleston*, the exemption of the public lands, while owned by the United States, from state taxation was assumed, both in the argument of counsel that a state tax on stock issued by the United States to individuals was equally valid with a tax on lands after they had been sold by the United States to private persons; and in the answer made by *Chief Justice* Marshall: "The distinction is, we think, apparent. When lands are sold, no connection remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country, with no exemption from common burthens." 2 Pet. 459, 468 [27 U. S. bk. 7, L. ed. 485, 488].

The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, "to pay the debts and provide for the common defense and gen- [159] eral welfare of the United States." Constitution, art. 1, § 8, cl. 1; *Dobbins* v. *Erie County Comrs.* 16 Pet. 435, 448 [41 U. S. bk. 10, L. ed.

1022, 1027]. The principal reason assigned in *Buchanan* v. *Alexander*, 4 How. 20 [45 U. S. bk. 11, L. ed. 857] for holding that money in the hands of a purser, due to seamen in the navy for wages, could not be attached by their creditors in a state court was: "The funds of the government are specifically appropriated to certain national objects; and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended."

The more thoroughly the proceedings by which the States became members of the Union —either by joining in establishing the Federal Constitution, or by admission under subsequent Acts of Congress—are examined, the more strongly they confirm the same view.

In the Articles of Confederation of 1778, it had been expressly stipulated that "No imposition, duties or restriction shall be laid by any State on the property of the United States." And in the articles which the Ordinance of 1787 for the government of the Northwest Territory declared should "be considered as articles of compact between the original States and the people and States in said Territory, and forever remain unalterable, unless by common consent," it had been provided that "no tax shall be imposed on lands the property of the United States." Constitutions and Charters, 8, 432.

The Articles of Confederation ceased to exist upon the adoption of the Federal Constitution; and the Ordinance of 1787, like all Acts of Congress for the government of the Territories, had no force in any State after its admission into the Union under that Constitution. *Permoli* v. *First Municipality of New Orleans*, 8 How. 589, 610 [44 U. S. bk. 11, L. ed. 739]. *Strader* v. *Graham*, 10 How. 82 [51 U. S. bk. 13, L. ed. 337].

The Constitution, creating a more perfect union and increasing the powers of the National Government, expressly authorized the Congress of the United States "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States;" "to exercise exclusive legislation over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings;" and to "dispose of and make needful rules and regulations respecting the territory or other property belonging to the United States;" and declared, "This Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." No further provision was necessary to secure the lands or other property of the United States from taxation by the States.

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Nor was any provision on this subject inserted in the Acts of Congress for the admission into the Union of Vermont in 1791; of Kentucky, formed out of part of Virginia, in the same year; of Tennessee, formed out of part of North Carolina, in 1796; of Maine, formed out of part of Massachusetts, in 1820; of Texas, previously a foreign and independent republic, in 1845; or of West Virginia, formed out of part of Virginia, in 1862. Constitutions and Charters, 1875, 646, 1676, 810, 1764, 1992.

The first State formed out of territory not within the jurisdiction of an existing State was Ohio, admitted into the Union in 1802, under an Act of Congress containing three propositions, offered by Congress for her acceptance or rejection, and which were accepted by the State, namely: that one section of land should be granted to each township for the use of schools; that certain salt springs should be granted to the State; and that one twentieth part of the net proceeds of lands lying within the State and sold by Congress after June 30, 1802, should be applied to the laying out of public roads; "*Provided always*, That the three foregoing propositions herein offered are on the conditions that the convention of the said State shall provide, by an ordinance irrevocable without the consent of the United States, that every and each tract of land sold by Congress from and after the 30th day of June next shall be and remain exempt from any tax laid by order or under authority of the State, whether for State, county, township or any other purpose whatever, for the term of five years from and after the day of sale." Constitutions and Charters, 1454, 1455.

The Acts for the admission of Indiana in 1816, and Illinois in 1818, contained similar provisions to those in the Act for the admission of Ohio. Constitutions and Charters, 499, 438.

Neither of these three Acts contained any stipulation for the exemption of the lands of the United States from state taxation; but each, assuming that exemption as undoubted, and requiring no affirmance, so long as the United States owned the lands, only provided for its continuance for five years after the United States should have sold them, and thereby ceased to have any interest in them.

The statement of *Mr. Justice* McLean, in a case in the circuit court concerning land in Illinois: "In the admission of new States into the Union, compacts were entered into with the Federal Government, that they would not tax the lands of the United States," was therefore as applied to the case before him, an inadvertence which impairs the weight of his dictum, based upon it, that "this implies that the States had power to tax such land, if unrestrained by compact." *U. S.* v. *R. R. Bridge Co.* 6 McLean, 517, 531–533.

The question in issue in that case was not of the State's right of taxation, but of its right of eminent domain for the construction of roads and bridges. The decision of the learned justice in favor of the validity of the exercise of that right by a State over lands of the United States, without the consent of the United States, manifested either by an express Act of Congress, or by the assent of a department or officer vested by law with the power of disposing of lands of the United States, appears to have been based upon the theory that the United States can hold land as a private proprietor, for other than public objects, and upon a presumption of the acquiescence of Congress in the State's exercise of the power as tending to increase the value of the lands; and it finds some support in *dicta* of *Mr. Justice* Woodbury, in a case in which, however, the exercise of the

power by the State was adjudged to be unlawful. *U. S.* v. *Chicago*, 7 How. 185, 194, 195 [48 U. S. bk. 12, L. ed. 661, 664, 665]. But it can hardly be reconciled with the views expressed by Congress, in Acts concerning particular railroads, too numerous to be cited, as well as in general legislation. Acts of August 4, 1852, chap. 80, and March 3, 1855, chap. 200, 10 Stat. at L. 28, 683; July 26, 1866, chap. 262, § 8, 14 Stat. at L. 253; R. S. § 2477. When that question shall be brought into judgment here, it will require and will receive the careful consideration of the court.

Upon the question of taxation of lands of the United States by the State of Illinois, two well considered opinions of the Supreme Court of that State are worthy of reference in this connection. In one of them it was held that a lot of land in Chicago, owned by the United States, used by them for a custom house, postoffice and court house, and which the Legislature of the State had consented might be so used, and had ceded jurisdiction over, was not liable to assessment by the municipal authorities, under a statute of the State, for the amount of the benefit to the land from the laying out of a highway; and the court said: "Nor under our system of government can the States tax the General Government, its agents or property; nor can the General Government tax the States, their agents or property." "A municipal corporation has no power to assess or exact from the State or the General Government any sum for benefits conferred. The power to levy taxes or impose assessments for benefits can only be exercised on the governed, and not on the governing power, whether state or federal." *Fagan* v. *Chicago*, 84 Ill. 227, 233, 234. In the other case, it was directly adjudged that from the very nature of the relation between the Federal and State Governments, and without regard to any supposed compact contained in the Ordinance of 1787, or in any Act of Congress, no property lawfully vested in the United States could be taxed by the State; and that therefore land sold, purchased and held by the United States for nonpayment of direct taxes was exempt from State taxation. *People* v. *U. S.* 93 Ill. 30.

In Louisiana, the first territory acquired by the United States from a foreign country, the Act of March 26, 1804, establishing a Territorial Government over it by the name of the Territory of Orleans, provided that the legislative power should be vested in the Governor and legislative council, and "shall extend to all the rightful subjects of legislation; but no law shall be valid which is inconsistent with the Constitution and laws of the United States;" and that "the Governor or legislative council shall have no power over the primary disposal of the soil, nor to tax the lands of the United States." Constitutions and Charters, 691.

On April 28, 1806, John Breckenbridge, of Kentucky, Attorney-General of the United States, gave to Mr. Madison, Secretary of State, a brief and comprehensive opinion, not based upon the restrictions imposed by the Territorial Act on the legislative council, or upon any considerations peculiar to Louisiana, but upon general principles applicable to all the States and Territories alike, and therefore, and as the earliest legal opinion upon the question, worthy of being quoted in full. It is in these words: "I am of opinion that there rests no power in the city council, or in any department of the Government of Orleans, to tax the property of the United States within that Territory. I believe the exercise of such power has never been before attempted in any part of the United States; and I think the General Government ought not to admit the principle. Laying the tax will be harmless, for I see no means by which the payment of it can be enforced." 1 Ops. of Attys-Gen. 157.

By the conditions of the Acts of 1811 and 1812, under which the State of Louisiana was admitted into the Union, "the people inhabiting the said Territory do agree and declare that they forever disclaim all right or title to the waste or unappropriated lands lying within the said Territory, and that the same shall be and remain at the sole and entire disposition of the United States; and moreover that each and every tract of land sold by Congress shall be and remain exempt from any tax laid by the order or under the authority of the State, whether for state, county, township, parish, or any other purpose whatever, for the term of five years from and after the respective days of the sales thereof," "and that no taxes shall be imposed on lands the property of the United States." Constitutions and Charters, 699, 700, 710.

Upon the admission of every other State into the Union, the exemption of the lands of the United States from taxation by the State has been declared (sometimes in the form of a condition imposed by Congress, and sometimes in the form of a proviso to a proposition to grant the State certain lands or money, offered for its acceptance or rejection) in phrases somewhat varying, but substantially similar to one another.

In the Acts for the admission of Mississippi in 1817, Alabama in 1819, Missouri in 1820, Arkansas in 1836, Michigan in 1837, Iowa in 1845 and 1846, Wisconsin in 1847, Minnesota in 1857, and Oregon in 1859, the words are "No tax shall be imposed on lands the property of the United States," or words of exactly the same meaning. Constitutions and Charters, 1053, 31, 1103, 118, 995, 535, 552, 2027, 1028, 1508. In the Acts of 1864 for the admission of Nevada, of 1864 and 1867 for the admission of Nebraska, and of 1875 for the admission of Colorado, the expression is somewhat fuller: "No tax shall be imposed by the State on lands or property therein, belonging to, or which may hereafter be purchased by, the United States." *Ib.* 1246, 1202, 1213, 218.

Florida was admitted in 1845, upon the express condition that it should never interfere with the primary disposal of the public lands lying within it, "nor levy any tax on the same whilst remaining the property of the United States;" and California in 1850, "upon the express condition that the people of said State, through their Legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public do-

main of the United States." Constitutions and Charters, 332, 206.

In the debate in the Senate in June, 1850, on the Act for the admission of California, a motion to amend the Act by requiring California before its admission to pass in convention an ordinance providing, among other things, "that she relinquishes all title or claim to tax, dispose of, or in any way to interfere with the primary [165] disposal by the United States of the public domain within her limits," was opposed by Mr. Douglas and Mr. Webster as unnecessary, and was defeated by a vote of 36 to 19. In the course of the debate, Mr. Douglas, after showing that the United States acquired title to the public lands, not by virtue of their sovereignty, but by deeds of cession from the old States, or by treaty of cession from France, Spain or Mexico, and referring to the provision of the Constitution authorizing Congress "to dispose of and make all needful rules and regulations concerning the territory or other property of the United States," said: "This provision authorizes the United States to be and become a land owner, and prescribes the mode in which the lands may be disposed of and the title conveyed to the purchaser. Congress is to make the needful rules and regulations upon this subject. The title of the United States can be devested by no other power, by no other means, in no other mode, than that which Congress shall sanction and prescribe. It cannot be done by the action of the people or Legislature of a Territory or State." And he supported this conclusion by a review of all the Acts of Congress under which States had theretofore been admitted. Mr. Webster said that those precedents demonstrated that "The general idea has been, in the creation of a State, that its admission as a State has no effect at all on the property of the United States lying within its limits;" and that it was settled by the judgment of this court in *Pollard* v. *Hagan*, 3 How. 212, 224 [44 U. S. bk. 11, L. ed. 565, 571], "that the authority of the United States does so far extend as, by force of itself, *proprio vigore*, to exempt the public lands from taxation, when new States are created in the Territory in which the lands lie." Congressional Globe, 31st Cong. 1st session, Vol. 21, p. 1314; Vol. 22, pp. 848, *et seq.* 960, 986, 1004; 5 Webster's Works, 395, 396, 405.

The Supreme Court of the State of California appears at one period to have assumed that the exemption of the lands of the United States from taxation depended upon the terms of the Act of Congress admitting the State into the Union, or upon the statutes of the State. *People* v. *Morrison*, 22 Cal. 73; *People* v. *Shearer*, 30 Cal. 645. But in later cases it has taken broader ground, and has defined the [166] meaning of "taxation" as "a charge levied by the sovereign power upon the property of its subject. It is not a charge upon its own property, nor upon property over which it has no dominion. This excludes the property of the State, whether lands, revenues or other property, and the property of the United States." *People* v. *McCreery*, 34 Cal. 432, 456; *People* v. *Austin*, 46 Cal. 520.

The recital in the ordinance prefixed to the Constitution of Kansas, that the State would possess the right to tax the lands owned by the United States within its limits, and the conditional relinquishment of that right, were not assented to by Congress; and Kansas was admitted into the Union in 1861, only upon the passage by its Legislature of another ordinance, irrevocable without the consent of Congress, accepting certain propositions, in which it was provided that the State should never interfere with the primary disposal of the soil within the same by the United States, and should never tax the lands of the United States. Constitutions and Charters, 613; Act of Congress of January 29, 1861, chap. 20, § 3, 12 Stat. at L. 127; Joint Resolution of Legislature of Kansas of January 20, 1862, Compiled Laws of Kansas 1862, p. 84. In 1865 the Supreme Court of the State, discussing and upholding the validity of a state tax upon Indian lands, said: "If the title to the lands be in the United States, they are not taxable. Not only are the lands of the General Government exempted from taxation by express stipulation on the part of the State, but without such agreement they would not be liable to be taxed. The irrevocable ordinance of the Legislature is merely the expression of what the law would have been without it." *Blue Jacket* v. *Johnson County Comrs.* 3 Kan. 299, 348, reversed by this court in 5 Wall. 737 [72 U. S. bk. 18, L. ed. 667], only because even the Indian lands were exempt from taxation. See also *Parker* v. *Winsor*, 5 Kansas, 362, 367, 372. The statutes of the State of Kansas, ever since its admission into the Union, have enumerated, among the property exempt from taxation, all property, real and personal, of the United States. Compiled Laws 1862, chap. 198, § 2; Gen. Stat. 1868, chap. 107, § 3; Stat. 1876, chap. 84, § 3.

The taxation by the State of Kansas, the validity of which was upheld by the decision of the Supreme Court of that State in *Fort Leavenworth R. R. Co.* v. *Lowe*, 27 Kan. 749, affirmed by this court, 525 [*ante*, 264], was not upon property of the United States, but upon property of a railroad corporation in lands situated within the boundaries of the Fort Leavenworth Military Reservation, yet not in that part of the lands occupied or used by the United States for a fort or military post. The civil and criminal jurisdiction over the Reservation had passed to the State upon its admission into the Union; and the cession of exclusive jurisdiction by the subsequent Statute of Kansas of 1875, chap. 66, which, because it conferred a benefit, was presumed to have been accepted by the United States, expressly saved "to said State the right to tax railroad, bridge and other corporations, their franchises and property, on said Reservation."

It cannot be doubted that the provisions which speak of the exemption of property of the United States from taxation, in the various Acts of Congress admitting States into the Union, are equivalent to each other; and that, like the other provision, which often accompanies them (that the State "shall not interfere with the primary disposal of the soil by the United States"), they are but declaratory, and confer no new right or power upon the United States.

In *Gibson* v. *Chouteau*, 13 Wall. 92, 99 [80 U. S. bk. 20, L. ed. 534, 536], *Mr. Justice* Field, delivering the judgment of this court, said: "With respect to the public domain, the Con-

stitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions and the mode of transferring this property or any part of it, and to designate the persons to whom the transfer shall be made. No state Legislature can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made."

Upon the admission of a State into the Union, the state doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order and the protection of persons and property throughout its limits, except where it has ceded exclusive jurisdiction to the United States. The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high water mark, vest in the State, and not in the United States. *New Orleans* v. *U. S.* 10 Pet. 662, 737 [35 U. S. bk. 9, L. ed. 573, 602]; *Pollard* v. *Hagan*, 3 How. 212 [44 U. S. bk. 11, L. ed. 566]; *Goodtitle* v. *Kibbe*, 9 How. 471 [50 U. S. bk. 13, L. ed. 220]; *Doe* v. *Beebe*, 13 How. 25 [54 U. S. bk. 14, L. ed. 35]; *Barney* v. *Keokuk*, 94 U. S. 324 [Bk. 24, L. ed. 234. But public and unoccupied lands, to which the United States have acquired title, either by deeds of cession from other States or by treaty with a foreign country, Congress, under the power conferred upon it by the Constitution, "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States," has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no State can interfere with this right, or embarrass its exercise. *U. S.* v. *Gratiot*, 14 Pet. 526 [39 U. S. bk. 10, L. ed. 573]; *Pollard* v. *Hagan* [*supra*]; *Irvine* v. *Marshall*, 20 How. 558, 563 [61 U. S. bk. 15, L. ed. 994, 997]; *Gibson* v. *Chouteau*, above cited.

In *McGoon* v. *Scales*, 9 Wall. 23, 27 [76 U. S. bk. 19, L. ed. 545,546], part of the public lands in Wisconsin being claimed under a sale for state taxes, this court, speaking by *Mr. Justice* Miller, said: "The answer to this is, that the land was then owned by the United States, and was not subject to state taxation." No reference was made to any Act of Congress, or compact with the State; but the fact that the land was then owned by the United States was given as the only and conclusive reason why it could not be taxed by the State. So in *Tucker* v. *Ferguson*, 22 Wall. 527,752 [89 U.S. bk. 22, L. ed. 805, 815], in which it was decided that public lands in Michigan, granted by Act of Congress to the State, to be held by the State to aid in the construction of a railroad, could not be taxed by the State, *Mr. Justice* Swayne, delivering judgment, said: "Upon general principles, she could not tax the lands while the title remained in the United States, nor while she held them as the trustee of the United States, which, in the view of the law, was the same thing."

The cases in which it has been held that public lands, granted by the United States to a railroad company, continue to be exempt from State taxation so long as the costs of survey have not been paid and patents have not been issued, stand upon equally broad ground. *Kansas Pac. R. Co.* v. *Prescott*, 16 Wall. 603, 608 [83 U. S. bk. 21, L. ed. 373, 374]; *Union Pac. R. Co.* v. *McShane*, 22 Wall. 444, 462 [89 U. S. bk. 22, L. ed. 747, 751]; *Northern Pac. R. R. Co.* v. *Traill Co.* [*ante*, 477]. And the reason why, after lands have been duly entered at the land-office, and everything has been done to entitle the party to a patent, they have by long usage, confirmed by the decisions of this court, been considered, before the patent is actually taken out, as subject to state taxation, is that the United States have nothing but the naked legal title, and the lands are in truth no longer public property, but have become private property. *Carroll* v. *Safford*, 3 How. 441 [44 U. S. bk. 11, L. ed. 671]; *Witherspoon* v. *Duncan*, 4 Wall. 210 [71 U. S. bk. 18, L. ed. 339]; *Deffeback* v. *Hawke* [*ante*, 428].

Even in the courts of the several States, the decided and increasing preponderance of authority is in favor of the absolute exemption of all property of the United States from state taxation.

The only instances that have been brought to our notice, in which a state court has countenanced the right of a State to tax any property of the United States, are the judgment now under review; some remarks in *Louisville* v. *Commonwealth*, 1 Duvall, 295, in which the only matter in issue was a tax laid by the State of Kentucky on property of one of its own municipal corporations; a dictum in *People* v. *Shearer*, 30 Cal. 645, 658, and two cases in the Supreme Court of Pennsylvania, not found in the regular series of its reports, but only in law periodicals, and in a reprint of one of them in a collection of *nisi prius* and other cases. *Commonwealth* v. *Young*, 1 Hall's Journal of Jurisprudence, 47; *S. C.* Brightly, 302; *Roach* v. *Philadelphia Co.* 2 Am. Law Journal (N. S.) 444.

In *Commonwealth* v. *Young*, decided in 1818, a person employed by the President of the United States, with the authority of Congress, to sell by public auction land in Pittsburgh, owned by the United States, was indicted and fined for so selling it, because he had not been licensed as an auctioneer under the statutes of the State. It was found by special verdict that the title to the land under the late proprietary of Pennsylvania was vested in fee simple in the United States; that the United States had erected a fort thereon, which had been used as a barrack, military depot and place of defense, but had been disused as such a short time before the sale; and that the State had never ceded its jurisdiction over it to the Federal Government. By the Act of Congress of August 2, 1813, chap. 48, the President had been authorized to cause this land to be sold, and the proceeds of the sale were "appropriated, under the direction of the President, to the erection of arsenals, armories and laboratories." 3 Stat. at L. 75. The ground of the decision, as assigned by the court, was that the United States held this lot as an individual, and therefore "the lot was subject to taxation for state purposes, to the laws directing the mode of aliena-

tion, and, in short, every other state regulation that could operate on the property of an individual." 1 Hall, Journal of Jurisprudence, 50; Brightly, 306. Of that decision it is perhaps enough to say that, even if the manner of transferring the property might lawfully be regulated by the State, it does not appear to us to follow that the State might take it by taxation; the decision was made before the judgment of this court in *McCulloch* v. *Md.*, and the subsequent judgment of the Supreme Court of Pennsylvania in *Comrs.* v. *Dobbins*, 7 Watts, 513, sustaining the validity of a county tax upon the salary of an officer of the United States, was reversed by this court. *Dobbins* v. *Erie Co. Comrs.* 16 Pet. 435 [41 U. S. bk. 10, L.ed. 1022].

In *Roach* v. *Philadelphia Co.* above cited, a tax on the United States mint was held valid; but no opinion is reported.

On the other hand, the necessary exemption of all the property of the United States from state taxation has been recognized by the highest courts of Illinois, California and Kansas, in the cases already cited; and by those of Virginia, Connecticut, Iowa and Wisconsin. *Western U. Tel. Co.* v. *Richmond*, 26 Gratt. 1, 30; [171] *Andrews* v. *Auditor*, 28 Gratt. 115, 124; *West Hartford* v. *Water Comrs.* 44 Conn. 360, 368; *Chicago, R. I. & Pac. R. R. Co.* v. *Davenport*, 51 Iowa, 451, 454; *Wisconsin Cent. R. R. Co.* v. *Taylor County*, 52 Wis. 37, 51, 52.

The Legislatures of most of the States have affirmed the same principle, by inserting in their general tax Acts an exemption of property belonging to the United States. Such a provision, as has been well observed by the Supreme Court of Connecticut in *West Hartford* v. *Water Comrs.* above cited, is not the foundation of the exemption, but is inserted only from abundant caution, and because the assessment of taxes is to be made by local officers skilled in the valuation of property, but presumably unlearned in legal distinctions. 44 Conn. 368.

An examination of the existing statutes of the several States (cited in the margin*) shows this result: in at least twenty-six States, namely: [172] Massachusetts, Connecticut, New Jersey, Delaware, Maryland, South Carolina, Vermont, Maine, Ohio, Indiana, Michigan, Wisconsin, Iowa, Kansas, Nebraska, Minnesota, Alabama, Mississippi, Louisiana, Arkansas, Texas, Florida, West Virginia, California, Oregon and Nevada, all property of the United States is expressly exempted from taxation. In Rhode Island, New York, Illinois and Missouri, "all lands belonging to the United States" are exempted; and in New York also "all property, real or personal, exempted from taxation under the Constitution of the United States." In Georgia, the phrase is "all public property;" and in Tennessee, "all property belonging to the United States, used exclusively for public purposes." In New Hampshire, North Carolina and Kentucky, the exemption is of certain public buildings and the lands on which they stand. In three States only, namely: Pennsylvania, Virginia and Colorado, is no exemption of property of the United States expressly declared. But it may be remembered that the Act of Congress for the admission of Colorado provided in the most sweeping terms that the State should impose no tax on lands or property then belonging to, or thereafter purchased by, the United States. Constitutions and Charters, 1246. And no state court has more strongly stated the absolute exemption of property of the United States from state taxation than the Court of Appeals of Virginia has in a recent case saying, "It is very clear that the States are prohibited from taxing either the property of the federal government or the instrumentalities by which its powers are carried into execution. This doctrine is well settled." *Western U. Tel. Co.* v. *Richmond*, above cited.

General tax Acts of a State are never, without the clearest words, held to include its own property or that of its municipal corporations, although not in terms exempted from taxation. *Buckley* v. *Osborn*, 8 Ohio, 180, 187; *Piper* v. *Singer*, 4 Serg. & R. 354; *Directors of the Poor* v. *School Directors*, 42 Pa. 21; *People* v. *Doe*, 36 Cal. 220; *Worcester Co.* v. *Worcester*, 116 Mass. 193; *Trustees of Public Schools* v. *Taylor*, 30 N. J. Eq. (3 Stew.) 618; *Trustees of Public Schools* v. *Trenton*, Id. 667; *Rochester* v. *Rush*, 80 N. Y. 302, *State* v. *Hartford*, 50 Conn. 89. The reasons for this have been well stated in the cases in Massachusetts and New Jersey. *Mr. Justice* Devens, delivering the opinion of the Supreme Judicial Court of Massachusetts, said: "The property of the Commonwealth is

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*The express exemption of property of the United States in the general tax Acts of each State is as follows:

Alabama. "All property belonging to the United States." Code 1876, § 358.

Arkansas. "All property, whether real or personal, belonging exclusively to the United States." Digest 1874, § 5055.

California. "The property of the United States." Political Code 1872, § 3607.

Colorado. None. Gen. Stat. 1883, § 2615.

Connecticut. "All property belonging to the United States." Gen. Stat. 1875, tit. 12, chap. 1, § 12.

Delaware. "Property belonging to the United States." R. S. 1874, chap. 11, § 1.

Florida. "All property, real and personal, of the United States." Digest 1872, chap. 138, § 4.

Georgia. "All property specially exempted by the Constitution of the United States." "All lands, mines and minerals belonging to the United States." Code 1873, § 798. "All public property." Code 1882, § 798.

Illinois. "All unentered government lands, all public buildings or structures of whatever kind, and the contents thereof, and the land on which the same are located, belonging to the United States." R. S. 1880, chap. 120, § 2.

Indiana. "The property of the United States." R. S. 1881, § 6276.

Iowa. "The property of the United States." Code 1873, § 797.

Kansas. "All property belonging exclusively to the United States." Stat. 1876, chap. 94, § 8.

Kentucky. "The property of the United States, used for custom houses, postoffices, docks, shipyards, forts, arsenals or barracks." Gen. Stat. 1883, chap. 92, art. 1, § 3.

Louisiana. "All lands and lots of ground, with their buildings, improvements and structures thereon, and all other property, belonging to the United States." R. S. 1870, § 3233.

Maine. "The property of the United States." R. S. 1883, chap. 6, § 6.

Maryland. "Property belonging to the United States." Rev. Code, 1878, art. 11, § 3.

Massachusetts. "The property of the United States." Pub. Stat. 1882, chap. 11, § 5.

Michigan. "All the property of the United States." Compiled Laws 1871, chap. 21, § 5.

Minnesota. "All property, whether real or personal, belonging exclusively to the United States." Stat. 1878, chap. 11, § 5.

Mississippi. "All property, real or personal,

exempt from taxation because, as the sovereign power, it receives the taxation through its officers or through the municipalities it creates, that it may from the means thus furnished discharge the duties and pay the expenses of government. Its property constitutes one of the instrumentalities by which it performs its functions." 116 Mass. 194. And *Mr. Justice* Depue, delivering the opinion of the Court of Errors of New Jersey, said: "The immunity of the property of the State, and of its political subdivisions, from taxation, does not result from a want of power in the Legislature to subject such property to taxation. The State may, if it sees fit, subject its property and the property owned by its municipal divisions to taxation, in common with other property within its territory. But inasmuch as taxation of public property would necessarily involve other taxation for the payment of the taxes so laid, and thus the public would be taxing itself in order to raise money to pay over to itself, the inference of law is that the general language of statutes prescribing the property which shall be taxable is not applicable to the property of the State or its municipalities. Such property is therefore, by implication, excluded from the operation of laws imposing taxation, unless there is a clear expression of intent to include it." 30 N. J. Eq. (3 Stew.) 681.

In short, under a republican form of government, the whole property of the State is owned and held by the State for public uses, and is not taxable, unless the State which owns and holds it for those uses clearly enacts that it shall share the burden of taxation with other property within its jurisdiction. Whether the property of one of the States of the Union is taxable under the laws of that State depends upon the intention of the State as manifested by those laws. But whether the property of the United States shall be taxed under the laws of a State depends upon the will of its owner, the United States, and no State can tax the property of the United States without their consent.

The only uncertainty in the decisions of this court upon the subject is to be found in two cases, the one argued at December Term, 1847, and the other at December Term, 1848, and both reargued by order of the court and decided at December Term, 1849, by an equal division of the judges, and therefore not reported, but which appear by the records to have been as follows:

The first of those cases was *U. S.* v. *Portland*, which, as agreed in the statement of facts upon which it was submitted to the decision of the Circuit Court of the United States for the District of Maine, was an action brought by the United States against the City of Portland to recover back the amount of taxes assessed for county and city purposes, in conformity with the statutes of Maine, upon the land, wharf and building owned by the United States in that city. The building had been erected by the United States for a custom house, and had always been used for that purpose, and no other. The land, building and wharf were within the legislative jurisdiction of the State of Maine and had always been so, not having been purchased by the United States with the consent of the Legislature of the State. The case was heard in the circuit court at May Term, 1845, and was brought to this court upon a certificate of division of opinion between *Mr. Justice* Story and *Judge* Ware on several questions of law, the principal one of which was, whether the building, land and wharf, so owned and occupied by the United States, were legally liable to taxation; and this court, being equally divided in opinion on those questions, remanded the case to the circuit court for further proceedings. The action therefore failed. The Legislature of Maine having meanwhile by the Statute of 1846, chap. 159, § 5, provided that the property of the United States should be exempted from taxation, the question has never been renewed.

The second case was that of *Roach* v. *Philadelphia Co.* above mentioned, a suit brought by [176] the County of Philadelphia against the treasurer of the mint of the United States to recover State, county and city taxes, which were found by special verdict to have been assessed, pursuant to the Statutes of Pennsylvania, upon a certain marble building and a lot of ground upon which it stood, the property of the United States, and the building having been erected and used by the United States, from the time of its completion, under the Constitution and laws of the United States, as a mint for coining money, regulating the value thereof and of for-

belonging to the United States." Rev. Code 1871, § 1002.

Missouri. "Lands and lots, public buildings and structures, with their furniture and equipments, belonging to the United States." R. S. 1879, § 6659.

Nebraska. "The property of the United States." Gen. Stat. 1873, chap. 66, § 1.

Nevada. "All lands or other property of the United States." Compiled Laws 1873, chap. 98, § 4.

New Hampshire. "The lots of land selected and purchased in this State by the United States for the purpose of erecting lighthouses and other public buildings, with the buildings thereon." Gen. Laws 1878, chap. 88, § 2.

New Jersey. "The property and the bonds and other securities of the United States." R. S. 1877, p. 1251, § 5.

New York. "1. All property, real or personal, exempted from taxation by the Constitution of this State, or under the Constitution of the United States. 2. All lands belonging to this State, or the United States." R. S. 1846, pt. 1, chap. 13, tit. 1, § 4.

North Carolina. Parcels of land, containing not more than twenty acres each, purchased by the United States from any individual or corporation, and held "for the purpose of erecting thereon lighthouses, lightkeeper's dwellings, life-saving stations, buoys and coal depots, and buildings connected therewith." Code of 1883, §§ 3060, 3062.

Ohio. "All property, whether real or personal, belonging exclusively to the United States." R. S. 1880, § 2732.

Oregon. "All property, real and personal, of the United States." General Laws, 1874, chap. 57, § 4.

Pennsylvania. None. Stats. 1873, chap. 41, 1874, chap. 94.

Rhode Island. "Lands ceded or belonging to the United States." Pub. Stat. 1882, chap. 41, § 2.

South Carolina. "All property owned exclusively by the United States." R. S. 1882, § 169.

Tennessee. "All property belonging to the United States, used exclusively for public purposes." Stat. 1883, chap. 105, § 2; Code 1884, § 601.

Texas. "All property, whether real or personal, belonging exclusively to the United States." R. S. 1879, art. 4673.

Vermont. "Real and personal estate owned by the United States." Rev. Laws, 1880, § 270.

Virginia. None. Code 1873, chap. 33, § 14.

West Virginia. "Property belonging to the United States." Code 1868, chap. 29, § 43.

Wisconsin. "Property owned exclusively by the United States." R. S. 1878, § 1038.

eign coin, and for fixing the standard of weights and measures, and now used for that purpose. The judgment rendered by the Supreme Court of Pennsylvania on March 31, 1845, holding the building and land to have been subject to the assessment and payment of the taxes, was brought to this court by writ of error, and affirmed by an equal division of opinion.

The division of opinion here in those cases was evidently the reason for the guarded form in which the general doctrine was stated, while those cases were pending, by *Mr. Justice* Woodbury in *U. S.* v. *Ames*, 1 Woodb. & Min. 76, 85, and presently afterwards by *Mr. Justice* Grier in *U. S.* v. *Weise*, 2 Wall. Jr. 72, and by Mr. Crittenden, as Attorney-General, in 5 Ops. Attys-Gen. 816, as well as by *Mr. Justice* McLean, when, in delivering the judgment of this court upholding the validity of a state law taxing all money or exchange brokers, he said: "The taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the Federal Government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the General Government." *Nathan* v. *La.* 8 How. 73, 82 [49 U. S. bk. 12, L. ed. 993, 996]. Somewhat similar language was used by *Mr. Justice* Clifford in later cases, in which it did not become necessary to define what could properly be considered as "means of the General Government." *Society for Savings* v. *Coite*, 6 Wall. 594, 605 [73 U. S. bk. 18, L. ed. 897, 902]; *State Tonnage Tax Cases* and *Ward* v. *Md.* 12 Wall. 204, 224, 418, 427 [79 U. S. bk. 20, L. ed. 370, 377, 449, 451]; *Transportation Co.* v. *Wheeling*, 99 U. S. 273, 279 [Bk. 25, L. ed. 412, 414].

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But the two decisions above mentioned, by an equal division of this court and with no evidence of the reasons which influenced any of the judges, have no weight as authority in any other case; and we have no hesitation in saying that a tax imposed under authority of a State upon a building used as a custom house or a mint, and the land on which it stands, owned by the United States, cannot be supported, consistently with the principles affirmed in *McCulloch* v. *Md.* especially in 4 Wheat. 432 [17 U. S. bk. 4, L. ed. 607] above cited, or with the recent judgments of this court, some of which have been already referred to.

The liability of the property of the Pacific Railroad Companies to state taxation has been upheld, on the distinction stated in *McCulloch* v. *Md.* 4 Wheat. 436 [17 U. S. bk. 4, L. ed. 608], and in *Osborn* v. *Bank of U. S.* 9 Wheat. 867 [22 U. S. bk. 6, L. ed. 235], already cited, and reasserted in *National Bank* v. *Commonwealth*, 9 Wall. 353, 362 [76 U. S. bk. 19, L. ed. 701, 703], namely: that although the railroad corporations were agents of the United States, the property taxed was not the property of the United States, but the property of the agents, and a State might tax the property of the agents, provided it did not tax the means employed by the national government. *Thomson* v. *Pac. R. R. Co.* 9 Wall. 579 [76 U. S. bk. 19, L. ed. 792]; *Union Pac. Railroad Co.* v. *Peniston*, 18 Wall. 5, 32, 34, 41 [85 U. S bk. 21, L. ed. 787, 792, 795. In *R. Co.* v. *Peniston*, *Mr. Justice* Strong, who delivered the principal opinion, dwelt upon the consideration, that the property taxed was not owned by the United States, as essential to support the validity of the tax. And *Mr. Justice* Bradley, in a dissenting opinion in which *Mr. Justice Field* joined, said: "The States cannot tax the powers, the operations or the property of the United States, nor the means which it employs to carry its powers into execution."

The cases in which this court has held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State have a direct and important bearing upon the question before us.

In *Collector* v. *Day*, 11 Wall. 113, 124 [78 U. S. bk. 20, L. ed. 122, 125], it was adjudged that Congress had no power, even by an act taxing all incomes, to levy a tax upon the salaries of judicial officers of a State, for reasons similar to those on which it had been held in *Dobbins* v. *Erie Co. Comrs.* 16 Pet. 435 [41 U.S. bk. 10, L. ed. 1022], that a State could not tax the salaries of officers of the United States. *Mr. Justice* Nelson, in delivering judgment, said: "The General Government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States, within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the General Government as that government within its sphere is independent of the States."

Applying the same principles, this court, in *U. S.* v. *Baltimore & O. R. R. Co.*, 17 Wall. 322 [84 U.S. bk. 21, L. ed. 597], held that a municipal corporation within a State could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the State, created by the State to exercise a limited portion of its powers of government, and therefore its revenues, like those of the State itself, were not taxable by the United States. The revenues thus adjudged to be exempt from federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the State or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income, belonging to it in its municipal character, must be so held. The reasons for exempting all the property and income of the State or of a municipal corporation, which is a political division of the State, from federal taxation equally require the exemption of all the property and income of the national government from state taxation.

The latest utterance of this court upon the subject is in a case decided at the present term, in which *Mr. Justice* Bradley, delivering the judgment of the whole court, upon a question of the extent of the taxing power of a State, said: "We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and

property belonging to or in the use of the government of the United States." *Coe* v. *Errol*, [*ante*, 715].

The United States acquired the title to all the land now in question under the express authority of Acts of Congress, and by proceedings the validity of which is clearly established by a series of decisions of this court. Acts of June 7, 1862, chap 98, § 7, 12 Stat. at L. 423; June 8, 1872, chap. 337, § 4, 17 Stat. at L. 331, and February 8, 1875, chap. 36, § 26, 18 Stat. at L. 313; *Bennett* v. *Hunter*, 9 Wall. 326 [76 U.S. bk. 19, L. ed. 672]; *DeTreville* v. *Smalls*, 98 U. S. 517 and *Keely* v. *Sanders*, 99 U. S. 441 [Bk. 25, L. ed. 174, 327]; *U. S.* v. *Taylor*, 104 U. S. 216 [Bk. 26, L. ed. 721]; *U. S.* v. *Lawton*, 110 U. S. 146 [Bk. 28, L. ed. 100]. The imposition of direct taxes upon the land by those Acts of Congress was a lawful exercise of the power conferred by the Constitution to lay and collect taxes. The provisions authorizing the United States to sell the land for nonpayment of the taxes assessed thereon, and to purchase the land for the amount of the taxes if no one would bid a higher price, were necessary and proper means for carrying into effect the power to lay and collect the taxes; and so were the provisions authorizing the United States afterwards to sell the land, to apply the proceeds to the payment of the taxes, and to hold any surplus for the benefit of the former owner. While the United States owned the land struck off to them for the amount of the taxes because no one would pay more for it, and until it was sold by the United States for a greater price, or was redeemed by the former owner, the United States held the entire title as security for the payment of the taxes; and it could not be known how much, if anything, beyond the amount of the taxes the land was worth. To allow land, lawfully held by the United States as security for the payment of taxes assessed by and due to them, to be assessed and sold for state taxes would tend to create a conflict between the officers of the two governments; to deprive the United States of a title lawfully acquired under express Acts of Congress and to defeat the exercise of the constitutional power to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States.

The question whether the taxes laid under authority of the State can be collected in this suit depends upon the question whether they were lawfully assessed. But all the assessments were unlawful, because made while the land was owned by the United States. The assessments, being unlawful, created no lien upon the land. Those taxes, therefore, cannot be collected, even since the plaintiffs in error have redeemed or purchased the land from the United States.

Whether the Supreme Court of Tennessee rightly construed the provisions of the Constitution and statutes of the State as not exempting from taxation land belonging to the United States, exclusive jurisdiction over which had not been ceded by the State, is quite immaterial; because, for the reasons and upon the authorities above stated, this court is of opinion that neither the people nor the Legislature of Tennessee had power, by Constitution or statute, to tax the land in question, so long as the title remained in the United States.

The result is, that the judgment of the Supreme Court of the State of Tennessee must be reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ANTONIO TUA, *Plff. in Err.*, [201]

v.

OLIVIER CARRIERE, Testamentary Exr. of ANTOINE CARRIERE, Deceased; EMILE L. CARRIERE, CHARLES J. CARRIERE; and J. M. SEIXAS, Syndic of EMILE L. CARRIERE and CHARLES J. CARRIERE, Individually and as Surviving Members of the Firm of A. CARRIERE & SONS, *Intervener*.

(See S. C. Reporter's ed. 201-210.)

Insolvent law of Louisiana—cession of property by insolvent—effect on attachments—cession by surviving partners—National Bankruptcy Law.

1. Under the law of Louisiana the effect of a cession of property by an insolvent person is to dissolve all attachments which have not matured into judgments.
2. A cession by surviving partners carries their own undivided interests, and if it purports to carry the interest of a deceased partner, and the court accepts the surrender, the validity of the cession cannot be attacked collaterally in attachment proceedings.
3. Property in possession of one court is not liable to seizure on process from another.
4. A State insolvent law is valid though enacted while a national bankruptcy Act is in force, and on repeal of the latter it becomes operative.

[No. 1090.]

Submitted Jan. 4, 1886. Decided Mar. 1, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

Statement by *Mr. Justice* **Woods**:

The plaintiff in error brought this suit on [201] August 18, 1884, on certain bills of exchange drawn by the firm of A. Carriere & Sons, on which he alleged there was due him the sum of $12,437. His petition stated that A. Carriere & Sons was a commercial firm, lately doing business in New Orleans, composed of Antoine Carriere, Emile L. Carriere and Charles J. Carriere; that Antoine Carriere had departed this life on June [202] 4, 1884, testate, and that Olivier Carriere and Emile L. Carriere had been appointed his executors. The petition alleged as a ground for the issue of a writ of attachment that the defendants had converted, or were about to convert, their property into money or evidence of debt, with intent to place it beyond the reach of their creditors, and prayed that the writ might issue against the property, goods and effects of the firm of A. Carriere & Sons, and

NOTE.—*Constitutional law; bankruptcy; validity of state laws.* See Sturges v. Crowninshield, 17 U. S. bk. 4, 529, *note*; Van Raugh v. Van Arsdalen, 3 Cai., 154, *note in L. ed.*; Hicks v. Brown, 12 Johns., 142, *note in L. ed.*

of Emile L. Carriere and Charles J. Carriere; that said firm be cited, and the individual members thereof, Emile L., and Charles J., and Antoine Carriere, through his testamentary executors, Olivier Carriere and Emile L. Carriere, and after due proceedings, that judgment be rendered in favor of petitioner and against A. Carriere & Sons and the members of said firm *in solido* for the amount due on the bills of exchange, "with lien and privilege on the property attached."

In accordance with the prayer of the petition a writ of attachment was issued, and, as appears by the marshal's return, was levied on certain property and effects already in his custody on other writs of attachment. Afterwards, one James M. Seixas filed his intervention and opposition in the cause, in which he averred that on July 18, 1884, the defendants, A. Carriere & Sons, made a cession of all their property to their creditors in the Civil District Court of the Parish of Orleans, which was accepted by the court for their creditors; that the petitioner was appointed by the court, and on August 21, 1884, was elected by the creditors and qualified as syndic of said involvent estate, and as such had title and right of possession to the goods seized by the marshal, and that the property was not subject to attachment, and prayed that the attachment might be dissolved. Olivier Carriere, as executor of Antoine Carriere, joined in the petition and intervention of Seixas, and prayed for the dissolution of the attachment.

Emile L. and Charles J. Carriere filed for themselves individually, and for the firm of A. Carriere & Sons, an answer, in which they averred that individually, and in behalf of A. Carriere & Sons, they had, on July 18, 1884, in the Civil District Court of the Parish of Orleans, surrendered all their assets to their creditors, and the surrender had been accepted by [203] the court and their creditors, and they prayed that the attachment might be dissolved.

The plaintiff filed an answer to the intervention of Seixas, in which he denied that the latter was the syndic of Carriere & Sons, averred that the property attached was in the hands of the United States Court, and that Seixas never had any control over the same, and had no right to disturb the possession of the United States Court.

Upon the issues thus raised upon the original petition of the plaintiff and the intervention of Seixas, the case was tried by a jury, which returned a verdict for the plaintiff for $12,437.82, and that the attachment be dissolved.

It appeared from a bill of exceptions taken upon the trial that evidence was given tending to show that the firm of A. Carriere & Sons was composed of Antoine Carriere, Emile Carriere and Chas. J. Carriere; that Antoine Carriere departed this life on the 4th day of June, 1884, and Olivier Carriere was appointed his testamentary executor, and that Emile L. and Chas J. Carriere, individually, and as surviving members of A. Carriere & Sons, took, on the 18th day of July, 1884, the benefit of the insolvent law of Louisiana, and filed schedules of their individual assets and liabilities, and of the assets and liabilities of the firm of A. Carriere & Sons; that at the meeting of the creditors, J. M. Seixas was appointed and qualified as the syndic of Emile L. and Chas. J. Carriere, individually, and as surviving members of the firm of A. Carriere & Sons; that their creditors refused them a discharge either individually or as surviving members of said firm; that said syndic was appointed prior to the attachment in this case, and that the attachment was levied subsequent to the refusal to discharge the said Emile L. and Chas. J. Carriere; that the attachment was levied on property already in the hands of the marshal by virtue of attachments issued prior to the 18th of July, 1884, and that said prior attachments were dissolved by the court on the day of the trial. Thereupon the court charged the jury that "The cession shown in this case is made by E. L. Carriere and Chas. J. Carriere, individually and as surviving partners of A. Carriere & Sons, and by operation of law carries into the surrender all their individual property and all the property of the firm; and that the effect of the cession and proceedings thereunder was to stay and practically dissolve all attachments then issued against the said surrendering partners, and all property surrendered in the state courts by direct operation of state laws, and in the national court by force of section 933 Revised Statutes." The plaintiff excepted to this charge. The court gave effect to the verdict of the jury by rendering judgment in favor of the plaintiff for $12,487.82, and dissolving his attachment. Thereupon the plaintiff sued out the present writ of error to bring under review that part of the judgment of the circuit court which dissolved his attachment.

Mr. **Charles Louque**, for plaintiff in error.

Mr. **Thomas L. Bayne**, for Seixas, defendant in error.

Mr. Justice **Woods** delivered the opinion of the court:

It is not disputed that if the insolvent law of Louisiana was a valid law, and the surrender made by the surviving partners of the dissolved firm of A. Carriere & Sons was a valid surrender of the effects of the firm, the attachment of the plaintiff was rightfully dissolved. For, under the law of Louisiana the effect of a cession of property by an insolvent person is to dissolve all attachments which have not matured into judgments. Code of Practice, 724; *Hanna* v. *His Creditors*, 12 Mart. 32; *Fisher* v. *Voss*, 3 Rob. 457; *Collins* v. *Duffy*, 7 La. Ann. 39. And by section 933 of the Revised Statutes of the United States an attachment of property upon process instituted in any court of the United States is dissolved when any contingency occurs by which, according to the law of the State where the court is held, such attachment would be dissolved upon the process instituted in the courts of said State.

But the plaintiff insists that the partnership of Carriere & Sons having been dissolved on June 4, 1884, by the death of Antoine Carriere the surviving members of the firm had no power to surrender the assets of the firm for the benefit of its creditors, and the plaintiff's attachment of said assets was therefore good.

We agree that the attempt of the surviving partners to surrender the share of their deceased partner in the assets of the firm dissolved by his death was not authorized by law, unless by consent of the heirs, or for some other reason

not disclosed by this record. For, under the jurisprudence of Louisiana, upon the death of a member of a partnership, the title to his interest in the partnership effects descends to his heir, and does not vest in the survivor. The law of Louisiana on this point is stated and illustrated by the following decisions of the supreme court of that State:

In the case of *Simmons* v. *Parker*, 4 Martin, N. S. 200, the court said: "We think the power of the surviving partner to alienate the property belonging to" the partnership "ceased with the dissolution, that the heirs of the deceased" partner "became joint owners of the common property, and that the utmost effect that can be given to a transfer" by the surviving partner "is to consider it as disposing of all the right which the vendor had in the thing sold."

In *Shipman* v. *Hickman*, 9 Rob. 149, it was held that after the death of a member of a partnership the partnership property was owned in common by the representatives of the deceased partner and the surviving partner, and that the interest of the representatives of the deceased could not be disposed of or alienated by the surviving partner.

So in *Notrebe* v. *McKinney*, 6 Rob. 13, it was said: "Our laws recognize no authority in a surviving partner. He cannot administer the partnership effects until regularly appointed, nor is he then surviving partner, but administrator."

In *Norris* v. *Ogden*, 11 Mart. 455, the court held that the heirs of a commercial partner have a right to participate with the survivor in the liquidation until a partition; if a partner sues for a partnership claim the others may be made parties to secure their rights.

"In commercial partnerships," says the court in *Flower* v. *O'Connor*, 7 La. 194, "the survivor, to receive the deceased partner's share and hold it subject to partnership debts, must apply to the probate court, have the portion ascertained and valued, and give security.

In *Shipwith* v. *Lea*, 16 La. Ann. 247, it was held that at the death of a partner his interest in the firm is vested in his heirs at law, and the surviving partner can only acquire that interest by transfer or assignment from the heirs. See also *Pickerell* v. *Fisk*, 11 La. Ann. 277; and *McKowen* v. *McGuire*, 15 La. Ann. 637.

But while it must be conceded that the cession made by the surviving members of the interest of Antoine Carriere, the deceased partner, in the assets of the firm, was not authorized, unless for some reason appearing to the court but not shown by this record, we are of opinion that the validity of the cession cannot be attacked in this collateral way. The cession of the surviving partners carried their own undivided interest in all the partnership effects, and it purported to carry the interest of the deceased partner. The surrender was accepted by the court; which, by the appointment of a syndic, undertook the administration of all the property of the late firm of A. Carriere & Sons. It is not disputed that the court had jurisdiction over the subject matter and the parties interested. It had jurisdiction, and it was its duty to decide whether the cession of the effects of the partnership was valid and effectual, and what property it conveyed. The fact that the heirs of Antoine Carriere did not join in the cession does not render the orders of the civil district court void. The judgment of that court accepting the cession of the property and appointing a syndic could only be reversed in a direct proceeding. This is the well settled law of Louisiana. It has been held by the supreme court of that State that the order of a court, accepting a cession of goods under the insolvent laws, and the staying of proceedings, is a judgment which demands the exercise of legal discrimination and which, when granted, can be set aside only by appeal or action in nullity. *State ex rel. Boyd* v. *Green*, 34 La. Ann. 1027. So in *Cloutier* v. *Lemeé*, 33 La. Ann. 305, the same court said: "The judgment of the civil district court, accepting the cession of the property and appointing a syndic, cannot be collaterally attacked." [207]

In *Nimick* v. *Ingram*, 17 La. Ann. 85, the facts were that Ingram had made in the fifth district court a surrender of his property for the benefit of his creditors, among whom were Nimick & Co. The court accepted the cession and stayed all proceedings against his person and property. After these events Nimick & Co. caused an execution to be issued on a judgment which they had recovered against Ingram in the fourth district court, and under it seized certain property which they charged was the property of Ingram, and in his possession. Thereupon Ingram took a rule upon Nimick & Co. in the fifth district court, where the insolvency proceedings were pending, requiring them to show cause why they should not respect the order of that court suspending proceedings against him, and why all further action upon the execution sued out by Nimick & Co. should not be stayed. The rule was upon trial made absolute, and Nimick & Co. appealed. In the supreme court they urged that by their diligence and vigilance they had discovered the property seized by them, which had never been surrendered by the insolvent debtor and, having thus made it available, had the right to appropriate it to the satisfaction of their claim. Upon the case thus stated the court said: "However irregular the proceedings in insolvency may have been, and however fraudulently the debtor may have acted, the plaintiffs could not on that account disregard the decree of the court which stayed all judicial proceedings against the insolvent and his property. They were parties to the proceedings, and were bound to respect them. * * * Any informality in the proceedings when questioned must be by direct action. No creditor will be permitted to disregard and treat as an absolute nullity a judgment accepting a surrender made by his debtor and granting a stay of proceedings. * * * The acceptance for the creditors by the court of the ceded estate vests in them all the rights and property of the insolvent, whether placed on the schedule or not; and the syndic may sue to recover them. But any creditor may show, provided it be contradictorily with the mass of the creditors or their legal representatives, that any particular object or fund is not embraced in the surrendered estate, but is subject exclusively to his individual claim. And this is the remedy of the plaintiffs if they have any." See also *Hanney* v. *Healey*, 14 La. Ann. 426. [208]

This is in accord with the general rule that when property is in the possession of one court

for administration it is not liable to be seized by process from another. *Taylor* v. *Carryl*, 20 How. 583 [61 U. S. bk. 15, L. ed. 1028]; *Freeman* v. *Howe*, 24 How. 450 [65 U. S. bk. 16, L. ed. 749; *Buck* v. *Colbath*, 3 Wall. 334 [70 U. S. bk. 18, L. ed. 257]; *Peoples' Bank* v. *Calhoun*, 102 U. S. 256 [Bk. 26, L. ed. 101]; *Krippendorf* v. *Hyde*, 110 U. S. 276 [Bk. 28, L. ed. 145].

If there was any defect or informality in the surrender, the remedy of the plaintiff was, first, to apply to the court in which the surrender was made to set aside its order accepting the surrender and appointing a syndic. The plaintiff could not seize the property the administration of which the civil district court had accepted as if no surrender thereof had been attempted. *Tyler* v. *His Creditors*, 9 Rob. 372; *Harris* v. *Knox*, 10 La. 230.

The property surrendered to and accepted by the civil district court included the undivided shares therein of the surviving partners. The cession of their shares was valid. Of this there can be no question. This gave the syndic appointed by that court the right to the possession of the whole. It was impossible for that court to perform its duty in respect of the property surrendered if its possession was disturbed. But the plaintiff, assuming the cession to be void *in toto*, and giving it no effect even as to the shares of the surviving partners who made it, contends that he can attach the entire interest of all the partners, and apply all the proceeds of the property to the payment of his debt to the exclusion of other creditors. His attachment was made with this purpose. It could not be effectual except by actual seizure and detention of the property attached. *Nelson* v. *Simpson*, 9 La. Ann. 311. In this case the property was seized on the attachment after the civil district court had accepted the surrender of the entire assets of the dissolved partnership, and after the property was constructively in its possession. We think the writ was improvidently issued and the levy invalid and ineffectual; and the attachment was properly dissolved, unless, as is next contended by the plaintiff in error, the Insolvent Law of Louisiana is of no force or effect.

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This position is based on the assertion that the Insolvent Law of Louisiana was passed while the General Bankrupt Act of the United States was in force, and as the provisions of the two Acts were inconsistent, the insolvent law was invalid and void.

The plaintiff in error concedes, as well he may, that, if the Insolvent Law of Louisiana had been enacted before the passage of the Bankrupt Act, it would have been valid, and that the effect of the Bankrupt Act would have been to suspend it only while the Bankrupt Act remained in force, and on its repeal the insolvent law would have revived. *Ward* v. *Proctor*, 7 Met. 318; *Lothrop* v. *Highland Foundry Co.* 128 Mass, 120; *Orr* v. *Lisso*, 33 La. Ann. 476. But he asserts that the Insolvent Law of Louisiana was passed while the Bankrupt Act of the United States was in force, and was therefore invalid and void and so continued after the repeal of the Bankrupt Act. We do not agree with either the premises or the conclusion. The Supreme Court of Louisiana, in the case of *Orr* v. *Lisso*, 33 La. Ann. 476, which was decided in April, 1881, held "that the insolvent laws now in force in this State were in existence in 1867, when Congress adopted a uniform system of bankruptcy." And the court added: "The operation and effect of those laws were suspended until September 1, 1878, when the General Bankrupt Law was repealed. This repeal vivified the state laws in the meantime dormant." A reference to the statutes of Louisiana shows that the insolvent law was first enacted in 1817 (see Acts of the first session of the third Legislature of Louisiana, begun November 18, 1816, p. 126); it was carried into the revision of 1855 (see R. S. of La. of 1856, pp. 251-259), and included in the revision of 1870 (see R. S. of 1870, p. 353), and still remains upon the statute book (see Voorhies Rev. Laws of La. 1884, pp. 279-288). The Act as it appears in the revision of 1855 is substantially the same as in Voorhies' Revised Laws of 1884. The circumstance alleged by the plaintiff that in the revision of 1870 the insolvent law was formally re-enacted is entirely immaterial. If those laws had then been enacted for the first time, they would, so far as inconsistent with the Bankrupt Act, have been inoperative while that Act remained in force, but upon its repeal would have come into operation. The enactment of the insolvent law during the life of the Bankrupt Act would have been merely tantamount to a provision that the former should take effect on the repeal of the latter. It follows that since the repeal of the Bankrupt Act all the provisions of the Insolvent Law of Louisiana have been valid and operative.

Although, as appears from what we have said, the charge of the court did not accurately state the effect of the cession by the surviving partners of the assets of the dissolved firm of A. Carriere & Sons, yet it is clear that upon the law and the facts the verdict of the jury was right. The error of the court, therefore, works the plaintiff no injury and does not require a reversal of the judgment dissolving the attachment. *Brobst* v. *Brock*, 10 Wall. 519 [77 U. S. bk. 19, L. ed. 1002]; *Phillips, etc. Co.* v. *Seymour*, 91 U. S. 646 [Bk. 23, L. ed 341].

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

ASHBEL H. BARNEY, JESSE HOYT, ALFRED M. HOYT, ET AL., *Appts.*,

v.

WINONA AND ST. PETER RAILROAD COMPANY.

(See S. C. Reporter's ed. 228-232.)

Practice—effect of decision on former appeal—construction of land grant Acts.

1. The rule that what was decided on a first appeal is not open to reconsideration in the same case on a second appeal upon similar facts does not apply to expressions of opinion on matters the disposition of which was not necessary to the decision.

2. In the construction of land grant Acts in aid of railroads, "granted lands" are held those falling within the limits specially designated, the title to which attaches when the lands are located by an approved and accepted survey of the line, filed in the Land Department, as of the date of the Act of Congress; while "indemnity lands" are those selected in lieu of parcels previously disposed of or reserved, the title to which accrues only from their selection.

3. The reservation made by the third section of the Act of March 3, 1865, increasing a prior grant of lands to Minnesota for railroad purposes, applies to the granted lands of the prior grant falling within the six mile limit and not to the possible indemnity lands which might be subsequently acquired.

[No. 1221.]

Submitted Jan. 7, 1886. Decided March 1, 1886.

APPEAL from the Circuit Court of the United States for the District of Minnesota.

The case is stated by the court.

Mr. **Gordon E. Cole,** for appellants.

Mr. **Thomas Wilson,** for appellee.

Mr. Justice **Field** delivered the opinion of the court:

This case was before us at the October Term, 1884. By an Act of Congress passed March 3, 1857, a grant of land was made to Minnesota, then a Territory, to aid in the construction of certain railroads, including one from Winona, a town on the Mississippi River, to a point on the Big Sioux River, in the present Territory of Dakota. 11 Stat. at L. 195. The grant was of every alternate section designated by odd numbers, for six sections in width on each side of the road, subject to certain exceptions, not important to be here mentioned, with a right to select indemnity lands within fifteen miles from the line of the road. In May following the Legislature of the Territory authorized a company, previously incorporated, to construct and operate this road; and, to aid in its construction, granted to the company the interest and estate, present and prospective, of the Territory and future State, in the lands ceded by the Act of Congress, together with the rights, privileges and immunities conferred by it.

In 1858* the Territory became a State and was admitted into the Union; and under proceedings for the foreclosure of a mortgage executed by the company, it became, before March, 1862, reinvested with the estate in the lands and the rights and privileges it had granted. In March, 1862, its Legislature passed an Act transferring the lands, property, franchises and privileges with which it had thus become reinvested, to the Winona and St. Peter Railroad Company, which soon afterwards commenced the construction of the road. By the Act of Congress of March 3, 1865, the quantity of land granted by the Act of 1857 was increased to ten sections per mile, with an enlargement of the limits within which indemnity lands might be selected from fifteen to twenty miles. 13 Stat. at L. 562. The third section provided that any lands which had been granted to Minnesota for the purpose of aiding in the construction of any railroad which might be located within the limits of the extension, should be deducted from the "full quantity" granted by the Act. The full quantity was the four additional sections, and we held that the reservation was merely a legislative declaration of that which the law would have pronounced independently of it, inasmuch as a prior grant of the same property must necessarily be deducted from a subsequent one in which it is included.

In October, 1867, the Company agreed with the plaintiffs, upon sufficient consideration, to convey to them as many acres of land, previously granted by Congress to Minnesota, as it should receive from the State by reason of the construction of its road already made, estimated to be 105 miles, but in fact only 102 miles and a fraction of a mile. This suit was brought to enforce the specific performance of this contract, and the only question between the parties was as to the quantity of land to be conveyed under it.

By the Act of 1857, lands were also granted to Minnesota to aid in the construction of the road of the Minnesota (Minneapolis) and Cedar Valley Railroad Company; afterwards of the Minnesota Central Railroad Company (Laws of Minn. Extra Sess. 1857, 20, and Special Laws of 1863, 137); and that road intersected the road of the defendant between Rochester and Waseca; and lands of that company at the intersection were located within the limits of the extension of four sections made by the Act of 1865.

The court below, however, held that, for the part of the defendant's road constructed after the Act of 1865, the plaintiffs were entitled, under their contract, to ten full sections per mile, without any deduction for the lands which were located at the intersection of the road with the road of the Minnesota Central Railroad Company, and within the grant for the construction of the latter. It was accordingly adjudged that the plaintiffs were entitled, in addition to what had been voluntarily conveyed to them, to a conveyance of 197,111 acres and a fraction of an acre, and a decree to that effect was entered. The case being brought to this court, that decree, at the October Term, 1884, was reversed, and the cause sent back to the court below, in order that the proper deduction might be made by reason of the interference of the two grants, and the elder grant be deducted from the extension made by the Act of 1865, so far as it was located within that extension. 113 U.S. 618, 629 [Bk. 28, L. ed. 1109, 1113].

In speaking of the two grants we said of the first one, that of 1857, that it was one by description, that is, of land in place and not one of quantity. It was of particular parcels of land designated by odd numbers for six sections on each side of the road; that is, of particular parcels of land lying within certain defined lateral limits to the road and described by numbers on the public surveys. The grant of the four additional sections by the Act of 1865 was also a grant of land in place. The intention of Congress was to enlarge the first grant from six to ten sections per mile; the additional four to be taken in like manner as the original six, and subject to the same limitations, and to others that had been or might be prescribed, with a right to select indemnity lands within twenty miles instead of fifteen. The Act did not purport to change the character of the first grant, but to increase its quantity. We said, however, that the grant of these additional sections might be regarded as one of quantity; an inadvertence for which the writer of that opinion, who is also the writer of this one, is alone [231]

*In the opinion in 113 U. S. 621 [Bk. 28, L. ed. 1109], the admission by a misprint is stated to have been in 1857. The Constitution of the State was adopted in that year, but the admission was on May 11, 1858. 11 Stat. at L. 285.

responsible. The statement was not at all material to the decision, which was that a deduction should have been made by reason of the intersection of the two grants, so far as the prior grant was located within the extension.

We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case and must control its disposition; but the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision. When the case went back, the court below seems to have been embarrassed by the erroneous description of the character of the grant of the four additional sections, and to have felt obliged to deduct from the amount originally decreed the number of acres which, prior to March 3, 1865, had passed to Minnesota within the designated limits of the grant to aid the construction of the road of the Minnesota Central Railroad Company, and also the number of acres which had been taken beyond them within the indemnity limits of fifteen miles. In this construction of the reservation made by the third section of the Act of 1865, we think the court erred. The reservation from the four sections was of land previously [232] granted, which was located within them. The previous grant was of lands in place, for it was of alternate sections designated by odd numbers, for six sections in width on each side of the road; and that portion of it was reserved from the subsequent grant which fell within the four new sections, also land in place.

In the construction of land grant Acts, in aid of railroads, there is a well established distinction observed between "granted lands" and "indemnity lands." The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the Act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection. It is these "granted lands" of the the prior grant falling within the six-mile limit that, in our opinion, are reserved, and not the possible indemnity lands which might be subsequently acquired. These granted lands of the prior grant being in place could be readily deducted from the four sections, also in place, whenever the roads of the two companies intersected, and the lands fell within the four sections. The quantity thus granted is found by the special masters appointed by the court to be 15,000$\frac{44}{100}$ acres. This quantity only, in addition to the lands used for the track of the road of the Winona and St. Peter Railroad Company, and for depots and other purposes necessary and incident to its operation, should therefore be deducted from the number of acres, to a conveyance of which from the Company the plaintiffs, by the decree of the court below at its December Term, 1880, were adjudged to be entitled.

The decree will, therefore, be reversed, and the cause be remanded with directions to enter a new decree conformable to this opinion; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN PATCH, *Plf. in Err.*,
v.
ELIAS E. WHITE.

(See S. C. Reporter's ed. 210-227.)

Construction of wills—latent ambiguity—parol evidence.

1. In the construction of wills a latent ambiguity may be removed by extrinsic evidence.

2. A latent ambiguity may arise upon a will, when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or it may arise when the will contains a misdescription of the object or subject.

3. Where a latent ambiguity consists of a misdescription, if it can be struck out and enough remain in the will to identify the person or thing, the court will so deal with it; or if it is an obvious mistake, will read it as if corrected.

4. Where the testator devised "lot 6" in a certain block, to a brother, and disposed of the remainder of his estate to others, and it appeared that he did not own lot 6 but did own lot 3 in said block and that lot 3 was otherwise properly described in the will, said lot 3 is held by this court to have been lawfully devised.

[No. 58.]

Argued Nov. 12, 1885. Affirmed by divided court, Nov. 23, 1885. Judgment rescinded and rehearing granted, Dec. 14, 1885. Reargued Jan. 13, 14, 1886. Decided March 1, 1886.

IN ERROR to the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. **John D. McPherson** and **Calderon Carlisle**, for plaintiff in error:

1. It is a well settled principle, applicable alike to wills, deeds and written contracts in general, that extrinsic evidence is always admissible for the purpose of applying the writing to its proper subject matter.

Bradley v. *Packet Co.* 13 Pet. 99 (38 U. S. bk. 10, L. ed. 77); *Blake* v. *Doherty*, 5 Wheat. 362 (18 U. S. bk. 5, L. ed. 109); *Atkinson* v. *Cummins*, 9 How. 485 (50 U. S. bk. 13, L. ed. 227); *Reed* v. *Insurance Co.* 95 U. S. 30 (Bk. 24, L. ed. 349); *Maryland* v. *R. R. Co.* 22, Wall. 112 (89 U. S. bk. 22, L. ed. 714).

2. In the case of a will, parol evidence which will place the court in the position of the testator with reference to extrinsic circumstances is always admissible; and the spirit in which courts approach the construction of wills, and the considerations which govern them in the admission of evidence are more liberal than in the case of other writings.

Hiscocks v. *Hiscocks*, 5 M. and W. 363; *Finlay* v. *King*, and *Inglis* v. *Trustees*, 3 Pet. 347, 117 (38 U. S. bk. 7, L. ed. 702, 624); *Smith* v. *Bell*, 6 Pet. 75 (31 U. S. bk. 8, L. ed. 325); *Allen's Errs* v. *Allen*, 18 How. 393 (59 U. S. bk. 15, L. ed. 396); *King* v. *Ackerman*, 2 Black. 417 (67 U. S. bk. 17, L. ed. 298); *Clarke* v. *Boorman's Errs.* 18 Wall. 502 (85 U. S. bk. 21, L. ed. 906); *Blake* v. *Hawkins*, 98 U. S. 324 (Bk. 25, L. ed. 141).

3. In the case of a latent ambiguity in a will or other writing, which can only appear by extrinsic evidence, parol evidence such as was offered is always admissible to explain the ambiguity.

9 How. 485 (50 U. S. bk. 13, L. ed. 227); *Miller* v. *Travers*, 8 Bing. 244; *Barry* v. *Coombe*, 1 Pet. 651 (26 U. S. bk. 7, L. ed. 301); *Allen* v. *Lyons*, 2 Wash. 477.

4. The parol evidence was competent evidence, and should have been admitted. It was offered "to identify the * * * thing intended by the testator;" to identify the thing devised to Henry Walker in the will, etc.

River's Case, *Purse* v. *Surplin*, and *Minshull* v. *Minshull*, 1 Atk. 410, 415 and 411; *Powell* v. *Biddle*, 2 Dall. 71 (2 U. S. bk. 1, L. ed. 293); *Doe* v. *Huthwaite*, 3 B. & A. 632; *Bradshaw* v. *Bradshaw*, 2 Y. & Coll. Exch. 72; *Allen* v. *Lyons*, 2 Wash. 477.

5. There is a marked distinction between those cases where the exact words of the will had some operation and those where they have none; where a devise is operative, and where it wholly fails.

In the former cases courts have shown themselves uniformly disposed to insist on the literal sense of the words of the will. In the latter they have acted on the principle laid down by *Chief Justice* Marshall, in *Smith* v. *Bell*, above cited, that "No effort to explain the words in a different sense can do so much violence to the clause as the total rejection of the whole bequest;" and have sought diligently among the property of the testator, with all the light obtainable from extrinsic circumstances, for some subject on which the bequest or devise might operate.

See *Doe* v. *Greening*, 3 Maule & Sel. 171; *Newton* v. *Lucas*, 6 Sim. 54; *Miller* v. *Traverse*, 8 Bing. 244.

Among the cases of the second class, of which there is almost an infinite variety, are the following:

Pacy v. *Knolly*, Brownlow, 131; *Doe* v. *Roberts*, 5 B. & Ald. 407; *Merrick* v. *Merrick*, 37 Ohio St. 127; *Cleveland* v. *Spilman*, 25 Ind. 95; *Moreland* v. *Brady*, 8 Oregon, 303; *Winkely* v. *Kaim*, 32 N. H. 268; *Selwood* v. *Mildmay*, 3 Ves. 306; *Door* v. *Geary*, 1 Ves. Sr. 255; *Dobson* v. *Waterman*, 3 Ves. 308, note; *Penticost* v. *Ley*, 2 Jac. & W. 207; *Clark* v. *Atkins*, 90 N. C. 629.

The same principles have governed those cases where there is a mistake in the name or description of the person instead of the thing; in the object instead of the subject of the devise or bequest.

Tucker v. *Seaman's Aid Society*, 7 Met. 188; *Button* v. *Am. Tract Society*, 23 Vt. 336; *Trustees* v. *Peasles*, 15 N. H. 317. See also, *Pinsuirn* v. *Brass*, Finch (Fol.), 403; *Dowset* v. *Sweet*, Amb. 175; *Parsons* v *Parsons*, 1 Ves. Jr. 266; *Smith* v. *Coney*, 6 Ves. 42; *Garth* v. *Meyrick*, 1 Brown, C. C. 30; *Stockdale* v. *Bushby*, 1 Corp. 229 *Doe* v. *Danvers*, 7 East, 299; *Hampshire* v. *Pierce*, 2 Ves. Sr. 218; *Beaumont* v. *Fell*, 2 P. Wms. 141.

6. The admitted power of courts to transpose words and clauses in wills, to effectuate the intention of the testator, has been applied in cases closely resembling the case at bar.

Bradwin v. *Harper*, Amb. 374; *Mosley* v. *Massey*, 8 East, 149; *Ex parte Hornby*, 2 Bradf. (N. Y.), 420.

The cases all illustrate the fundamental rule by which courts are governed in dealing with a will, viz.: to carry out the intention of the testator and, if possible, not to allow it to be defeated. They do not seek to make an intention for him nor do they look for an intention not in the will; but, finding that he has expressed some intention in the paper, they are solicitous to ascertain what that intention was.

In the District of Columbia the law is the same today with reference to the devising of after-acquired property, as it was in England, when text writers and judges on the bench put their supposed cases, and decided actual cases without once considering whether the devise applied accurately to anything not belonging to the testator, which was wholly without the possible purview of the will.

The fact that there is a lot accurately described, as far as its arbitrary designation on the plat of the City of Washington is concerned, cannot affect this devise any more than the fact that there is such a lot laid down on the plat of the City of Melbourne in Australia. But the description in the devise is not in every particular an accurate description even of lot 6 in square 403, with which the testator and his will are shown to be entirely unconnected.

The devise is of a lot with improvements thereon erected. Lot 6 in square 403 had no improvements thereon erected. This makes it absolutely certain that the testator did not, in fact, devise in his will a lot which he did not own; while in law it was impossible for him to do so.

The real estate devised, including the residue, being all described by lots and squares, the will purports to contain a schedule of all that the testator owned; and lot 8 in square 406, which he did own, is not otherwise described than as lot 6 in square 403.

The last devise in the will purports to give a schedule of all his property which the testator had not disposed of; it does not contain lot 8 in square 406; and it consequently asserts, by implication, that said lot had been devised in a previous clause, and if so, then it was devised by the description of lot 6 in square 403.

Messrs. **Walter D. Davidge** and **J. Holdsworth Gordon**, for defendant in error:

The evidence was properly rejected for two reasons: first, because it tended to the disherison of the heir at law; and second, because it tended to contradict the plain language of the will.

1. As to the first. The testator left an only child, his heir at law.

It is an established canon of interpretation that the heir at law, or those standing in his place cannot be disinherited, except by express devise or implication so inevitable that an intention to the contrary cannot be supposed. The heir takes by nature and law, and can only be disinherited by some explicit affirmative gift.

3 Jarm. Wills, 5th Am. ed. 704; 1 Powell, Devises, 199; *Berry* v. *Berry*, 1 Har. & J. 417; *Cresswell* v. *Lawson*, 7 G. & J. (Md.) 227; *Ridgely* v. *Bond*, 18 Md. 437; *Saylor* v. *Plaine*, 31 Md. 158; *Lingan* v. *Carroll*, 3 H. & McH.

(Md.) 333; *Allen's Exrs.* v. *Allen*, 18 How. 385 (59 U. S. bk. 15, L. ed. 396); *Finlay* v. *King*, 3 Pet. 379 (28 U. S. bk. 7, L. ed. 718); *French* v. *McIlhenny*, 2. Binn. (Pa.) 20; *Doe* v. *Buckner*, 6 T. R. 611; *Hayden* v. *Stoughton*, 5 Pick. 536; *Roosevelt* v. *Felton*, 7 Carr. 79, 187.

In the present case there is no devise or express words or implication which takes the lot in suit from the heir at law. On the contrary the devise as made leaves intact the right of the heir at law to the lot in suit; and it is sought to disinherit him by parol evidence, taking from him what passed, as the will is written, and substituting it in lieu of a different subject disposed of by the will.

2. As to the second.

What the testator has written is plain and explicit. There is no shadow of doubt about the writing, the only legal exponent of intention. Indeed, the writing could not possibly be clearer.

The subject of the devise, as written, is an existing and known thing; but even if it was not, it is the only thing that he has legally manifested an intention to devise. It is proposed by parol evidence to show that when the testator, by writing (the only mode by which he could give expression to testamentary intention) said one thing, he meant another and a different thing; and this is proposed fifty years after the execution of the writing. Such evidence is inadmissible, for the reason that it proposes to contradict the will as made in writing and make a new will by parol.

If the evidence were admitted, the will would still remain. The will would then say one thing and the parol evidence another thing. Which is to prevail? Are the words of the writing to be expunged and different words interpolated? If not, of what avail is the parol evidence?

Even assuming that such evidence would show intention, the question remains whether it could show intention manifested by writing, executed as required by law.

In no case, when the language of the will is clear, can parol evidence be admitted to contradict it; for in such case to admit the evidence would be to make a new will by parol.

1 Jarm. Wills, 5th Am. ed. 708, 713, and notes, 1, 2, where all the authorities are cited.

Wigram, Ext. Ev. Am. ed. 1872, p. 55.

If the description be wholly inapplicable to the subject intended or said to be intended by it, evidence cannot be received to prove where or what the testator really intended to describe.

2 Taylor. Ev. § 1109; 1 Greenl. Ev. §§ 277, 287, 289, 290; *Miller* v. *Travers*, 8 Bing. 244; *Doe* v. *Hiscocks*, 5 M. & W. 363; *Doe* v. *Hubbard*, 15 Q. B. 227; *Webber* v. *Stanley*, 16 C. B. N. S. 698; *Drake* v. *Drake*, 8 H. L. Cas. 172; *Charter* v. *Charter*, 7 H. L. Cas. (Eng. & Ir. App). 364; *Weatherhead* v. *Baskerville*, 11 How. 329 (52 U. S. bk. 13, L. ed. 717); *Allen's Exrs.* v. *Allen*, 18 How. 385 (59 U. S. bk. 15, L. ed. 396); *Mackie* v. *Story*, 93 U. S. 589 (Bk. 23, L. ed. 986).

It is not possible to distinguish between *Miller* v. *Travers* and the present case. In the former, as here, the testator gave, as alleged, what he did not own. The answer was, and is here, that the only thing given was the thing written in the will. To expunge that thing and substitute something else was to make a new will. To expunge was to make a blank, in which case the devise would be void for uncertainty. See opinion in *Miller* v. *Travers*.

Baylis v. *Atty-Gen.* 2 Atk. 239; *Ulrich* v. *Litchfield*, 2 Atk. 372; *Taylor* v. *Richardson*, 2 Drew, 16; 1 Jarm. 761; *Hunt* v. *Hort*, 3 Brown, C. C. 311.

It is not denied that extrinsic evidence may be resorted to which in its nature and effect is simply explanatory of what the testator has written; but no evidence can be received for the purpose of showing what he intended to have written.

Wigram, § 9.

In every case of a controverted construction the sole question is *non quod voluit sed quod dixit*.

The office of the extrinsic evidence is to preserve, not to defeat, the written will. Its effect is not to contradict or vary the language used, but merely to show the sense in which the testator used it.

2 Tayl. Ev. § 1085; *Shore* v. *Wilson*, 9 Cl. & F. 355.

Evidence of actual intention, irrespective of the language of the will, is always inadmissible.

1 Jarm. 726, note 8 and cases cited; *Allen* v. *Allen*, and *Mackie* v. *Story*, *supra*.

Undoubtedly the court may, in the interpretation of a will, put itself in the place of a testator by looking at the state of his property and the circumstances by which he was surrounded when he made his will.

But this, again, is to aid and not to destroy the written will and make a parol will.

Allen v. *Allen* and *Weatherhead* v. *Baskerville*, *supra*.

4. It is further urged by the other side that the introductory clause of the will shows an intention on the part of the testator to dispose of all his property.

The question is what he did. No principle is better settled than that such a clause has not the effect of disinheriting the heir, unless the intention is carried out by a devise which expressly or by necessary implication has that effect. In such case the rule *quod voluit non dixit* is held to apply.

An estate given cannot be enlarged by such a clause.

Beall v. *Holmes*, 6 Harr. & J. 206; *Preston* v. *Evans*, 56 Md. 488; *Hammond* v. *Hammond*, 8 G. & J. 441; *Dougherty* v. *Monett*, 5 G. & J. 462.

Mr. Justice **Bradley** delivered the opinion of the court:

Ejectment for two undivided thirds of a lot of land in Washington City, known on the plats and ground plan of the city as lot No. 3, square 406, fronting 50 feet on E street north: plea, not guilty. The plaintiff, John Patch, now plaintiff in error, claims the lot under Henry Walker, devisee of James Walker. The latter died seised of the lot in 1832, and by his last will, dated in September of that year, devised to Henry Walker as follows, to wit: "I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot numbered 6, in square 408, together with the improvements thereon erected and appurtenances thereto belonging." The testator did not own lot num

ber 6, in square 403, but did own lot number 3, in square 406, the lot in controversy; and the question in the cause is, whether the parol evidence offered and by the court provisionally received, was sufficient to control the description of the lot so as to make the will apply to lot number 3, in square 406. The judge at the trial held that it was not; and instructed the jury to find a verdict for the defendant. The court in general term sustained this ruling and rendered judgment for the defendant; and that judgment is brought here by writ of error for review, upon the bill of exceptions taken at the trial.

The testator, at the time of making his will and at his death, had living a wife, Ann Sophia, an infant son, James, a mother, Dorcas Walker, three brothers, John, Lewis and Henry (the latter being only eleven years old), and three sisters, Margaret Peck, Louisa Ballard and Sarah McCallion, and no other near relations; and all of these are provided for in his will, if the change of description of the lot given to Henry is admissible; otherwise Henry is unprovided for, except in a residuary bequest of personal property in connection with others. The following are the material clauses of the will. After expressing the ordinary wishes and hopes with regard to the disposal of his body and a future life, the testator adds: "And touching worldly estate, wherewith it has pleased Almighty God to bless me in this life, I give, devise and dispose of the same in the following manner and form." He then gives and bequeaths to his wife one third of all his personal estate, forever, and the use of one third of his real estate for life, remainder to his infant son, James. He then proceeds: "I bequeath and give to my dear and affectionate mother, Dorcas Walker, forever, all of lot numbered 7, in square 106, as laid down on the plan of the City of Washington, together with all the improvements thereon erected and appurtenances thereto belonging.

"I bequeath and give to my dearly beloved brother, John Walker, forever, all of lot numbered 6, in square 106, with the two story brick house, back building, and all appurtenances thereto belonging.

"I bequeath and give to my dearly beloved brother, Lewis Walker, forever, lots 23, 24 and 25, in square numbered 106, together with a two story brick building, with a basement story back building, and all appurtenances thereto belonging and erected on one or more of said lots.

"I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot numbered 6, in square 403, together with the improvements thereon erected and appurtenances thereto belonging."

Then, after giving to his three sisters and his infant son, respectively, other specific lots, with houses thereon, he proceeds as follows:

"I also bequeath and give to my infant son, James Walker, forever, the balance of my real estate *believed to be and to consist in* lots numbered 6, 8 and 9, with a house, part brick and part frame, erected on one of said lots, in square 116; lots 31, 32 and 33, in square numbered 140, and a slaughter house erected on one of said lots; lots numbered 8 and 11, in square numbered 250; and lot numbered 28, in square numbered 107; and further, I bequeath and give to my infant son, James Walker, $1,000, to be paid out of my personal estate, and applied at the discretion of his guardian hereinafter appointed, for the education of my son, James Walker." He then adds:

"The balance of my personal estate, whatever it may be, I desire shall be equally divided between my mother, Dorcas Walker, my sister, Sarah McCallion, and my brothers, Jno., Lewis and Henry Walker."

It is clear from the will itself:

1. That the testator intended to dispose of all his estate. [215]

2. That he believed he had disposed of it all in the clauses prior to the residuary clause, except the specific lots thereby given to his son.

3. That when he gave to his brother, Henry, lot number 6, in square 403, he believed he was giving him one of his own lots. On general principles, he would not have given him a lot which he did not own; and he expressly says, "touching worldly estate, wherewith it has pleased Almighty God to bless *me* in this life, I give, devise, and dispose of *the same* in the *following* manner."

4. That he intended to give a lot with improvements thereon erected.

Now, the parol evidence discloses the fact that there was an evident misdescription of the lot intended to be divided. It shows: first, as before stated, that the testator, at the time of making his will and at the time of his death, did not and never did own lot 6, in square 403; but did own lot 3, in square 406; second, that the former lot had no improvements on it at all, and was located on Ninth Street, between I and K Streets, while the latter, which he did own, was located on E Street, between Eighth and Ninth Streets, and had a dwelling house on it and was occupied by the testator's tenants; a circumstance which precludes the idea that he could have overlooked it.

It seems to us that this evidence, taken in connection with the whole tenor of the will, amounts to demonstration as to which lot was in the testator's mind. It raises a latent ambiguity. The question is one of identification between two lots, to determine which was in the testator's mind; whether lot 3, square 406, which he owned and which had improvements erected thereon and thus corresponded with the implications of the will and with part of the description of the lot and rendered the devise effective, or lot 6, square 403, which he did not own, which had no improvements thereon and which rendered the devise ineffective.

It is to be borne in mind that all the other property of the testator, except this one house and lot, was disposed of to his other devisees; [216] at least that was his belief as expressed in his will, and there is no evidence to the contrary; while this lot (although he believed he had disposed of it), was not disposed of at all, unless it was devised to his brother Henry, by the clause in question. In view of all this, and placing ourselves in the situation of the testator at the time of making his will, can we entertain the slightest doubt that he made an error of description, so far as the numbers in question are concerned, when he wrote or dictated the clause

under consideration? What he meant to devise was a lot that he owned; a lot with improvements on it; a lot that he did not specifically devise to any other of his devisees. Did such a lot exist? If so, what lot was it? We know that such a lot did exist, and only one such lot in the world, and that this lot was the lot in question in this cause, namely: lot number 3, in square 406. Then is it not most clear that the words of the will, "lot numbered 6, in square 406," contained a false description? The testator, evidently by mistake, put "3" for "6," and "6" for "3," a sort of misspeech to which the human mind is perversely addicted. It is done every day, even by painstaking people. Dr. Johnson, in the preface to his dictionary, well says: "Sudden fits of inadvertence will surprise vigilance, slight avocations will seduce attention, and casual eclipses of the mind will darken learning." Not to allow the correction of such evident slips of attention, when there is evidence by which to correct it, would be to abrogate the old maxim of the law: "*Falsa demonstratio non nocet.*"

It is undoubtedly the general rule that the maxim just quoted is confined in its application to cases where there is sufficient in the will to identify the subject intended to be devised, independently of the false description, so that the devise would be effectual without it. But why should it not apply in every case where the extrinsic facts disclosed make it a matter of demonstrative certainty that an error has crept into the description, and what that error is? Of course the contents of the will, read in the light of the surrounding circumstances, must lead up to and demand such correction to be made.

[217] It is settled doctrine that as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject; as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect, either circumstances, or declarations of the testator. 1 Jarman, Wills, 370; Hawkins, 9, 10. Where it consists of a misdescription, as before stated, if the misdescription can be struck out and enough remain in the will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected. The ambiguity in the latter case consists in the repugnancy between the manifest intent of the will, and the misdescription of the donee or the subject of the gift. In such a case evidence is always admissible to show the condition of the testator's family and estate, and the circumstances by which he was surrounded at the time of making his will. 1 Jarman, Wills, 364, 365; 1 Roper, Legacies, 297, 4th ed.; 2 Wms. Executors, 988, 1032. Mr. Williams (afterwards *Mr. Justice* Williams) says: "Where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake shall not disappoint the bequest. The error may be rectified: * * * 1, By the context of the will; 2, To a certain extent by parol evidence. * * * A court may inquire into every material fact relating to the person who claims to be interested under the will, and to the circumstances of the testator, and of his family or affairs, for the purpose of enabling the court to identify the person intended by the testator." P. 989. Again, he says on page 1032: "Mistakes in the description of legacies, like those in the description of legatees, may be rectified by reference to the terms of the gift, and evidence of extrinsic circumstances, taken together. The error of the testator, says Swinburne, in the proper name of the thing bequeathed, doth not hurt the validity of the legacy, so that the body or substance of the thing bequeathed is certain: as for instance, the testator bequeaths his horse Criple, when the name of the horse was Tulip, this mistake shall not make the legacy void; for the legatory may have the horse by the last denomination; for the testator's meaning was certain that he should have the horse; if, therefore, he hath the thing devised, it is not material if he hath it by the right or the wrong name." See also Roper, Legacies, 297.

The rule is very distinctly laid down by Sir James Wigram, who says: "A description, though false in part, may, with reference to extrinsic circumstances, be absolutely certain, or at least sufficiently so to enable a court to identify the subject intended; as where a false description is superadded to one which by itself would have been correct. Thus, if a testator devise his black horse, having only a white one, or devise his freehold houses, having only leasehold houses, the white horse in the one case and the leasehold houses in the other would clearly pass. In these cases the substance of the subject intended is certain, and if there is but one such substance, the superadded description, though false, introduces no ambiguity; and, as by the supposition the rejected words are inapplicable to any subject, the court does not alter, vary or add to the effect of the will by rejecting them." Wigram, Extrinsic Ev. 53. Of course when the author speaks of the rejected words as being "inapplicable to any subject," he means inapplicable because the subject is not in existence, or does not belong to the testator.

The case of the *Roman Catholic Orphan Asylum* v. *Emmons*, 3 Bradf. 144, which arose before the surrogate of New York, well illustrates the application of the rule. There a testatrix bequeathed *her* shares of the Mechanics Bank stock to the orphan asylum. She had no bank stock except ten shares of the City Bank. *Surrogate* Bradford, in a learned opinion, held that the word "mechanics" must be rejected as inapplicable to any property ever owned by the testatrix; and the rejection of this word left the bequest to operate upon any bank stock possessed by her, and so to pass the City Bank shares. See also a learned note of *Chief Justice* Redfield, 10 Am. Law Reg. N. S. p. 93, to the

case of *Kurtz* v. *Hibner*, in which he strongly disapproves the decision in that case.*

Chief Justice Marshall, in *Finlay* v. *King's Lessee*, 3 Pet. 377 [28 U. S. bk. 7, L. ed. 712], lays down the general rule that underlies all others. "The intent of the testator," says he, "is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although in giving effect to it some words should be rejected or so restrained in their application as materially to change the literal meaning of the particular sentence."

But it is not our intention to review or classify the decisions. They are legion. The intrinsic difficulty of stating the rule as applicable to all cases is such as to make it presumptuous in anyone to attempt to chain it down and fix it in the form of a verbal definition. Sufficient appears from the authorities already quoted to show that whilst no bill in equity lies to reform a will, because its author is dead, and his intent can only be known from the language he has used, when applied to the circumstances by which he was surrounded, yet a careful study of that language and of those circumstances will generally disclose any inadvertency or mistake in the description of persons or things, and the manner in which it should be corrected, without adding anything to the testator's language, and thereby making a different will from that left by him. We will only quote, further, an observation of *Chief Justice* Thompson, of New York, in *Jackson* v. *Sill*, 11 Johns. 201, which is very pertinent to the present discussion. In that case the court rejected the extrinsic evidence offered to remove a supposed latent ambiguity in a will, for the very good reason that it appeared, on examination, that no ambiguity existed. But the Chief Justice justly said: "It is undoubtedly a correct rule, in the construction of wills, to look at the whole will for the purpose of ascertaining the intention of the testator in any particular part, where such part is ambiguous. But where the intention is clear and certain, and no repugnancy appears between the different parts of the will, no such aid is necessary or proper." Of course, in the case of a latent ambiguity such repugnancy can only appear by means of the evidence which discloses the ambiguity.

In view of the principles announced in these authorities, the case under consideration does not require any enlargement of the rule ordinarily laid down, namely: the rule which requires in the will itself sufficient to identify the subject of the gift, after striking out the false description. The will, on its face, taking it all together, with the clear implications of the context, and without the misleading words, "six" and "three," devises to the testator's brother, Henry, in substance as follows: "I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot number—, in square four hundred and —, together with the improvements thereon erected and appurtenances thereto belonging,—being a lot which belongs to me, and not specifically devised to any other person in this my will." In view of what has already been said there cannot be a doubt of the identity of the lot thus devised. It is identified by its ownership, by its having improvements on it, by its being in a square the number of which commenced with 400, and by its being the only lot belonging to the testator which he did not otherwise dispose of. By merely striking out the words "six" and "three" from the description in the will, as not applicable (unless interchanged) to any lot which the testator owned; or, instead of striking them out, supposing them to have been blurred by accident so as to be illegible, the residue of the description, in view of the context, so exactly applies to the lot in question, that we have no hesitation in saying that it was lawfully devised to Henry Walker.

The judgment is reversed and the cause remanded, with directions to award a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Woods**, with whom concurred *Mr. Justice* **Matthews**, *Mr. Justice* **Gray** and *Mr. Justice* **Blatchford**, dissenting:

Mr. Justice Matthews, *Mr. Justice* Gray, *Mr. Justice* Blatchford and myself cannot concur in the judgment of the majority of the court. [221]

The suit was an action of ejectment in which the will was offered in evidence to prove the plaintiff's title. The property in controversy was lot 3, in square 406, in the City of Washington. The plaintiff claimed under a devise of lot 6, in square 403. The devise was as follows: "I bequeath to my dearly beloved brother, Henry Walker, forever, lot numbered 6, in square 403, together with the improvements thereon erected and the appurtenances thereto belonging." The devise does not describe the property sued for. Extrinsic evidence to aid the devise was offered by the plaintiff, who insisted that it was admissible for the purpose of removing a latent ambiguity.

Latent ambiguities are of two kinds: first, where the description of the devisee or the property devised is clear upon the face of the will, but it turns out that there are more than one estate or more than one person to which the description applies; and second, where the devisee or the property devised is imperfectly or in some respects erroneously described, so as to leave it doubtful what person or property is meant.

It is clear that if there is any ambiguity in the devise under consideration it belongs to the latter class. But there is no ambiguity. The devise describes the premises as lot 6, in square 403. It is conceded that there is such a lot and square in the City of Washington, and but one; and it is not open to question what precise parcel of land this language of the devise points out. It clearly, and without uncertainty, designates a lot on Ninth Street, between I and K Streets, well known on the map of the City of Washington, whose metes and bounds and area are definitely fixed and platted and recorded. The map referred to was approved by President Washington in 1792, and recorded in 1794. Thousands of copies of it have been engraved and printed. All conveyances of real estate in the city made since it was put on record refer to it; it is one of the muniments of title to all the public and private real estate in the City of Washington, and it is probably better known than any document on record in the District of [222]

* *Kurtz* v. *Hibner* is reported in 55 Ill. 514.

Columbia. The accuracy of the description of the lot devised is, therefore, matter of common knowledge, of which the court might even take judicial notice.

Nor is any ambiguity introduced into the description by the words "with the improvements thereon erected and the appurtenances thereto belonging," or by the testimony which was offered to prove that at the date of the will and of the death of the testator the lot described in the devise was unimproved. It is plain that the words "improvements thereon erected" were a conveyancer's phrase of the same nature as the words which immediately followed them, namely: "and the appurtenances thereto belonging," and the whole phrase is simply equivalent to the words "with the improvements and appurtenances." The words "with the improvements thereon erected" were not intended as a part of the description of the premises which had already been fully and accurately described; but were used, perhaps, as a matter of habit, or perhaps out of abundant but unnecessary caution to include in the grant improvements that might be put upon the premises between the date of the testator's will and the date when it took effect, namely: at his death. The phrase is one not commonly used to identify the premises, and was not so used in this devise. There is persuasive evidence of this in the will. For in eight other devises of realty the testator particularly describes the character of the improvements. Thus, in the devise to his brother, John Walker, the improvements are described as a "two story brick house, back building;" in the devise to Lewis Walker as "a two story brick building, with a basement story back building;" in the devise to Margaret Peck of four lots, as "a two story frame house erected on lot 27;" in the devise to Louisa Ballard, as a "three story brick house;" in the devise to Sarah McCallion, as a "frame house;" in the devise to James Walker of two lots, as "two two-story brick houses;" and in the residuary devise to James Walker of the testator's real estate as "a house part brick and part frame," and "a slaughter house." There is no proof that any of the other real estate mentioned in the will was improved. There is, [423] therefore, no doubt about the identity of the lot described in the devise.

But even if the words under discussion were used to carry the idea that the property mentioned in the devise was improved, and it turned out to be unimproved, these facts would not make the description ambiguous or uncertain. For it is a settled rule of construction that if there be first a certain description of premises and afterwards another description in general terms, the particular description controls the general. Thus, in *Goodtitle* v. *Southern*, 1 M. & S. 299, it was held that by a devise of "all my farm called Trogues Farm, now in the occupation of C.," the whole farm passed, though it was not all in C's occupation. See also *Miller* v. *Travers*, 8 Bing. 244; *Goodright* v. *Pears*, 11 East, 58.

Another cognate rule, well settled in the law, is also applicable here, and that is that where there is a sufficient description of premises, a subsequent erroneous addition will not vitiate the description, and we may reject a false demonstration. *Doe* v. *Galloway*, 5 B. & Ad. 43; *Law* v. *Hempstead*, 10 Conn. 23; *Bass* v. *Mitchell*, 22 Tex. 385; *Peck* v. *Mallams*, 10 N. Y. 509, 532; *Abbott* v. *Abbott*, 53 Me. 360; *Doane* v. *Willcutt*, 16 Gray, 368, 371; *Jones* v. *Robinson*, 78 N. C. 396; 3 Washb. Real Prop. 629.

Upon these established rules, as well as upon the general sense and practice of mankind, it is beyond controversy that a lot described in the words used in the devise in question would pass either by will or deed, although it should turn out that the lot was unimproved. The description is as particular and precise as if the metes and bounds, the area, and the street on which the lot was situated, and every other particular of size and situation, had been given. The identity of the lot is settled beyond question. Upon the authorities cited the description is not rendered ambiguous or uncertain by the use of the general words "with the improvements erected thereon," even though there be no improvements. It follows that the description of the premises in controversy, contained in the devise, was good and sufficient and, upon well settled rules of law, free from doubt or ambiguity.

It is, therefore, beyond controversy that if the testator had been the owner of lot numbered 6, in square 403, it would have passed by the devise; and the sufficiency of the description could not have been challenged. The only ground, therefore, upon which the plaintiff can base his contention that there is a latent ambiguity in the devise, is his offer to prove that the testator did not own the lot described in the devise, but did own another which he did not dispose of by his will. This does not tend to show a latent ambiguity. It does not tend to impugn the accuracy of the description contained in the devise. It only tends to show a mistake on the part of the testator in drafting his will. This cannot be cured by extrinsic evidence. For, as Mr. Jarman says: "As the law requires wills, both of real and personal estate, to be in writing, it cannot consistently with this doctrine permit parol evidence to be adduced either to contradict, add to or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is a partial or total failure of the testator's intended disposition, for it would have been of little avail to require that a will *ab origine* should be in writing, or to fence a testator around with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied or its inaccuracies corrected from extrinsic sources." 1 Jarman, Wills, 4th ed. 409.

If there is any proposition settled in the law of wills, it is that extrinsic evidence is inadmissible to show the intention of the testator, unless it be necessary to explain a latent ambiguity; and a mere mistake is not a latent ambiguity. Where there is no latent ambiguity, there no extrinsic evidence can be received. The following cases support this proposition:

In *Miller* v. *Travers*, 8 Bing. 244, Tindal, *Chief Justice* of the Common Pleas, and Lyndhurst, *Chief Baron* of the Exchequer, were called in to assist Brougham, *Lord Chancellor*. Their joint opinion was delivered by Tindal,

Chief Justice. The case was this: the testator devised all his freehold and real estate in the County of Limerick and City of Limerick. The testator had no real estate in the County of Limerick, but his real estate consisted of lands in the County of Clare, which was not mentioned in the will, and a small estate in the City of Limerick, inadequate to meet the charges in the will The devisee offered to show by parol evidence that the estates in the County of Clare were inserted in the devise to him, in the first draft of the will, which was sent to a conveyancer to make certain alterations not affecting those estates; that by mistake he erased the words "County of Clare," and that the testator, after keeping the will by him for some time, executed it without adverting to the alteration as to that county. The case was considered on the assumption that the extrinsic evidence, if admitted, would show that the County of Clare was omitted by mistake, and that the land in that county was intended to be included in the devise. But the evidence was held inadmissible to show that the testator intended to devise property which had been omitted by mistake.

So in *Box* v. *Barrett*, Law Rep. 8 Eq. 244, *Lord* Romilly, Master of the Rolls, said: "Because the testator has made a mistake, you cannot afterwards remodel the will and make it that which you suppose he intended, and as he would have drawn it if he had known the incorrectness of his supposition."

In *Jackson* v. *Sill*, 11 Johns. 201, which was an action of ejectment, the defendant claimed under the following devise to the testator's wife: "I also give to my said beloved wife the farm which I now occupy, together with the whole crops," etc. In a subsequent part of his will the testator mentioned said premises as his lands. It turned out that the premises in controversy were, at the time the will was made and at the death of the testator, in the possession of one Salisbury under a lease for seven years. The plaintiff offered testimony to show that the testator intended to devise the premises as a part of the farm which he occupied himself and of which he died possessed. *Chief Justice* Thompson, afterwards a justice of this court, in delivering judgment, said: "I think it unnecessary to notice particularly the evidence offered, for it is obvious that if it was competent, especially that of Mr. Van Vechten, it would have shown that the premises were intended by the testator to be devised to the defendant, Sill. The will was drawn, however, by Mr. Van Vechten, under a misapprehension of facts, and under a belief that the testator was in the actual possession of the premises. It is, therefore, a clear case of mistake, as I apprehend; and under this belief I have industriously searched for some principle that would bear me out in letting in the evidence offered; but I have searched in vain and am satisfied the testimony cannot be admitted in a court of law without violating the wise and salutary provisions of the Statute of Wills, and breaking down what have been considered the great landmarks of the law on this subject."

In *Tucker* v. *Seaman's Aid Society*, 7 Met. 188, the testator gave a legacy to the "Seaman's Aid Society in the City of Boston," which was the correct name of the society. The legacy was claimed, however, by another society called the Seaman's Friend Society. *Chief Justice* Shaw, in stating the case, said: "It is also, we think, well proved by the circumstances which preceded and attended the execution of the will, as shown by extrinsic evidence, that it was the intention of the testator to make the bequest in question to the Seaman's Friend Society, and at the time of the execution of the will he believed he had done so;" "that the testator was led into this mistake by erroneous information honestly given to him by Mr. Baker, who drew the will:" "that the testator acted on this erroneous information and made the bequest to the Seaman's Aid Society by their precise name and designation." The court, therefore, held that there was simply a mistake and no latent ambiguity, and that extrinsic evidence was inadmissible.

It is unnecessary to extend this opinion by other extracts from the adjudged cases. The quotations we have made are from masters of the law. The following additional authorities will be found to sustain the proposition we have stated: *Cheyney's Case*, 5 Rep. 68; *Doe* v. *Oxenden*, 3 Taunt. 147; *Smith* v. *Maitland*, 1 Ves. Jr. 363; *Chambers* v. *Minchin*, 4 Ves. 675 and note; *Doe* v. *Westlake*, 4 B. & Ald. 57; *Newburgh* v. *Newburgh*, 5 Madd. 364; *Clementson* v. *Gandy*, 1 Keen, 309; *Brown* v. *Saltonstall*, 8 Met. 423, 426; *Mann* v. *Exrs. of Mann*, 1 Johns. Ch. 231; *Yates* v. *Cole*, 1 Jones, Eq. (N. C.) 110; *Walston's Lessee* v. *White*, 5 Md. 297; *Cesar* v. *Chew*, 7 Gill & J. 127; *Fitzpatrick* v. *Fitzpatrick*, 36 Iowa, 674; *Kurtz* v. *Hibner*, 55 Ill. 514.

Our conclusion is, therefore, that, as the evidence offered and rejected was for the purpose of explaining a latent ambiguity when there was no ambiguity, either latent or patent, it was properly rejected.

The opinion of the court in this case allows what seems to us to be an unambiguous devise to be amended by striking out a sufficient description of the premises devised, and the blank thus made to be filled by ingenious conjectures based on extrinsic evidence. This is in the face of the Statute of Frauds in force in the District of Columbia, where the premises in controversy are situate. Fifty years after the unequivocal devise in question, as written and executed by the testator, had, as required by law, been placed upon the records of the District for the information of subsequent purchasers and incumbrancers, it is allowed to be erased, and, by argument and inference, a new one substituted in its place. This is not construing the will of the testator; it is making a will for him.

The decision of the court subjects the title of real estate to all the chances, the uncertainty, and the fraud attending the admission of parol testimony, in order to give effect to what the court thinks was the intention of the testator, but which he failed to express in the manner required by law.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Ex Parte
[241] WILLIAM ROYALL (No. 1), *Appt.* and *Plff. in Err.*

Ex Parte
WILLIAM ROYALL (No. 2.), *Appt.* and *Plff. in Err.*

(See S. C. Reporter's ed. 241-254.)

Habeas corpus—*jurisdiction of circuit courts where petitioner is restrained under state process—discretion.*

1. The circuit court has jurisdiction on *habeas corpus* to discharge from custody one who is restrained of his liberty in violation of the constitution, but who at the time is held under state process for trial, on an indictment charging him with an offense against the laws of the State.

2. Where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion whether it will discharge him, upon *habeas corpus*, in advance of his trial in the state court; that discretion, however, to be subordinated to any special circumstances requiring immediate action.

3. It seems that after the conviction of the accused in the state court, the circuit court still has a discretion whether he shall be put to his writ of error, or whether it will proceed on writ of *habeas corpus* summarily to determine whether he is restrained of his liberty in violation of the Constitution.

[Nos. 974, 975.]

Argued Jan. 7, 8, 1886. Decided Mar. 1, 1886.

APPEALS from and in error to the Circuit Court of the United States for the Eastern District of Virginia.

The history and facts of the case appear in the opinion of the court.

The case was argued with the related cases of *Chaffin* v. *Taylor*, *Barry* v. *Edmunds*, *Royall* v. *Va.* and *Sands* v. *Edmunds*, *ante*, 727, 729, 735 and 739, and with *Ex parte Royall*, *post*, 872.

Messrs. **William L. Royall**, in person, **Daniel H. Chamberlain** and **Wm. B. Hornblower**, for petitioner.

Messrs. **R. A. Ayers**, *Atty-Gen. of Virginia*, and **Walter H. Staples**, *contra.*

Mr. Justice **Harlan** delivered the opinion of the court:

[242] On the 29th day of May, 1885, William L. Royall filed two petitions in the Circuit Court of the United States for the Eastern District of Virginia, each verified by oath and addressed to the judges of that court.

In one of them he represents, in substance, that he is a citizen of the United States; that in June, 1884, as a representative of a citizen of New York, who was the owner of certain bonds issued by Virginia under the Act approved March 30, 1871, entitled "An Act to Provide for the Funding and Payment of the Public Debt," he sold in the City of Richmond, to Richard W. Maury, for the sum of $10.50 in current money, a genuine past due coupon, cut from one of said bonds in petitioner's presence, and which he received from the owner, with instructions to sell it in that city for the best market price; that said coupon bears upon its face the contract of Virginia that it should be received in payment of all taxes, debts and demands due that Commonwealth; that he acted in said matter without compensation; and consequently, the transaction was a sale of the coupon by its owner.

The petition proceeds:

"That on the second day of June, 1884, the grand jury of the City of Richmond, Virginia, found an indictment against your petitioner for selling said coupon without a license. That the before mentioned coupon is the only one that your petitioner has sold. That your petitioner was thereupon arrested and committed to the custody of N. M. Lee, Sergeant of the City of Richmond, to be tried on said indictment, and that he will be prosecuted and tried on said indictment for selling said coupon without a license, under the provisions of section 65 of the Act of March 15, 1884, relating to licenses generally, and the general provisions of the state law in respect to doing business without a license. That your petitioner had no license under the laws of Virginia to sell coupons. That the Act of the General Assembly, under which your petitioner was arrested and is being prosecuted, requires any person who sells one or more of the said tax receivable coupons issued by said State of Virginia to pay to said State, before said sale, a special license tax of $1,000; and, in addition thereto a tax of 20 per cent on the face value of each coupon sold.

"That said Act does not require the seller of any other coupon, or the seller of anything else, to pay said tax; but it is directed exclusively against the sellers of such coupons. That your petitioner is being prosecuted under said Act because he sold said coupon without having first paid to said State said special license tax, and without paying to her said special tax of 20 per cent on the face value thereof. That said Act of the General Assembly of Virginia is repugnant to section 10 of article 1 of the Constitution of the United States and is, therefore, null and void. That if the said State can refuse to pay the said coupons at maturity, and then tax the sale of them to taxpayers, she may thus indirectly repudiate them absolutely, and thus effectually destroy their value.

"That your petitioner has been on bail from the time he was arrested until now, but that his bail has now surrendered him, and he is at this time in the custody of the said N. M. Lee, Sergeant of the City of Richmond, to be prosecuted and tried on said indictment. That he is held in violation of the Constitution of the United States, as he is advised."

In the other petition he represents, in substance, that, under the provisions of the before mentioned Act of 1871, Virginia issued her bonds, with interest coupons attached, and bearing upon their face a contract to receive them in payment of all taxes, debts and demands due to that Commonwealth; that another Act, approved January 14, 1882, provides that said coupons shall not be received in payment of taxes until after judgment rendered in a suit thereon according to its provisions; that

NOTE.—Habeas corpus; *jurisdiction; what may be considered.* See U. S. v. Hamilton, 3 U. S., bk. 1, 490, *note;* Ex parte Carll, 106 U. S., 521, bk. 27, 248, *note.*

the validity of the latter Act was sustained in *Antoni* v. *Greenhow*, 107 U. S. 769 [Bk. 27, L. ed. 468], upon the ground that it furnished taxpayers with a sufficient remedy to enforce said contract; that by the provisions of sections 90 and 91 of chapter 450 of the laws of Virginia for the year 1883-84, it is provided that attorneys at law who have been licensed to practice law less than five years shall pay a license tax of $15, and those licensed more than five years $25, and that such license shall entitle the attorney paying it to practice law in all the courts of the State; that it is further provided by said ninety-first section that no attorney shall bring any suit on said coupons under said Act of January 14, 1882, unless he pays, in addition to the above mentioned license tax, a further special license tax of $250; that petitioner had been licensed to practice law more than five years, and that in the month of April, 1884, he paid $25, receiving a revenue license to practice law in all the courts of the State, but that he had not paid the additional special license tax provided for in said ninety-first section; that, under employment of a client who had tendered coupons, issued by Virginia under the Act of March 30, 1871, to the treasurer of Richmond City in payment of his taxes, and thereafter had paid his tax in money—the coupons having been received by that officer for identification and verification, and certified to the Hustings Court of the City of Richmond—he brought suit under the Act of January 14, 1882, to recover the money back after proving the genuineness of the coupons; that the grand jury of the City of Richmond thereupon found an indictment against him for bringing the suit without having paid the special license tax; that he brought it after he had paid his license tax above mentioned, and while he had a license to practice law until April, 1885; that he was thereupon arrested by order of the Hustings Court of Richmond, committed to the custody of N. M. Lee, Sergeant of that city, and is about to be tried and punished under said indictment; that the Act requiring him to pay a special license tax in addition to his general license tax is repugnant to section 10 of article 1 of the Constitution of the United States and is, therefore, null and void; and that the Act providing for punishing him for not paying the special license tax is likewise repugnant to the Constitution.

After stating, at some length, the grounds upon which he contends that the before mentioned Acts are repugnant to the Constitution, the petitioner avers that he "is now in the custody of the said N. M. Lee, Sergeant of the City of Richmond, under said indictment and he is, therefore, restrained of his liberty in violation of the Constitution of the United States."

Each petition concludes with a prayer that the circuit court award a writ of *habeas corpus* directed to that officer, commanding him to produce the body of the petitioner before that court, together with the cause of his detention, and that he have judgment discharging him from custody.

In each case the petition was dismissed, upon the ground that the circuit court was without jurisdiction to discharge the prisoner from prosecution.

These cases come here under the Act of March 3, 1885, chap. 353, which so amends section 764 of the Revised Statutes as to give this court jurisdiction, upon appeal, to review the final decision of the Circuit Courts of the United States in certain specified cases, including that of a writ of *habeas corpus* sued out in behalf of a person alleged to be restrained of his liberty in violation of the Constitution. 23 Stat. at L. 437.

The first question to be considered is whether the circuit courts have jurisdiction on *habeas corpus* to discharge from custody one who is restrained of his liberty in violation of the National Constitution, but who, at the time, is held under state process for trial, on an indictment charging him with an offense against the laws of the State.

The statutory provisions which control the determination of this question are found in the following sections of the Revised Statutes:

"§ 751. The supreme court and the circuit and district courts shall have power to issue writs of *habeas corpus*.

"§ 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty.

"§ 753. The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States; or, being a subject or citizen of a foreign State and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission or order or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify. [246]

"§ 754. Application for the writ of *habeas corpus* shall be made to the court or justice or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

"§ 755. The court or justice or judge to whom the application is made, shall forthwith award a writ of *habeas corpus*, unless it appear from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

"§ 761. The court or justice or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

It is further provided that, pending the proceedings on *habeas corpus* in cases mentioned in sections 763 and 764 (which include an application for the writ by a person alleged to be

restrained of his liberty in violation of the Constitution of the United States) and, "until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his [247] liberty, in any state court, or by or under the authority of any State, for any matter so heard or determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void." § 766.

The grant to the circuit courts in section 751 of jurisdiction to issue writs of *habeas corpus* is in language as broad as could well be employed. While it is attended by the general condition, necessarily implied, that the authority conferred must be exercised agreeably to the principles and usages of law, the only express limitation imposed is that the privilege of the writ shall not be enjoyed by—or rather that the courts and the judicial officers named shall not have power to award the writ to—any prisoner in jail, except in specified cases, one of them being where he is alleged to be held in custody in violation of the Constitution. The latter class of cases was first distinctly provided for by the Act of February 5, 1867, chap. 28, 14 Stat. at L. 634, which declares that the several courts of the United States, and the several justices and judges thereof, within their respective jurisdictions, in addition to the authority then conferred by law, "shall have power to grant writs of *habeas corpus* where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States." Whether, therefore, the appellant is a prisoner in jail, within the meaning of section 753, or is restrained of his liberty by an officer of the law executing the process of a court of Virginia, in either case, it being alleged under oath that he is held in custody in violation of the Constitution, the circuit court has, by the express words of the statute, jurisdiction on *habeas corpus* to inquire into the cause for which he is restrained of his liberty, and to dispose of him "as law and justice require."

It may be suggested that the state court is competent to decide whether the petitioner is or is not illegally restrained of his liberty; that the appropriate time for the determination of that question is at the trial of the indictment; and that his detention for the purpose simply of securing his attendance at the trial ought not to be deemed an improper exercise by that court [248] of its power to hear and decide the case. The first of these propositions is undoubtedly sound; for in *Robb* v. *Connolly*, 111 U. S. 637 [Bk. 28, L. ed. 545], it was held, upon full consideration, that "a state court of original jurisdiction, having the parties before it, may, consistently with existing federal legislation, determine cases at law or in equity, arising under the Constitution and laws of the United States, or involving rights dependent upon such Constitution or laws;" and that "upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them." But with respect to the other propositions, it is clear that if the local statute under which Royall was indicted be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity. As was said in *Ex parte Siebold*, 100 U. S. 376 [Bk. 25, L. ed. 719]: "An unconstitutional law is void and is as no law. An offense created by it is no crime. A conviction under it is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment." So, *Ex parte Yarbrough*, 110 U. S. 654 [Bk. 28, L. ed. 274], it was said that if the statute prescribing the offense for which Yarborough and his associates were convicted was void, the court which tried them was without jurisdiction, and they were entitled to be discharged. It would seem, whether reference be had to the Act of 1867 or to existing statutory provisions, that it was the purpose of Congress to invest the courts of the Union, and the justices and judges thereof, with power, upon writ of *habeas corpus*, to restore to liberty any person, within their respective jurisdictions, who is held in custody, by whatever authority, in violation of the Constitution or any law or treaty of the United States. The statute evidently contemplated that cases might arise when the power thus conferred should be exercised during the progress of proceedings instituted against the petitioner in a state court, or by or under authority of a State, on account of the very matter presented for determination by the writ of *habeas corpus;* for care is taken to provide that any such proceedings, pending the hearing of the case, upon the writ and until final judgment, and after the prisoner is discharged, shall be null and void. If such were not the clear implication of the statute, still, as it does not except from its operation cases in which the applicant for the writ is held in custody by the authority of a State, acting through its judiciary or by its officers, the court could not, against the positive language of Congress, declare any such exception, unless required to do so by the terms of the Constitution itself. But as the judicial power of the Nation extends to all cases arising under the Constitution, the laws and treaties of the United States; as the privilege of the writ of *habeas corpus* cannot be suspended unless when in cases of rebellion or invasion the public safety may require it; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States or in any department or offices thereof; no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union and of their justices and judges. That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the circuit court to inquire into the cause of his commitment and to discharge him, if he be restrained of his liberty in violation of the Constitution. The grand jurors who found the indictment, the court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all, equally with individual citizens, under a duty, from the discharge of which the State could not release them, to respect and obey the supreme law of the land, "anything in the Constitution and laws of any State to the contrary notwithstanding." And that equal power does not belong to the courts and judges

of the several States; that they cannot, under any authority conferred by the States discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the General Government acting under its laws, results from the supremacy of the Constitution and laws of the United States. *Ableman* v. *Booth*, 21 How. 506 [62 U. S. bk. 16, L. ed. 169]; *Tarble's Case*, 13 Wall. 397 [80 U. S. bk. 20, L. ed. 597]; *Robb* v. *Connolly*, 111 U. S. 639 [Bk. 28, L. ed. 547]

We are, therefore, of opinion that the circuit court has jurisdiction upon writ of *habeas corpus* to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the Constitution.

It remains, however, to be considered, whether the refusal of that court to issue the writ and to take the accused from the custody of the state officer can be sustained upon any other ground than the one upon which it proceeded. If it can be, the judgment will not be reversed because an insufficient reason may have been assigned for the dismissal of the petitions.

Undoubtedly the writ should be forthwith awarded, "unless it appears from the petition itself that the party is not entitled thereto;" and the case summarily heard and determined "as law and justice require." Such are the express requirements of the statute. If, however, it is apparent upon the petition that the writ if issued ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. *Ex parte Watkins*, 3 Pet. 193, 201 [28 U. S. bk. 7, L. ed. 650, 653]; *Ex parte Milligan*, 4 Wall. 3, 111 [71 U. S. bk. 18, L. ed. 281, 292]. What law and justice may require, in a particular case, is often an embarrassing question to the court or to the judicial officer before whom the petitioner is brought. It is alleged in the petitions—neither one of which, however, is accompanied by a copy of the indictment in the state court, nor by any statement giving a reason why such a copy was not obtained—that the appellant is held in custody under process of a state court in which he stands indicted for an alleged offense against the laws of Virginia. It is stated in one case that he gave bail but was subsequently surrendered by his sureties. But it is not alleged and it does not appear in either case that he is unable to give security for his appearance in the state court, or that reasonable bail is denied him, or that his trial will be unnecessarily delayed. The question as to the constitutionality of the law under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which, as we have seen, it is competent for the state court to pass. Under such circumstances, does the statute imperatively require the circuit court, by writ of *habeas corpus*, to wrest the petitioner from the custody of the state officers in advance of his trial in the state court? We are of opinion that while the circuit court has the power to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the National Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require," does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under state authority. So, also, when they are in the custody of a state officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses. The present cases involve no such considerations. Nor do their circumstances, as detailed in the petitions, suggest any reason why the state court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The circuit court was not at liberty, under the circumstances disclosed, to presume that the decision of the state court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States. In *Taylor* v. *Carryl*, 20 How. 595 [61 U. S. bk. 15, L. ed. 1028], it was said to be a recognized portion of the duty of this court (and, we will add, of all other courts, national and state) "to give preference to such principles and methods of procedure as shall seem to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and federal obligations." And in *Covell* v. *Heyman*, 111 U. S. 182 [Bk. 28, L. ed. 393],

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it was declared "that the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of the other, is a principal of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law and, therefore, of necessity."

That these salutary principles may have full operation, and in harmony with what we suppose was the intention of Congress in the enactments in question, this court holds that where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the [253] United States, the circuit court has a discretion whether it will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States. The latter was substantially the course adopted in *Ex parte Bridges*, 2 Woods, 428. The prisoner was indicted and convicted in one of the courts of Georgia for perjury committed in an examination before a United States Commissioner under what is known as the Enforcement Act of Congress. He was discharged upon *habeas corpus*, sued out before *Mr. Justice* Bradley, upon the ground that the state court had no jurisdiction of the case, the offense charged being one which, under the laws of the United States, was exclusively cognizable in the federal courts. Adverting to the argument that where a defendant has been regularly indicted, tried, and convicted in a state court, his only remedy was to carry the judgment to the state court of last resort, and thence by writ of error to this court, he said: "This might be so if the proceeding in the state court was merely erroneous; but where it is void for want of jurisdiction, *habeas corpus* will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case. *Ex parte Lange*, 18 Wall. 163 [85 U. S. bk. 21, L. ed. 872]." It was further observed in the same case that while it might appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on *habeas corpus*, there was no escape from the Act of 1867, which invested such judge with power to discharge when the prisoner was restrained of his liberty in violation of a law of the United States.

[254] As it does not appear that the circuit court might not, in its discretion and consistently with law and justice, have denied the applications for the writ at the time they were made, we are of opinion that the judgment in each case must be affirmed, but without prejudice to the right of the petitioner to renew his applications to that court at some future time should the circumstances render it proper to do so.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited 117 U. S. 255, 518.

Ex Parte:

In the Matter of WILLIAM L. ROYALL, *Petitioner.*

(See S. C. Reporter's ed. 254-255.)

Habeas corpus—*jurisdiction of this court where petitioner is restrained under state process.*

If this court has legal power, on *habeas corpus*, to discharge the petitioner who is held under state process for trial on an indictment charging him with an offense against the laws of the State, it should not be exercised in advance of his trial.

[No. 3 Orig.]

Argued Dec. 1, 1884. Decided March 1, 1886.

PETITION for a writ of *habeas corpus.*

Messrs. **William L. Royall**, in person, and **Daniel H. Chamberlain**, for petitioner.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an original application by W. L. Royall, to this court, for a writ of *habeas corpus*, directed to N. M. Lee, Sergeant of the City of Richmond, Virginia, commanding him to produce the body of the petitioner before this court, together with the cause of his detention, that he may be discharged from the custody of said officer. The writ is asked upon the ground that the statute under which he was arrested and is held in custody is repugnant to the Constitution of the United States; and, consequently, that he is restrained of his liberty in violation of that instrument. The petition was filed here on the first day of December, 1884. It states the same facts as are set out in the petition in case 975, just determined.

The application for the writ must be denied. It is sufficient to say that if this court has power, under existing legislation and upon *habeas corpus*, to discharge the petitioner who is in custody under the process of a state court of original jurisdiction, for trial on an indictment charging him with an offense against the laws of that State—upon which it is not necessary to express an opinion—such power ought not, for the reasons given in the other cases just decided, to be exercised in advance of his trial.

Denied.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

PHŒNIX INSURANCE COMPANY OF BROOKLYN, *Appt.*,

v.

ERIE AND WESTERN TRANSPORTATION COMPANY.

(See S. C. Reporter's ed. 312-327.)

Insurance—subrogation—effect of clause in bill of lading giving carriers benefit of insurance.

1. Upon payment for a total loss of goods insured, the insurance is only subrogated to such rights of action as the assured has against third persons who caused or are responsible for the loss.
2. A stipulation in a bill of lading allowing the carrier the benefit of any insurance procured by the owner is valid as between the parties, although the loss be occasioned by the negligence of the carrier or his agents; and in the absence of fraudulent concealment or misrepresentation, the insurer can maintain no action against the carrier, upon any terms inconsistent with the stipulation.

[No. 120.]

Argued Jan. 19, 20, 1886. Decided Mar. 1, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

Statement by *Mr. Justice* **Gray**:

This was a libel in admiralty against a common carrier, by an Insurance Company which had insured the owners upon the goods carried and had paid them the amount of the insurance, and claimed to be subrogated to their rights against the carrier. The defense relied on was that, by a provision of the contract of carriage, the carrier was to have the benefit of any insurance upon the goods. The district court held that this provision was valid, and therefore no right of subrogation accrued to the libelant, and entered a decree accordingly. The libelant appealed to the circuit court, which found the following facts:

The respondent was a Pennsylvania corporation, authorized to carry on the business of lake transportation, was engaged in business as a common carrier, and owned a line of propellers running between Erie and other ports on the Lakes, called the Anchor Line, one of which propellers was The Merchant.

On July 24, 1874, the firms of A. M. Wright & Co., owners of 16,325.34 bushels of corn worth $8,000; Elmendorf & Co., owners of 800 bushels of corn, worth $600; and Gilbert Wolcott & Co., owners of 370 bushels of corn and 650 bushels of oats, together worth $800, caused to be shipped on board the propeller Merchant, then lying at Chicago and bound for Erie, the grain aforesaid, consigned to themselves at other places beyond; and severally made oral agreements with the respondent, by which, in consideration of certain stipulated freight, the respondent agreed to transport the several parcels of grain from Chicago by way of the lakes to Erie, and thence to forward them to their ultimate destinations; and it was tacitly understood that bills of lading for the shipments would be subsequently issued to the shippers, but nothing whatever was said respecting the terms and conditions thereof.

After the goods had been received on board and the propeller had departed on her voyage, the respondent delivered to the shippers respectively bills of lading, each of which described the goods as shipped on the propeller Merchant, and addressed to the owners by name at their ultimate destination; fixed the rate of freight from Chicago to that destination; and contained an agreement that the goods should be "transported by the Anchor Line, and the steamboats, railroad companies and forwarding lines with which it connects, until the said goods shall have reached the point named in the bill of lading, on the following terms and conditions," among which were these:

"The said Anchor Line, and the steamboats, railroad companies and forwarding lines with which it connects, and which receive said property, shall not be liable" "for loss or damage by fire, collision or the dangers of navigation while on seas, bays, harbors, rivers, lakes or canals. And where grain is shipped in bulk, the said Anchor Line is hereby authorized to deliver the same to the elevator company at Erie, as the agent of the owner or consignee, for transhipment (but without further charge to such owner and consignee) into the cars of the connecting railroad companies or forwarding lines; and when so transhipped in bulk, the said Anchor Line and the said connecting railroad company or carrier shall be and is, in consideration of so receiving the same for carriage, hereby exempted and released from all liability for loss, either in quantity or weight; and shall be entitled to all other exemptions and conditions herein contained." [314]

"It is further agreed that the Anchor Line, and the steamboats, railroads and forwarding lines with which it connects, shall not be held accountable for any damage or deficiency in packages, after the same shall have been receipted for in good order by consignees or their agents, at or by the next carrier beyond the point to which this bill of lading contracts."

"It is further stipulated and agreed that in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for, during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage; and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

"And it is further agreed that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under this bill of lading."

These bills of lading were received by the shippers, without protest or objection, and were signed by Elmendorf & Co. and by Wolcott & Co., but not by A. M. Wright & Co.

The bills of lading were received by the shippers without specially reading the terms and conditions; their attention was not directed to them nor was anything said respecting them; and no reduction of freight from the rate stipulated in the oral agreement was made in consequence of those terms and conditions, or other consideration paid therefor; but the shippers had often before shipped goods by this line under similar contracts, and thereby knew [315]

or had every opportunity of knowing the contents of these bills of lading.

The propeller completed the lading of the goods during the evening of July 24, 1874, and about midnight departed on her voyage. About 10 o'clock the next morning, in a dense fog, she was stranded on the western shore of Lake Michigan, about ten miles south of Milwaukee, through the negligence of those managing her, and immediately filled with water, and all the grain became wet and damaged; 1,200 bushels of it were thrown overboard to get the vessel off; and 5,188 bushels were brought into Milwaukee in a perishable condition, and were there sold for the sum of $1,087.60, which was retained by the respondent.

On said 24th of July, the libelant, a New York corporation, authorized to transact a general lake and insurance business, insured the shippers, at their request and expense, against loss or damage to these shipments from the perils of the seas and other perils; and issued to them certificates of insurance, for $8,000, $520 and $700, respectively, in this form:

"No. 627. The Phœnix Insurance Company, New York.

$8,000. Chicago, July 24, 1874.

This certifies that A. M. Wright & Co. [are] insured, under and subject to the conditions of open policy No. 2263 of the Phœnix Insurance Company, in the sum of $8,000, on corn on board the propeller Merchant, at and from Chicago to Erie. Loss payable to assured, order hereon, and return of this certificate. "Chas. E. Chase, Agent."

The policy of insurance referred to in these certificates insured "Charles E. Chase, on account of whom it may concern," "lost or not lost at and from ports and places to ports and places, on cargo, premiums to be settled monthly, upon all kinds of lawful goods and merchandise laden or to be laden on board" any vessel or vessels; and was otherwise in the usual form of an open policy of insurance for $1,000,000 against marine risks, including perils of the seas, "barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises or any part thereof;" and contained these provisions: "The Company are to be entitled to premium at their usual rates on all shipments reported or not. It is warranted by the assured to report every shipment on the day of receiving advices thereof, or as soon thereafter as may be practicable, when the rate of premium shall be fixed by the president or the vice president of the Company." "No shipment to be considered as insured until approved and indorsed on this policy by C. E. Chase, agent."

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The shipments were duly approved and indorsed on the policy. On August 19, 1874, the shippers abandoned the goods to the libelant as a total loss, by written instruments, substantially alike, the material part of the one executed by A. M. Wright & Co. being as follows:

"Chicago, August 19, 1874. For and in consideration of the sum of $8,000, the receipt whereof is hereby acknowledged, we do by these presents assign, transfer, cede and abandon to the Phœnix Insurance Company all our right, title and interest in and to the property hereinafter specified, and to all that can or may in any way be made, saved or realized from the damage or loss reported to have occurred, by reason of which a claim of payment has been made by us, with full power to take and use all lawful ways and means (at the risk and expense of the Phœnix Ins. Co.) to make, save and realize the said property, to wit: 16,325.34 bushels of corn, as per bill of lading and invoice, shipped on board the propeller Merchant, bound from Chicago for Erie, and cov ered by insurance with the Phœnix Ins. Co. by open policy No. 2263, certificate No. 627, under date of July 24, 1874."

In consequence thereof, the libelant paid to the shippers the amount of insurance as and for a constructive total loss.

A general average adjustment was made on September 2, 1884, and readjusted on February 1, 1875, awarding to the libelant the sum of $2,466.12 on account of these shipments.

The circuit court made and stated the following conclusions of law: 1. That the bills of lading were the contracts by which the rights of the parties were to be governed. 2. That under them the respondent became liable to the shippers for the value of the shipments, by reason of the negligent loss of the same, and that the shippers had rights of action therefor. 3. That by the abandonments, the libelant did not succeed to those rights of action of the shippers, by reason of the stipulation contained in the bills of lading, that "The carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods." 4. That the libelant was entitled to recover the sum of $2,466.12, awarded to it in the general average adjustment readjusted as aforesaid, with interest thereon.

The circuit court entered a decree for the libelant for this sum only, and the libelant appealed to this court.

Mr. **George D. Van Dyke,** for appellant: The abandonments had the effect of a legal transfer to the Insurance Company of the grain insured, operating retroactively and vesting the legal title thereof in the Insurance Company as of the moment of the casualty which occasioned the loss; and the *jus recuperandi* from the carrier, whose negligent act caused the loss, passed as an incident of the legal ownership of the grain.

Chesapeake Ins. Co. v. *Stark*, 6 Cranch, 268 (10 U. S. bk. 3, L. ed. 220); *Columbian Ins. Co.* v. *Ashby*, 4 Pet. 189 (29 U. S. bk. 7, L. ed. 809); *Patapsco Ins. Co.* v. *Southgate*, 5 Pet. 604 (30 U. S. bk. 8, L. ed. 243); *Comegys* v. *Vasse*, 1 Pet. 193 (26 U. S. bk. 7, L. ed. 108); *Union Ins. Co.* v. *Burrell*, Anthon's Cases, 128; *Mellon* v. *Bucks*, 8 Mart. (La.) 567; *Rogers* v. *Hosack's Exrs.* 18 Wend. 319; *Mutual S. Ins. Co.* v. *Cargo of Ship George, etc.* Olcott, 89; *The Monticello* v. *Mollison*, 17 How. 153 (58 U. S. bk. 15, L. ed. 68); Arnould, Ins. Perkins' ed. 1178-1180; Meredith's Emérigon, § VI. p. 648; 3 Kent, 318.

The transfer is completely, instantly and irrevocably effected by notice of abandonment, duly given or accepted.

Rogers v. *Hosack's Exrs.* 18 Wend. 331; *The Manistee*, 5 Bis. C. C. 381; *S. C.* 7 Bis. C. C. 35; *Mellon* v. *Bucks*, 8 Mart. (La.) 567; *Bradlee* v. *Maryland Ins. Co.* 12 Pet. 378 (37 U. S. bk. 9, L.

ed. 1124); *Union Ins. Co.* v. *Scott*, 1 Johns. 106; *Smith* v. *Mfg. Ins. Co.* 7 Met. 453; *Sun Mut Ins. Co.* v. *Hall*, 104 Mass. 507.

Equitable subrogation is an incident of every contract of indemnity, and follows upon settlement of partial or total losses under marine or fire policies.

Garrison v. *Memphis Ins. Co.* 19 How. 312, 314, 317 (60 U. S. bk. 15, L. ed. 656-658); *Hall* v. *Railroad Co.* 13 Wall. 367 (80 U. S. bk. 20, L. ed. 594); *Mobile, etc. R. Co.* v. *Jurey*, 111 U. S. 594 (Bk. 28, L. ed. 531); *The Atlas*, 93 U. S. 310 (Bk. 23, L. ed. 865); *The Potomac*, 105 U. S. 633 (Bk. 26, L. ed. 1195); *Royal Insurance Co.* v. *Stinson*, 103 U. S. 28 (Bk. 26, L. ed. 476).

The vendition by abandonment, however, is peculiar to marine insurance and differs radically from equitable subrogation. The vendition by abandonment arises *ex contractu*, and is as much a part of the contract of marine insurance as if set forth in the policy.

Marcardier v. *Chesapeake Ins. Co.* 8 Cranch, 39 (12 U. S. bk. 3, L. ed. 481).

Equitable subrogation is a creature of equity, dependent not at all upon privity of contract, but worked out through the rights of the creditor or owner.

Abandonment passes the *spes recuperandi* as an incident of the property transferred. Equitable subrogation is not incident to the transfer of any property.

The abandonments were authorized by the policies from their inception, and when made operated retroactively, vesting in the insurers the *jus recuperandi* from the negligent carrier. The carrier is conclusively presumed to have known this, when stipulating for the benefit of the insurance; and the proposition contended for is an application that an assignor cannot impair the assignee's rights by dealing with one having notice.

Welch v. *Mandeville*, 1 Wheat. 233 (14 U. S. bk. 4, L. ed. 79); *Andrews* v. *Beecker*, 1 Johns. Cas. 411; *Hart* v. *Western R. R. Co.* 13 Met. 99; *Monmouth Ins. Co.* v. *Hutchinson*, 21 N. J. Eq. 107; *Conn. F. I. Co.* v. *Erie R. R. Co.* 73 N. Y. 399; *Steele* v. *Franklin Ins. Co.* 17 Pa. St. 290.

The right of abandonment having the legal effect mentioned, and the right of the insurer in virtue thereof to enforce the *jus recuperandi* against the negligent carrier, are rights inherent in the policies and are announced by law on the very face thereof to all claiming any benefit thereunder.

Sheppard v. *Taylor*, 5 Pet. 675 (30 U. S. bk. 3, L. ed. 269); *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. 383 (26 U. S. bk. 6, L. ed. 664); *Atlantic Ins. Co.* v. *Storrow*, 1 Edw. Ch. 621; *S. C.* 5 Paige, 265.

Thus it has been held that the abandonees of the ship were entitled, by reason of the transfer, to the subsequent earnings of freight upon performance of her voyage, although the freight was insured by another underwriter who, upon abandonment to him, paid a total loss.

2 Phillips, Ins. § 1649; Arnould, Ins. 1152; *Atlantic Ins. Co.* v. *Storrow*, 1 Edw. Ch. 625. See also *Carpenter* v. *Providence Ins. Co.* 16 Pet. 495 (41 U. S. bk. 10, L. ed. 1044); Phillips, Ins. 1886; *Bank of S. C.* v. *Bicknell*, 1 Cliff. C. C. 85.

Applying the foregoing principles to the case at bar, it seems clear that the policy was an absolute and independent contract between the insurer and the owners of the grain; covering their insurable interest alone, founded upon the ultimate and primary liability of the carrier for negligent transportation, and importing the right of abandonment.

Nothing in the policy or certificates issued thereunder relinquishes the insurer's right, on abandonment, to insist on a transfer of the *spes recuperandi* against the negligent carrier. Nowhere is it found that the insurer has consented that its right under the abandonments shall be impaired by any application of the insurance made by the insured.

The Transportation Company, as a common carrier, received the property aboard its propeller Merchant for transportation; and the liability sought to be enforced arose through the negligence of those managing the propeller.

This liability does not arise *ex contractu*, but is annexed to the calling of the common carrier by a positive rule of law; and the carrier cannot, by contract with those who employ it, devest itself of this liability.

Bank v. *Adams Exp. Co.* 93 U. S. 181 (Bk. 23, L. ed. 875); *Railroad Co.* v. *Lockwood*, 17 Wall. 357 (84 U. S. bk. 21, L. ed. 627); *Southern Exp. Co.* v. *Caldwell*, 21 Wall. 266, and *Railroad Co.* v. *Pratt*, 22 Wall. 123 (88 and 89 U. S. bk. 22, L. ed. 558, 827); *Railway Co.* v. *Stevens*, 95 U. S. 655 (Bk. 24, L. ed. 585); *Hart* v. *Railroad Co.* 112 U. S. 331 (Bk. 28, L. ed. 717).

If this stipulation gives the carrier the benefit of the shipper's insurance so as to satisfy its established liability for the negligence of its agents and servants in the management of its propeller, it seems to be within the rule of law "finally determined" in the cases above cited. It is clearly an attempt, indirectly and by a subtly devised trick of the bill of lading, to obtain that which the law forbids, viz.: common carrier's exemption from liability for negligence, by contract with its employers.

The Hadji, 20 Fed. Rep. 875; *S. C.* 18 Fed. Rep. 459; 16 Fed. Rep. 861; *The Titania*, 19 Fed. Rep. 101; *Peck* v. *North S. R. Co.* 10 H. L. C. 473; *Cincinnati, etc., R. R. Co.* v. *Spratt*, 2 Duvall (Ky.) 4.

The test of the validity of the carrier's exemption seems to be its reasonableness. If it is not just and reasonable it is void. Because the carrier's exemption of liability for the negligence of itself and servants is deemed unreasonable in the eye of the law, it is held void.

Another test of the reasonableness of the stipulation in question is its effect upon the shipper's insurance. If valid and having the legal effect claimed by appellee, the stipulation disables the assured from making a full abandonment; and such disability invalidates the insurance and releases the insurer.

Carstairs v. *M. & T. Ins. Co.* 18 Fed. Rep. 473; *Watson* v. *Ins. Co. of N. A.* 1 Binn. 47; *Gracie* v. *N. Y. Ins. Co.* 8 Johns. 237.

The position taken by the Transportation Company and which received the sanction of the court below is that the common carrier can, by accepting property for transportation for hire, assume a liability for the negligent loss of same; and at the same time and as part of the same act creating the obligation, exact and receive from the other party to the contract that which amounts to a satisfaction of such future liability. In other words, the shipper being in-

sured, the carrier can willfully destroy the property entrusted to his care, and then demand that the shipper's insurance shall satisfy its liability for its tort.

Such being the effect of the stipulation, it would seem to be not merely a limitation of liability, but utterly repugnant to the obligation to safely carry and deliver at destination.

Candee v. *West. U. Tel. Co.* 34 Wis. 471; Addison, Contracts, chap. 8, § 2, p. 512.

Knowledge on the part of the master and marines that their employers would be protected from the consequences of their neglect would encourage a relaxation of that degree of attention and vigilance so necessary for the safety of life and property at sea.

General M. Ins. Co. v. *Sherwood*, 14 How. 35 (55 U. S. bk. 14, L. ed. 452); *Matthews* v. *Howard Ins. Co.* 11 N. Y. 1; *William* v. *N. E. Mut. Mar. I. Co.* 3 Clif. 244; *McQuirk* v. *The Penelope*, 2 Pet. Adm. 276; 2 Pars. Mar. Law, p. 89, note 3; Phillips, Ins. §§ 211, 212, 906; 1 Parsons, Mar. Ins. 531, note 1, 533; 1 Marshall, Ins. chap. VIII, § 1, p. 215; 3 Kent, Com. 291. *Phœnix Ins. Co.* v. *Cochran*, 51 Pa. St. 148; *Citizens Ins. Co.* v. *Marsh*, 41 Pa. St. 386.

It is indisputable that the policy in the case at bar is a contract insuring the interest of the shipper alone. The stipulation did not oblige the shipper to insure the carrier's interest, and no policy has been obtained covering it. The stipulation did not constitute the shippers the carrier's agents to procure insurance; in fact it did not oblige them to insure at all. It is not found that in obtaining their insurance the shippers intended to provide indemnity for any except themselves; and the insurance obtained, from its very nature, presupposes the carrier's ultimate and primary liability for negligent transportation; and by no possibility could it inure to the carrier's benefit.

It cannot be maintained that the stipulation was an assignment, legal or equitable, of any interest in the insurance to the carrier; for it contemplated that the assured should retain control of the insurance and collect it, which was fatal to any right of the carrier in the insurance.

Christmas v. *Russell*, 14 Wall 84 (81 U. S. bk. 20, L. ed. 764); *Dillon* v. *Barnard*, 21 Wall. 439 (88 U. S. bk. 22, L. ed. 677); *Removal Cases*, 100 U. S. 477; (Bk. 25, L. ed. 600); *Rogers* v. *Hosack's Exrs.* 18 Wend. 334; *Minturn* v. *Mfrs. Ins. Co.* 10 Gray, 501; *Stearns* v. *Quincy Mut. F. Ins. Co.* 124 Mass. 61.

The most that can be claimed for the stipulation is that it is a sort of voluntary trust declared by the assured, without consideration, in favor of the carrier, inoperative as to the insurance but applicable to its proceeds when received by the assured.

The stipulation was entirely without consideration, for no difference in freight was made whether the shipper insured or not. A court of equity would not lend its aid to enforce such a voluntary, optional trust.

2 Story, Eq. Jur. 793 a; 973; *Ellison* v. *Ellison*, 1 White & Tudor, L. Cas. in Eq. part 1, p. (245) 382.

The carrier, authorizing an abandonment by its stipulation, and tacitly encouraging the payment of the insurance by the insurer, cannot afterwards exercise legal rights in opposition to such consent.

Swain v. *Seamens*, 9 Wall. 254 (76 U. S. bk. 19, L. ed. 554); *Turner* v. *Flanigan*, 1 Black, 491 (66 U. S. bk. 17, L. ed. 106); Bigelow, Estop. chap. 19, pp. 503, 511, note; *King* v. *Fowler*, 16 Mass. 397.

Mr. George A. Black, also for appellant: The carrier's liability arises, not out of his contract, but out of the legal duty imposed upon him to safely carry and deliver.

Bretherton v. *Wood*, 3 Brod. & B. 54; *Atlantic Mut. Ins. Co.* v. *McLoon*, 48 Barb. 27; *Nolton* v. *Western R. R. Co.* 15 N. Y. 444; *Marshall* v. *York, N. & B. R. Co.* 11 C. B. 655; *Skinner* v. *London, B. & S. C. R. Co.* 5 Exch. 787; *Carroll* v. *Staten I. R. R. Co.* 58 N. Y. 126; *The Washington and Gregory*, 9 Wall. 513 (76 U. S. bk. 19, L. ed. 787); *Phil. & Read. R. R. Co.* v. *Derby*, 14 How. 483 (55 U. S. bk 14, L. ed 508); *Catlin* v. *The Adirondack Co.* 20 Hun. 22; *The Quickstep*, 9 Wall. 665 (76 U. S. bk. 19, L. ed. 767); *The Brooklyn*, 2 Ben. 547; *The Deer*, 4 Ben. 355; *The Liberty*, 7 Fed. Rep. 226.

Such being the duty of the common carrier from which flows the corresponding remedy for a violation of it, the carrier has attempted by contract to be relieved from such duty. In this effort the clauses of the bills of lading relieving the carrier from various risks and exempting him from liability for negligence have been devised. These clauses have operated as a release or covenant not to sue would operate, for the owner not being dependent on the contract for his right of action, the carrier would be compelled to set them up as a bar, and his efforts to do so have led to the adjudications of this court declaring it to be against public policy to permit him to avoid the effect of his own negligence and consequently holding all stipulations to that effect void *ab initio;* and in reaching the conclusion that they were void, the grounds on which the court has placed its decision are equally applicable to the efforts of the carrier to evade responsibility by the asserted right to the insurance money here presented. This is shown by the language of the court in *Bank of Ky.* v. *Adams Exp. Co.* 93 U. S. 183 (Bk. 23, L. ed. 877). See, *Matthews* v. *Howe. Ins Co.* 11 N. Y. 16; *Ardrey* v. *Karthaus*, Taney, Dec. 381; *Icard* v. *Goold*, 11 John. 279; *The Hadji*, 20 Fed. Rep. 876.

As to the contract of marine insurance, see *Ins Co.* v. *Dunham*, 11 Wall. p. 31 (78 U. S. bk. 20, L. ed. 99); Story, Eq. 20; *Robertson* v. *United Ins. Co.* 2 Johns. Cas 252; *Glover* v. *Black*, 3 Burr. 1394; 2 Duer, Ins. p. 462. Meredith's Emérigon, chap. XVII, § VI. p. 684; Lowndes' Marine Ins. p. 21, § 23, Lowndes M. Ins. 2d ed. 1885, p. 156; 2 Arnould, Ins. 995 (999 2d Am. ed); *Cammell* v. *Sewell*, 3 H. & N. 617, affd. 5 H. & N. 728; *Comegys* v. *Vasse*, 1 Pet. 214 (26 U. S. bk. 7, L. ed. 118); 2 Phillips, Ins. secs. 1492, 1608, 1712; Parsons' Mer. Law, 444; *Marcardier* v. *Ches. Ins. Co.* 8 Cranch, 39 (12 U. S. bk. 3, L. ed. 481); 1 Wheat. 228 (14 U. S. bk. 4, L. ed. 78); Lowndes, Marine Ins. 2d ed. (1885), sec. 143; *Hunton* v. *Phœnix. Ins. Co.* 1 Wash. C. C. 400; *Rogers* v. *Hosack*, 18 Wend. 319; *Mellon* v. *Bucks*, 5 Martin (La.) N. S. 371. *Mutual Safety Ins. Co.* v. *Cargo of Ship George*, Olcott, 89; *Atlantic Ins. Co.* v. *Storrow*,

5 Paige, 285; *The Monticello* v. *Mollison*, 17 How. 155 (58 U. S. bk. 15, L. ed. 69); *The Potomac*, 105 U. S. 630 (Bk. 26, L. ed. 1194); *Mobile, etc. R. Co.* v. *Jurey*, 111 U. S. 594 (Bk. 28, L. ed. 531); *Chesapeake Ins. Co.* v. *Stark*, 6 Cranch, 268 (10 U. S. bk. 3, L. ed. 220); *Kaltenbach* v. *Mackenzie*, L. R. 3 C. P. 471; *Castellian* v. *Preston*, L. R. 11 Q. B. D. 380.

The result of all the above authorities, tersely stated, is that it is part of the very essence of the contract of marine insurance that the insurer is to have the *spes recuperandi;* that by the nature of the contract a right to an assignment, upon a loss or abandonment, is incorporated into and is an inherent part of the transaction. The right is given by operation of law, is contemplated by the nature of the engagements the parties make and is predicated upon the very term "insurance;" and whether it be effectuated by an instrument of cession or by an abandonment under circumstances which justify the abandonment, the legal effect is the same. It has, as *Judge* Cowen and *Judge* Story have said, "all the effects the most accurately drawn assignment would accomplish." It is in effect a contract for an assignment upon a future contingency. It is part of the contract of insurance.

If force is given to the above contention, and if it be conceded that in the definition of the contract of insurance there is understood to be, as one of the terms thereof, an agreement that the insured shall, upon a loss or abandonment, assign his interest in the property, and his claims for any damage to it, to the insurer, then the next proposition follows logically; that when the carrier inserts in his bill of lading a clause that the insurance shall be for his benefit, he does it with knowledge that the contract of insurance when made must contain an agreement that all the remedies against the carrier for negligence shall pass to the insurer on payment or abandonment.

Sheppard v. *Taylor*, 5 Pet. 689 (30 U. S. bk. 8, L. ed. 274); *Duncan* v. *Jaudon*, 15 Wall. 176 (82 U. S. bk. 21, L. ed. 145).

We then have the familiar case of an assignor attempting to impair the rights of his assignee, by dealing with a party having notice of those rights.

Welch v. *Mandeville*, 1 Wheat. 233 (14 U. S. bk. 4, L. ed. 79); *Anderson* v. *Van Alen*, 12 Johns. 345; 2 Phillips, Ins. 1715.

The legal effect of the abandonment being to transfer the title to all the property remaining to the insurer and to transfer all rights and remedies for injuries to the property, which are regarded as choses in action, the position has been taken that the insurer's interests having to be enforced in the name of the assured, he therefore stood in his shoes; and deriving, as it is said, his title from the assured, he took it, subject to all its contracts. This position, growing as it did out of a technical rule of the common law, cannot be availed of in a court of admiralty or a court of equity.

Mutual L. Ins. Co. v. *Cargo of Ship George*, Olcott, 89; *Garrison* v. *Memphis Ins. Co.* 19 How. 312 (60 U. S. bk. 15, L. ed. 656).

The cases which have considered the effect of such a stipulation are very few.

See *Mercantile Mut. Ins. Co.* v. *Calebs*, 20 N. Y. 176; *Rintoul* v. *N. Y. C. & H. R. R. R. Co.* 6 Rep. 356; *S. C.* 17 Fed. Rep. 905; 20 Fed. Rep. 318; *The Hadji*, 18 Fed. Rep. 459, and 20 Fed. Rep. 875; *Carstairs* v. *Merchants & T. Ins. Co.* 18 Fed. Rep. 473.

The great confusion that exists in some of the cases arises out of the use of the word "subrogation," and from the idea that the insurer is a surety and has only the rights of a surety.

Castellian v. *Preston*, L. R. 11 Q. B. D. 380.

As to cases of fire insurance, where the mortgagee has insured, see: *Waring* v. *Loder*, 53 N. Y. 585; *Excelsior F. Ins. Co.* v. *Royal Ins. Co.* 55 N. Y. 352; *Foster* v. *Van Reed*, 70 N. Y. 26.

Mr. **George B. Hibbard,** for appellee:

No direct action could be maintained against the appellee, founded upon any supposed claim on the part of the insurer, except upon such rights, if any, as an insurer may derive from the insured. If, as a matter of practice, in admiralty, an insurer may be libelant, that does not change the merits, so to speak, of the action. The privilege of the insurer to sue in its own name is one merely for convenience; and the insurer in any such case only sues upon a derivative claim, only occupies the place of the party as to whose right or supposed right it seeks to maintain an action. The rights of parties are not changed by such regulation as to the practice.

That such is the law appears upon principle; for the insurer is in no such privity with the party sought to be charged in such a case; and that party owes the insurer no obligation or duty which would enable the insurer to maintain such action. That such is the law appears from overwhelming authority. No action can be maintained by the insurer in this case unless the insured respectively, in their own names respectively, and for the benefit of each of them respectively, could maintain such actions.

Mobile, etc. R. Co. v. *Jurey*, 111 U. S. 584 (Bk. 28, L. ed. 527); *Hall* v. *R. R. Co.* 13 Wall. 367 (80 U. S. bk. 20, L. ed. 594), and cases cited; *The Monticello* v. *Mollison*, 17 How. 152 (58 U. S. bk. 15, L. ed. 68); *Rintoul* v. *N. Y. C. & H. R. R. R.* 21 Blatchf. 419; *Simpson* v. *Thomson*, Eng. L. R. 4 App. Cas. H. of L. 279; *Conn. Mut. I. Co.* v. *N. Y. & N. H. R. R. Co.* 25 Conn. 165; *Peoria, M. & F. Ins. Co.* v. *Frost*, 37 Ill. 333; *Gardner* v. *Heartt*, 3 Denio, 232.

The whole subject—the bills of lading, the contracts of insurance, all connected with the matter—were within admiralty jurisdiction and remedy; and the defense of the appellee arises out of the transaction. The whole matter, in any view which can be taken of it, can be litigated in this action.

Insurance Co. v. *Dunham*, 11 Wall. 1 (78 U. S. bk. 20, L. ed. 90); *Bradstreet* v. *Heron* and *Zerega* v. *Poppe*, Abb. Adm. 209, 397; *Bearse* v. *Ropes*, 1 Sprague, 331; *Thatcher* v. *McCulloh*, Olcott, 365; *The New Phœnix*, 2 Hagg. 420.

An abandonment, of course, proceeds only from the party making it, and can change no right of any other party, can add nothing to the position of an abandonee except, when accepted, to transfer to the abandonee such rights as may pass by abandonment, subject, of course, to the rights of every party as to the party making such abandonment; and in this

case expressly subject to this provision in the bills of lading.

[319] *Mr. Justice* **Gray** delivered the opinion of the court:

It being found as matter of fact that the lading of the goods on board the propeller was not completed until the evening of the 24th of July; that she departed on her voyage about midnight, and that the bills of lading were not delivered by the carrier to the shippers until [320] after her departure, it is clear that the bills of lading were not actually delivered until the 25th. But it being also found that oral agreements for the carriage were made on the 24th, with the understanding that bills of lading would be subsequently issued, and that the shippers, having often before shipped goods by this line under similar bills of lading, knew or had every opportunity of knowing their terms and conditions; it is also clear that the bills of lading were but a putting in form of the oral agreements made on the 24th, and took effect as if they had been delivered and accepted on that day.

The certificates of the agent of the Insurance Company, without which the policy of insurance did not attach to these goods, were also made on that day, and described the goods as on board the propeller. The contract of carriage and the contract of insurance must therefore be treated as substantially contemporaneous, and both made before the loss of the goods. There is nothing to show any misrepresentation or intentional concealment by the assured in obtaining the insurance, or that the insurer had or had not knowledge or notice of the usual form of the bills of lading.

The policy of insurance contains no express stipulation for the assignment to the insurer of the assured's right of action against third persons. In the bills of lading, it is expressly stipulated that the carriers whose railroad or vessels form part of the line of transportation shall not be liable for loss or damage by fire, collision, or dangers of navigation; and that each carrier shall be liable only for a loss of the goods while in its custody, "and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

The question is, whether under these circumstances the insurer, upon payment of a loss, became subrogated to the right to recover damages from the carrier.

When goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss. No ex- [321] press stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such persons. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. In a court of common law, it can only be asserted in his name; and even in a court of equity or of admiralty it can only be asserted in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the the assured. *Comegys* v. *Vasse*, 1 Pet. 193, 214 [26 U. S. bk. 7, L. ed. 108, 117]; *Frets* v. *Bull*, 12 How. 466, 468 [53 U S. bk. 13, L. ed. 1068, 1069]; *The Monticello*, 17 How. 152, 155 [58 U. S. bk. 15, L. ed. 68]; *Garrison* v. *Memphis Ins. Co.* 19 How. 312, 317 [60 U. S. bk. 15, L. ed. 656]; *Hall* v. *Railroad Co.* 13 Wall. 367, 370, 371 [80 U. S. bk. 20, L. ed. 594, 596]; *The Potomac* v. *Cannon*, 105 U. S. 630, 634, 635 [Bk. 26, L. ed. 1194, 1195]; *Mobile & Montgomery Railway* v. *Jurey*, 111 U. S. 584, 594 [Bk. 28, L. ed. 527, 531]; *Clark* v. *Wilson*, 103 Mass. 219; *Simpson* v. *Thompson*, 3 App. Cas. 279, 286, 292, 293. That the right of the assured to recover damages against a third person is not incident to the property in the thing insured, but only a personal right of the assured, is clearly shown by the fact that the insurer acquires a beneficial interest in that right of action, in proportion to the sum paid by him, not only in the case of a total loss, but likewise in the case of a partial loss, and when no interest in the property is abandoned or accrues to him. *Hall* v. *Railroad Cos.*, *The Potomac*, and *Simpson* v. *Thompson*, above cited.

The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action, none passes to the insurer; and that if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions.

For instance, if two ships owned by the same person come into collision by the fault of the master and crew of the one ship and to the injury of the other, an underwriter who has insured the injured ship and received an abandonment from the owner, and paid him the amount of the insurance as and for a total loss, acquires thereby no right to recover against the other ship, because the assured, the owner of both ships, could not sue himself. *Simpson* v. *Thomson*, above cited; *Globe Ins. Co.* v. *Sherlock*, 25 Ohio St. 50, 68.

Upon the same principle, any lawful stipulation between the owner and the carrier of the goods limiting the risks for which the carrier shall be answerable, or the time of making the claim, or the value to be recovered, applies to any suit brought in the right of the owner, for the benefit of his insurer, against the carrier; as, for instance, if the contract of carriage expressly exempts the carrier from liability for losses by fire; *York Mfg. Co.* v. *Central Railroad Co.* 3 Wall. 107 [70 U. S. bk. 18, L. ed. 170]; or requires claims against the carrier to be made within three months; *Express Co.* v. *Caldwell*, 21 Wall. 264 [88 U. S. bk. 22, L. ed. 556]; or fixes the value for which the carrier shall be responsible; *Hart* v. *Pennsylvania*

Railroad Co. 112 U. S. 331 [Bk. 28, L. ed. 717]. So the stipulation, not now in controversy, in the bills of lading in the present case, making the value of the goods at the place and time of shipment the measure of the carrier's liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination, as held in *Mobile & Montgomery Railway* v. *Jurey* [*supra.*]

The stipulation in these bills of lading, that the carriers "shall not be liable for loss or damage by fire, collision, or the dangers of navigation," clearly does not protect them from liability for any loss occasioned by their own negligence. By the settled doctrine of this court, even an express stipulation in the contract of carriage, that a common carrier shall be exempt from liability for losses caused by the negligence of himself and his servants, is unreasonable and contrary to public policy, and therefore void. *Railroad Co.* v. *Lockwood*, 17 Wall. 357 [84 U. S. bk. 21, L. ed. 627]; *Railroad Co.* v. *Pratt*, 22 Wall. 123 [89 U. S. bk. 22, L. ed. 827]; *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174 [Bk. 23, L. ed. 872]; *Railway Co.* v. *Stevens*, 95 U. S. 655 [Bk. 24, L. ed. 535]. And it may be that, as held by *Judge* Wallace in a case in the circuit court, a stipulation that "No damage that can be insured against will be paid for," would not protect the carrier from liability for his own negligence; because that would be to compel the owners of the goods to insure against the negligence of the carrier. *The Hadji*, 22 Blatchf. 235.

But the stipulation upon the subject of insurance, in the bills of lading before us, is governed by other considerations. It does not compel the owner of the goods to stand his own insurer, or to obtain insurance on the goods; nor does it exempt the carrier, in case of loss by negligence of himself or his servants, from liability to the owner, to the same extent as if the goods were uninsured. It simply provides that the carrier, when liable for the loss, shall have the benefit of any insurance effected upon the goods.

It is conclusively settled, in this country and in England, that a policy of insurance, taken out by the owner of a ship or goods, covers a loss by perils of the sea or other perils insured against, although occasioned by the negligence of the master or crew or other persons employed by himself. *Waters* v. *Merchants Louisville Ins. Co.* 11 Pet. 213 [36 U. S. bk. 9, L. ed. 691]; *Copeland* v. *New England Ins. Co.* 2 Met. 432; *General Ins. Co.* v. *Sherwood*, 14 How. 351, 366 [55 U. S. bk. 14, L. ed. 451, 458]; *Davidson* v. *Burnand*, L. R. 4 C. P. 117, 121.

Anyone who has made himself responsible for the safety of goods has a sufficient interest in them to enable him to obtain insurance upon them.

Contracts of reinsurance, by which one insurer causes the sum which he has insured to be reassured to him by a distinct contract with another insurer, with the object of indemnifying himself against his own responsibility (although prohibited for a time in England by statute), are valid by the common law, and have always been lawful in this country; and in a suit upon such a contract, the subject at risk and the loss thereof must be proved in the same manner as if the original assured were the plaintiff. 3 Kent, Com. 278, 279; *Sun Ins. Co.* v. *Ocean Ins. Co.* 107 U. S. 485 [Bk. 27, L. ed. 337]; *Mackenzie* v. *Whitworth*, L. R. 10 Exch. 142, and 1 Exch. Div. 36.

So a common carrier, a warehouseman, or a wharfinger, whether liable by law or custom to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility, as well as to secure his lien, cause the goods in his custody to be insured to their full value, and the policy need not specify the nature of his interest. *Crowley* v. *Cohen*, 3 B. & Ad. 478; *De Forest* v. *Fulton F. Ins. Co.* 1 Hall, 84, 110; *Waters* v. *Monarch Assurance Co.* 5 El. & Bl. 870; *London & N. R.* v. *Glyn*, 1 El. & El. 652; *Savage* v. *Corn Exchange F. & I. Co.* 36 N. Y. 655; *Joyce* v. *Kennard*, L. R. 7 Q. B. 78; *Commonwealth* v. *Shoe & Leather Dealers F. & M. Ins. Co.* 112 Mass. 131; *Home Ins. Co.* v. *Baltimore Warehouse Co.* 93 U. S. 527 [Bk. 23, L. ed. 868]; *North British M. Ins. Co.* v. *London, L. & G. Ins. Co.* 5 Ch. Div. 569. [324]

No rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, although occasioned by the negligence of his own servants. By obtaining insurance, he does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility. If it were true that a ship owner, obtaining insurance by general description upon his ship and the goods carried by her, could, in case of the loss of both ship and goods, by perils insured against, and through the negligence of the master and crew, recover of the insurers for the loss of the ship only, and not for the loss of the goods, some trace of the distinction would be found in the books. But the learning and research of counsel have failed to furnish any such precedent.

On the contrary, in one of the earliest cases in which the rule that a policy of insurance covers losses by perils insured against, though occasioned by the negligence of the servants of the assured, was judicially affirmed, the assured, being the owner of a ship, had chartered her for a West India voyage, and by the usages of trade bore the risk of bringing the cargo from the shore to the ship; the policy was upon the boats of the ship, and upon goods in them; and the amount recovered of the insurer was for goods being carried from the shore to the ship in her boats, and lost by the wrecking of the boats, in consequence of the misconduct and negligence of some of the ship's crew. Such was the state of facts to which *Lord Chief Justice* Abbott applied the language, cited and approved by *Mr. Justice* Story in *Waters* v. *Merchants Louisville Ins. Co.* 11 Pet. 222 [36 U. S. bk. 9, L. ed. 695], and by *Chief Justice* Shaw in *Copeland* v. *New England Marine Ins. Co.* 2 Met. 442: "In this case, the immediate cause of the loss was the violence of the winds and waves. No decision can be cited where, in such a case, the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule; it will introduce an infi- [325]

nite number of questions as to the *quantum* of care which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the mast-head to look out, and he falls asleep, in consequence of which the vessel runs upon a rock or is taken by the enemy; in that case it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and that the underwriters were not liable. These and a variety of other such questions would be introduced, in case our opinion were in favor of the underwriters." *Walker* v. *Maitland*, 5 B. & Ald. 171, 174, 175.

So in the recent case of *North British M. Ins. Co.* v. *London, Liverpool & Globe Ins. Co.*, it was assumed, as unquestionable, that insurance obtained by a wharfinger would cover a loss by his own negligence. 5 Ch. D. 584.

As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, although occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not, in terms or in effect, prevent the owner from being reimbursed the full value of the goods; but being valid as between the owner and the carrier, it does prevent either the owner himself or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation.

Nor does this conclusion impair any lawful rights of the insurer. His right of subrogation, arising out of the contract of insurance and payment of the loss, is only to such rights as the assured has, by law or contract, against third persons. The policy containing no express stipulation upon the subject, and there being no evidence of any fraudulent concealment or misrepresentation by the owner in obtaining the insurance, the existence of the stipulation between the owner and the carrier would have afforded no defense to an action on the policy, according to two careful judgments rendered in June last and independently of each other, the one by the English Court of Appeal, and the other by the Supreme Judicial Court of Massachusetts. *Tate* v. *Hyslop*, 15 Q. B. D. 368; *Jackson Co.* v. *Boylston Mut. Ins. Co.* 139 Mass. 508.

[326]

In *Tate* v. *Hyslop*, owners of goods, insured against risks in crafts or lighters, had previously agreed with a lighterman that he should not be liable for any loss in crafts except loss caused by his own negligence, and did not disclose this agreement to the underwriters at the time of procuring the insurance. The sole ground upon which it was held that the owners could not recover on the policy was that this agreement was material to the risk, because the underwriters, as the assured knew, had previously established two rates of premium, depending on the question whether they would have recourse over against the lighterman. *Lord Justice* Brett observed that, but for the two rates of premium established by the underwriters and known to the assured, the omission of the assured to disclose their agreement with the lighterman could only have affected the amount of salvage which the underwriters might have, and would have been immaterial to the risk, and consequently to the insurance 15 Q. B. D. 375, 376.

In *Jackson Co.* v. *Boylston Mut. Ins. Co.* it was adjudged that, in the absence of any fraud or intentional concealment, the undisclosed existence of a stipulation between the assured and the carrier, like that now before us, afforded no defense to an action on the policy.

It may be added that our conclusion accords with the decision of *Judge* Shipman in *Rintoul* v. *New York Cent. & H. R. R. R.* 21 Blatchf. 430, as well as with those of *Judge* Dyer in the district court, and *Judge* Drummond in the circuit court, in the present case. 10 Biss. 18, 38. See also *Carstairs* v. *Mechanics & Traders Ins. Co.* 18 Fed. Rep. 473; *The Sidney*, 23 Fed. Rep. 88; *Mercantile Mut. Ins. Co.* v. *Calebs*, 20 N. Y. 173.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice **Bradley**, dissenting:

*The insurer of goods which are lost while in custody of a carrier, upon paying the loss, is subrogated to the claim of the insured against the carrier. *Hall* v. *Railroad Co.* 13 Wall. 367 [80 U. S. bk. 20, L. ed. 594]. This being so, I think that the insured cannot, by separate agreement with the carrier, deprive the insurer of this right. Such agreement would be *res inter alios acta*, and void as against the insurer. It would be a fraud upon him. The carrier would thereby protect himself against the consequences of his own negligence, and compel the insurer to indemnify him without paying any premium. The owner of the goods gives up no right himself against the carrier; but they two agree, behind the insurer's back, that he shall have no right of subrogation against the carrier, but that the carrier shall have such a right against him; thus changing the law by their private agreement. It seems to me that this is contrary both to law and justice.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

EASTERN BAND OF CHEROKEE INDIANS, *Appt.*,

v.

UNITED STATES AND CHEROKEE NATION, Commonly Called CHEROKEE NATION *West.*

(See S. C. "*Cherokee Trust Funds*," Reporter's ed. 288-312.)

Cherokee Indians—trust funds—Status *of Eastern Band.*

1. By various treaties the United States has recognized the Cherokee Indians as one people, composing a single Tribe or Nation.
2. The Cherokees in North Carolina dissolved their connection with their Nation, when they refused to accompany the body of it on its removal, and they have since had no separate political organization.
3. The Cherokees of North Carolina are not entitled to a share of the commuted annuity fund of

*Not reported in official edition.

$214,000, and of the fund created by sales of Cherokee lands west of the Mississippi.

Such Indians must be readmitted to citizenship in the Cherokee Nation in compliance with its Constitution and laws, if they wish to enjoy the benefits of its common property.

[No. 886.]

Argued Jan. 4, 5, 6, 1886. Decided March 1, 1886.

APPEAL from the Court of Claims.

The case is stated by the court.

Messrs. **Samuel Shellaberger, J. M. Wilson,** *Samuel J. Crawford* and *J. H. Gilpatrick*, for appellant.

Messrs. **William A. Phillips** and **S. S. Burdette,** for Cherokee Nation West.

Mr. Wm. A. Maury, Asst. Atty-Gen., for the United States, filed a brief stating that the United States, being the trustee of the fund, would stand neutral.

Mr. Justice **Field** delivered the opinion of the court:

This case comes before us on appeal from the Court of Claims. It was brought to determine the right of the petitioners, called the Eastern Band of the Cherokee Indians, to a proportionate part of two funds held by the United States in trust for the Cherokee Nation. One of the funds was created by the Treaty with the Nation made December 29, 1835, at New Echota, in Georgia, commuting certain annuities into the sum of $214,000. The other arose from sales of certain lands of the Nation lying west of the Mississippi River.

The suit by the petitioners was authorized by an Act of Congress, and it is brought against the United States and the Cherokee Nation, 22 Stat. at L. 581, chap. 141. The United States, however, have no interest in the controversy, as they hold the funds merely as trustee. They stand neutral, therefore, in the litigation, although as a matter of form they have filed an answer traversing the allegations of the petition.

The general ground upon which the petitioners proceed and seek a recovery is, that the Cherokee Indians, both those residing east and those residing west of the Mississippi, formerly constituted one people and composed the Cherokee Nation; that by various treaty stipulations with the United States they became divided into two branches, known as the Eastern Cherokees and the Western Cherokees; and that the petitioners constitute a portion of the former, and as such are entitled to a proportionate share of the funds which the United States hold in trust for the Nation.

This claim is resisted, upon the ground that the two branches, into which it is admitted the Nation was once divided, subsequently became reunited, and have ever since constituted one nation, known as the Cherokee Nation; and that as such it possesses all the rights and property previously claimed by both; and that the petitioners have not, since the Treaty of New Echota, constituted any portion of the Nation.

To determine the merits of the respective claims and pretensions of the parties, it will be necessary to give some account of the different treaties between the Cherokees and the United States, and to refer to the several laws passed by Congress to carry the treaties into effect, and accomplish the removal of the Indians from their former home east of the Mississippi to their present country west of that river.

When that portion of North America which is now embraced within the limits of the United States east of the Mississippi was discovered, it was occupied by different tribes or bands of Indians. These people were destitute of the primary arts of civilization, and with a few exceptions had no permanent buildings, occupying only huts and tents. Their lands were cultivated in small patches and generally by women. The men were chiefly engaged in hunting and fishing. From the chase came their principal food, and the skins of animals were their principal clothing. The different tribes roamed over large tracts and claimed a right to the country as their territory and hunting grounds. Of these tribes, the Cherokee Indians constituted one of the largest and most powerful. They claimed the principal part of the country now composing the States of North and South Carolina, Georgia, Alabama and Tennessee. Their title was treated by the governments established by England, and the governments succeeding them, as merely usufructuary; affording protection against individual encroachment, but always subject to the control and disposition of those governments, at least, so far as to prevent, without their consent, its acquisition by others. Such superior right rested upon the claim asserted by England, of prior discovery of the country, and was respected by other European nations. There was no nation, therefore, to oppose this assertion of superior right to control the disposition of the lands, and to acquire the title of the Indians, except the Indians themselves; and by treaties with them from time to time their title and interest were ceded to the United States.

On the 28th of November, 1785, the United States made its first treaty with the Cherokees, 7 Stat. at L. 18. It was concluded at Hopewell, on the Keowee, between commissioners representing the United States on the one part and the "head men and warriors of all the Cherokees on the other." By it the Indians, for themselves and their respective tribes and towns, acknowledged that all the Cherokees were under the protection of the United States and of no other Sovereign. The Treaty promised peace to them and the favor and protection of the United States, on condition of the restoration to liberty of certain prisoners whom they had captured, and of the return of certain property which they had seized. It also prescribed the boundary between them and citizens of the United States, of lands allotted to them for their hunting grounds. These lands embraced large tracts within the States mentioned. The ninth article provided that, for the benefit and comfort of the Indians and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States should "have the sole and exclusive right of regulating the trade with the Indians and managing all their affairs in such manner as they think proper." By this Treaty the Cherokees were recognized as one people, composing one Tribe or Nation; but subject, however, to the jurisdiction and authority of the Government of the United States, which could regulate their trade and manage all their affairs. [295]

On the second of July, 1791, another Treaty

was made with the Cherokees, in which they were described as the "Cherokee Nation." 7 Stat. at L. 39. Its representatives were designated as the "Chiefs and warriors of the Cherokee Nation of Indians;" and the first article declared that "There shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the whole Cherokee Nation of Indians." And the chiefs and warriors, "for themselves and all parts of the Cherokee Nation," acknowledged themselves and the Cherokee Nation to be under the protection of the United States and of no other Sovereign. The Treaty also renewed the agreement, on the part of the Cherokees, that the United States should have the [296] sole and exclusive right of regulating their trade; and readjusted the boundary between citizens of the United States and the "Cherokee Nation," by which the hunting grounds were reduced in quantity; and in consideration of this reduction the United States agreed to deliver certain valuable goods to the chiefs and warriors for the use of the Nation, and to pay to the Nation annually the sum of $1,000. A further article increased the amount to $1,500.

The boundary of the hunting grounds was from time to time changed by subsequent treaties, and by each succeeding one their extent was reduced; in consideration of which a larger quantity of goods was promised to the Nation; and the annuity was increased until, in the year 1805, it amounted to $10,000. 7 Stat at L. 43, 62, 98. This annuity was regularly paid to the Cherokee Nation, as represented by the Indians occupying territory east of the Mississipi River, until the Treaty of July 8, 1817. 7 Stat. at L. 156. That Treaty originated from a division in opinion among the Cherokees as to their mode of life, which existed when the first Treaty with the United States was made, in 1785, and which had from that time increased. There were numerous settlements or towns within the territory allotted to the Indians. Those who occupied the upper towns, which were mostly in the State of North Carolina, desired to engage in the pursuits of agriculture and civilized life; while those who occupied the lower towns, in the valley of the Mississippi, desired to continue "the hunter life:" and owing to the scarcity of game where they lived, to remove across the Mississippi River to vacant lands of the United States. As early as 1808 a deputation from the upper and lower towns, authorized by the Cherokee Nation, came to Washington to declare to the President their desires and inform him of the impracticability of uniting the whole Nation in the pursuits of civilized life, and to request the establishment of a division line between the two classes of towns. The Treaty of 1817, which was made with "the chiefs, head men and warriors of the Cherokee Nation east of the Mississippi River, and the chiefs, head men, and warriors of the Cherokees on the Arkansas River," recites the [297] action of this deputation and the reply of the President to the parties, made on the 9th of January, 1809, which was, in substance, that the United States were the friends of both parties, and, as far as could be reasonably asked, were willing to satisfy the wishes of both; that those who remained might be assured of their patronage, aid, and good neighborhood; that those who wished to remove would be permitted to send an exploring party to reconnoiter the country on the west of the Arkansas and White Rivers and higher up; that when this party should have found a tract of country suiting the emigrants and not claimed by other Indians, the United States would arrange with them to exchange it for a just proportion of the country they should leave, and to a part of which, according to their numbers, they had a right; and that every aid towards their removal and what would be necessary for them there would then be freely extended to them.

The Treaty recites that, relying upon these promises of the President, the Cherokees explored the country on the west side of the Mississippi, and made choice of the country on the Arkansas and White Rivers, and settled upon lands of the United States to which no other tribe of Indians had any just claim; and that they had duly notified the President thereof; and of their desire for a full and complete ratification of his promise. To that end, as notified by him, they had sent their agents with full powers to execute a treaty, relinquishing to the United States their right, title and interest to all lands belonging to them as part of the Cherokee Nation, which they had left and which they were about to leave, proportioned to their numbers, including with those now on the Arkansas those who were about to remove thither. The Treaty then proceeds to recite that, to carry into effect in good faith the promises of the President, and to promote a continuation of friendship with their brothers on the Arkansas River, and for that purpose to make an equal distribution of the annuities secured by the United States to the whole Cherokee Nation, its articles were agreed upon. These were in substance, that the chiefs, head men and warriors of the whole Cherokee Nation ceded to the United States certain lands lying east of the Mississippi; and the United States, in exchange for them, bound themselves to give to that branch of the Cherokee Nation on the Arkansas as much land on that river and the White River as they had received or might thereafter receive from the Cherokee Nation east of the Mississippi, "acre for acre, as the just proportion due that part of the Nation on the Arkansas, agreeably to their numbers." The United States also agreed to give to each poor warrior who might remove to the western side of the Mississippi a rifle gun, with ammunition and other articles, to pay for all improvements of real value to their lands; and to give of the lands surrendered to the United States, to every head of an Indian family residing on the east side of the Mississippi, who might wish to become a citizen of the United States, 640 acres. It was also agreed that the annuity due to the whole nation for the year 1818 should be divided between the two branches of the Nation, according to their respective numbers, to be ascertained by a census to be taken. Previous treaties between the United States and the Cherokee Nation were to continue in force with both of its branches, each to be entitled to all the immunities and privileges which the "old Nation" enjoyed under them.

On the 27th of February, 1819, another Treaty was made with the Cherokee nation (7 Stat. at L. 195), represented by its chiefs and head men.

By it a further cession of lands was made to the United States, and it was agreed that the annuity to the Nation should be paid as follows: two thirds to the Cherokees east of the Mississippi, and one third to the Cherokees west of that river. This apportionment was based upon an estimate that those who had emigrated, and those who were enrolled for emigration, constituted one third of the Nation, instead of upon a census to be taken, as mentioned in the Treaty of 1817. The annuity thus divided was regularly paid as stipulated until commuted by the Treaty of December, 1835, of which we shall presently speak.

On the 6th of May, 1828, a treaty was made with the chiefs and head men of the Cherokee Nation of Indians west of the Mississippi. 7 Stat. at L. 311. This was the first time that the Cherokees west of the river were recognized as so far a distinct and separate political [299] body from the Cherokees east of the river as to call for separate treaty negotiations with them. The Treaty recited, as among the causes of its being made, that it was the anxious desire of the Government to secure to the Cherokee Nation of Indians, as well those then living within the limits of Arkansas as those of their friends and brothers residing in States east of the Mississippi, who might wish to join their brothers west, a permanent home which should, under the guaranty of the United States, remain forever theirs; and that the present location of the Cherokees in Arkansas was unfavorable to their repose, and tended to their degradation and misery. By it the United States agreed to put the Cherokees in possession of, and to guaranty to them forever, seven millions of acres of land which were specifically described, and which are situated in what is now known as the Indian Territory, and also to give and guaranty to the Cherokee Nation a perpetual outlet west of these lands, and a free and unmolested use of the country so far as their sovereignty and right of soil extended. They also agreed to pay for all improvements on the land abandoned; and, in order to encourage the emigration of their brothers remaining in the States, to give to each head of a Cherokee family then residing within any of the States east of the Mississippi, who might desire to remove west, on enrolling himself for emigration, a good rifle and certain other articles, to make just compensation for their property abandoned, to bear the cost of their emigration, and to procure provisions for their comfort, accommodation and support by the way, and for twelve months after their arrival at the agency. On the other hand, the chiefs and head men of the Cherokee Nation west re-ceded to the United States the lands to which they were entitled on the Arkansas under the Treaties of July 8, 1817, and of February 27, 1819, and agreed to remove from the same within fourteen months.

From this time until the Treaty of New Echota, concluded December 29, 1835, 7 Stat. at L. 478, the Cherokees were divided into two branches, so far constituting distinct political bodies that the United States had separate negotiations with each; and on the 14th February, [300] 1833, by a treaty with the chiefs and head men of the Cherokee Nation west of the Mississippi, the United States renewed their guaranty of the seven millions of acres, and of the perpetual outlet to the Nation west of those lands, and of the free and unmolested use of the country west.

In the meantime (from the Treaty of 1828 until the Treaty of New Echota) the Cherokees remaining east of the Mississippi were subjected to harrassing and vexatious legislation from the States within which they resided. The United States had, as early as 1802, agreed with Georgia, in consideration of her cession of western lands, to extinguish the Indian title to lands within the State. North Carolina claimed that the United States were under a similar obligation to extinguish the Indian title to lands within her limits, in consideration of a like cession of western lands, although there was no positive agreement to that effect. And with the extinguishment of their title, it was expected that the Indians themselves would be removed to territory beyond the bounds of those States. At the time the Treaty of 1828 was made, a great deal of impatience had been exhibited by the people of those States at the little progress made in the extinguishment of the Indian title, and at the continued presence of the Indians. Severe and oppressive laws were passed by Georgia, in order to compel them to leave; and, though less severity was practiced in North Carolina towards the Indians in that State, an equally pronounced desire for their departure was expressed. Angry and violent disputes between them and the white people in both States but more particularly in Georgia, were of frequent occurrence. See case of *Cherokee Nation v. Ga.* as reported in a separate volume by Richard Peters in 1831 [see 30 U. S. bk. 8, L. ed. 1]; also a document called "The Public Domain," prepared by the Public Land Commission, and published as Ex. Doc. 47 of H. of R., 46th Cong. 3d Sess. and Doc. No. 71 of H. of R. 23d Cong. 1st Sess.

The Treaty of New Echota was made to put an end to those troubles and to secure the reunion of the divided Nation. It recites as motives to its negotiation, among other things, that the Cherokees were anxious to make some arrangement with the Government of the United States, whereby the difficulties they had experienced from residence within the settled [301] parts of the country under the jurisdiction and laws of the State Governments, might be terminated and adjusted, and they be reunited into one body, and be secured a permanent home for themselves and their posterity in the country selected by their forefathers, without the territorial limits of the state sovereignties, and where they could establish and enjoy a government of their choice, and perpetuate such a state of society as might be most consonant with their views, habits and conditions, and as might tend to their individual comfort and their own advancement in civilization. By its stipulations the Cherokees ceded to the United States all the lands owned, claimed or possessed by them east of the Mississippi River, and all claims for spoliations of every kind, for the sum of $5,000,000, and agreed to remove to "their new home" west of the Mississippi within two years from its ratification.

The Treaty also recited the cession to the Cherokee Nation by previous treaties of the 7,000,000 acres, and the guaranty of a perpetual outlet west of these lands, and a free and unmolested use of all the country, so far as the

sovereignty of the United States and their right to the soil extended; and also that it was apprehended by the Cherokees that in this cession there was not a sufficient quantity of land for the accommodation of the whole Nation, and, therefore, the United States agreed, in consideration of $500,000, to convey by patent to the Indians and their descendants an additional tract of 800,000 acres; and that the land previously ceded, including the outlet, should be embraced in the same patent. Art. 2. They also agreed to remove the Indians to their new home, and to subsist them one year after their arrival there, except that such persons and families, as in the opinion of "the emigrating agent" were capable of subsisting and removing themselves, should be permitted to do so, and should be allowed for all claims for the same $20 for each member of their families; and, in lieu of their one year's rations, should be paid the sum of $33.33, if they preferred it. Art. 8.

It was also agreed that after deducting the amount which should be actually expended for the payment for improvements, claims for spoliations, removal, subsistence and debts and claims upon the Cherokee Nation, and for the additional quantity of lands and goods for the poorer class of Cherokees, and the several sums to be invested for the general national funds provided for in the several articles of the Treaty, the balance, whatever the same might be, should be equally divided between all the people belonging to the Cherokee Nation east according to the census completed, and such Cherokees as had removed west after June, 1833; and that those individuals and families that were averse to removal and were desirous to become citizens of the State wherein they resided, and such as were qualified to take care of themselves and their property, should be entitled to receive their due proportion of all the personal benefits arising under the treaty for their claims, improvements and their *per capita*, as soon as an appropriation was made to carry out the Treaty. Arts. 12, 15.

By the eleventh article, "The Cherokees, believing it would be for the interest of their people to have all their funds and annuities under their own direction and future disposition," agreed to commute their permanent annuity of $10,000 for the sum of $214,000; the same to be invested by the President of the United States as part of the general fund of the Nation.

In the following year Congress made the requisite appropriation for the commutation and, according to the tenth article of the treaty, the money was invested "for the benefit of the whole Cherokee Nation," which had removed or should subsequently remove to the lands assigned to it west of the Mississippi. This is one of the funds of which the petitioners claim a part, in proportion to their numbers as compared with the citizens of the Cherokee Nation living west of the Mississippi on the territory ceded. The provisions of the Treaty as to the investment, custody and distribution of the income of this fund, and all other funds belonging to the Nation, remained in force until the Treaty of July 19, 1866. The interest was paid over annually to the agents of the Cherokee Nation authorized to receive the same, and was subject to application by its council to such purposes as they deemed best for the general interests of their people. The Treaty of 1866 (art. 23, 14 Stat. at L. 805) provided that all funds then due the Nation, or that might thereafter accrue from the sale of its lands by the United States, as provided for, should be invested in United States registered stocks at their current value, and the interest on all said funds should be paid semi-annually on the order of the Cherokee Nation, and be applied to the following purposes, to wit: 35 per cent for the support of the common schools of the Nation and educational purposes, 15 per cent for the orphan fund, and 50 per cent for general purposes, including reasonable salaries of district officers.

Immediately after the ratification of the Treaty of 1835 measures were taken by the Government to secure its execution; and commissioners were appointed to adjust claims for improvements and facilitate the emigration of the Indians. But emigration proceeded slowly. Great reluctance to go was manifested by large numbers, and at last it became necessary to make a display of force to compel their removal. Major-General Scott was sent to the country with troops and instructed to remove all the Indians except such as were entitled to remain and become citizens under the twelfth article of the Treaty. The number that remained was between eleven and twelve hundred. They were without organization or a collective name. They ceased to be part of the Cherokee Nation, and henceforth they became citizens of and were subject to the laws of the State in which they resided. The name of the Eastern Cherokees accompanied those who emigrated, to distinguish them from those who had preceded them and who were called old settlers.

After the reunion of the Cherokee people on their lands west of the Mississippi, resulting from the execution of the Treaty, and on the 12th of July, 1839, the following Act of union between the Eastern and Western Cherokees was adopted:

"*Act of Union between the Eastern and Western Cherokees.*

"*Whereas*, our fathers have existed as a separate and distinct Nation, in the possession and exercise of the essential and appropriate attributes of sovereignty, from a period extending into antiquity, beyond the records and memory of man; and whereas, these attributes, with the rights and franchises which they involve, remain still in full force and virtue, as do also the national and social relation of the Cherokee people to each other and to the body politic, excepting in those particulars which have grown out of the provisions of the Treaties of 1817 and 1819 between the United States and the Cherokee Nation, under which a portion of our people removed to this country and became a separate community (but the force of circumstances have recently compelled the body of the Eastern Cherokees to remove to this country, thus bringing together again the two branches of the ancient Cherokee family), it has become essential to the general welfare that a union should be formed and a system of government matured adapted to their present condition, and providing equally for the protection of each individual in the enjoyment of all his rights:

"Therefore we, the people composing the

Eastern and Western Cherokee Nation, in national convention assembled, by virtue of our original unalienable rights, do hereby solemnly and mutually agree to form ourselves into one body politic, under the style and title of the Cherokee Nation.

"In view of the union now formed, and for the purpose of making satisfactory adjustment of all unsettled business which may have arisen before the consummation of this union, we agree that such business shall be settled according to the provisions of the respective laws under which it originated, and the courts of the Cherokee Nation shall be governed in their decisions accordingly. Also, that the delegation authorized by the Eastern Cherokees to make arrangements with Major-General Scott for their removal to this country shall continue in charge of that business, with their present powers, until it shall be finally closed; and also, that all rights and titles to public Cherokee lands on the east or west of the River Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforward vest entire and unimpaired in the Cherokee Nation as constituted by this union.

"Given under our hands, at Illinois camp grounds, this 12th day of July, 1838.

"By order of the National Convention.

"George Lowry,
"President of the Eastern Cherokees.

his
"George x Guess,
mark.
"President of the Western Cherokees."

On the 6th of September following they adopted a Constitution of government, in which they recited that the Eastern and Western Cherokees had become reunited in one body politic, under the style and title of the Cherokee Nation. The second clause of its first article is as follows:

"The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made or may rightfully be in possession of them; *Provided*, That the citizens of the Nation possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements in any manner whatever to the United States, individual States, or to individual citizens thereof; and that whenever any citizen shall remove with his effects out of the limit of this Nation and become a citizen of another government, all his rights and privileges as a citizen of this Nation shall cease; *Provided, nevertheless*, That the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the Nation, on memorializing the national council for such readmission."

But notwithstanding this declared reunion of the divided Cherokees, there was much bitter feeling between the old settlers and the newcomers, leading to violent contests, and causing, in many instances, great loss of property and life. The newcomers, being the more numerous, claimed to control the government of the country, and endeavored to compel the old settlers to submit to their rule. The old settlers had an organization of their own and complained that the newcomers occupied their lands and overthrew their organization. And among the newcomers also there was bitterness between those who had favored the Treaty of removal from the east side of the Mississippi and those who had opposed it. The former sided with the old settlers, but the latter outnumbered both. Violent measures were resorted to on both sides to carry out their purposes, and there was little security for person or property. The situation became intolerable; and in 1845 the contending factions—the old settlers, the Treaty party, and the Anti-Treaty party—sent delegates to Washington to lay their grievances before the officials of the United States Government, in the hope that some relief might be afforded to them. The old settlers and the Treaty party desired the division of the people into two Nations and a division of the Territory. Demands also were made by each party against the United States under the stipulations of the Treaty of New Echota. These circumstances led to the Treaty of August 6, 1846. It was negotiated on the part of the Cherokees by delegates appointed by the regularly constituted authorities of the Cherokee Nation, and by delegates appointed by and representing that portion of the Cherokee Tribe known as the Treaty party, and by delegates appointed by and representing that portion of the Tribe known and recognized as Western Cherokees or the old settlers. It recited that serious difficulties had for a considerable time existed between the different parties of the people constituting and recognized as the Cherokee Nation of Indians, which it was desirable should be speedily settled, so that peace and harmony might be restored among them; and that certain claims existed on the part of the Cherokee Nation and portions of the Cherokee people against the United States; and that, with a view to the final and amicable settlement of these difficulties and claims, the parties had agreed to the treaty. 9 Stat. at L. 871.

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It declared that all difficulties and differences existing between the several parties of the Cherokee Nation were settled and adjusted; and that they should, as far as possible, be forgotten and forever buried in oblivion; that all party distinctions should cease, except so far as they might be necessary to carry the Treaty into effect; that a general amnesty should be proclaimed; and that all offenses and crimes committed by a citizen or citizens of the Cherokee Nation against the Nation or an individual were pardoned. It was agreed also that all parties were to unite to enforce laws against future offenders, and that laws should be passed for equal protection and for security of life, liberty and property. Thus the personal dissensions were to a great extent healed.

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The Treaty also declared that the lands occupied by the Cherokee Nation should be secured to the whole Cherokee people for their common use and benefit, and that a patent should be issued for the same, including the 800,000 acres purchased, together with an outlet west; thus recognizing that all the lands ceded by the United States for the benefit of the

[illegible] Mississippi belonged to the entire Nation, and not to any of the factions into which the Nation was divided. The Treaty also made provision for the adjustment and settlement of the claims of different parties. The [illegible] as follows:

"The United States agree to make a fair and [illegible] settlement of all moneys due to the Cherokees and subject to the [illegible] division under the Treaty of 29th December, 1835, which said settlement shall exhibit all money properly [illegible] under said Treaty, shall embrace all sums paid for improvements, ferries, spoliations, removal and subsistence and commutation [illegible] and claims upon the Cherokee Nation of Indians for the additional quantity of land ceded to said Nation; and the [illegible] provided in the several articles of the Treaty to be invested in the general funds of the Nation, and also all sums which may be [illegible] allowed and paid under the provisions of the Treaty of 1835. The aggregate of the said several sums shall be deducted from the sum of $5,447,007, and the balance found to be due shall be paid over by [illegible] in equal amounts to all those individuals, heads of families or their legal representatives, entitled to receive the same under the Treaty of 1835 and the supplement of 1836, being all those Cherokees residing east of the [illegible] said Treaty and the supplement thereto."

By the Treaty of July 19, 1866, 14 Stat. at L. 799, provision was made for the settlement of friendly Indians on certain unoccupied lands of the Cherokees west of the Mississippi; and for the sale of their interest, and also for the sale of other lands belonging to them in the State of Kansas, and the investment of the proceeds in registered stocks of the United States for the benefit of the Cherokee Nation. Under these provisions and other laws, sales were made of the lands mentioned, and also of other lands west of the Mississippi ceded to the Cherokees under the different Treaties, to which we have referred, and the proceeds have been duly invested, as required by article 23 of the Treaty. The government constitutes one of the funds to which the petitioners seek a proportionate share.

That fund, however, rests upon no solid foundation. The funds from the sales of which the proceeds were derived belonged to the Cherokee Nation as a political body, and not to individual members. They were held, it is true, for the common benefit of all the Cherokees. But this does not mean that each member had such an interest as a tenant in common has in a share of a specific proportion of the property, or a share equal to that of any part of them. [illegible] the proceeds of the lands thus [illegible] Nation, subject to such rules as its [illegible] authority might prescribe; but that [illegible] provisions for qualified the legal [illegible] authority to sell the lands and [illegible] the Nation to the United States. Our [illegible] by its treaties with the Cherokees, [illegible] them as a distinct political community [illegible] independent as to justify and [illegible] negotiations with them in that character. [illegible] rights of question must, therefore, [illegible] to convey the common property [illegible] but to divest the interest therein of each of its members. Such was substantially the language and such the decision of the Attorney-General of the United States in a communication made to the President, in 1845, with reference to the Treaty of New Echota. "The Executive of the United States," he said, "must therefore regard the Treaty of New Echota as binding on the whole Cherokee Tribe; and the Indians, whether in Georgia, Alabama, Tennessee or North Carolina, are bound by its provisions. As a necessary consequence, they are entitled to its advantages. The North Carolina Indians, in asking the benefit of the removal and subsistence commutation, necessarily admit the binding influence of the Treaty on them and their rights. They cannot take its benefits without submitting to its burdens. The Executive must regard the Treaty as the supreme law, and as a law construe its provisions." 4 Ops. Attys-Gen. 437.

Whatever rights, therefore, the Cherokees in North Carolina, who refused to join their countrymen in the removal to the lands ceded to them west of the Mississippi, can claim in the funds arising from sales of portions of such lands, or in the fund created by a commutation of the annuities granted upon cessions of the lands of the Cherokee Nation, must depend entirely upon the treaties out of which those funds originated. They have as yet received nothing from either of them; and they can claim nothing by virtue of the fact that the lands of the Nation, which its authorities ceded to the United States, were held for the common benefit of all the Cherokees. All public property of a nation is supposed to be held for the common benefit of its people; their individual interest is not separable from that of the nation.

The Cherokees in North Carolina dissolved their connection with their Nation when they refused to accompany the body of it on its removal, and they have had no separate political organization since. Whatever union they have had among themselves has been merely a social or business one. It was formed in 1868, at the suggestion of an officer of the Indian Office, for the purpose of enabling them to transact business with the Government with greater convenience. Although its articles are drawn in the form of a Constitution for a separate civil government, they have never been recognized as a separate Nation by the United States; no Treaty has been made with them; they can pass no laws; they are citizens of that State and bound by its laws. As well observed by the Court of Claims, in its exhaustive opinion, they have been in some matters fostered and encouraged by the United States, but never recognized as a Nation in whole or in part. 20 Ct. Cl.

Nor is the band, organized as it now is, the successor of any organization recognized by any treaty or law of the United States. Individual Indians who refused to remove west and preferred to remain and become citizens of the States in which they resided were promised certain moneys; but there is no evidence that the petitioners have succeeded to any of their rights. The original claimants have probably all died, for fifty years have elapsed since the Treaty of 1835 was made; and no transfer from them or their legal representatives is shown. But assuming that the petitioners properly represent

all rightful demands of the Cherokees living in North Carolina when the Treaty was made, what were those demands? As designated by articles 12 and 15 of the Treaty, these Cherokees were to receive "their due portion of all the personal benefits accruing under the Treaty, for their claims, improvements and *per capita*." The term "claims" had reference to demands for spoilations of their property which existed prior to the Treaty. The improvements were those made on the property ceded. By *per capita* was meant the proportionate amount, given to each Cherokee east not choosing to emigrate, of the money received on the cession of the lands east of the Mississippi, after deducting certain expenditures mentioned in article 15. Whatever may have remained for the *per capita* distribution, of the $5,000,000 received for the lands after the deductions mentioned, it is plain that it constituted no portion of the moneys that formed the fund of which the petitioners seek by this suit a proportionate part. By the Treaty of 1846 certain sums were allowed in addition to the $5,000,000 specified in the Treaty of 1835, and from the whole amount certain items, other than those three designated, were to be deducted, and the balance was to be paid over *per capita* in equal amounts to all the individuals, heads of families, or their legal representatives entitled to receive it under that Treaty. But this change in no respect affects the case.

While the Treaty of 1846 was under negotiation, one William H. Thomas appeared in Washington as the representative of Cherokees in North Carolina and urged a recognition of their demands for the *per capita* money and the removal and subsistence money under articles 8 and 12 of the Treaty of 1835. He had obtained a statement from one of the commissioners who negotiated that Treaty on the part of the United States, from several respectable persons who were privy to the negotiations, and from some of the Cherokees who signed the Treaty, as to the meaning which should be given to certain terms used in it; and we are referred to these documents as though they should have some influence upon the construction of those terms. But it is too plain for controversy that they cannot be used to control the language of the Treaty or guide in its construction.

The *per capita* money and removal and subsistence money had not been paid when the Treaty of 1846 was made, but the court of claims finds that since then they have been paid. The claim now presented by the Cherokees of North Carolina to a share of the commuted annuity fund of $214,000, and of the fund created by sales of lands west of the Mississippi ceded to the Cherokee Nation, resting, as it does, upon the designation in the Treaties of the lands originally possessed by the Cherokees and ceded to the United States, or subsequently acquired by them from the United States, as "the common property of the Nation," or as held for the "common use and benefit" of the Cherokee people, has no substantial foundation. If Indians in that State or in any other State east of the Mississippi wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the court of claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided. They cannot live out of its Territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation. Those funds and that property were dedicated by the Constitution of the Cherokees, and were intended by the Treaties with the United States, for the benefit of the united Nation, and not in any respect for those who had separated from it and become aliens to their Nation. [312]

We see no just ground on which the claim of the petitioners can rest to share in either of the funds held by the United States in trust for the Cherokee Nation; and the decree of the Court of Claims must, therefore, be affirmed; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

NORMAN B. HARWOOD ET AL., *Appts.*, [200]
v.
EMIL DICKERHOFF ET AL.

(See S. C. "*Harwood* v. *Dieckerhoff*," Reporter's ed. 200, 201.)

Practice—security on appeal.

Motion to increase the amount of the bond given on appeal overruled, the circumstances not having been so changed by the death of one of the appellants as to make the security which was sufficient when the appeal was taken now insufficient, and the affidavits not satisfying the court that the property in question is depreciating by reason of the neglect of the surviving appellants.

[No. 944.]

Argued March 2, 1886. Decided March 8, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Florida.

On motion for an increase of *supersedeas* bond.

This was a creditor's suit, commenced in one of the state courts of Florida and removed to the Circuit Court of the United States for the Northern District of Florida. The bill was filed by the appellees to subject certain real property and debts to a claim held by them against Norman B. Harwood. The decree of the court below declared the property in question subject to the claims of the complainants and the defendants appealed, giving a bond which was approved.

This motion was to increase the bond or to dismiss the appeal, for the reason that by the death of Norman B. Harwood, one of the appellants, since the date of the decree, the property has greatly depreciated and is constantly depreciating for the want of the care it received during his lifetime.

Messrs. **W. E. Earle, Chas. J. Babbitt** and **John T. Walker,** for appellees, in support of the motion.

Messrs. **Henry Jackson** and *L. J. Fleming, contra.*

Mr. Chief Justice **Waite** delivered the opinion of the court: [200]

This motion is denied, on the authority of *Jerome* v. *McCarter,* 21 Wall. 17 [88 U. S. bk. 22,

L. ed. 515]. "The circumstances of the case, or of the parties," have not been so changed by the death of N. B. Harwood, one of the appellants, as to make "the security, which, at the [201] time it was taken, was 'good and sufficient,'" now insufficient. No personal decree is asked. The sole purpose of the suit is to subject the lands in question to the payment of debts of Harwood, the deceased appellant. The affidavits do not satisfy us that the property is depreciating in value by reason of any neglect of the surviving appellants in its care or management

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[197] BAXTER SMITH, EXR. of GEORGE F. AKERS, Deceased, *Plff. in Err.*,

v.

ALBERT AKERS.

(See S. C. "*Akers* v. *Akers*," Reporters ed." 197, 198.)

Jurisdiction—removal of causes—citizenship.

A suit cannot be removed from a state to a federal court, upon the ground of citizenship unless the plaintiff and defendant are citizens of different States, at the time when the suit was brought as well as at the time when the petition for removal is filed.

[No. 442.]

Submitted March 1, 1886. Decided March 8, 1886.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

This action was commenced in the Circuit Court of Davidson County, Tennessee, and removed upon petition of the defendant, now the plaintiff in error, to the United States Circuit Court for the Middle District of Tennessee. That court remanded the case to the state court and the defendant sued out this writ of error. The judgment remanding the case stated that the petition for removal failed to aver that the parties were citizens of different States, at the time of the commencement of the suit, and that it was admitted that at that time both parties were citizens of Tennessee.

No appearance for plaintiff in error.

[198] *Mr. S. Watson*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The order remanding this cause is affirmed, on the authority of *Gibson* v. *Bruce*, 108 U. S. 561 [Bk. 27, L. ed. 825], it being admitted that both the plaintiff and the defendant were citizens of Tennessee at the time the suit was brought.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

NOTE.—*Removal of causes under Act of 1875 on ground of citizenship.* See Delaware R. R. Construction Co. v. Meyer, 100 U. S., 457, bk. 25, 593, *note.*

JOHN JOHNSON, *Plff. in Err.*,

v.

PERRIE KEITH ET AL.

(See S. C. Reporter's ed. 199.)

*Jurisdiction—final judgment.**

A judgment of reversal, accompanied by an order remanding the cause for a retrial, is not a final judgment for the purposes of a writ of error to this court.

[No. 888.]

Submitted March 8, 1886. Decided March 8, 1886.

IN ERROR to the Supreme Court of the State of Missouri.

On motion to dismiss.

Messrs. F. M. Cockrell and *Wallace & Chiles*, for defendants in error, in support of the motion.

No counsel appeared for plaintiff in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is granted. A judgment of reversal, accompanied by an order remanding the cause for a retrial, is not a final judgment for the purposes of a writ of error to this court. *Houston* v. *Moore*, 3 Wheat. 433 [16 U. S. bk. 4, L. ed. 428]; *Bostwick* v. *Brinkerhoff*, 106 U. S. 4 [Bk. 27, L. ed. 74], and cases there cited.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOHN C. PHELPS ET AL., *Plffs. in Err.*,

v.

GEORGE R. OAKS, MARIA ZEIDLER AND JOHN ZEIDLER, Her Husband.

(See S. C. Reporter's ed. 236–241.)

Removal of causes—jurisdiction—§ 914, R. S.—practice of United States Courts—conformity with that of state courts—introduction of landlord of defendant as codefendant.

2. Where the circuit court has acquired jurisdiction of a cause by removal from a state court, because of the citizenship of the parties, its jurisdiction is not devested by the introduction, under a state statute, of the defendant's landlord as a codefendant, although he is a citizen of the same State as the plaintiff.

2. Under section 914, R. S., a court of the United States is not required to conform its practice to that of the state courts in the State in which it is held, when the effect would be to defeat its jurisdiction once lawfully attached under an Act of Congress.

3. It was proper in this case for the court to admit the landlord as codefendant of the tenant; but this did not arrest or interfere with its jurisdiction already established by the plaintiffs against the tenant in possession.

[No. 807.]

Submitted Mar. 1, 1886. Decided Mar. 15, 1886.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri.

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*NOTE.—*What is final judgment for purposes of writ of error or appeal.* See Gibbons v. Ogden, 19 U. S. bk. 5, 302, *note.*

The history and facts of the case appear in the opinion of the court.

Messrs. **S. B. Ladd, J. D. Strong, C. A. Mosman** and **H. K. White,** for plaintiffs in error.

Messrs. **Charles W. Hornor, S. S. Brown, H. Ramey** and **J. F. Harwood,** for defendants in error.

Mr. Justice **Matthews** delivered the opinion of the court:

The plaintiffs in error, who were plaintiffs below, brought their action in the Circuit Court of DeKalb County, Missouri, at the April Term, 1883, against George R. Oaks, for the recovery of the possession of certain lands in that county, unlawfully withheld by him, as they alleged; and for damages therefor and for rents and profits.

The defendant, a citizen of Missouri, having been served with process, the plaintiffs, who were citizens of Pennsylvania, filed their petition for the removal of the cause to the Circuit Court of the United States for the Western Division of the Western District of Missouri, on the ground that the controversy in said suit was between citizens of different States, the matter and amount in dispute being in excess of the sum or value of $500. The prayer of the petition was granted, the accompanying bond being approved, and the cause was removed.

Afterwards, on June 16, 1884, the defendant Oaks filed his answer, in which he denied all the allegations of the plaintiffs' complaint, except as expressly admitted; and in addition set up that at the time of the commencement of the action he was in possession of the premises as the tenant, from year to year, of one Maria Zeidler, wife of John Zeidler, who was the owner thereof, and to whom he had paid the rents due on account thereof; and asked that the said Maria and John Zeidler be made parties defendant to the suit, according to the form of the Statute of Missouri in such cases provided. Thereupon the Zeidlers also appeared and asked to be let in as defendants and for leave to plead; and it was so ordered by the court, with leave to file a motion to remand the cause to the state court in thirty days. Such a motion was accordingly made, upon the ground that Maria Zeidler and John Zeidler, her husband, were both citizens of Pennsylvania; that the defendant Oaks made no claim or demand to the premises in controversy, otherwise than as the tenant of Maria Zeidler, and that consequently, the said suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court of the United States.

Pending this motion the plaintiffs moved the court to rescind the order making Maria and John Zeidler parties. This motion to rescind was denied, and the motion of the defendants to remand the cause was granted. To reverse these rulings is the object of this writ of error.

That the cause when removed from the state to the circuit court was rightly removed is not denied. Under the Removal Act of 1875, the plaintiffs were authorized to remove their action, although brought by them in the first place in the state court, into the Circuit Court of the United States, they being citizens of Pennsylvania, and the defendant a citizen of Missouri and an inhabitant of the district.

The ground on which the suit was remanded was that it subsequently appeared that it did not really and substantially involve a controversy properly within the jurisdiction of the circuit court, according to the sense of the fifth section of the Act of March 3, 1875. This conclusion, it is supposed, is justified by the fact that the defendant Oaks, being merely a tenant of Maria Zeidler, who claimed title to the premises in dispute, had no real interest in the controversy and was a merely nominal party, his landlord being the real party in interest, entitled to be let in to defend as a party to the record, and bound by law to maintain his tenant's possession; so that the real and substantial controversy involved in and to be determined by the action, was not between the plaintiffs and Oaks, but between them and the Zeidlers; and the latter being citizens of the same State with the plaintiffs, it became apparent that the cause was not properly within the jurisdiction of the circuit court.

The Statutes of Missouri provide that "Every tenant on whom a summons in an action to recover the tenements held by him shall be served shall forthwith give notice thereof to the person or agent of the person of whom such tenant holds, under the penalty of forfeiting to such person the value of three years' rent of the premises occupied by him." 1 R. S. Mo. 1879, 514, § 3071. And by section 2244, that "The person from or through whom the defendant claims title to the premises may, on motion, be made a codefendant." 1 R. S. Mo. 374. And it is claimed that under the decisions of the Supreme Court of the State, this right of the owner or warrantor of the title to be let in as a party to defend, does not rest in the discretion of the court, but is absolute. *Sutton* v. *Casseleggi*, 77 Mo. 397, 408. It is assumed that the statute is equally obligatory upon the courts of the United States.

But this is a mistake. It is true that by section 914, R. S., it is required that "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding;" but "The conformity is required," as was said by this court in *Indianapolis, etc. R. R. Co.* v. *Horst*, 93 U. S. 291, 300 [Bk. 23, L. ed. 898, 901], "to be, as near as may be;" not as near as may be *possible*, or as near as may be *practicable*. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals." Certainly it was not intended that these statutes were to be adopted with the effect of defeating the jurisdiction of the courts of the United

[239]

[illegible] Jameson, 115 U. S. 61, [illegible]

[illegible] the Zeidlers [illegible] the plaintiffs should [illegible] against the [illegible] the [illegible] with the [illegible] the [illegible] the circuit [illegible] the Statute [illegible] the right [illegible] tribunals, and if [illegible] the supreme [illegible] would [illegible] the proper [illegible] the two [illegible] tribunals. [illegible] of the circuit [illegible] party. For the [illegible] possession, [illegible] this end, he might not only be permitted to appear as a party to the record and codefendant, but to control the defense as *dominus litis*, raising and conducting such issues as his own rights and interests might dictate. And this need not arrest or interfere with the jurisdiction of the suit already established by the plaintiffs against the tenant in possession. For such proceedings should be treated as incidental to the jurisdiction thus acquired, and auxiliary to it; as in like cases, in equity, one interested in the subject matter, although a stranger to the litigation, may be allowed to intervene *pro interesse suo*. *Krippendorf* v. *Hyde*, 110 U. S. 276 [Bk. 28, L. ed. 145].

In this view, the Circuit Court was right in admitting the Zeidlers as codefendants; but there was error in remanding the cause to the state court.

For this error, the judgment complained of is reversed and the cause is remanded to the Circuit Court, with directions to proceed in the action according to law.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

JOHN W. COFFEY, Claimant of one Copper Still and Other Articles, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 238-235.)

Suits in rem—*Pleadings—section 914 R. S.*

1. The practice in the Courts of the United States as to the pleadings in suits *in rem*, as settled prior to the Act of June 1, 1872, was not changed by section 5 of that Act, now section 914 R. S.

2. Upon application for a rehearing, this court adheres to its original opinion, *ante*, 861.

[No. 92.]

Submitted Mar. 1, 1886. Decided Mar. 15, 1886.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

On petition for rehearing.

For the history and facts of the case, see the report of the opinion of this court at the original hearing. *Ante*, 861.

Mr. **Samuel McKee**, for plaintiff in error:

The practice for forfeitures under the internal revenue laws is not regulated by the admiralty rules, but by section 914, R. S.

This is an action at common law.

Morris v. *U. S.* 8 Wall. 507 (75 U. S. bk. 19, L. ed. 281); *Armstrong's Foundry* v. *U. S.* 6 Wall. 766 (73 U. S. bk. 18, L. ed. 882); *The Sarah*, 8 Wheat. 394 (21 U. S. bk. 5, L. ed. 644).

A common-law action, or proceeding for a forfeiture under a seizure, may be kindred to an admiralty proceeding *in rem*, so far as the information is concerned; but Rule 51, Admiralty, cannot prevail against section 914.

Only two classes of cases are excepted by the statute; equity and admiralty, not cases kindred to suits in admiralty.

There was no issue on the plea of former conviction, and claimant was entitled to a judgment on the pleadings. He moved for it. His

motion was denied, and his exception properly entered. It needed no bill of exceptions to bring up for review this action of the court.

Young v. *Martin*, 8 Wall. 357 (75 U. S. bk. 19, L. ed. 419); *Ins. Co.* v. *Boon*, 95 U. S. 125 (Bk. 24, L.ed. 396); *Slacum* v. *Pomery*, 6 Cranch, 223 (10 U. S. bk. 3, L.ed. 206); *Garland* v. *Davis*, 4 How. 143 (45 U. S. bk. 11, L. ed. 912); *Roach* v. *Hulings*, 16 Pet. 319 (41 U. S. bk. 10, L. ed. 979); *Suydam* v. *Williamson*, 20 How. 433 (61 U. S. bk. 15, L. ed. 978).

It is most respectfully but earnestly insisted that the opinion of January 18, 1886, in this case, does not conform to the authorities and the law heretofore delivered by this court, and is contrary to the statutes regulating pleadings and practice, as defined in section 914, R. S., and that a different judgment should be entered.

(No brief was filed on behalf of the defendant in error in opposition to the petition.)

Mr. Justice **Blatchford** delivered the opinion of the court:

On the 18th of January last, a decision was made in this case [*ante*, 681], affirming the judgment below, rendered on an information *in rem*, filed for the forfeiture to the United States of certain personal property seized for a violation of the internal revenue laws. There was a trial by jury and a verdict for the United States. The claimant, in his answer, had set up in bar that a criminal information had been filed against him, in the same court, alleging as offenses the same matters averred in the information in the civil suit, and that he had pleaded guilty and been adjudged to pay a fine. There was no demurrer or reply to this answer. After verdict, the claimant moved in arrest of judgment, alleging as cause the judgment in the criminal proceeding; but the motion was overruled. There was no bill of exceptions, and no exception to the overruling of the motion.

On the hearing in this court, the claimant contended that, as there was no traverse of the answer, it must be taken to be true. But this court held that no reply or replication to the answer was necessary to raise an issue of fact on the matters averred in it; that the proceedings, so far as the pleadings were concerned, were kindred to those in a suit in admiralty *in rem;* that the general rules of pleading in regard to admiralty suits *in rem* apply to suits *in rem* for a forfeiture, brought by the United States, after a seizure on land, as laid down in the cases of *The Sarah*, 8 Wheat. 391 [21 U. S. bk. 5, L. ed. 644]; *Union Ins. Co.* v. *U. S.*, and *Armstrong's Foundry* v. *U. S.* 6 Wall. 759, 766, 769 [73 U. S. bk. 18, L. ed, 879, 882, 884]; and *Morris* v. *U. S.* 8 Wall. 507, 511 [75 U. S. bk. 19, L. ed. 479, 482]; that Rule 22 of the Rules in Admiralty prescribes regulations for the form of informations and libels of information on seizures for the breach of the laws of the United States on land or water; that by Rule 51 in admiralty, new matter in an answer is considered as denied by the libelant; that the issue of fact as to the former conviction must be held to have been found against the claimant, by the general verdict; and that no question in regard to the defense set up could be raised.

An application is now made by the claimant for a rehearing, on the ground that as to the pleadings, the case must be governed by section 914 of the Revised Statutes, which is a re-enactment of section 5 of the Act of June 1, 1872, chap. 255, 17 Stat. at L. 197, and is in these words: "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." It is urged that this is a civil cause, but not an equity or an admiralty cause; and that the provisions of section 126 and 386 of the Civil Code of Practice of Kentucky, which took effect January 1, 1877, apply to it. Those sections are as follows: "§ 126 [153]. Every material allegation of a pleading must, for the purposes of the action, be taken as true, unless specifically traversed." "§ 386 [416]. Judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him."

The practice as to the pleadings in suits *in rem* like the present having been well settled prior to the passage of the Act of June 1, 1872, the question is, whether it was changed by that Act. In *Union Ins. Co.* v. *U. S.* [*supra*], where land was seized and proceeded against as forfeited to the United States under a confiscation Act, it was held that while either party had a right to demand a trial by jury, the proceedings were to be "in general conformity to the course in Admiralty." A like ruling was made, in a like case, in *Armstrong's Foundry* v. *U. S.* [*supra*], and in a case of the seizure of personal property on land, in *Morris' Cotton* [*supra*]. Section 914 prescribes a conformity to the practice in the courts of the State only "as near as may be," and only "in like causes." It is a proper construction of this section to hold that while the provisions of the Code of Kentucky in regard to pleadings in civil suits *in personam* apply to like causes in the federal courts in Kentucky, they do not apply to suits *in rem* by the United States for the forfeiture of property, after its seizure, for the violation of a revenue law, because there are no "like causes" known to the laws of Kentucky. Such suits *in rem* are peculiar in their practice, pleadings and forms of procedure; and so long as there is ample scope for the operation of section 914 of the Revised Statutes in regard to civil suits *in personam*, and no intention is manifest to change the established practice in such suits *in rem*, and any change in practice is limited to "like causes," we must continue to regard the former practice as applicable to the present suit. [235]

The question of the scope of operation of section 914 has been considered by this court in *Nudd* v. *Burrows*, 91 U. S. 426, and *Indianapolis, etc. R. R. Co.* v. *Horst*, 93 U. S. 291 [Bk. 23, L. ed. 286, 898]; *Newcomb* v. *Wood*, 97 U. S. 584 [Bk. 24, L. ed. 1086]; and *Ex parte Fisk*, 113 U. S. 713 [Bk. 28, L. ed. 1117.] In *Newcomb* v. *Wood*, it was held that the section did not abrogate the established rule in the courts of the United States, that to grant or refuse a new trial was a matter of discretion

[illegible] be reviewed as a writ of [illegible] a state court sustaining a party [illegible] in an action to recover the [illegible] property [illegible] entitle him [illegible] a federal [illegible] in this court [illegible] with the views above indicated as [illegible] to this case, and the application for a [illegible] is denied.

[illegible]

[illegible] Clerk, Sup. Court, U. S.

[illegible] IN THEIR OWN [illegible] HARRIET B. [illegible]

v.

[illegible] AND [illegible] COUNTY [illegible] COMPANY, THE NORTON [illegible] THE EASTERN KENTUCKY RAILWAY COMPANY, W. W. [illegible] ET AL., PARTNERS, AS CO-[illegible] & [illegible], ET AL.

[illegible]

[illegible]—[illegible] of [illegible] proof [illegible]

[illegible] are admissible [illegible] strong evidence [illegible] and if [illegible] would excite [illegible]

[illegible] case is admissible in [illegible] persons or private, to [illegible] the antiquity of origin [illegible] for their [illegible]

[illegible] of a recorder indorsed on a deed, which is apparently ancient and genuine, is competent and sufficient evidence that it was recorded [illegible]

[illegible] deed is admissible in evidence if it appears to be at least thirty years old, is found in proper custody, and either possession under it is shown, or some other corroborative evidence free[illegible] from all just grounds of suspicion.

[illegible] established by the Act of the Legislature of Kentucky of December 19, 1796, [illegible] of actions to foreclose mortgages.

[illegible] a court of general jurisdiction is authorized to bring in, by substituted service, nonresident individuals interested in property within its jurisdiction, but is not required to place the proof of service upon the record, and it orders such service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record; and a judgment affecting the property will be valid.

[No. 140.]

Argued and submitted March 4, 1886. Decided March [illegible], 1886.

[illegible] the Circuit Court of the United States for the District of Kentucky.

[illegible] Mr. Justice Woods:

[illegible] was in the nature of an action of [illegible] possession of a tract of [illegible] County, but now in [illegible] and Boyd Counties, in Kentucky. The plaintiffs in error were the plaintiffs in the circuit court. They alleged in their [illegible] that they were the lineal heirs of Carey [illegible] Clark, who died seized of a tract of 8,334 [illegible] and of a tract of 18,000 acres, granted by patent from the Commonwealth of Virginia dated April 21, 1792, to Charles Fleming, from whom their ancestor, Carey L. Clark, derived title by a regular chain of conveyances; that the plaintiffs were the owners and entitled to the possession of the land sued for; and that the defendants had unlawfully entered upon and unlawfully withheld possession of the same.

The defendants by their answers, denied these allegations and averred that they were seised of the premises by paramount title. The answers were traversed by the plaintiffs' reply.

There was a jury trial. The plaintiffs, to sustain the issue on their part, offered in evidence the following documents as links in their chain of title:

1. A copy, duly certified from the land office of the State of Kentucky, of the patent from the State of Virginia to Charles Fleming, for the tract of land of which the land in controversy was originally a part.

2. A copy of the will of Charles Fleming, devising a moiety of said tract of land to William Fleming, John Bernard, Jr., and Richard Bernard, as trustees.

3. A copy of a deed from Samuel Sackett and wife to Joseph Conkling and others, dated August 29, 1795, for the particular land in controversy in this case, together with certain other tracts that had been patented by the State of Virginia to Charles Fleming.

4. A copy of a mortgage from Joseph Conkling and others, the grantees above named, to Samuel Sackett, the grantor above named, conveying the same lands as above, and dated August 29, 1795.

5. A copy of a deed from William Fleming and the Bernards, trustees as above under the will of Charles Fleming, to John Bryan, conveying to Bryan the lands devised to them by the will of Fleming, and dated December 31, 1796.

6. The original of the deed last named.

7. A copy of a deed from John Bryan and wife to Samuel Sackett, dated January 28, 1797, conveying the same land conveyed to Bryan by deed last above named.

8. The original of the deed last above named.

9. The original of a deed from Charles Fleming, dated August 8, 1784, to John and William Bryan, conveying to them 13,800 acres of the land that had been patented to said Charles Fleming, and being part of the 18,000 acre tract, of which tract the land in controversy is also a part.

10. A certified copy from the Mason County Circuit Court of the record in the case of *Carey L. Clark* v. *Joseph Conkling*, in which Clark, as the assignee of the above mentioned mortgage of Joseph Conkling and others to Samuel Sackett, brought suit to foreclose the same.

The court admitted in evidence the first four of the documents above mentioned. All the others were rejected, namely: the original and the copy of the deed from William Fleming and the Bernards to John Bryan, the original and the copy of the deed from Bryan to Sackett, the original of the deed from Charles Fleming to John and William Bryan, and the copy of the record from the Mason County Circuit Court in the case of *Clark* v. *Conkling*.

The court having excluded these documents, the plaintiffs were unable to trace title to them-

selves for the premises in controversy; thereupon the jury, under the instruction of the court returned a verdict for the defendants, upon which the court rendered judgment, and the plaintiffs sued out this writ of error.

Messrs. **David W. Armstrong, W. W. Helm** and **N. T. Crutchfield,** for plaintiffs in error.

Messrs. **Ed. F. Dulin** and **John F. Hager,** for defendants in error:

A copy of a deed is admissible as evidence only when acknowledgment or proof thereof was legally sufficient to entitle it to record.

Carpenter v. *Dexter*, 8 Wall, 513 (75 U. S. bk. 19, L. ed. 426.

To authorize the copy of a deed to be used in evidence, the original must be recorded in such a manner as to be valid against creditors and purchasers.

Morgan v. *Beall*, 1 A. K. Marsh, 310.

An official copy of a deed not recorded in time, cannot be used in evidence.

Edwards v. *Hanna*, 5 J. J. Marsh. 117; *Winlock* v. *Hardy*, 4 Litt. 272; *Taylor* v. *Bush*, 5 T. B. Mon. 97; *Harris* v. *Price*, 14 B. Mon. 414.

In Kentucky a deed can only be recorded after it has been duly acknowledged. An inscription upon the books of record of an instrument, without such authentication, is considered a mere unofficial entry of the clerk or register, constituting no record and imparting no validity.

Carpenter v. *Dexter*, 8 Wall. 532 (75 U. S. bk. 19, L. ed. 431; *Carter* v. *Champion*, 8 Conn. 555; *De Witt* v. *Moulton*, 17 Maine, 418; *Tilman* v. *Cowand*, 12 Smedes & M. 262; *Kerns* v. *Swope*, 2 Watts (Pa.), 75; *Miller* v. *Holt*, 1 Overton (Tenn.), 111.

Mere antiquity of a deed is not sufficient to entitle it to be read as evidence; nor can the record of a suit, against one not a party, be received as corroborating proof of its execution.

Davis v. *Wood*, 1 Wheat. 6 (14 U. S. bk. 4, L. ed. 22); *Tappan* v. *Beardsley*, 10 Wall. 433 (77 U. S. bk. 19, L. ed. 975; *Owings* v. *Hull*, 9 Pet. 624 (34 U. S. bk. 9, L. ed. 252); *Fenwick* v. *Macy*, 2 B. Mon. 471; *Beckwith* v. *Marryman*, 2 Dana, 373; *Samuel* v. *Hall*, 9 B. Mon. 374. See also, Abbott, Tr. Ev. p. 708; *Crowder* v. *Hopkins*, 10 Paige, 183; *Staring* v. *Bowen*, 6 Barb. 109; *Jackson* v. *Blanshan*, 3 Johns. 292; *Wilson* v. *Betts*, 4 Den. 201; *Clark* v. *Owens*, 18 N. Y. 434; *Ridgeley* v. *Johnson*, 11 Barb. 527.

The Washington District Court was without jurisdiction.

See *Grignon's Lessee* v. *Astor*, 2 How. 338 (43 U. S. bk. 11, L. ed. 290); *Dunn* v. *McMillen*, 1 Bibb, 409; Act of 1796, Vol. 1, Morehead & Brown's Stat. 91, 94; *Hare* v. *Bryant*, 7 J. J. Marsh. 375.

The record is void because the facts essential to the exercise of the jurisdiction do not appear therein. It contains no evidence of the fact of publication as required by section 2, Act of 1796, Vol. 1, p. 92, M. & B. Stat. See also, *Galpin* v. *Page*, 18 Wall. 350 (85 U. S. bk. 21, L. ed. 259); *Hart* v. *Grigsby*, 14 Bush, 542; *Green* v. *Breckenridge*, 4 Mon. 546; *Blight* v. *Banks*, 6 Mon. 205; *Brownfield* v. *Dyer*, 7 Bush, 507; *Long* v. *Montgomery*, 6 Bush, 394; *Grigsby* v. *Barr*, 14 Bush, 333; *Mitchell* v. *Bond*, 11 Bush, 615.

The defendants had the right to show collaterally the want of jurisdiction in the Washington District Court, as the plaintiffs were seeking and claiming rights and benefits under the proceedings there had.

Latham v. *Edgerton*, 9 Cow. 227; *Barnes* v. *Harris*, 3 Barb. 608; *Putnam* v. *Man*, 3 Wend. 205.

Mr. Justice **Woods** delivered the opinion of the court: [260]

We shall first consider the exclusion of the original deed from Fleming and the Bernards to John Bryan, and the original deed from John Bryan to Samuel Sackett. We are of opinion that they should have been admitted in evidence. They have been certified to and inspected by this court. Their appearance affords strong evidence of their genuineness and antiquity, and they are free from any badge that would excite suspicion of fraud or forgery. In support of their genuineness it was shown that a short time before the trial in the circuit court they were discovered by one of the plaintiff's attorneys in the office of the clerk of the [261] Circuit Court of Greenup County, Kentucky, among the original papers of a suit in that court brought by one *James Hughes* v. *Heirs of Thomas Shore*, on July 15, 1816, to quiet his title to 16,000 acres of land in Greenup County, part of the lands conveyed by the deed of William Fleming and the Bernards to John Bryan. The deeds and the original papers in that suit were produced by a clerk of the Greenup Circuit Court in obedience to a *subpœna duces tecum*. The record of this case was admissible against persons not parties or privies, to prove the collateral fact of the antiquity of the original deeds offered in evidence and to account for their custody. *Barr* v. *Grats*, 4 Wheat. 220 [17 U. S. bk. 4, L. ed. 555].

The bill of Hughes averred that he derived title under the patent to Charles Fleming, and by virtue of the devise in his will to William Fleming and the Bernards, and the deeds of William Fleming and the Bernards to John Bryan, and of John Bryan to Samuel Sackett. The complainant Hughes offered by his bill "to produce said patent and deeds showing the deduction of title in proper time, or whenever the court should require it." The two deeds mentioned in the bill of complaint filed by Hughes correspond with and appear to be the two original deeds, namely: the deed from William Fleming and the Bernards to John Bryan, and the deed from John Bryan to Samuel Sackett, offered in evidence by the plaintiffs in this case, which were found among the other papers in the case of *Hughes* v. *Heirs of Shore*. These deeds were necessary exhibits and evidence in the case to entitle Hughes to the relief prayed for. They were produced from the files of the highest court of the county where the lands were situate, from the custody of an officer charged by law with their care and safe keeping, where they had been placed for a necessary and proper use, and from which they could not be withdrawn without the order and consent of the court. Their custody was, therefore, accounted for, and was shown to be proper and beyond suspicion.

It further appeared that upon the trial of the case of *Hughes* v. *Shore's Heirs*, on July 8, 1825, the patent to Charles Fleming from the Com-

monwealth of Virginia for 16,191 acres of land [illegible] the will of Charles Fleming and the said deed of William Fleming and the Bernards, trustees, to John Bryan, were offered in evidence. The latter was rejected "because," as the bill of exceptions states, "the certificate and seal of the mayor of Philadelphia" was "not sufficient to authorize it to be read, and because the same could not be read as a recorded deed, not having been recorded within the time prescribed by law." And "because by rejecting this deed complainants claim of title was broken and they could not further progress with their evidence, the court rendered a decree dismissing their bill." It is, therefore, made clear by the evidence offered that at least as early as the year 1[illegible] the deed of William Fleming and the Bernards to John Bryan was on file in the Circuit Court of Hampshire County, and it may be safely inferred that the other documents mentioned by Bryan as his muniments of title were also on file in the same court at the same time, and that all the deeds remained in the custody of the court down to the time when they were [illegible] by the clerk under the statute, there and [illegible] in this case, a period of [illegible] years.

[illegible] circumstance tended to show the genuineness of the original deeds was that each [illegible], carried a certificate apparently [illegible], was with the signature of the [illegible] officer and the other without signature. The effect is that the deeds had been recorded in the year 1[illegible]. In the case of [illegible] 10 L. S. 30 [illegible] L. ed. [illegible] was held that a certified copy of a [illegible] of a deed of the record of a [illegible] 1[illegible], and without [illegible] was competent and conclusive evidence that the deed had been recorded at the date [illegible]. In New Jersey, therefore, if the [illegible] which is universal [illegible] to maintain [illegible] and date of [illegible] certificate appearing on [illegible] were competent and sufficient [illegible] the deed had been duly recorded [illegible] the year [illegible] the statute.

[illegible] the evidence in support of the decree in that suit, it was admissible without the regular proof of its execution.

So in *Carathers* v. *Eldridge*, 12 Gratt. 670, it was contended by the plaintiff in error that in no case could a paper be admitted in evidence as an ancient deed, without proof of its execution, until it was first shown that thirty years' quiet and continued possession of the land had been held under the deed. But the court held in substance, that an ancient deed may be introduced in evidence without proof of its execution, although possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and as will afford the presumption that it is genuine.

In *Harlan* v. *Howard*, 79 Ky. 378, the court of appeals states the rule in relation to the proof of ancient deeds thus: "The genuineness of such instruments may be shown by other facts as well as that of possession. And when proof of possession cannot be had, it is within the very essence of the rule to admit the instrument, when no evidence justifying suspicion of its genuineness is shown, and it is found in the custody of those legally entitled to it." See also Viner's Abr. *Evidence* A. b. 5; *Ancient Deeds*, 7; Comyns, Dig., *Evidence*, B. 2; 1 Greenl. Ev. § 144 and note 1; Starkie, Ev. 594; Phillips, Ev. Cowen & Hill's Notes, part II, note 197, page 388 *et seq.* 3d ed.; *Doe* v. *Parsingham*, 12 Eng. C. L. 3[illegible]; *Sir T. Parkyn's Will*, 6 Dow. 202; *Winn* v. *Patterson*, 9 Pet. 663 [34 U. S. bk. 9, L. ed. 3[illegible]]; *Jackson* v. *Laroway*, 3 Johns. Cas. 3[illegible]; *Blunt* v. *Cock*, 7 Wend. 371.

In the case last cited, *Judge* Nelson, afterwards a justice of this court, said that there was some confusion in the cases in England and New York as to the preliminary proof necessary to authorize an ancient deed to be received in evidence; that possession accompanying the land was always sufficient without other proof; but it was not indispensable. He approved the decision in *Jackson* v. *Laroway*, *ubi supra*, which he said had been recognized as law in *Jackson* v. *Lansing*, 5 Cowen, 221, and had uniformly in its favor the weight of English authority. These authorities sustain the rule as we have stated it.

The deeds in question, when offered in evidence, purported to be over eighty years old, and their appearance tended to prove their antiquity and their genuineness. The testimony offered in support of them proved their existence as far back as the year 1816, and that in that year they had been placed upon the public record of deeds, where, if properly acknowledged, they would have been entitled to registration. In the same year in which they were recorded they were mentioned and referred to in the bill filed by *Hughes* v. *Shore's Heirs* as muniments of his title, and he offered to produce them when required. There is no reason to doubt that they remained in the rightful custody of the clerk in whose office they had been since the papers, until, after a lapse of at least fifty-five years, they were found and produced upon the trial of the present case by the officer in whose custody they belonged.

But the proof of the genuineness of both deeds was greatly strengthened by evidence

which applied directly to one only of the two, namely: the original deed from John Bryan to Samuel Sackett, dated January 28, 1797.

This consisted of the record of a partition made October 18, 1810, on the application of James Hughes, by commissioners under authority of a general Act of the Legislature of Kentucky, approved December 19, 1796. Hughes claimed the undivided half of the 18,000 acres conveyed to Charles Fleming by the Governor of Virginia, by patent dated April 21, 1792, and alleged as muniments of his title the said patent and the deed of John Bryan to Samuel Sackett. On the strength of the title shown by Hughes, the commissioners divided the 18,000 acres and set off and conveyed to him the one half thereof in severalty, and in their deed of conveyance referred to the patent to Charles Fleming, and the deed of Bryan to Sackett, as links in the title of Hughes. The partition thus made is shown to have been recognized by successive conveyances of parts of the land set off to Hughes and by possession held thereunder. The testimony, therefore, shows that as early as the year 1810 the deed of Bryan to Sackett was in existence; that it was recognized as a genuine deed by public officers whose duty it was to scrutinize it, and was made by them the basis of their official action; and that possession has been held of a portion of the land described therein, by persons who trace title through it to the patent to Charles Fleming. These two deeds under consideration are shown by the record to have a common history, and to have been relied on as links in the same chain of title. Testimony, therefore, which is directly applicable to one only tends to support the other. The facts, therefore, which we have just stated in reference to the deed from Bryan to Sackett, tend to show also the genuineness of the deed from Fleming and the Bernards to Bryan. We are therefore of opinion that the genuineness of both deeds was proven, and that the court erred in excluding them from the jury.

The offer in evidence of the original deed from Charles Fleming to John and William Bryan, dated August 8, 1794, stands upon substantially the same ground as the two deeds already considered The bill of exceptions states that the plaintiffs offered in support of the competency of this deed the same evidence as was offered in support of the two last mentioned deeds; that it was found at the same time and place and produced from the same custody. In further support thereof the plaintiffs produced the clerk of the Mason County Court, having with him deed book B, containing deeds recorded in the clerk's office of that court, beginning February 22, 1794, and the two or three years next ensuing; and offered to show that there was recorded in that book a deed identical in terms with the aforesaid original deed. They also offered and read in evidence a copy of the deed duly certified from the clerk's office of the Mason County Circuit Court, with a copy of the certificate thereto appended showing that the original deed was recorded in the year 1794. It follows, from what we have said in relation to the admissibility of the other original deeds, that this one also should have been received in evidence, and that the circuit court erred in excluding it.

It remains to consider the exclusion by the circuit court of the transcript of the record in the case of *Clark* v. *Conkling* This was a suit brought by Clark in the District Court, held at Washington, in Mason County, Kentucky, on June 13, 1798, as the assignee of the mortgage from Conkling to Sackett, to foreclose the same; and the record was offered only to show the orders and decrees of the court in respect to the mortgaged premises situated within its jurisdiction, and not to prove any personal decree against the defendants. It appears from the record in this case that a subpœna having been issued and returned with the indorsement that the defendants were not inhabitants of the Commonwealth, the court made the following order, at its November Term, 1798:

"The defendants, not having entered their appearance agreeably to an Act of Assembly and rules of this court, and it appearing to the satisfaction of the court that they are not inhabitants of this Commonwealth, on the motion of the complainant, by his attorney, it is ordered that the defendants appear here on the third day of our next term and answer the complainants' bill; and that a copy of this order be inserted in the Kentucky Gazette or Herald for two months, successively; another posted at the door of the court house of Mason County; and that this order be published some Sunday at the door of the Baptist meeting house in Washington."

In June, 1799, the bill was taken as confessed, and an interlocutory decree made requiring the defendants to pay the money due on the mortgage. The money not having been paid a decree of sale was made at the February Term, 1800. The commissioners to make the [267] sale reported on July 19, 1802, that after public notice they had sold the lands at public sale to Carey L. Clark, the complainant. Afterwards a final decree was made foreclosing the defendants of their equity of redemption in the premises.

The defendants objected to the introduction of the record, and the objection was sustained, and the defendants now insist that the exclusion of the record was right; first, because the court did not have authority of law to hear and determine the subject matter of the suit, nor of suits of the class to which it belonged; and second, because the record exhibits no proof of the publication or posting of the notice to the defendants as required by the laws of Kentucky.

We think the first objection is answered by reference to the statute laws of Kentucky in force at the time. Section 8 of the Act of the General Assembly of Kentucky, approved December 19, 1795, "to establish district courts in this Commonwealth," provided as follows: "The jurisdiction of the said district courts, respectively, shall be over all persons, and in all causes, matters and things at common law or in chancery, arising within their districts," excepting actions of assault and battery, or suits for slander and subjects of controversy of less than fifty pounds in value. 1 Littell, Laws of Ky. 298.

Section 4 of the Act approved December 19, 1796, directing the method of proceeding in courts of equity against absent debtors and other absent defendants, provides for constructive service by publication, "in all cases what-

ever, when a suit is or shall be depending in any court of chancery, concerning any matter or thing whatever, against any absent defendant or defendants." 1 Stat. Laws (M. & B.), 93. These provisions of the statute law are ample to confer jurisdiction on the court where the property in controversy is within its territorial jurisdiction, and are so clear as to require no discussion of the question. For, as was said in *Grignon's Lessee* v. *Astor*, 2 How. 338 [43 U. S. bk. 11, L. ed. 290]: "The power to hear and determine a cause is jurisdiction. If the law confers the power to render a judgment or decree, then the court has jurisdiction."

[268] But it is objected to the record that it does not show publication and posting of notice to the defendants, as required by the order of the court and by law.

The law is found in section 2 of the Act of December 19, 1796, *ubi supra*, and is as follows: "The court shall also appoint some day in the succeeding term for the absent defendant or defendants to enter his, her, or their appearance to the suit, and give security for performing the decree, a copy of which order shall be forthwith published in the Kentucky Gazette or Herald, and continued for two months successively, and shall also be published on some Sunday, immediately after divine service, in such church or meeting house as the court shall direct, and another copy shall be posted at the front door of the said court house."

The plaintiffs in the present case offered evidence outside the record to prove the fact that the order was published in the Kentucky Gazette, as required by the statute, by calling the assistant librarian of the public library at Lexington, "having with him," as the bill of exceptions states, "printed newspapers which appeared to be of great age, and which purported to be the original files of the newspaper called the Kentucky Gazette, published weekly, and plaintiffs showed, in nine successive issues of said newspaper, weekly publications, beginning with December 12, 1798, and ending with February 7, 1799, of" the order of the court above mentioned.

But no proof was offered to show the publication of the order at the church or meeting house, or the posting of it at the front door of the court house. After the lapse of more than eighty years proof not of record of these facts was clearly impossible. The fact, therefore, that after the lapse of so long a time the plaintiffs were able to show that the order of the court had been obeyed, by its publication in a newspaper, was persuasive evidence that the other requirements of the order had also been performed.

But the record contained no proof of the publication and posting of the notice as required by the statute; and it is insisted by the defendants in this case that the record itself must show

[269] the publication and posting of the notice as required by law; otherwise the jurisdiction of the court does not appear, and its decree is absolutely void.

While it must be conceded that, in order to give the court jurisdiction over the persons of the defendants, all the steps pointed out by the statute to effect constructive service on nonresidents were necessary, yet it does not follow that the evidence that the steps were taken must appear in the record, unless indeed the statute expressly or by implication requires it. The court which made the decree in the case of *Clark* v. *Conkling* was a court of general jurisdiction. Therefore, every presumption not inconsistent with the record is to be indulged in favor of its jurisdiction. *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173 [9 U. S. bk. 3, L. ed. 70]; *Voorhees* v. *Bank of U. S.* 10 Pet. 449 [35 U. S. bk. 9, L. ed. 490]; *Grignon's Lessee* v. *Astor*, 2 How. 319 [43 U. S. bk. 11, L. ed. 283]; *Harvey* v. *Tyler*, 2 Wall. 328 [69 U. S. bk. 17, L. ed. 871]. It is to be presumed that the court before making its decree took care to see that its order for constructive service, on which its right to make the decree depended, had been obeyed. That this presumption is authorized will appear by the following cases: In *Harvey* v. *Tyler*, *ubi supra*, the court, speaking by *Mr. Justice* Miller, said: "The jurisdiction which is now exercised by the common-law courts in this county is, in a very large proportion, dependent upon special statutes conferring it. * * * In all cases where the new powers thus conferred are to be brought into action in the usual form of common law or chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made as in cases falling more strictly within the usual powers of the court."

In *Hall* v. *Law*, 102 U. S. 461 [Bk. 26, L. ed. 217], the validity of a partition of lands, made by a Circuit Court of the State of Indiana, was attacked. This court, speaking by *Mr. Justice* Field, said: "All that" the statute "designates as necessary to authorize the court to act is that there should be an application for partition by one or more joint proprietors, after giving notice of the intended application in a public newspaper for at least four weeks. When application is made, the court must consider whether it is by a proper party, whether it is sufficient in form and substance, and whether the requisite notice has been given, as prescribed. Its order made thereon is an adjudication in these matters."

The case of *Voorhees* v. *Bank of U. S.* 10 Pet. 449 [35 U. S. bk. 9, L. ed. 490], was an action of ejectment, and the case turned on the validity of a sale of the premises in controversy under a judgment of the Court of Common Pleas of Hamilton County, Ohio, in a case of foreign attachment. The sale was attacked on the following among other grounds: 1. Because the statute authorizing the proceeding by foreign attachment required that an affidavit should be made and filed with the clerk before the writ issued, and no such affidavit was found in the record. 2. Because the statute directed three months' notice to be given, by publication in a newspaper, of the issuing of the attachment, before judgment should be entered, and also required fifteen days' notice of sale to be given; neither of which appeared by the record to have been done. 3. Because the statute required that the defendant should be put in default at each of the three terms preceding the judgment, and the default entered of record; but no entry was made of the default at the last of the three terms.

But the court overruled the objections and sustained the validity of the judgment and the

sale. It said: "But the provisions of the law do not prescribe what shall be deemed evidence that such acts have been done, or direct that their performance shall appear on the record. The thirteenth section of the attachment law, which gives to the conveyances of the auditors the same effect as a deed from the defendant in the attachment, contains no other limitation than that it shall be 'in virtue of the authority herein granted.' This leaves the question open to the application of those general principles of law by which the validity of sales made under judicial process must be tested, in the ascertainment of which we do not think it necessary to examine the record in the attachment, for evidence that the acts alleged to have been omitted appear therein to have been done."

The result of the authorities and what we decide is, that where a court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, nonresident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid. The case of *Galpin* v. *Page*, 18 Wall. 350 [85 U. S. bk. 21, L. ed. 959], cited by counsel for defendant, is not in conflict with this proposition. The judgment set up on one side and attacked on the other in that case was rendered on service by publication. The law permitted service to be made by publication only where certain facts were made to appear to the satisfaction of the court, and the court by a precedent order, which must necessarily appear of record, authorized service to be made by publication. But the record showed no such order, and the publication, therefore, was the unauthorized act of the party, and appeared affirmatively to be invalid and ineffectual. See also *Pennoyer* v. *Neff*, 95 U. S. 727, 734 [Bk. 24, L. ed. 570, 572].

It results from the views we have expressed, that the judgment of the Circuit Court of Kentucky must be reversed and the cause remanded, with directions to grant a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—117 U. S. 397 post.

JOHN W. JEFFERSON, Trustee, J. T. JEFFERSON ET AL., *Appts.*

v.

JOHN B. DRIVER, Admr. *de bonis non, of* JAMES H. EDRINGTON, Deceased.

(See S. C. Reporter's ed. 272-275.)

Removal of causes for local prejudice.

1. Removals of actions on the ground of local prejudice can only be had where all the parties on one side are citizens of different States from those on the other side.

2. A person who purchases property *pendente lite* and who is made a party comes into the suit subject to the disabilities of the other parties in respect to a removal at the time he came in.

[No. 1083.]

Submitted Mar. 1, 1886. Decided Mar. 15, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

The case is stated by the court.

Messrs. **J. J. Horner, J. C. Tappan, D. E. Myers, and W. M. Sneed.** for appellants.

Mr. **E. F. Adams,** for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court: [273]

This is an appeal under section 5 of the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137, from an order of the circuit court remanding a suit which had been removed from a state court. The case was here on a former appeal, and it was then decided that a former removal, to which J. T. Jefferson was a party, had been improperly accepted by the circuit court, and the cause was remanded to the state court by the order of this court. *Edrington* v. *Jefferson*, 111 U. S. 770 [Bk. 28, L. ed. 594]. Reference is made to the report of that appeal for the facts of the case as they appear in the record down to that time.

That appeal, which was taken from a final decree upon the merits, did not operate as a *supersedeas;* and before the suit got back to the state court a sale of the property involved in the litigation was made, in accordance with the decree appealed from under which J. W. Jefferson, a citizen of Tennessee, not then a party to the suit, became a purchaser and went into possession.

After the case got back to the state court Mrs. Edrington resigned her office as executrix of the will of James H. Edrington, and John B. Driver, a citizen of Arkansas, was appointed administrator with the will annexed. On the 16th of January, 1885, the administrator, who had been substituted as complainant for Mrs. Edrington as executrix, filed a petition against J. W. Jefferson, the purchaser of the property pending the former appeal, for an account of the rents and profits while he was in possession; and the next day Jefferson presented his petition for a removal of the suit to the Circuit Court of the United States, upon the ground that as to him the suit was a new one just begun, in which there was a controversy "wholly between citizens of different States, and which can be fully determined as between them without the presence or intervention of the parties thereto, to wit: a controversy between your [274] petitioner, defendant J. W. Jefferson, who is a citizen and resident of the State of Tennessee, and the complainant in the original and

NOTE.—*Removal of causes on ground of local prejudice.* See Gaines v. Fuentes, 92 U. S. bk. 23, 324, *note;* American Bible Society v. Grove, 101 U. S. bk. 25, 847; Insurance Co. v. Dunn, 86 U. S. (19 Wall.), bk. 22, 68; Bowen v. Chase, 7 Blatchf., 255; Dennis v. Alachua Co., 3 Woods, 683; Minnett v. M. & St. P. R. R. Co., 3 Dill., 460; Hatch v. Chicago, etc., Co., 6 Blatchf., 105; Aldrich v. Crouch, 10 Fed. R., 805; Gurnee v. Brunswick Co., 1 Hughes, 270; Akerly v. Vilas, 2 Biss., 110; *In re* Iowa & M. C. Co., 10 Fed. Rep., 401; Removal Cases, 100 U. S., bk. 25, 598, *note;* Jifkins v. Sweetzer, 102 U. S. bk. 26, 129.

amended bill, John B. Driver, * * * who is a citizen of Mississippi County, Arkansas." He also petitioned for a removal, under section 639, subdivision 3, of the Revised Statutes, upon the ground of local prejudice. On the 15th of January, 1885, J. T. Jefferson, who was a party to the first petition for removal, presented his petition for another removal on the ground of local prejudice.

When the suit was entered in the Circuit Court of the United States under these removals it was remanded to the state court, and thereupon this appeal was taken.

So far as the removals on the ground of local prejudice are concerned, it is only necessary to say that such removals can only be had where all the parties to the suit on one side are citizens of different States from those on the other. *Myers* v. *Swann*, 107 U. S. 547 [Bk. 27, L. ed. 583]. The language of the statute is: "When a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant." The provision as to the removal of a separable controversy, under the second subdivision of section 639, has no application to removals under the third subdivision; and the similar provision in the Act of 1875 applies only to removals under that Act. *Bible Society* v. *Grove*, 101 U. S. 611 [Bk. 25, L. ed. 848]. As in this case many of the defendants are citizens of the same State with Driver, the complainant, it follows that the suit was properly remanded under this branch of the applications for removal.

As to the application of J. W. Jefferson for a removal under the Act of 1875, the rule in *Cable* v. *Ellis*, 110 U. S. 389 [Bk. 28, L. ed. 186], applies. He was brought into the suit as a purchaser *pendente lite*, and the relief asked against him is only an incident to the original controversy. The proceeding is merely ancillary to the suit pending when he bought the property in dispute, and under which he got possession. It is, in short, only a part of the machinery in the administration of the cause. By purchasing *pendente lite* he connected himself with the [275] suit, subject to the disabilities of the other parties in respect to a removal at the time he came in.

The order remanding the suit is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[271] HENRY W. BOARDMAN, Surviving Partner of the Firm of WILLIAM H. ABEL & Co., *Plff. in Err.*,

v.

JOHN J. TOFFEY.

(See S. C. Reporter's ed. 271, 272.)

General findings on trial by court, conclusive.

Where the trial below is by the court without a jury, a general finding prevents all inquiry by the court into the special facts and conclusions of law on which it rests.

[No. 158.]

Argued and submitted Mar. 11, 1886. Decided Mar. 15, 1886

IN ERROR to the Circuit Court of the United States for the District of New Jersey.

The case sufficiently appears in the opinion of the court.

Mr. James B. Vredenburgh, for plaintiff in error.

Mr. **Preston Stevenson**, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This judgment is affirmed. The trial was by the court without a jury and there is no special finding of facts. The only questions presented by the bill of exceptions which we can consider are those which relate to the refusal of the court to allow certain interrogatories to be put to witnesses on the stand, and in these we find no error. The general finding prevents all inquiry by us into the special facts and conclusions of law on which that finding rests. *Norris* v. *Jackson*, 9 Wall. 125 [76 U. S. bk. 19, L. ed. 608]; *Cooper* v. *Omohundro*, 19 Wall. 69 [86 U. S. bk. 22, L. ed. 49]; *Martinton* v. *Fairbanks*, 112 U. S. 673 [Bk. 28, L. ed. 863].

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, *Appt.*,

v.

COLLIS P. HUNTINGTON.

(See S. C. Reporter's ed. 280-282.)

Jurisdiction—removal of causes—creditor's bill—single controversy, although separate defenses.

A creditor's bill to subject incumbered property to the payment of a judgment by sale and distribution of the proceeds among lienholders, according to their respective priorities, constitutes but a single cause of action. Although separate defendants have separate defenses, this does not create separate controversies within the meaning of the removal Act.

[No. 1236.]

Submitted Mar. 1, 1886. Decided Mar. 15, 1886.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The case is stated by the court.

Messrs. **Richard C. Dale, E. W. Kittredge** and **John C. Bullitt**, for appellant.

Mr. **Samuel Dickson**, also for appellant, filed a motion to advance under Rule 32.

Messrs. **R. A. Harrison, W. A. Hutchins, Wm. M. Ramsey, Lawrence Maxwell, Jr.** and **Mortimer Matthews**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal under section 5 of the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137, from an order of the circuit court remanding a suit which had been removed from a state court.

NOTE.—*Removal of causes; separable controversies.* See Sloane v. Anderson, post, 699, note.

The case is this: Collis P. Huntington, a citizen of New York, recovered a judgment in the Court of Common Pleas of Scioto County, Ohio, on the 29th of May, 1885, against the Scioto Valley Railroad Company, an Ohio corporation, for $639,805.67. Executions were afterwards issued upon this judgment, and levied upon the railroad, rolling stock and other personal property of the company. This property was covered by several mortgages or deeds of trust; one to the Fidelity Insurance, Trust and Safe Deposit Company, a Pennsylvania corporation; another to Samuel Thomas, a citizen of New York; another to the Central Trust Company of New York, a New York corporation; another to Henry K. McKarg, a citizen of New York; another to the Metropolitan Trust Company of the City of New [1] York, a New York corporation; and others to various citizens of Ohio. Such being the condition of the property, Huntington began a suit in the Court of Common Pleas of Scioto County, the object of which was to marshal the liens and obtain a sale of the property free of incumbrance, to pay his judgment, after satisfying all prior claims, and in the meantime to have a receiver appointed. To this suit all the several lienholders were made parties, and the Fidelity Insurance, Trust and Safe Deposit Company answered, setting up its mortgage as a first lien, and asking that the property be sold and the proceeds applied to the satisfaction of that mortgage debt. This being done, the same Company presented a petition for the removal of the suit to the Circuit Court of the United States, on the ground that there was in the suit a controversy which was wholly between citizens of different States, and which could be fully determined as between them, to wit, a controversy between the petitioner, a citizen of Pennsylvania, and Huntington, the plaintiff, and all the defendants, except the petitioner, citizens of States other than Pennsylvania. When the suit was entered in the circuit court it was remanded, and to reverse that order this appeal was taken.

The suit as brought by Huntington is a creditor's bill to subject incumbered property to the payment of his judgment by a sale and distribution of the proceeds among lienholders according to their respective priorities. There is but a single cause of action, and that is the equitable execution of a judgment against the property of the judgment debtor. This cause of action is not divisible. Each of the defendants may have a separate defense to the action, but we have held many times that separate defenses do not create separate controversies within the meaning of the removal Act. *Louisville and Nashville Railroad Co.* v. *Ide*, *Putnam* v. *Ingraham*, *Pirie* v. *Tvedt*, *Starin* v. *New York*, [*ante*, 63, 65, 381, 388] and *Sloane* v. *Anderson* [*post*]. The judgment sought against the Fidelity Company is incident to the main purpose of the suit; and the fact that this incident relates alone to this Company does not separate this part of the con- [2] troversy from the rest of the action. What Huntington wants is not partial relief settling his rights in the property as against the Fidelity Company alone, but a complete decree which will give him a sale of the entire property free of all incumbrances, and a division of the proceeds as the adjusted equities of each and all the parties shall require. The answer of this Company shows the questions that will arise under this branch of the one controversy, but it does not create another controversy. The remedy which Huntington seeks requires the presence of all the defendants and the settlement not of one only, but of all the branches of the case.

The order remanding the case is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Ct. U. S.

JOHN SLOANE, WILLIAM D. SLOANE, HENRY F. SLOANE, THOMAS C. SLOANE, WALTER W. LAW ET AL., *Plfs. in Err.*, [275]

v.

MARCUS ANDERSON.

(See C. S. Reporter's ed. 275-279.)

Removal of causes—joint action in tort against several defendants.

An action of tort against several defendants for a wrongful seizure of the property of the plaintiff is not removable, although separate answers are filed, if a necessary defendant and the plaintiff are citizens of the same State.

[No. 905.]

Submitted Mar. 1, 1886. Decided Mar. 15, 1886.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

The case is stated by the court.

Messrs. J. M. Flower and *C. W. Bunn*, for plaintiffs in error.

Messrs. M. P. Wing and *J. Hubley Ashton*, for defendant in error.

Mr. Chief Justice **Waite** delivered the opin- [275] ion of the court:

This is a writ of error brought under the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137, to reverse an order of the circuit court remanding a suit which had been removed from a state court. The suit was brought by Anderson, the defendant in error, a citizen of Wisconsin, against John Sloane, William D. Sloane, Henry F. Sloane, Thomas C. Sloane, Walter W. Law, Alexander Wright and Charles L. Watson, partners, under the name of W. & J. Sloane, all citizens of New York; John V. [276] Farwell, Charles B. Farwell, William D. Farwell, and John L. Harmon, partners under the name of J. V. Farwell & Co., citizens of Illinois; Curtis H. Remy, an attorney at law, and

NOTE.—*Removal of cause by one of two or more codefendants.* See Bixby v. Couse, 8 Blatchf., 73; Allen v. Ryerson, 2 Dill., 501; Yulee v. Vose, 99 U. S., bk. 25, 355; McGinnity v. White, 3 Dill., 350; Allen v. Robinson, 1 Dill., 119; Field v. Lownsdale, Deady, 288; Forrest v. Keeler, 17 Blatchf., 522; King v. Cornell, 106 U. S., bk. 27, 60; Hyde v. Ruble, 104 U. S., 407, bk. 26, 823; Cooke v. Ford, 2 Flip., 22.

What are separable controversies. See Fraser v. Jennison, 106 U. S., 191, bk. 27, 131; Shainwald v. Lewis, 108 U. S., 158, bk. 27, 691; Langdon v. Fogg, 18 Fed. Rep., 5; Chicago v. Hutchinson, 11 Biss., 484; Mills v. Central R. Co., 20 Fed. Rep., 449; N. P. Terminal Co. v. Lowenberg, 18 Fed. Rep., 339; Osgood v. Chicago, D. & V. R. R. Co., 6 Biss., 330; Moore v. North River Construction Co., 19 Fed. Rep., 803; Freidler v. Chotard, 19 Fed. Rep., 227.

a citizen of Illinois; and Angus Cameron, Joseph W. Losey and Charles W. Bunn, partners doing a general law business under the name of Cameron, Losey & Bunn, citizens of Wisconsin.

The complaint states that in September, 1881, Anderson was a merchant in good credit, doing business at La Crosse, Wisconsin, and worth at least $15,000 over his debts; that on the 28th of September he was indebted to W. & J. Sloane in the sum of $3,378.28, of which only $363.08 was then due, and to J. V. Farwell & Co. in the sum of $1,757.08, of which only $439.27 was due; that on that day the defendants Cameron, Losey & Bunn and Curtis H. Remy, by the order and direction of W. & J. Sloane, caused a judgment to be entered against him as by confession in the Circuit Court of La Crosse County for his entire debt to that firm, and by the order and direction of J. V. Farwell & Co. another judgment for his entire debt to that firm; and that each of these judgments was irregular and void, the court being without jurisdiction in the premises. The complaint then proceeds as follows:

"That on the 28th day of September, 1881, the said defendants, Cameron, Losey & Bunn, by order and direction of the said Curtis H. Remy, and by order and direction of the said defendants, W. & J. Sloane and John V. Farwell & Co., wrongfully and unlawfully issued executions out of said circuit court on said several judgments for the full amount of damages and costs aforesaid to the sheriff of La Crosse County, which said executions, though regular in form so as to protect said sheriff, were unauthorized and void.

"That Mark M. Buttles, the then sheriff of La Crosse County, on the said 28th day of September, 1881, under and by virtue of the said executions, which were both delivered to him at the same time, and under and by virtue of the orders and directions of the said defendants, Cameron, Losey & Bunn, and of the defendants, Curtis H. Remy and W. & J. Sloane and John V. Farwell & Co., and in the absence of this plaintiff from the City of La Crosse, he having left this city at the express request of [277] the said defendant Curtis H. Remy, who was acting in behalf of said defendants, W. & J. Sloane and John V. Farwell & Co., the said sheriff, without the plaintiff's consent, levied upon, seized and took possession of the entire stock of goods, fixtures and furniture and store of this plaintiff, occupied by him under lease * * * and seized and took the keys of said store, and turned out and caused to be removed and kept out from said store the clerks and customers of this plaintiff, and shut up said store and stopped all trades and sales therein for and during the space and time of twenty-five days, to his damage in the sum of $5,000, the said stock of goods and fixtures and furniture being then and there worth the sum of $30,000.

Separate answers were filed by Cameron, Losey & Bunn, W. & J. Sloane, and J. V. Farwell & Co. Each of these answers was substantially a copy of the others and the same defenses were set up in all. Among other things it was alleged that in making the levies the firms of W. & J. Sloane and J. V. Farwell & Co. acted separately, each on its own account, and not jointly: "and that there was consequently a misjoinder of parties defendant." It was, therefore, pleaded in abatement of the action that there was a "misjoinder of parties defendant, inasmuch as the defendants, W. & J. Sloane, and the defendants, J. V. Farwell & Co., are not jointly concerned in this matter or jointly liable to the plaintiff herein." Each of the firms, however, admitted that Cameron, Losey & Bunn acted under its authority and by its direction in what they did on its account.

After filing these answers, W. & J. Sloane and J. V. Farwell & Co. united in a petition for the removal of the suit to the Circuit Court of the United States upon the following ground:

"That there exists in said suit a controversy which is wholly between citizens of different States, to wit: between the said plaintiff, a citizen of Wisconsin, and your petitioners, citizens of the States of New York and Illinois aforesaid, and which can be fully determined as between them; that the controversy in this action, and which is stated in the pleadings on file therein, is a separable one and can be fully tried and determined between the said plaintiff and your petitioners, without the presence of their said codefendants above named, or any or either of them."

The suit was docketed in the Circuit Court of the United States on the first of June, 1885, and that court remanded it to the state court on the third of June. To reverse the order to that effect this writ of error was brought.

We are unable to distinguish this case in principle from that of *Pirie* v. *Tvedt* [*ante*, 331], in which it was held, on full consideration, that a suit for malicious prosecution, brought by a citizen of Minnesota against citizens of Minnesota and citizens of Illinois, was not removable by the citizens of Illinois, under the second clause of section 2 of the Act of 1875, on the ground that, as the action was in tort, it was severable for the purposes of removal. It is true in that case the complaint alleged that "The said defendants, confederating together, and with a malicious and unlawful design had and entertained by them and each of them, to injure, oppress and harass these plaintiffs, and to break them up in business, wrongfully, maliciously, unlawfully and without any reason or provocation or probable cause," brought the action against the plaintiffs; but this was in its legal effect, so far as the present inquiry is concerned, nothing more than an allegation that the defendants acted jointly in the commission of the wrong which had been done. The point decided was that a joint action in tort was not severable for the purposes of removal any more than a joint action on contract. We had decided at the same term, in *Louisville & Nashville R. R. Co.* v. *Ide* [*ante*, 63] and in *Putnam* v. *Ingraham* [*ante*, 65], that suits on contracts were not separable for the purposes of removal because separate defenses had been interposed by the several defendants; and under the state practice, judgments in joint actions might be given for or against one or more defendants. Applying this principle to the case then in hand we said, p. 43, [332]: "There is here, according to the complaint, but a single cause of action, and that is the alleged malicious prosecution of the plaintiffs by all the defendants acting in concert. The cause of action is several as well as joint,

and the plaintiffs might have sued each defendant separately, or all jointly. It was for plaintiffs to elect which course to pursue. They did elect to proceed against all jointly, and to this the defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of the defendants only does not divide a joint action in tort into separate parts, any more than it does a joint action on contract." In the present case there is, according to the complaint, but a single cause of action, and that is the wrongful seizure of the property of the plaintiff by the united efforts of all the defendants acting in common.

The claim that W. & J. Sloane and J. V. Farwell & Co. were acting each for themselves, and not in common, has no effect on the question of removal. All the defendants concede that Cameron, Losey & Bunn were acting as well for Sloane as for Farwell; and if there were in fact two trespasses instead of one, they were connected with both. Whether this, therefore, be considered as a suit for the Sloane trespass or for the Farwell trespass, Cameron, Losey & Bunn are necessary parties to the relief which the plaintiff asks, and that is a judgment for damages against all who were guilty of the wrong of which he complains. They were parties to both the alleged trespasses, and a judgment is asked against them as well as the others. Sloane and Farwell cannot, either separately or jointly, remove the suit as it has been begun, without taking them along. They are citizens of the same State with the plaintiff. Consequently, if it be conceded that there are two separate causes of action, so far as Sloane and Farwell are concerned, the suit is still not removable, because each cause of action includes the Wisconsin defendants, and as to them there cannot be a removal.

The order remanding the suit is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—117 U. S. 281, 348.

WILLIAM A. GLASGOW, EXR. of CHARLES C. SPEARS, Deceased, *Appt.*,

v.

DAVID H. LIPSE, In His Own Right and as Surviving Executor of MOSES LIPSE, Deceased, ET AL.

(See S. C. Reporter's ed. 327-336.)

Payment of debt in 1862 in Virginia in confederate currency, valid.

Payment made in confederate currency to a co-executor in Virginia in 1862, of a debt contracted there in 1860, such payment having been made and accepted in good faith, discharged the debt.

[No. 28.]

Argued March 3, 4, 1886. Decided March 15, 1886.

APPEAL from the Circuit Court of the United States for the Western District of Virginia.

The history and facts of the case appear in the opinion of the court.

Messrs. **Thomas J. Kirkpatrick** and **Wm. J. Robertson**, for appellant.

Messrs. **G. W. Hansbrough** and **John S. Wise**, for appellees:

The *ex parte* settlement of the executorial accounts is not a bar to a recovery.

Butterfield v. *Smith*, 101 U. S. 570 (Bk. 25, L. ed. 868); *Utterback* v. *Cooper*, 28 Gratt. 270.

The surviving executor, who was no party to the settlement, was in Indiana, beyond the jurisdiction of the court which confirmed it. He was without notice, actual or constructive, and had no day in court.

Underwood v. *McVeigh*, 23 Gratt. 418; *Connolly* v. *Connolly*, 32 Gratt. 666; *Singleton* v. *Singleton*, 8 B. Mon. 340; *Gray* v. *Stewart*, 33 Gratt. 358.

The land was sold for specie or its equivalent in the currency of the United States.

Hilb v. *Peyton*, 22 Gratt. 561.

The executors had no right to take anything in payment but such money or its equivalent.

Fretz v. *Stover*, 22 Wall. 205 (89 U. S. bk. 22, L. ed. 771); *McBurney* v. *Carson*, 99 U. S. 570 (Bk. 25, L. ed. 381); *Alley* v. *Rogers*, 19 Gratt. 366; *Purdie* v. *Jones*, 32 Gratt. 884; *Ewart* v. *Saunders*, 25 Gratt. 207; *Tosh* v. *Robertson*, 27 Gratt. 277; *Wilson* v. *Bushong*, 29 Gratt. 237; *Patterson* v. *Bondurant*, 30 Gratt. 95. See also *Pinckard* v. *Woods*, 8 Gratt. 145; *Fisher* v. *Bassett*, 9 Leigh, 119; *Cocke* v. *Minor*, and *Jones* v. *Clarke*, 25 Gratt. 258, 662.

Mr. Justice **Field** delivered the opinion of the court:

[329] This case comes before us from the Circuit Court of the United States for the Western District of Virginia. The facts out of which it arises are briefly as follows: in December, 1859, Moses Lipse, of Botetourt County, Virginia, died possessed of considerable property, real and personal, in that county, and leaving twelve children surviving him. His will, made a few days before his death, after providing for the payment of his debts, directed that all his property should be sold by his executors, and the proceeds be equally divided between his children and their representatives, certain sums advanced to them to be deducted from their respective portions. He appointed his sons Samuel and David executors. The will was proved and admitted to record by the county court of [330] the county at its May Term of 1860, and in June following the executors qualified and gave a bond with sureties in the sum of $30,000.

In August of that year the executors sold the personal property, and on the 10th of September following the real property. The sale of the latter was made to Charles C. Spears, a citizen of Virginia, and the contract of sale was signed by the parties. The property was supposed at the time to consist of 371 acres, but the quantity was to be definitely ascertained by an actual survey. The consideration agreed upon was $38 an acre, of which one third was to be paid on the third of October, and the balance in two equal annual installments on the third of October, 1861, and on the third of October, 1862. For these deferred payments Spears was to give his bonds, and the executors agreed to place him in possession of the property by the

NOTE.—*Confederate notes; contracts made payable in; validity; tender; discharge of contract.* See Thorington v. Smith, 75 U. S., bk. 19, 362, *note.*

be impeached, and how far any remedy is affected by alleged laches. At present these questions require no answer.

The decree of the court below must be reversed and the cause remanded, with directions to dismiss the suit; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[336] INHABITANTS OF TOWNSHIP OF NEW PROVIDENCE, IN THE COUNTY OF UNION AND STATE OF NEW JERSEY, *Plfs. in Err.*,

v.

ABRAHAM HALSEY.

(See S. C. Reporter's ed. 336-340.)

*Municipal bonds—jurisdiction of circuit court—construction of statute—*bona fide *purchaser may rely upon decision of commissioners as to bonds to be issued—costs.*

1. The Circuit Court of the United States has no jurisdiction of an action brought by a citizen of California against a municipality of New Jersey upon bonds assigned to the plaintiff by citizens of New Jersey for the purpose of collection only.

2. The Circuit Court of the United States has jurisdiction of an action brought by a citizen of California against a municipality of New Jersey upon bonds purchased by the plaintiff for a valuable consideration from citizens of New Jersey, although he is compelled to rely on the title of his vendors to avoid matters pleaded in bar of the action.

3. This court follows the Court of Errors of New Jersey, in holding that purchasers of the bonds in question had the right to rely on the decision of the commissioners as conclusive as to the amount that could be issued under the statute.

4. An offer by the defendant in error that the case might be reversed in part, for the purpose of saving costs, made out of court, cannot be considered by the court. Such an offer should be made in open court, upon due notice to the other side.

[No. 148.]

Argued March 8, 1886. Decided March 22, 1886.

IN ERROR to the Circuit Court of the United States for the District of New Jersey.

The case is stated by the court.

Mr. **Thomas N. McCarter**, for plaintiffs in error.

Mr. **Henry C. Pitney**, for defendant in error.

[337] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This suit was brought by Abraham Halsey, a citizen of California, to recover the amount due on twenty-six bonds, amounting in the aggregate, without interest, to $8,200, given by the Inhabitants of the Township of New Providence, New Jersey, for stock in the Passaic Valley and Peapack Railroad Company. It is conceded that Halsey holds in his own right but nine of the bonds, on which there is due, without interest, $900. The rest belong to citizens of New Jersey, who assigned them to him for collection only. Of the nine which he holds in his own right, seven belonged at one time to his father, a citizen of New Jersey, who was a purchaser before maturity for value without notice. Three of these seven came to him on the distribution of his father's estate, and the other four he bought from his brothers and sisters, citizens of New Jersey, who got them in the same way. The remaining two he bought from a brother, who had bought from another brother, who was a *bona fide* holder for value, and both these brothers were citizens of New Jersey. The evidence does not show how much he paid for what he bought, but it does appear that he paid something.

The bonds were issued under the same statute which was before this court for consideration in *Bernards Township* v. *Stebbins*, 109 U. S. 341 [Bk. 27, L. ed. 956], and is found fully stated on pages 342-344 [957] of that case.

On the trial several questions arose, but the following are all that have been brought to the attention of this court by the argument for the plaintiffs in error:

1. Whether a recovery can be had in this action for the bonds actually owned by citizens of New Jersey and held by Halsey only to collect for their account.

2. Whether Halsey can recover on the nine bonds he holds in his own right, inasmuch as he got them by assignment from citizens of New Jersey who could not sue in the courts of the United States, and he is compelled to rely on the title of his assignors to avoid the matters pleaded in bar to the action.

3. Whether the issue of the bonds under the statute by the commissioners appointed for that purpose estops the Township from setting up as a defense against a *bona fide* holder that the original issue was in excess of the amount authorized.

The circuit court ruled against the Township on all these questions, and gave judgment upon a verdict of the jury for the full amount claimed, being $15,981.88. To reverse that judgment, this writ of error was brought.

It is conceded that the ruling on the first of the questions was wrong, and that the judgment is erroneous to the extent of the bonds not held by Halsey in his own right. That was decided in *Bernards Township* v. *Stebbins*, above referred to.

The second question is disposed of by the case of *Ackley School District* v. *Hall*, 113 U. S. 135 [Bk. 28, L. ed. 954], where it was decided that a municipal bond in the ordinary form was "a promissory note negotiable by the law merchant," within the meaning of that term in the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137, sec. 1, which allows a suit on instruments of that class to be brought in the courts of the United States by an assignee, notwithstanding a suit could not have been prosecuted in such court if no assignment had been made. These bonds are of that character. Such being the case, it is a matter of no importance that Halsey makes title to the bonds he owns through assignments by citizens of New Jersey.

The Court of Errors of New Jersey has recently decided in *Cotton* v. *New Providence*, 18 Vroom, 401 [1 Cent. Rep. 444], following the rule laid down in *Mutual Benefit Life Ins. Co.* v. *Elizabeth*, 13 Vroom, 235, that purchasers of bonds of the issue of those now in suit had the right to rely on the decision of the commissioners as conclusive in respect to the amount

NOTE.—*Suits on municipal bonds; jurisdiction of circuit court; Act of 1875.* See Farmington v. Pillsbury, *ante*, 114, note.

Same; estoppel. See Mercer Co. v. Hackett, 68 U. S., bk. 17, 548, note.

that could be put out under the statute. The language of the court is: "When they (the commissioners) issued bonds they averred that the issue was within the limit. Construing the Act by the rule laid down in the case cited (*Ins. Co. v. Elizabeth*), the legislative intent that their decision on this subject should be final, appears. The holder of the bonds had the right to rely thereon. For this reason I feel constrained to hold that bonds issued beyond the limit would be enforceable." To this we agree, and it is conclusive as to the correctness of the ruling of the court below upon the third question presented.

It follows that the judgment of the court below must be reversed. A question was, however, raised at the argument as to costs. Annexed to the brief of counsel for the defendant in error is a copy of what purports to be an offer to the Township by Halsey, after the decision of this court in *Bernards Township v. Stebbins*, and before the record in this case was printed, to allow the judgment to be reversed at once, so far as the bonds not owned by him were concerned, "with permission to the defendant in error to discontinue as to those bonds, and to strike from the record the counts founded thereon;" and that as to the other bonds it be affirmed, "and that the court may make such order as to the costs incurred in this court as it shall deem just;" "or that the court be requested at once to pronounce judgment on the basis of the plaintiff being entitled to recover only upon the bonds" owned by him, "and that as to all the other bonds mentioned in the record the plaintiff was not entitled to recover," under the decision in *Bernards Township v. Stebbins*. We are asked now, on account of this offer, to adjudge that the plaintiff in error pay the costs which have been incurred in printing the record, including the clerk's fee for supervising. The offer, although printed in the brief, was not proved at the hearing, but if it had been we could not have given it the effect now asked. Offers of this kind made out of court cannot be considered by us. The offer should have been made in open court and the court asked to act thereon after the Township had been notified in due form to show cause against it. The case of *Bernards Township v. Stebbins* was decided at the October Term, 1883, and the offer is said to have been made January 24, 1884. There was abundance of time after the decision in that case had become known for counsel to have applied for an order in the premises before the end of that term, and before the record was printed. This was not done.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

[282] ALBERT KLEINSCHMIDT ET AL., *Plffs. in Err.*,
v.
JOHN S. MCANDREWS AND JOHN S. BRISTOL.

(See S. C. Reporter's ed. 282-288.)

Montana Code—bill of exceptions—appeal—sales—delivery of possession.

1. An exception to a ruling of the trial court sustaining a motion for a nonsuit is within section 279 of the Montana Code.
2. The bill of exceptions in this case is not limited to the exception taken to the entry of the final judgment, but embraces matters accruing previously and the testimony and the agreed statement of facts on which the motion for a nonsuit was based.
3. Section 408, Montana Statutes, limiting the time within which appeals may be taken upon the ground that the decision or verdict is not supported by the evidence, does not apply to a decision granting a motion for a nonsuit.
4. Upon the facts recited in the bill of exceptions in this case, the delivery of possession under the bill of sale is held to have been immediate, within the meaning of section 15 of the Statute of Montana relating to conveyances and contracts.

[No. 147.]

Argued Mar. 8, 1886. Decided Mar. 22, 1886.

IN ERROR to the Supreme Court of the Territory of Montana.

Statement of the case by *Mr. Justice* **Matthews:**

[283] The plaintiffs in error, who were plaintiffs below, brought an action of replevin in the District Court for the Third Judicial District in the Territory of Montana, for the recovery of personal property which had been taken under a writ of attachment by the defendant McAndrews, as sheriff, at the instance of the other defendant, Bristol, a creditor of one Ingersoll, whose goods he claimed them to have been at the time of the levy. The plaintiffs claimed title by virtue of a bill of sale from Ingersoll, made before the seizure under the attachment.

The transcript of the record shows that the cause came on for trial on March 22, 1880, before a jury. The plaintiffs put in evidence a bill of sale, dated Helena, March 29, 1879, conveying to them the goods in controversy, consisting of a stock of merchandise, other personal property, and choses in action, in the store of Ingersoll in the Town of Vestel, Deer Lodge County, with authority to sell and dispose of the same, and apply the proceeds *pro rata* to the payment of the indebtedness due from Ingersoll to the plaintiffs respectively. The record then contains certain stipulations between the parties in respect to the conduct of the cause, and a recital of the testimony adduced by the plaintiffs. It then proceeds as follows: "The whole evidence on the part of the plaintiffs showed that the bill of sale referred to was executed by Ingersoll and delivered to plaintiff in the office of Sanders & Cullen, in Helena City, in Lewis and Clark County, M. T., about 9 o'clock P. M. on the 29th day of March, A. D. 1879; that the goods, etc., were in possession of Stevenson, his clerk, at Vestel, in the county of Deer Lodge, about twenty-three miles distant; that after the writing mentioned was delivered to plaintiffs, as aforesaid, it was ex-

pressly agreed that plaintiffs should go out to Vestel and get possession of said property, and that said Stevenson should turn said property over to them; that said plaintiffs went at once and sent an agent with said 'bill of sale' to Vestel; and the evidence was sufficient to go to the jury, and tended to show that he took possession of said property about 4 o'clock on the [284] morning of the 30th of March, being the following morning after the execution and delivery of said writing; that he took with him said writing, exhibited it to said Stevenson, then in possession as clerk of said Ingersoll, and that he made no objection, but delivered him (said agent) the property aforesaid, being the property in controversy, and that the said Stevenson, the said clerk of Ingersoll, after said agent of plaintiffs so had possession, remained with and assisted said agent until the levy of the attachment by the sheriff on the 31st of said March; that the plaintiffs and defendant Bristol during this time were creditors of the said Ingersoll, for the purposes of this trial, was mutually agreed and conceded as a fact on the trial, and so entered accordingly as an admission."

It is thereupon stated that the plaintiffs then rested their case and the defendants made a motion for a nonsuit, upon the ground, among others, that there was "no sufficient case made out so as to authorize the submission of the same to the jury," and more particularly that

"The evidence shows that there was no immediate change of possession accompanying the 'bill of sale,' or assignment of said property; and that in the meantime, between the execution thereof and the taking of such possession, if any was taken, defendant Bristol was a creditor of said Ingersoll, and his attachment duly levied on the 31st day of March, A. D. 1879."

The record then proceeds as follows:

"Which said motion was, after argument, duly submitted to the court, who thereupon granted the said motion and directed judgment to be entered in favor of the defendants and against the plaintiffs. To which ruling of the court the plaintiffs then and there duly excepted; and thereupon judgment was entered in the case as follows, to wit:

"*Judgment of nonsuit.*

(Name of court. Title of cause.)

"This action came regularly on for trial. The said parties appeared by their respective counsel. A jury of twelve persons was duly impaneled and sworn to try said action. Wit- [285] nesses on the part of plaintiffs were duly sworn and examined. After the said plaintiffs had closed their case said cause was heard upon defendants' motion for a nonsuit and duly submitted to the court for consideration and decision, and after consideration thereon the court sustains said motion and orders judgment for the defendants accordingly. Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the said defendants do have and recover of and from said plaintiffs all the property in the complaint, affidavit and pleadings in this action described, or, in case possession of said property cannot be had, the value thereot in accordance with a certain stipulation filed herein April 11, 1879, and introduced in evidence herein, and that they recover their costs in this cause expended, taxed at the sum of $63.50.

"Judgment entered March 22, A. D. 1880.

"To the entry of which said judgment the plaintiffs then and there excepted, and ask the court to sign this bill of exceptions, and that the same be made part of the record, which is done accordingly this 22d day of March, A. D. 1880.

"(Signed) D. S. Wade, Judge."

From this judgment there was an appeal by the plaintiffs, to the Supreme Court of the Territory, where it was affirmed. To reverse the judgment of that court this writ of error is prosecuted.

Mr. **M. F. Morris,** for plaintiffs in error.

Messrs. **Joseph K. Toole** and *Edwin W. Toole,* for defendants in error.

Mr. Justice **Matthews** delivered the opinion of the court:

The Supreme Court of Montana, in affirming the judgment of the district court, proceeded on the ground that the errors assigned could not be considered for want of a sufficient bill of exceptions. It was held by that court that, in the nature of the case, an exception, within the meaning of section 279 of the Montana Code of Civil Procedure, could not be taken to the ruling of the court sustaining the motion for a nonsuit and directing judgment to be entered in favor of the defendants, because that section of the Code defines an exception as being "an objection taken at the trial to a decision upon a matter of law at any time from the calling of the action for trial to the rendering of the verdict or decision;" whereas, the exception here relied upon "could not have been taken until after the rendition of the decision of the court." But no exception to a ruling of the court can be taken until after it is made; and it is plain, therefore, that what is meant by the section of the Code referred to is, that the exception must be to some decision or ruling of the court, occurring before final judgment is rendered, and not that the exception must be taken before the the decision excepted to has been made. But in this case, the granting of the motion for a nonsuit, which is the ruling or decision excepted to, did take place before the final judgment was in fact made and entered.

It was also held by the Supreme Court of Montana Territory that the bill of exceptions in the record is limited to the exception taken to the entry of the final judgment, and does not embrace any of the matters stated in the record as occurring previously, nor include the testimony nor agreed statement of facts on which the motion for a nonsuit was based. But an inspection of the record shows this to be a mistake. The whole transcript from the beginning professes to be a bill of exceptions, and is so styled in the caption, and the verification by the signature of the judge cannot be restrained to the last sentence of the connected history of the case which precedes. Taken together, as it plainly should be, the ground of the exception is distinctly stated, and everything necessary to entitle it to consideration satisfactorily appears. The office of a bill of exceptions is evidently the same under the Montana Code as at common law, and whatever brings upon the

record, properly verified by the attestation of the judge, the matters of fact occurring at the trial, on which the point of law arises, which enters into the ruling and decision of the court excepted to, answers sufficiently the description of a proper bill of exceptions.

It is further objected here, however, in argument, that the exception in the present case must be disregarded, because the appeal from the district court to the supreme court was not taken in time under the provisions of section 408, Montana Statutes, 1879, which is as follows: "An exception to the decision or verdict, on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment." In the present case, the judgment was rendered March 22, and the appeal taken on July 13, 1880, more than sixty days after the rendition of the judgment. But the exception taken and to be considered is not within the description of the class mentioned in this section of the statute. Here there was no verdict or decision upon the facts in favor of either party, which it is alleged was erroneous because not supported by the evidence. The ruling excepted to was, that upon the evidence submitted by the plaintiffs it was matter of law that they could not recover. The verdict or decision referred to in the above quoted section of the statute relates exclusively to findings alleged to be erroneous for want of sufficient support in the evidence. Here the matter of the exception is purely matter of law.

But on the motion for a nonsuit the court was also in error. It should not have been granted. The ground on which the district court proceeded was that the sale of the stock of goods by Ingersoll to the plaintiffs was void under section 15 of a Statute of Montana relating to conveyances and contracts (Laws of Montana, 1872, p. 394), which is as follows:

"Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by the immediate delivery and be followed by an actual and continued change of possession of the thing sold and assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or the person making such assignments, or subsequent purchasers in good faith."

Upon the facts recited in the bill of exceptions, that the bill of sale was executed and delivered at Helena on Saturday night, March 29, 1879, at 9 o'clock; that the stock of goods was at Vestel, twenty-three miles distant; that the plaintiffs took possession of them the next morning, Sunday, at 4 o'clock, and remained in possession until the goods were seized under the levy of the attachment made by the defendants the next morning; it appears that there was not a single hour in which business could be, or was usually, transacted that intervened between the execution and delivery of the bill of sale and the transfer of the possession of the property. This was certainly an immediate delivery of possession under the statute, and that possession continued until interrupted by the seizure by the defendants. Upon the facts in evidence, the title of the plaintiffs to the goods in controversy was sufficiently established in law, and if nothing else appeared it would have been the duty of the court so to have instructed the jury.

The judgment of the Supreme Court of Montana Territory is, therefore, reversed and the cause is remanded, with instructions to take further proceedings therein in conformity with law.

True copy. Test:

James H. McKenney, Clerk, Sup. Ct. U. S.

GEORGE C. RAND, Junior, *Appt.*, [340]

v.

MARTHA A. WALKER.

(See S. C. Reporter's ed. 340-345.)

Jurisdiction—removal of causes—necessary parties.

1. In a suit for assignment of dower in lots, the legal title to which is according to the pleadings and the evidence, in one defendant for the joint use of himself and another defendant, they being in joint possession, and the prayer of the bill being for a decree against both for damages as well as for the assignment of dower, both of them are necessary parties.

2. The right to remove a suit on the ground of separable controversy is, by the statute, confined to the parties to that controversy.

3. Where a party by a supplemental bill seeks to avoid the effect of a judgment of a federal court, not by avoiding the judgment as between the parties, but by showing that as to her it is of no effect, she not having been a party to it, no question is raised under the authority of the United States so as to confer jurisdiction on the circuit court.

[No. 1135.]

Submitted Mar. 2, 1886. Decided Mar. 22, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Mr. **W. C. Goudy**, for appellant.

Messrs. **Edward S. Isham** and **Robert T. Lincoln**, for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal under section 5 of the Act [341] of March 3, 1875, 18 Stat. at L. 470, chap. 137, from an order of the circuit court remanding a suit which had been removed from a state court. The suit was brought in the Superior Court of Cook County on the 4th of April, 1881, by Martha A. Walker, widow of Martin O. Walker, deceased, a citizen of Illinois, against George C. Rand, Jr., Charles E. Brown, Thomas Brown and Henry G. Tucker, citizens of New York, and John W. Doane, Samuel Otis Walker, Edward Stone Walker, Augustus L. Chetlain and Charles Fargo, citizens of Illinois, for an assignment of dower in certain lots in Chicago. The bill charges that Martin O. Walker died on the 28th of May, 1874, seised of the lots described, and leaving Martha A. Walker, his widow, and the defendants Walker, his sole heirs at law: that on the first of August, 1874, Mrs. Walker, the widow, demanded of the heirs an assignment of her dower, which was refused; that in the beginning of the year 1875,

NOTE.—*Removal of causes; separable controversy.* See Sloane v. Anderson, *ante*, 299, note.

[illegible] the defend- [illegible] and [illegible] [illegible] administrator [illegible] and [illegible] [illegible] and conveyed [illegible] Rand. The bill [illegible]

[illegible] information [illegible] that said [illegible] in part [illegible] W. Doane. [illegible] himself and [illegible] shows that [illegible] conveyance said [illegible] into and enjoyed [illegible] premises, but that said [illegible] requested, have, [illegible] said premises, [illegible] to set off and ap- [illegible] dower therein, by [illegible] Doane and Rand be- [illegible] your matrix for [illegible] dower in said [illegible] day of November, [illegible]

[illegible] shows that on or [illegible] November, A. D. [illegible] and premises to [illegible] Samuel O. Walker, [illegible] and as part of [illegible] Carrie Walker and [illegible] Walker [illegible] said premises to [illegible] your matrix charges in part, in [illegible] that said Doane and [illegible] premises free from all in- [illegible] except the estate of dower of your [illegible]

[illegible] insists that the said Samuel [illegible] and Edward S. Walker are liable [illegible] in damages for the detention [illegible] premises from the time she [illegible] that her dower be set off in [illegible] until they conveyed said premises [illegible] to wit, the first day of January, [illegible] and that said Fargo is liable to [illegible] in damages for the detention of [illegible] from said last mentioned day [illegible] day of November, A. D. 1878, [illegible] Doane and Rand are liable to [illegible] damages for the like detention [illegible] rights in said premises from [illegible] November, A. D. 1878."

[illegible] premises were sub- [illegible] trust made to Charles [illegible] Chauncey Tucker now [illegible] Tucker and Thomas [illegible] that, for reasons [illegible] a charge on the [illegible] which is claimed. [illegible] Tucker answered [illegible] 1881, denying the [illegible] trust had in any [illegible] on the prop- [illegible] Walker. On [illegible] defendants Doane [illegible] demurrer to the [illegible] the same character [illegible] the defendants, [illegible] Fargo. On the 5th [illegible] of Rand and [illegible] of the Walkers

overruled, and that of Fargo sustained, with leave to Mrs. Walker to amend her bill in ten days, which she did. Demurrers to the amended bill were filed by Chetlain and the defendants Walker, December 21, 1881. These demurrers were overruled February 1, 1882, and on the [illegible] of the same month answers were filed by the Browns and Tucker, by Fargo, by Edward Stone Walker, by Samuel Otis Walker, by Chetlain, and by Rand and Doane. In the answer of Rand and Doane, which was joint, reasons were given why dower had not been assigned, but the conveyances to Rand as charged in the bill were admitted. While in the answer it is stated that Rand alone holds the legal title under that conveyance, no reference whatever is made to the allegation in the bill that this title is held for the joint account of Rand and Doane, and that the premises had been since the conveyances in their joint possession.

On the same day that this answer was filed Rand presented his petition to the court for a removal of the suit to the Circuit Court of the United States. This petition set forth the citizenship of Mrs. Walker, Rand, the Browns and Tucker, at the time of the commencement of the suit, and at the time of the presentation of the petition, the same as is above stated; that the petitioner alone held the legal title to the property, and that "In said suit there is a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit: a controversy between said Martha A. Walker, and your petitioner and the said Thomas Brown, Charles E. Brown and Henry G. Tucker." The state court thereupon made an order transferring the cause to the Circuit Court of the United States. A copy of the record was entered in due time in the circuit court; whereupon, a motion to remand was made by Mrs. Walker and denied by the court, but afterwards, on the 8th of June, 1885, after the cause had been argued at the final hearing, it was remanded. The evidence showed clearly that Doane had a substantial interest in the property under the title held by Rand. From the order to remand this appeal was taken.

Upon the argument here two positions were taken in support of the order appealed from to wit:

1. That the petition for removal was not presented in time; and,

2. That Rand had no controversy in the case to which Doane was not a necessary party.

Without considering whether, under the circumstances of this case, the order to remand could be sustained at the time it was made on the first of these grounds, we are entirely satisfied it was properly granted under the second. The suit is for an assignment of dower in lo[illegible] the legal title to which is, according to the pleadings and the evidence, in Rand for the joint use and benefit of himself and Doane. Rand and Doane are also, as is alleged on the one side and not denied on the other, in joint possession, and the prayer of the bill is for decree against them jointly for damages on this account as well as for the assignment of dower.

It is claimed, however, that as Rand holds the legal title Doane is an unnecessary a[illegible]

merely nominal party, because his interests are represented for all the purposes of the suit by Rand as his trustee. It is certainly true, as was said in *Kerrison* v. *Stewart*, 93 U. S. 160 [Bk. 23, L. ed. 845], that "Under some circumstances a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position; not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust, or to one by a stranger against him to defeat it in whole or in part." But this case has nothing in the pleadings or elsewhere to show that Rand was authorized to represent Doane in respect to the property any more than one tenant in common respects another. Having the legal title, a judgment against him in favor of one not chargeable with notice of Doane's equity might bind Doane as well as Rand, but here there is the notice, and the bill has been brought against both Rand and Doane on that account. So far as this suit is concerned, Doane is just as much a necessary party as he would be if the deeds under which Rand holds had in express terms provided that the conveyances were made for the joint use and benefit of the two; and certainly under those circumstances, especially if the two were in actual possession, Doane would be as necessary a party as he would be if both the legal and the equitable title were in him. As the suit now stands, it is, so far as Rand and Doane alone are concerned, by a citizen of Illinois against one defendant a citizen of Illinois and another defendant a citizen of New York, to obtain an assignment of dower in property owned by the two defendants jointly, and in which they have a common interest. Both defendants are necessary parties, and consequently there cannot be a removal by one alone, because the controversy is not separable; nor by the two together, because as to them there is not the necessary citizenship.

It is argued, however, that the order to remand ought not to have been granted, because the bill shows there is in the suit a separable controversy between Mrs. Walker and the parties interested in the deed of trust to Charles E. Brown, trustee, in which the citizenship necessary for a removal exists. As to this, it is sufficient to say that neither of the parties to this controversy, if it be separable, a question which we do not decide, has petitioned for removal; and the right to remove a suit on the ground of a separable controversy is, by the statute, confined to the parties "actually interested in such controversy."

After the suit got into the circuit court a supplemental bill was filed by Mrs. Walker, in which she alleged that a certain judgment, which had been obtained in the Circuit Court of the United States after the removal, in a suit to which she was not a party, had been obtained by collusion between the parties thereto, and did not conclude her upon certain questions arising under the deed of trust to Brown. This, it is claimed, gave the circuit court jurisdiction independent of any question of removal, on the ground that thereafter the suit was one arising under the Constitution and laws of the United States within the meaning of the Act of 1875. To this we cannot agree. The effort of Mrs. Walker is not to avoid the judgment as between the parties, but to show that as to her, she not being a party, it has no effect. This raises no question under the authority of the United States.

The order remanding the case is affirmed.

True copy Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOSEPH C. MACKIN AND WILLIAM J. GALLAGHER, *Plffs. in Err.* [348]

v.

UNITED STATES.

(See S. C. Reporter's ed. 348-355.)

Infamous crimes—what are.

Crimes punishable by imprisonment in a state prison or penitentiary, with or without hard labor, are infamous crimes for which persons cannot be held to answer in the federal courts otherwise than on presentment or indictment of a grand jury.

[No. 924.]

Argued Mar. 2, 3, 1886. Decided Mar. 22, 1886.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Northern District of Illinois.

Statement by *Mr. Justice* **Gray**:

This was an information filed by the District Attorney on January 20, 1885, in the District Court of the United States for the Northern District of Illinois, on section 5440 of the Revised Statutes, which is as follows:

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States in any manner [349] or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than $1,000 and not more than $10,000, and to imprisonment not more than two years."

The information contained seven counts, which were respectively for conspiracies to commit offenses within sections 5512, 5511 and 5403. The substance of the offense, as alleged in different forms in the various counts, was the breaking open of a package containing a return, by the judges and clerks of election, of an election held in a district of the City of Chicago to choose a representative in Congress and certain state and county officers, the alteration of the certificate of the result of the election, the poll book, the tally list of the votes cast for each candidate, and a large number of the ballots; and the substitution of spurious papers in their stead.

In the district court, the defendants were tried by a jury and convicted, and on March 21, 1885, were sentenced to pay a fine of $5,000 each, and to be imprisoned for two years in the

[illegible]

[illegible]

[illegible]

put upon his trial, except on the accusation of a grand jury. The Constitution protecting everyone from being prosecuted in a court of the United States, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment, no declaration of Congress is needed to secure, or competent to defeat, the constitutional safeguard. What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another; and for more than a century, imprisonment at hard labor in the state prison or penitentiary has been considered an infamous punishment, in England and America.

The argument by which the soundness of those conclusions has been now impugned is, in substance, the same as the one submitted in that case, and has not convinced us that there was any error in the decision.

The judgments in *Hurtado* v. *California*, 110 U. S. 516, and *U. S.* v. *Waddell*, 112 U. S. 76 [Bk. 28, L. ed. 232, 673], on which the counsel for the Government rely, are quite in accord with the decision in *Wilson's Case*.

In *Hurtado* v. *California*, the point decided was that the provision of the Fourteenth Amendment of the Constitution, which forbids any State to "deprive any person of life, liberty or property, without due process of law," did not require an indictment by a grand jury in a prosecution for a capital crime in a state court. One of the reasons for so deciding was that the insertion in the Fifth Amendment, addressed to the United States only, of a specific provision requiring indictments for capital or other infamous crimes, as well as the general provision securing due process of law, showed that the latter was not intended to include the former; and the former must be taken to have been purposely omitted in the Fourteenth Amendment. 110 U. S. 534 [Bk. 28, L. ed. 238].

In *United States* v. *Waddell*, the prosecution was upon an Act of Congress providing that any person convicted under it should be fined and imprisoned, and should "moreover be thereafter ineligible to any office or place of honor, profit or trust, created by the Constitution or laws of the United States." The only suggestion in the opinion, bearing upon the question before us, was the expression of a serious doubt whether the disqualification so declared did not make the crime an infamous one. 112 U. S. 82 [Bk. 28 L. ed. 675]. That disqualification was in the nature of an additional punishment, which could only take effect upon conviction. *Kurts* v. *Moffitt* [*ante*, 45*].

By the express provisions of Acts of Congress, either a sentence "to imprisonment for a period longer than one year," or a sentence "to imprisonment and confinement to hard labor," may be ordered to be executed in a state prison or penitentiary; and the convict while thus imprisoned, is "subject to the same discipline and treatment as convicts sentenced by courts of the State." R. S. §§ 5541, 5542, 5539; *Ex parte Karstendick*, 93 U. S. 396 [Bk. 23, L. ed. 889].

How far a convict sentenced by a court of the United States to imprisonment in a state prison or penitentiary, and not in terms sentenced to hard labor, can be put to work either as part of his punishment or as part of the discipline and treatment of the prison, was much discussed at the bar; but we have not found it necessary to dwell upon it, because we cannot doubt that at the present day imprisonment in a state prison or penitentiary, with or without hard labor is an infamous punishment. It is not only so considered in the general opinion of the people, but it has been recognized as such in the legislation of the States and Territories, as well as of Congress.

In most of the States and Territories, by Constitution or statute (as is shown by the supplemental brief of the plaintiffs in error) all crimes, or at least statutory crimes, not capital, are classed as felonies or as misdemeanors, accordingly as they are or are not punishable by imprisonment in the state prison or penitentiary. [353]

The Acts of Congress, referred to at the argument, clearly show that the opinion of the legislative branch of the National Government, so far as it has been expressed, is in full accordance with what we hold to be the true judicial construction of the Constitution.

The provision of section 1022 of the Revised Statutes of the United States, by which "all crimes and offenses" against the elective franchise or the civil rights of citizens, under sections 5506-5532, "which are not infamous, may be prosecuted, either by indictment or by information filed by a district attorney," does not undertake to define which of those crimes and offenses are infamous, and therefore not to be prosecuted by information, but leaves that to be regulated by the paramount authority of the Constitution.

So the provisions of sections 1044 and 1046 of the Revised Statutes, in the nature of a Statute of Limitations, by which no person can be prosecuted, tried or punished for any offense not capital, or for any crime under the revenue laws or the slave-trade laws, "unless the indictment is found or the information is instituted" within a certain time after the committing of the crime or offense, do not prescribe or indicate what offenses must be prosecuted by indictment, and what may be prosecuted by information. [354]

Nor can any such effect be attributed to the similar phrase in the Act of July 5, 1884, chap. 225, by which no person shall be prosecuted, tried or punished for any offense under the internal revenue laws, "unless the indictment is found or the information instituted within three years next after the commission of the offense, in all cases where the penalty prescribed may be imprisonment in the penitentiary, and within two years in all other cases." 23 Stat. at L. 122. The including, in a single clause, of two classes of offenses, one of which may be prosecuted by information, is a sufficient reason for mentioning informations as well as indictments, without attributing to Congress an intention that both classes should be prosecuted by information; and imprisonment in the penitentiary is made the line of distinction between the two classes.

But the most conclusive evidence of the opinion of Congress upon this subject is to be found in the Act conferring upon the Police Court of

[illegible] was sufficient to support the ver-
[illegible] From a time prior to February 22, 1873,
[illegible] a title could be acquired,
[illegible] the statutes of Montana, by three years'
[illegible] After that it required five
years. It follows that Mrs. Sullivan's title to the
property was perfected by her adverse posses-
sion before Dungiry entered into actual posses-
sion, and that the judgment in her favor on the
special findings, as well as on the general ver-
dict, was right.

Affirmed.

Mr. Justice Brewer, dissenting. Dissent:

James H. McKenney, Clerk, Sup. Court, U. S.

[illegible] THE AND BENJAMIN S. COMP-
TON, Plfs. in Err.,

v.

JOHN F. VINAL.

(See S. Reporter's ed. 267, 268.)

[illegible] of causes—residence of parties.

[illegible] tried in a state court and
[illegible] by a superior state court and
[illegible] for a new trial it is too late to
[illegible] for a removal of the cause to the fed-
eral court.

[illegible] for tort against two defendants
[illegible] entitled to have the case removed
[illegible] under the separable controversy
[illegible] act, where he is an inhabi-
[illegible] State from the plaintiff, the other
[illegible] an inhabitant of the same State
with the plaintiff.

[No. 122.]

[illegible] March 5, 1886. *Decided March 22,*
1886.

[illegible] the Circuit Court of the United
States for the District of West Virginia.

[illegible] of tort brought by the de-
[illegible] against the plaintiffs in error
[illegible] of West Virginia. The defend-
[illegible] plea of not guilty. The tri-
[illegible] a verdict for the plaintiff. On writ
[illegible] the supreme court of appeals thi
[illegible] was reversed and the cause remande
[illegible] new trial.

[illegible] defendant Compton, then filed a peti
[illegible] for the removal of the case to the feder
court, alleging in his petition that he was a cit
[illegible] and that the other defendan
[illegible] plaintiff were citizens of West Virginia
[illegible] that the case involved a co
[illegible] which was wholly between citizens o
different States. The case was docketed in th
[illegible] Circuit Court and afterwards, o
motion of the plaintiff, remanded to the stat
court. The writ of error was sued out to r
[illegible] the order remanding the case to the stat

[illegible] for the defendant in erro
[illegible] motion.

[illegible] appeared for plaintiffs in error.

Mr. Chief Justice Waite delivered the opi
[illegible] of the court:

The petition for removal was not filed in time and the suit was not removable. *Pirie* v. *Tvedt*, and *Sloane* v. *Anderson*, [*ante*, 331, 899] decided at this term.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

JOHN VAN RISWICK, *Appt.*,
v.
WILLIAM E. SPALDING ET AL.

(See S. C. Reporter's ed. 370–373.)

Sale under power in trust deed—when not void as to other creditors.

Where the payee of a promissory note secured by a trust deed on two lots, the trustee having power to sell the lots at private sale on direction of the payee, accepted the lots in satisfaction of his debt, which was of thrice the amount of the value of the lots, and authorized and directed their conveyance in trust for the children of the maker of the note as a gift to them, it is held that such conveyance is valid as against other creditors.

[No. 156.]

Argued Mar. 10, 1886. Decided Mar. 22, 1886.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Mr. **T. A. Lambert**, for appellant.

Mr. **Leigh Robinson**, for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

This is a bill in equity by a judgment creditor of William E. Spalding against Spalding, his children, William W. Rapley, William H. Thomas, trustee, and George W. Bonnell, to set aside conveyances of land in Washington, and to have it sold and applied to the payment of Spalding's judgment debts.

The material facts of the case, as appearing by the pleadings and proofs upon which it was heard in the court below, are as follows:

The plaintiff's judgment was recovered on February 6, 1868. On December 20, 1867, Spalding being indebted to Rapley in the sum of $10,000, for which he had given him a promissory note, payable in ninety days, and Rapley having indorsed other notes of Spalding, to the amount of $20,000, Spalding, by a deed in which his wife joined, conveyed all his real estate in Washington to Thomas, in trust to secure the payment of the note for $10,000, and to secure Rapley from loss by reason of his indorsements. The trusts declared in that deed were, that in case of Spalding's failure to pay any of the notes at maturity, or interest thereon, the trustee should, upon the written order of Rapley, sell the land by public auction; that Rapley might at any time during the continuance of the trust direct the trustee to sell the land or any part thereof, at private sale, to such persons and upon such terms and conditions as Rapley should deem most advantageous to all parties concerned, and make conveyances accordingly; that the proceeds of all sales under [illegible] should be applied, first, to pay the expenses of the trust; then to pay all [illegible] to pay any balance re[illegible] wife, their executors and administrators; and that the trustee should stand seised of any land remaining unsold, after satisfying the liens aforesaid, to the sole use and benefit of Spalding's wife and children, and sell or mortgage it as she should in writing appoint, and pay over the proceeds to her, or invest them as she should direct.

Mrs. Spalding died without having attempted to exercise this power; and all the land, except two lots, was sold by the trustee, according to the deed of trust, for the sum of $22,046, and applied to the payment of the notes indorsed by Rapley, and interest accrued thereon.

On March 27, 1876, Spalding and Rapley made a final settlement of all business between them, including the affairs of a partnership which had existed between them in other lands from before any of the transactions above stated; and Spalding, at Rapley's request, signed the following agreement:

"It is agreed this 27th day of March, A. D. 1876, between William W. Rapley and William E. Spalding, of the City of Washington in the District of Columbia, in full and final settlement of all their partnership affairs and of all business heretofore existing between them, that the said Rapley does release and convey to George W. Bonnell (for such purposes as the said Spalding may direct) all the right, title, and interest of him, the said Rapley, in and to" (six lots of land, designated by squares and numbers, being the two lots aforesaid, and four others owned by Rapley) "in the City of Washington in the District of Columbia; and in consideration of such release and conveyance the said Spalding does hereby release and acquit the said Rapley from any and all demand and claim whatever on account of their business aforesaid." [372]

On the same day, Spalding, Rapley and Thomas as trustee, executed a deed of the two lots to Bonnell, expressed to be in consideration of the payment of the sum of $2,500. The value of these lots was admitted to be $3,297. The record before us contains no copy of the deed nor any further statement of its contents.

But the oral testimony proves, beyond controversy, that no money was actually paid for this conveyance; that at that time Spalding had no claim against Rapley; that no part of Spalding's note to Rapley for $10,000 had then or has since been paid; that Rapley decided to take the two lots in satisfaction of that debt to himself, and authorized and directed this conveyance to be made, without a sale by auction, in order to save expense, and with the sole object of having the land held by Bonnell in trust for Spalding's children as a gift to them from Rapley; and that Thomas and Spalding joined with Rapley in the deed to Bonnell, in order to perfect the legal title.

The facts of the case being understood, the law applicable to them is clear. There is no proof whatever that the trust deed from Spalding to Thomas was made with any intent to defraud Spalding's creditors. Under that deed, Rapley had the whole equitable title in the two lots, and the right to direct Thomas to sell them by private sale, for an adequate consideration, to pay the debt due him from Spalding. He in effect paid a greater consideration by accepting the lots in satisfaction of a debt for thrice their value. He might cause them to be con-

[373] veyed to himself, to Spalding's children, or to any other person, without exceeding the powers conferred upon him by the trust deed or affording to Spalding's creditors any just ground of complaint.

Decree affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[401] MARY A. HOYT (NOW MARY A. VESTEL) AND JOHN W. GONN, *Plffs. in Err.*, *v.* JOSEPH H. RUSSELL.

(See S. C. Reporter's ed. 401-405.)

Evidence—judicial notice of territorial jurisdiction.

1. A court will take judicial notice of the territorial extent of its jurisdiction.
2. The Act of the Legislature of Montana of May 8, 1873, affecting the mode of making proof of the location of mining claims, was not in force in the County of Lewis and Clarke on May 13, 1873; and of this fact the court below should have taken judicial notice.

[No. 159.]

Submitted Mar. 11, 1886. Decided Mar. 22, 1886.

IN ERROR to the Supreme Court of the Territory of Montana.

The case is stated by the court.

Mr. Wm. Chumasero, for plaintiffs in error.

No counsel appeared for defendant in error.

[402] *Mr. Justice* **Field** delivered the opinion of the court:

This is an action to determine the right of the parties to the possession of certain mining ground situated in Lewis and Clarke County, in the Territory of Montana. The plaintiffs in error, Hoyt and Gonn, defendants in the court below, allege that on the 13th day of May, 1873, they discovered a silver-bearing quartz lode in that county, which they named Mammoth Lode, and then proceeded to locate it by placing stakes so as to mark its extent; and that on the 29th day of that month they filed in the recorder's office of the county a notice or declaratory statement of the location, describing the claim. In October, 1877, Gonn conveyed his interest to Mary A. Hoyt, and she subsequently filed an application for a patent in the land office at Helena, in the Territory.

Russell, the plaintiff below, the defendant in error here, also claimed a silver-bearing quartz lode in that county which, he alleges, he and one Bassett discovered in 1867, duly located and named The J. H. Russell Lode. The claims of these parties, Hoyt and Russell, conflicted; and in opposition to her application he filed his adverse claim under the statute (R. S. § 2326), and in due time commenced this action, joining Gonn as a defendant with her.

The plaintiff's made proof of his location. The defendant notice of location was accompanied by an affidavit that they were citizens of the United States and of the Territory; but the other matters set forth therein were not [403] sworn to, and for this omission it was excluded.

The action of the court on other points became of little moment in the face of this ruling; if that was correct, their proof of right to the disputed ground failed.

Their lode was located under an Act of Montana of December 26, 1864, and the Act of Congress of May 10, 1872. The Act of Montana provided that notice of the discovery of any lead, lode or ledge should be filed for record in the office of the recorder of the county in which the same was situated, within fifteen days from the date of discovery, and that at the same time an oath should be taken before the recorder that all the claimants were *bona fide* residents of the Territory. Sess. Laws Mont. 1864, p. 328. The Act of Congress does not require an affidavit. It merely prescribes that the record, subsequently made, where one is required by the regulations of the mining district, shall contain the names of the locators, the date of the location, and such a description, by reference to some natural object or permanent monument, as will identify the claim. R. S. § 2324. By an Act of the Legislature of Montana, passed on the 8th of May, 1873, it was provided that any person who should *thereafter* discover a mining claim upon any vein or lode bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits should, within twenty days after the discovery, file for record in the office of the recorder of the county a declaratory statement thereof in writing, on oath, before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States. Ex. Session 1873, 34.

Another Act then in force provided that all Acts and joint resolutions declaring that they should take effect from and after their passage and approval by the Governor should so take effect only at the seat of government and in other portions of the Territory, allowing fifteen miles from the seat of government for each day. R. S. Mont. § 785. That seat was then at Virginia, in Madison County. The pleadings admit that the ground in controversy is situated in Lewis and Clarke County, and in Township No. 8 North, Range 5 West; but there was no evidence as to its distance from Virginia. It was contended that the court should have taken judicial notice of the distance and declared that the ground was so far distant that the Act of May 8, 1873, was not in force there at the time of the discovery of the lode and its location. But the court replied that while courts would take judicial notice of what is generally known within the limits of their jurisdiction; of the divisions of a State or Territory into towns or counties; of the leading geographical features of the land; of the positions of important cities and towns and of government surveys of the public lands, no principle or authority authorized or required them to take judicial notice of the place where mere private property was situated, or its distance from the seat of government; that matters only of public importance and notoriety were within the scope of what courts will take judicial notice of; and that matters of mere private concern, as the location or situation of a farm or a mining claim, or its distance from the seat of government, were not within the operation of the principle.

It is undoubtedly true that judicial notice is not taken of purely private concerns, when

they are not connected with or necessarily involved in a matter of a public nature; but it is otherwise when they are so connected or involved. For example, a court will take notice of the boundaries of the State or Territory where it holds its sessions, and of judicial districts, and municipal subdivisions within it. If the public surveys have established the distance from its capitol to any such subdivision, the court will take notice of the fact; and if private property be shown to be within that subdivision, its distance also from the capitol will be judicially noticed; notice of the general fact embracing all the facts included in it. In the present case, the court below was required to take notice of the extent of its jurisdiction, not only of the subjects placed by law under its cognizance, but of its extent territorially. It should have known judicially whether the laws of the Territory, which it was appointed to expound, were in operation with reference to a subject brought before it in the regular course of procedure. It was bound to know whether they were in force in the township designated in the County of Lewis and Clarke on the 13th day of May, 1873, and that necessarily involved a knowledge of its distance from the capitol of the Territory. It may be that the judge's information on the subject was at fault, and calculations and inquiries on the subject may have been necessary. Such is the case with reference to a great variety of subjects of general concern, of which courts are required to take judicial notice. Information to guide their judgment may be obtained by resort to original documents in the public archives or to books of history or science or to any other proper source. In this case, it appears by the government maps of the Territory, upon which the public surveys are marked, that the distance from the seat of government to the nearest point of the township in which the mining ground in controversy is situated exceeds seventy-five miles. The Act of May 8, 1873, was not, therefore, in force there on the 13th of May, the day of the discovery of the Mammoth lode. The court having become informed on this subject, should have so declared, and its conclusion would not have been open to contest before the jury. It erred, therefore, in excluding the notice of the defendant's location for the omission stated, because no proof was offered of the distance of the disputed ground from the seat of government, where the Act took effect on the day of its passage. The court said that if there were any exception to it by reason of the distance of the Mammoth lode from that place, the defendants should have made the fact appear by proof, holding that the Act not having been complied with, the notice was inadmissible in evidence.

It is not necessary to express any opinion whether, after the passage of the Act of Congress of 1872, the Legislature of the Territory could add any further requirement touching the record of notices of location. It is sufficient for the reversal of the judgment that the court required proof of a fact of which it was bound to take judicial notice.

Judgment reversed and cause remanded, for a new trial.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

[389]

W. WHITEHALL FULKERSON ET AL.,
Plffs. in Err.,
v.
SETH C. HOLMES ET AL.

(See S. C. Reporter's ed. 389-401.)

Ejectment—ancient deed as evidence—recitals—forfeiture.

1. A deed sixty-one years old, produced from the custody of the heirs of the grantee, is held to have been rightfully admitted as an ancient document by the court below, without proof by the subscribing witnesses, or possession by the plaintiff or those under whom they claimed, especially in view of strong evidence in support of its validity.
2. After the lapse of sixty-one years, the declaration of the grantor deliberately made in an ancient deed, signed, sealed, witnessed, acknowledged and recorded, to the effect that he was the only child and heir of the patentee of the lands in controversy, and that the latter was dead, was properly admitted as evidence of the facts recited.
3. The refusal of the court below to instruct the jury upon the question of the forfeiture of the lands in controversy, under the revenue laws of Virginia, was proper, the defendants having completely failed to show a forfeiture.

[No. 160.]

Argued March 11, 1886. Decided March 22, 1886.

IN ERROR to the Circuit Court of the United States for the Western District of Virginia.

Statement by *Mr. Justice* **Woods**:

This was an action of ejectment. The defendants in error were the plaintiffs in the circuit court, and were the heirs at law of John Holmes, deceased. They brought the action in August, 1871, to recover a tract of 3,000 acres of land in Lee County, in the State of Virginia. The defendants pleaded the general issue. The case was tried by a jury, and there was a verdict for the plaintiffs, on which the court rendered judgment, and the defendants sued out this writ of error. [390]

It appeared from the bill of exceptions that the plaintiffs, to sustain the issue on their part, offered in evidence a patent from the Commonwealth of Virginia to Samuel Young, dated May 7, 1787, for the premises in controversy, which was admitted without objection.

They next offered a deed for the same premises from Samuel C. Young to John Holmes, dated July 12, 1819. This deed recited the grant by the Commonwealth of Virginia to Samuel Young of the premises in controversy; that Samuel Young, the patentee, had died intestate; that Samuel C. Young, the grantor, was his only child and heir, and that the title to said lands had vested in him. Appended to the deed was a certificate of acknowledgment, dated July 15, 1819, at the Eastern District of Pennsylvania, purporting to have been taken by Richard Peters, United States Judge for the District of Pennsylvania, and signed by him. The deed appeared also to have been witnessed by John Shaw and John Craige. Immediately after the certificate of acknowledgment appeared what purported to be the receipt of Samuel C. Young for the consideration money mentioned in the deed, which was $10,400, signed by him and witnessed by John Craige. The plaintiffs proved the handwriting of *Judge* Peters to the certificate, and the death of John Shaw, one of the witnesses, which took place

more than fifty years before the trial. Appended to the deed was the following certificate of registration:

"Virginia: At a court begun and held for Lee County, at the court house thereof, on the 15th day of January, 1838, this indenture of bargain and sale for land between Samuel C. Young of the one part, and John Holmes of the other part, was admitted to record upon the certificate of Richard Peters, Judge of the Pennsylvania District of the United States.

J. W. S. Morrison, D. C."

The deed bore the following indorsement:

[391] "Recorded in the clerk's office of the County Court of Lee, in book No. 7, page 401.

Teste: J. W. S. Morrison, D. C."

The plaintiffs also introduced evidence tending to show that the patent to Samuel Young, and the deed from Samuel C. Young to John Holmes, were found among the papers of the latter after his death in 1834.

They also offered the testimony of John Holmes, a son-in-law of John Holmes the grantee of the land, who testified that he knew that said grantee owned a tract of 3,000 acres of land in Lee County, Virginia, and that the deed for the land was in the possession of John Holmes the elder, at the time of his death; that at the request of one of the executors of John Holmes the elder, and of the family, the witness, in the year 1836, went to Virginia to examine the lands; that he took with him a map and plan and two deeds, one being the patent above mentioned for the lands in controversy, the other the deed from Samuel C. Young to John Holmes for the same lands; and that these papers had been in his possession or under his control for a period of thirty-seven or thirty-eight years. On his said visit the witness went upon the lands with Peter Fulkerson, who lived in sight of them, and who, as well as Frederick D. Fulkerson and Mr. Ewing, brother-in-law of the latter, recognized him as representing the owners of the land. It was at that time called the "Holmes plantation." There were no intruders upon the land and no one in actual possession. In 1840 Frederick D. Fulkerson treated by letter with the witness for the purchase of the land; and in 1846 James Fulkerson wrote the witness to learn the least he would take for the land, and repeated his inquiry in the year 1847. It may be here stated that the defendants claimed possession under patents issued, one to the Peter Fulkerson above mentioned, dated October 30, 1838, and another to said Frederick D. Fulkerson and James Fulkerson and Elizabeth Fulkerson, dated October 31, 1846, and by subsequent conveyances from said patentees.

Having introduced this evidence the plaintiffs rested.

One of the defenses set up to the action by the defendants was, that under the laws of Virginia the lands in controversy had been forfeited to the State, and the title by reason there-
[392] of had, *ipso facto*, reverted to the State and was, therefore, out of the plaintiffs.

The Acts of the State of Virginia applicable to the present case, providing for the forfeiture of lands delinquent for the nonpayment of taxes, were as follows:

The second section of the Act of February 27, 1835, after citing by way of preamble that whereas, it was "known to the General Assembly, that many large tracts of land lying west of the Alleghany Mountains which were granted by the Commonwealth before the first day of April, 1831, never were, or have not been for many years last past, entered on the books of the commissioner of the revenue where they respectively lie" * * * declared that every owner of any such tract of land should, on or before the first day of July, 1836, enter or cause to be entered, on the books of the commissioner of revenue for the county in which the lands lay, any land owned by him the title of which came through grants by the Commonwealth, and have the same charged with all taxes and damages in arrears properly chargeable thereon, and pay all such taxes and damages which had not been relinquished and exonerated by the second section of the Act concerning delinquent and forfeited lands, passed March 10, 1832, and upon failure to do so, such lands, not in the actual possession of said owner, should become forfeited to the Commonwealth after the first of July, 1836. Laws of Virginia 1834, 1835, chap. 13, p. 12.

The second section of the Act of March 10, 1832, referred to in the statute just recited, provided that all taxes and damages due and chargeable on lands lying west of the Alleghany Mountains, returned delinquent for the year 1831 or any previous year, and which had not been redeemed or exonerated by former laws, should be discharged, and the lien of the Commonwealth therefor relinquished, provided said taxes and damages did not exceed $10. See Laws of Virginia, 1832, chap. 73, page 67.

By successive Acts of the Legislature of Virginia (Act of March 23, 1836, chap. 8, p. 7, Acts of 1835-36; Act of March 30, 1837, chap. 8, p. 9, Acts of 1836-37; Act of March 15, 1838, chap. 8, pp. 16, 17, Acts of 1838) the time for entering lands upon the books of the commissioners of revenue, and paying the taxes and damages charged thereon, and thereby saving them from forfeiture, was extended to the first day of July, 1838.

In order to prove the forfeiture of the land in controversy to the State of Virginia, the defendants introduced "a table of tracts of Land in Lee County assessed with taxes," certified on September 5, 1876, by the Auditor of Public Accounts of the State of Virginia. This table showed that three tracts of land, containing in the aggregate 6,300 acres, had been listed for taxation, against Samuel Young of Philadelphia, for the years from 1827 to 1832 inclusive. The taxes on the three tracts for the five years from 1827 to 1831 inclusive were, according to the table, unpaid, and amounted in all to 38 cents. The taxes for 1832 were marked paid.

The Auditor of Public Accounts certified that the books of Lee County prior to 1827 were missing; that the record showed that the taxes on said three tracts of Samuel Young had been paid up to and including the year 1832; that the taxes were released to 1831, inclusive; and that said lands were returned among the unascertainable lands in 1832, and subsequently dropped from the commissioners' books of Lee County.

To rebut this testimony introduced by the defendants, the plaintiffs put in evidence the

certificate of the deputy sheriff of Lee County dated December 14, 1837, to the effect that he had placed a tract of land in the name of Samuel Young, for 3,000 acres, which was returned in the year 1834 not ascertainable, on the commissioners books of said county of Lee, and taxed the damages thereon. They also introduced "an extract," certified September 5, 1875, by the Auditor of Public Accounts, "from the land books of the commissioners of the revenue for the County of Lee, for the years 1838 to 1875, both inclusive" * * * of lands assessed successively to John Holmes, John Holmes, Jr., and John Holmes' estate, for each of said years. The extract showed that a tract of 3,000 acres of land, conveyed by Samuel C. Young, was listed for taxation to John Holmes and John Holmes, Jr., of Philadelphia, and to the estate of John Holmes, for the years above mentioned; the taxes down to 1874, excepting one year, appeared to have been paid or released by law.

The evidence having been closed, the court, at the request of the plaintiffs, charged the jury as follows: "That if they believed from the evidence in the cause that the Commonwealth, by letters patent, on the 7th day of May, 1787, granted to Samuel Young the parcel of 3,000 acres of land in the declaration mentioned; that Samuel C. Young was the only child and heir of Samuel Young; that Samuel C. Young conveyed the said 3,000 acres, by deed of the 12th day of July, 1819, to John Holmes, of the City of Philadelphia, Penn.; that said John Holmes was dead; and that the plaintiffs were his heirs; then the title to this land was satisfactorily traced to the plaintiffs; and that, in consequence of the antiquity of the deed of Samuel C. Young to John Holmes of 12th July, 1819, and its custody by said Holmes, the jury might be justified by the testimony tending to prove an acknowledgment of this title by those under whom defendants claim, to accept the recitals of said deed as to the heirship of Samuel C. Young."

At the request of the defendants the court charged the jury: "That the plaintiffs have attempted to show a right under Samuel Young's patent, and that they cannot derive title from Samuel C. Young, unless they prove to the satisfaction of the jury that Samuel Young's rights passed by deed, devise, or descent to Samuel C. Young, under whom the plaintiffs claim."

Having given these charges, the court refused the defendants' request to charge the jury as follows: "That the recital in the deed of Samuel C. Young, that he is the only heir of Samuel Young, has been permitted to be read to the jury as evidence; yet it is left to the jury to decide from all the facts and circumstances in evidence before them, whether Samuel Young is dead or not, and whether Samuel C. Young is his only son and heir or not, and unless they should be clearly satisfied from the evidence that Samuel C. Young is the son and heir of Samuel Young, then they should find for the defendants."

[5] The defendants also asked the court to instruct the jury upon the question of the forfeiture of the lands in controversy under the laws of the State of Virginia, above recited, but the court refused to instruct the jury on this point.

Mr. **John A. Buchanan**, for plaintiffs in error:

It was error to allow the deed to be read in evidence, without instructing the jury that the recitals therein as to the death of Samuel Young and the heirship of Samuel C. Young were not evidence against the plaintiffs in error, even if it were admissible at all without proof of its execution, or of possession accompanying and held under it.

Such recitals are not evidence of the facts recited as to third persons, who do not claim under but adversely to the title which the deed purports to convey.

Wiley v. *Givens*, 6 Gratt. 277.

They could not be received as evidence of pedigree, because the relationship of Samuel C. Young, the declarant, to Samuel Young was not established; and it was not shown that the declarant was dead. These two facts must be shown by evidence independent of the recitals.

Blackburn v. *Crawford's Lessee*, 3 Wall. 175 (70 U. S. bk. 18, L. ed. 186); *Gregory* v. *Baugh*, 4 Rand. (Va.) 611; *Chapman* v. *Chapman*, 2 Conn. 347; *Fort* v. *Clarke*, 1 Russell, 601; *Speed* v. *Brooks*, 7 J. J. Marsh. 119; 1 Whart. Ev. § 218 and cases cited; 2 Starkie, 205 and note.

These recitals were made by Samuel C. Young in his own interest; and upon no principle of law can such acts be evidence in favor of those who claim under him, to establish the facts stated in the recitals as against these persons.

Edwards v. *Ballard*, 16 B. Mon. 239.

The forfeiture was clearly shown; but if it were not, there was evidence tending to show it; and it was the plain duty of the court, in such a case, to instruct the jury upon that question.

Farish v. *Reigle*, 11 Gratt. 719; *Early* v. *Garland*, 13 Gratt. 1; *Hopkins* v. *Richardson*, 9 Gratt. 486.

Messrs. **Patrick Hagan, William Pinckney Whyte** and *John A. Campbell*, for defendants, in error:

An ancient deed may be introduced as evidence without proof of its execution, although possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and will afford the presumption that it is genuine.

Caruthers v. *Eldridge*, 12 Gratt. 670; *Carver* v. *Jackson*, 4 Pet. 1 (29 U. S. bk. 7, L. ed. 761); *Crane* v. *Astor*, 6 Pet. 598 (31 U. S. bk. 8, L. ed. 514); *Deery* v. *Gray*, 5 Wall. 795 (72 U. S. bk. 18, L. ed. 653). [396]

Mr. Justice **Woods** delivered the opinion of the court.

It is first assigned for error that the circuit court "allowed the deed from Samuel C. Young to John Holmes to be read in evidence without instructing the jury that the recitals therein in respect to the death of Samuel Young and the heirship of Samuel C. Young were not evidence against the defendants, even if it were admissible at all, without proof of its execution or possession accompanying and held under it."

The deed of Samuel C. Young to John Holmes was rightfully admitted in evidence, as an ancient deed, without proof by the sub-

scribing witnesses, or of possession by the plaintiffs or those under whom they claimed. When offered it was more than sixty years old; it was produced from the custody of the heirs of John Holmes, the grantee, who claimed the lands described therein. It, as well as the patent for the same land from the Commonwealth of Virginia to Samuel Young, was shown to have been found among the papers of John Holmes. The lands described therein were shown to have been listed for taxation to John Holmes, or to his heirs, for a period beginning with the year 1838 down to and including the year 1875, which was after the bringing of this suit; and it appeared that during that time they had paid the taxes assessed on said lands, or the same had been released to them by law. It was further shown that the judge before whom the acknowledgment of the deed had been made was dead; that his signature to the certificate of acknowledgment was genuine; that the deed had been recorded in the county where the lands lay, for more than forty-two years before it was offered in evidence; and that before and after the deed was put upon record, the lands described therein were reported to be the lands of John Holmes, the grantee, and his heirs, and were known and designated in the neighborhood where they lay as the "Holmes plantation."

This state of facts amply justified the admission of the deed in evidence, as an ancient [397] document, without other proof. *Caruthers* v. *Eldridge*, 12 Gratt. 670; *Applegate* v *Lexington, etc., Mining Co.* decided at the present term, *ante*, 892 and cases there cited.

The question is, therefore, fairly presented, whether the recitals made in the deed of Samuel C. Young to John Holmes (to the effect that Samuel Young, the patentee, had died intestate, leaving one child only, namely: the said Samuel C. Young, the grantor) were admissible in evidence against the defendants, who did not claim title under the deed.

The fact to be established is one of pedigree. The proof to show pedigree forms a well settled exception to the rule which excludes hearsay evidence. This exception has been recognized on the ground of necessity; for as in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known to but few persons, it is obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice. Taylor, Evidence, sec 635. Traditional evidence is, therefore, admissible. *Jackson* v. *Willson*, 9 Johns. 92; *Jackson* v. *Brouner*, 18 Johns 37; *Jackson* v. *King*, 5 Cowen, 237; *Davis* v. *Wood*, 1 Wheat. 6 [14 U. S. bk. 4, L. ed. 22]. The rule is that declarations of deceased persons who were *de jure* related by blood or marriage to the family in question may be given in evidence in matters of pedigree. *Jewell* v. *Jewell*, 1 How. 219 [42 U. S. bk. 11, L. ed. 108]; *Blackburn* v. *Crawford*, 3 Wall. 175 [70 U. S. bk. 18, L. ed. 186]; *Johnson* v. *Lawton*, 2 Bing. 86; *Vowles* v. *Young*, 13 Ves. 147; *Monkton* v. *Atty-Gen.* 2 Russ. & Myl. 159; *White* v. *Strother*, 11 Ala. 720. A qualification of the rule is that before a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof independent of the declaration itself. *Monkton* v. *Atty-Gen.* 2 Russ. & Myl. 156; *Atty-Gen.* v. *Kohler*, 9 H. L. Cas. 660; *Rex* v. *All-Saints*, 7 B. & Cr. 789. But it is evident thatbut slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy.

Applying these rules, we are of opinion that the recital in the deed of Samuel C. Young to John Holmes, supported as it was by the circumstances of the case shown by the evidence, was admissible, as tending to prove the facts recited, namely: that Samuel Young, the patentee, was dead, and Samuel C. Young, the grantor, was his only child and heir.

As the deed in which the recital was made was entitled to be admitted in evidence, it stands upon the same footing as if its execution had been proved in the ordinary way. The fact, therefore, that on the 12th day of July, 1819 (the date of the deed, in the City of Philadelphia, before Richard Peters, United States Judge, and two other persons as witnesses) Samuel C. Young, the grantor in the deed mentioned, made the declarations in question may be taken as established.

It is not disputed that when, upon the trial of the case in the circuit court in October, 1880, the deed containing the recitals was offered in evidence, the declarant, Samuel C. Young, was dead. It only remained, therefore, to offer some evidence that the declarant, Samuel C. Young, was related to the family of Samuel Young. One circumstance relied on to show his relationship was the similarity of names. This, after the lapse of so great a time, was entitled to weight. Another fact was that the patent to Samuel Young for the land in controversy was found with the deed of Samuel C. Young to John Holmes among the papers of the latter after his death. The well known practices and habits of men in the transfer of title make it clear that the patent was delivered to Holmes by Samuel C. Young, when the latter delivered his own deed to Holmes for the premises conveyed by the patent. There was, therefore, persuasive proof that on January 12, 1819, Samuel C. Young had in his possession, claiming it as a muniment of his title, the patent issued by the Commonwealth of Virginia to Samuel Young; and the presumption is that his possession of the patent was rightful. The fact that Samuel C. Young, representing himself to be the son and heir of Samuel Young, had in his rightful possession the title papers of the latter to a valuable estate is a fact tending to prove the truth of his asserted relationship.

Another circumstance of weight is that Samuel C. Young, having assumed, as the son and sole heir of Samuel Young, to convey the landed estate of the latter, and his grantees having for more than sixty years claimed title under his conveyance, the right of Samuel C. Young to make the conveyance has never, so far as appears, been questioned or challenged by any other person, claiming under Samuel Young.

After a lapse of sixty-one years we think these circumstances were sufficient to prove that Samuel C. Young was of the family of Samuel Young, and that the declaration of the

former deliberately made in an ancient writing, signed, sealed, witnessed, acknowledged and recorded, to the effect that the declarant was the only child and heir of Samuel Young and that the latter was dead, was of right admitted in evidence, as tending to prove the facts so recited. This conclusion is sustained by the case of *Deery* v. *Cray*, 5 Wall. 795 [72 U. S. bk. 18, L. ed. 658], which is directly in point. See also *Carver* v. *Jackson*, 4 Pet. 1 [29 U. S. bk. 7, L. ed. 761]; *Crane* v. *Astor*, 6 Pet. 598 [31 U. S. bk. 8, L. ed. 514]; *Garwood* v. *Dennis*, 4 Binney, 314; *Stokes* v. *Dawes*, 4 Mason, 268; *Jackson* v. *Cooley*, 8 Johns. 128. In view, therefore, of the circumstances of the case, there was no error in the refusal of the court to instruct the jury that said recital was not evidence against the defendants.

The next and only other ground of error alleged by the defendants is that the court refused to charge the jury on the question of forfeiture. We think there was no error here.

The forfeiture of the lands in controversy is alleged to have occurred by virtue of the provisions of the second section of the Act of February 27, 1835. Two classes of lands were declared subject to forfeiture by this Act. The first was lands which had never been entered upon the books of the commissioners of revenue for the county in which the lands lay.

There is a failure to show that the lands in question had never been listed for taxation upon the books of the commissioners of Lee County, within whose limits they were included. It is true the certificate of the Auditor of Public Accounts, introduced by the defendants, states that the records of Lee County prior to 1827 are missing. But it can hardly be maintained that when a party shows his inability to prove an essential fact, the fact may be inferred from his inability to prove it.

But the same certificate shows that the lands of Samuel Young were placed on the books of the commissioners of Lee County for six years, namely: from 1827 to 1832 inclusive, and that the taxes on the same lands had been paid up to and including the year 1832. Upon the showing of the defendants themselves, it appears that the lands in question do not belong to the class which had never been entered upon the books of the commissioners of revenue.

Nor are the defendants any more successful in showing that the lands in controversy fell within the second class liable to forfeiture, namely: those which for many years previous to February 27, 1835, the date of the Act declaring the forfeiture, had not been entered upon the books of the commissioners of revenue. For, referring to the second section of the Act of March 10, 1832 (Laws Va. 1832, chap. 73, p. 67), it appears that only those tracts of land on which the unpaid taxes exceeded $10 were liable to forfeiture under the Act of February 27, 1835. There is no proof that the taxes and damages on the lands in question exceeded that amount. On the contrary, if the table of lands showing the taxes thereon for the years 1827 to 1832 inclusive, certified by the Auditor of Public Accounts, includes the lands in controversy, as the defendants contend, the taxes thereon for all the years stated amounted to only 88 cents, and the taxes were, therefore, released and relinquished by the second section of the Act of March 10, 1832. And if this table did not include the lands in controversy, then there is an entire failure to show what the taxes were. The defendants, therefore, have failed to prove that the lands in controversy were liable to forfeiture under the Act of February 27, 1835.

But there is affirmative proof that no forfeiture could have occurred, for the time for entering the lands on the commissioners' books for taxation and for paying the taxes, and thereby preventing forfeiture, was extended, as has been stated, to the first day of July, 1838; and it was shown by the certificate of Crabtree, the deputy sheriff, that as early as December 14, 1837, the lands in controversy were placed upon the tax books, and the damages thereon taxed; and it was further shown that the State of Virginia never claimed the lands as forfeited, but, from the year 1838 down to the beginning of this suit, a period of more than thirty-three years, had assessed and collected taxes therefor from the plaintiffs and those under whom they claim. It follows that the failure to show a forfeiture of the lands under the Act of February 27, 1835, was complete. It would, therefore, have been the duty of the court, if it gave any instruction upon this branch of the defense, to say to the jury that the defendants had failed to maintain it. It can hardly be urged by them, as a ground for the reversal of the judgment, that the court did not so charge. *Brobst* v. *Brock*, 10 Wall. 519 [77 U. S. bk. 19, L. ed. 1002]; *Phillips, etc., Const. Co.* v. *Seymour*, 91 U. S. 646 [Bk. 23, L. ed. 341].

Judgment affirmed.

True copy: Test.

James H. McKenney, Clerk, Sup. Court, U. S.

L. M. MARSHALL, *Plff. in Errr.*, [415]

v.

STEPHEN HUBBARD.

(See S. C. Reporter's ed. 415–419.)

Practice—peremptory instruction for plaintiff.

Where, giving the defendant the benefit of every inference that could have been fairly drawn from the evidence, it was insufficient to authorize a verdict in his favor, a peremptory instruction for the plaintiff was proper.

[No. 110.]

Argued Jan. 11, 1886. Decided Mar. 22, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

This action was brought in the Circuit Court of Brown County, Wisconsin, by the defendant in error, upon two promissory notes, against the plaintiff in error. The notes were signed by the plaintiff in error and were payable to the defendant in error. The trial resulted in a verdict for the defendant in error for a part of the amount claimed, the jury allowing a recoupment set up in the answer. The defendant

NOTE.—*Conditions necessary to sustain action for deceit.* See Ming v. Woolfolk, *ante*, 740, note.

When verdict may be directed by court. See Town of Grand Chute v. Winegar, 82 U. S., bk. 21, 170, note on page 174.

in error appealed and the Supreme Court of the State reversed the judgment.

Hubbard v. *Marshall*, 50 Wis. 322.

The case was then removed to the Circuit Court of the United States, where the court directed a verdict for the plaintiff, defendant in error.

It is unnecessary to an understanding of the opinion to set out the facts alleged in defense of the action.

Mr. **T. R. Hurd,** for plaintiff in error.

Mr. **J. D. Markham,** for defendant in error

[418] *Mr. Justice* **Harlan** delivered the opinion of the court:

We concur with the circuit court in holding that the alleged false representations of Hubbard to Marshall in reference to the quantity of pine upon the land in question could not have resulted in any injury to the latter, of which he could complain as against the former, unless, at the time the representations were made, it was understood, with Hubbard's knowledge, that Gillen and Monroe were to surrender their purchase and that Marshall was to take their place with reference to the land and pine. Under such an arrangement, Gillen and Monroe would be released from their obligations to Hubbard, while Marshall would occupy the position of a purchaser of the land and the pine, the title remaining in the plaintiff. The evidence, however, fails to connect Hubbard with any such understanding or arrangement. The evidence shows nothing more, as between the parties to this suit, than a purchase by Marshall of certain property rights which Hubbard held, including Gillen and Monroe's obligation to him in reference to the land in question. Marshall was aware of the extent of that obligation, and took from Hubbard the writing of May 23, 1874, which recites that Hubbard had sold and assigned to him "all his right, title and interest in and to a certain contract executed and entered into by and between the said Stephen Hubbard, Nicholas Gillen and Hugh Monroe, which said contract is dated 23d of May, 1873;" Hubbard reserving the right to enforce the covenants contained in that contract in his own interest and behalf, in case of default in the payment of either of the notes executed by Marshall to him. So clearly, in our judgment, does the evidence show that this was the only contract between the parties to this suit, that a verdict based upon any other view ought to have been set aside.

[419] Giving the defendant the benefit of every inference that could have been fairly drawn from the evidence, written and oral, it was insufficient to authorize a verdict in his favor. Such being the case, a peremptory instruction for the plaintiff was proper. *Pleasants* v. *Fant*, 22 Wall. 116 [89 U. S. bk. 22, L. ed. 780]; *Montclair* v. *Dana*, 107 U. S. 162, and *Randall* v. *R. R. Co.* 109 U. S. 483 [Bk. 27, L. ed. 436, 1005]; *Anderson Co. Comrs.* v. *Beal*, 113 U. S. 241, and *Baylis* v. *Travellers Ins. Co.* 118 U. S. 320 [Bk. 28, L. ed. 971, 990].

The judgment is affirmed.

True copy. Test:

James H. McKenney. Clerk, Sup. Court, U. S.

THOMAS T. STURGES ET AL. *Plffs. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 363-365.)

Legacy tax—when tax accrues.

A legacy which did not become payable until after the repealing Act of July 14, 1870 took effect, is held not to be subject to a legacy tax under the Act of June 30, 1864, as amended by that of July 13, 1866.

[No. 193.]

Submitted Mar. 24, 1886. Decided Mar. 29, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This action was brought in the District Court of the United States for the Southern District of New York by the defendant in error, to recover a legacy tax on a legacy of $100,000 given by the will of Thomas T. Sturges (who died July 17, 1870) to George W. M. Sturges, "to be paid to him within three months after he shall arrive at the age of twenty-one years."

The said George W. M. Sturges did not arrive at the age of twenty-one years until February 21, 1872.

The district court overruled a demurrer by the defendants and gave judgment for the plaintiff. The court below having affirmed this judgment on error, the defendants sued out this writ of error.

Mr. Thomas Harland, for plaintiffs in error.

Mr. John Goode, Solicitor-Gen., for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This judgment is reversed on the authority of *Mason* v. *Sargent*, 104 U. S. 689 [Bk. 26, L. ed. 894], and the cause remanded, with instructions to reverse the judgment of the District Court and to send the case back to that court for further proceedings according to law.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

UNION PACIFIC RAILWAY COMPANY, *Appt.*,

v.

UNITED STATES.

UNITED STATES, *Appt.*,

v.

UNION PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 355-363.)

Union Pacific Railway—construction of statute—Method of fixing rate of transportation charges.

1. In a controversy between the Union Pacific Railway Company and the United States, arising under the Act of July 1, 1862, it is immaterial whether the amount actually found to be due for transportation of the mails "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service," as required by said Act, is ascertained upon

evidence comparing them with the rates previously determined and fixed by the Company, or with those allowed by the accounting officers of the Government. The only material thing is to adjudge what is due according to the rule prescribed by the statute; and a finding by the court of claims, "that the amounts allowed and retained by the Treasury Department for transportation of mails, as aforesaid, are a fair and reasonable compensation for the service, and not in excess of the rates paid by private parties for the same kind of service," is held to be sufficient.

2. The bridge of the Union Pacific Railway Company between Council Bluffs and Omaha is subject to the provisions of the Act of July 1, 1862, as to the rates to be paid by the Government for transportation over it.

3. *It seems* that the service rendered by a carrier in transporting a local passenger between two points is not in law identical with that rendered in transporting a through passenger between the same points.

[Nos. 1034, 1035.]

Argued Jan. 26, 1886. Decided Mar. 29, 1886.

CROSS appeals from the Court of Claims. The case is stated by the court.

Messrs. **John F. Dillon**, *J. M. Wilson* and *Sidney Bartlett*, for the Union Pacific Railway Company.

Mr. **John Goode**, *Solicitor-Gen.*, for the United States.

Mr. Justice **Matthews** delivered the opinion of the court:

In the case of *Union Pacific R. Co.* v. *U. S.* 104 U. S. 662 [Bk. 26, L. ed. 884], on appeal from the court of claims, it was decided that the Railroad Company, by virtue of the sixth section of the Act of July 1, 1862, chap. 120, 12 Stat. at L. 489, was entitled to be paid by the Government for services rendered in the transportation of the mails over its road, and of the *employés* accompanying them, compensation at fair and reasonable rates, not to exceed the amounts paid by private parties for the same kind of service, and not such rates as were or might be prescribed by general laws regulating the compensation for similar service by other railway companies; and for the purpose of ascertaining and awarding the amount due for such services as had been rendered, and for which the suit had been brought, the judgment was reversed and the cause remanded to the court of claims.

In that court the cause was consolidated with two others between the same parties, having similar objects, and an amended petition was substituted, in which the Union Pacific Railway Company was plaintiff, that being the name of the consolidated corporation composed of The Union Pacific Railroad Company, The Kansas Pacific Railway Company, and The Denver Pacific Railway and Telegraph Company. In that petition the plaintiff alleged claims against the Government for compensation for transportation of troops, mails, munitions of war, supplies, public stores, passengers, mail agents and clerks, and the transmission of dispatches, the details of which were set out in schedules attached thereto. Of these the sum of $3,768,568.60 was alleged to have accrued for services rendered by the Union Pacific Railroad Company prior and up to June 30, 1878, one half of which, it was admitted, should be retained by the Government and applied, as required by section 5 of the Act of July 2, 1864, to the payment of the bonds issued by the United States in aid of the construction of the road; an additional sum of $1,415,415.25 was claimed to be due and payable in cash, for services rendered by the Kansas Pacific Railway Company for similar services, and the further sum of $94,206.20 for like services rendered by the Denver Pacific Railway and Telegraph Company.

It was also averred that the several amounts charged for the services so performed were according to the rates therefor which the railroad company had determined and fixed, both as respects the Government and the public, and of which the Government and the several departments were duly notified; which rates were fair and reasonable and not exceeding the amounts paid by private parties for the same kind of service.

The United States filed an answer to this complaint denying generally all its allegations, and with it a counterclaim for the recovery of the sum of $11,500,000, alleged to be due, as follows: $1,000,000, being 5 per centum on the net earnings of the Kansas Pacific Railway Company on the subsidized portion of its road from November 2, 1868, to December 31, 1882; $1,500,000 being 5 per centum of the net earnings of the Union Pacific Railroad Company from November 6, 1875, to June 30, 1878; and $9,000,000, as being 25 per centum of the gross earnings of the Union Pacific Railroad Company from June 30, 1878, to December 31, 1882, after deducting the necessary expenses actually paid within the year, in operating and keeping the same in a state of repair, and also the sum paid within the year in discharge of interest on the first mortgage bonds.

To this counterclaim the plaintiff answered, in substance, that the 25 per centum of the earnings referred to were required by law to be paid into a sinking fund for the benefit of the plaintiff, and to be used in liquidation of its obligations; that the amount so to be paid is such a sum, not exceeding the sum of $850,000 in any one year, as, added to the amount earned by the company for transportation for the defendants, will amount to 25 per centum of the net earnings of said company, no money being required to be paid into said sinking fund unless the compensation for transportation shall not equal 25 per centum of said net earnings; that during the period mentioned in the counterclaim, to wit: from June 30, 1878, to December 31, 1882, the United States became and is still indebted to the plaintiff, on transportation account, in the sum of $7,158,166.06, as shown in schedules exhibited, one half of which amount, $3,579,083.03, is applicable to bond and interest account, and the other half to the sinking fund account, which said last mentioned sum is equal to and a full satisfaction of all the demands of the defendant and of the obligation of the plaintiff to pay the said 25 per centum of its net earnings during the said period.

On these issues the court of claims ascertained from the evidence the facts in dispute, which are set forth in special findings; and on these findings its conclusions of law, that the plaintiff is entitled to be paid, on account of the matters set forth in the claim, the sum of $2,910,124.08; that the defendants, on account of the counterclaim, are entitled to be paid the sum of $4,487,807.39; and that the United

States is consequently entitled to judgment for the difference, amounting to $1,577,683.31, and judgment was so entered.

The United States appealed from so much of this judgment as allowed to the plaintiff the sum of $2,910,124.08, on its claim.

The plaintiff appealed from the whole judgment.

And the case is now here for determination on these cross appeals.

The only question of law made upon its appeal, by the plaintiff below, is that the court of claims failed in its finding of facts as to compensation claimed for transportation of the mails to meet the actual issue made by the pleadings. This issue, it is said, was an affirmation on the part of the plaintiff, and a denial on the part of the defendant, that the rates of transportation fixed and determined by the Railway Company, of which notice had been given to the proper department of the Government, were fair and reasonable, and not in excess of what was paid by private parties for the same kind of service; whereas, the finding of fact by the court of claims was "that the [359] amounts allowed and retained by the Treasury Department for transportation of mails, as aforesaid, are a fair and reasonable compensation for the service, and not in excess of the rates paid by private parties for the same kind of service." A distinction is thus sought to be made between a *quantum meruit*, ascertained according to the rate prescribed by the Act, and rates determined and fixed in the first instance by the Railway Company, not to be disturbed if they are found not to be in excess of the limit prescribed by the statute.

But, as it seems to us, this is a distinction without a difference. It is quite immaterial whether the amount actually found to be due for transportation of the mails, "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service," as required by the sixth section of the Act of July 1, 1862, is ascertained upon evidence comparing them with the rates previously determined and fixed by the Company, or with those allowed by the accounting officers of the Government. The only material thing is to adjudge what is due according to the rule prescribed by the statute. That the court of claims has done. In doing so, it has virtually decided the point of the issue; for if the Company has charged rates producing a different amount, they are thereby declared not to be fair and reasonable, because whatever differs from the amount found by the court to answer this description cannot be supposed to fulfill it. There cannot be two differing rates for such compensation which will both correspond with the conditions prescribed by the Act of Congress.

We come now to consider the appeal of the United States.

The first question arising upon this appeal relates to the charges which may be lawfully made to the Government for transportation services over the bridge of the Union Pacific Railway Company between Council Bluffs and Omaha. On this subject, the finding of the court of claims is as follows:

"The Company's uniform rate, during the time covered by this suit, for the transportation of passengers between Council Bluffs and Omaha, over its bridge and approaches, a distance of 3.97 miles, was fifty cents each, which sum was included in the price of tickets sold for longer or shorter distances. That was a fair and reasonable rate of compensation to be paid by the defendants and not in excess of the rates paid by private parties for the same kind of service.

"The treasury department did not allow fifty cents for each passenger so transported for the defendants, but in each case, ascertaining over what railroad or public highway the passenger reached Council Bluffs or Omaha, and the rate per mile paid by him over such part of said railroad or public highway as he had thus traveled, the Company was allowed only the same rate per mile for transporting such passenger between Council Bluffs and Omaha as he had so paid on the road leading to the bridge. On the roads leading to said bridge the rates per mile are different, and the rates on the same road differ according to distance traveled.

"The difference between the amount so allowed by the treasury department for the transportation of such passengers for the defendants and that which the Company should be allowed if it has a right to charge fifty cents for each passenger so transported during the time above specified, is $3,693.31.

"Similar rules were applied by the treasury department to the transportation of freight over said bridge, and the disallowance resulting therefrom amounted to $10,885.34. The rate claimed by the Company for transportation of freight over said bridge was fair and reasonable, and not in excess of the rates paid by private parties for the same kind of service."

The contention of the Government in support of the allowances made by the treasury department, thus adjudged to be insufficient, is based on the Act of February 24, 1871, chap. 67, 16 Stat. at L. 430, under which it is claimed the bridge was built, which provides that:

"Said bridge may be so constructed as to provide for the passage of ordinary vehicles of travel; and said Company may levy and collect tolls and charges for the use of the same; and for the use and protection of said bridge and property the Union Pacific Railway Company shall be empowered, governed and limited by the provisions of the Act entitled 'An Act to Authorize the Construction of Certain Bridges and to Establish them as Postroads,' approved July 25, 1886, so far as the same is applicable thereto."

The Act thus referred to is chapter 246 of 1866, 14 Stat. at L. 245, of which section 3 is as follows:

"Any bridge constructed under this Act, and according to its limitation, shall be a lawful structure, and shall be recognized and known as a post route; upon which, also, no higher charge shall be made for the transportation over the same of the mails, the troops and the munitions of war of the United States, than the rate per mile paid for the transportation over the railroads or public highways leading to the said bridge."

It is argued that this limitation, made by reference a part of the Act of 1871, applies to charges to be made by the Union Pacific Railway Company for transportation over the

bridge, considered as part of its railway line, and supersedes the legislative contract contained in section 6 of the Act of July 1, 1862, whereby it was authorized to receive compensation at fair and reasonable rates, not in excess of those charged to private parties for similar service.

The court of claims held otherwise, and we think rightly. The Omaha bridge of the Union Pacific Railway Company was not constructed under the Act of 1866. It was constructed under the original Acts incorporating the Company: the Acts of July 1, 1862, and of July 4, 1864, and the Act of February 24, 1871; and the reference in the last named Act to the Act of 1866 was for the purpose of extending the provisions of the latter, so far as necessary to confer additional powers upon the Railway Company for the use and protection of the bridge, and contains no evidence of any intent on the part of Congress to change the rule as to rates of transportation over the line of the Railway Company, as prescribed by section 6 of the Act of July 1, 1862. In the case of the *Union Pacific R. Co.* v. *Hall*, 91 U. S. 343 [Bk. 23, L. ed. 428], it was decided that the bridge in question became part of the railroad of the Company, and that the Company was bound to run and operate its whole road, including the bridge, as one connected and continuous line. The bridge, therefore, as part of the railroad, became subject to the provisions of the Act of July 1, 1862, as to the rates to be paid by the Government for transportation service over it, and there is nothing in the Act of 1871 that changes the application of the rule fixing these rates.

The next question arising on the appeal of the United States relates to items charged for the transportation of passengers, on account of the Government, traveling between Council Bluffs and Ogden.

The finding of facts on the subject by the court of claims is as follows:

"The Company's uniform rate for the transportation of passengers between Council Bluffs and Ogden, when said passengers purchase tickets at either of those places, is $78.50 each; but, by contracts with connecting railroad companies, the claimant receives from said companies who sell through tickets at reduced rates from New York, San Francisco, and other places over their own and the claimant's road, $54 only for each passenger carried between said Council Bluffs and Ogden upon said through tickets, as its proportion of money paid for the whole through distance.

"In computing the compensation set out in finding IX. the treasury department allowed the claimant only $54 for each passenger carried for the defendants, when said passenger did not have a through ticket over its own and other roads, but took the train at Council Bluffs or Ogden upon an order from the defendants' authorized officers to proceed over the road between those places at the charge of the Government.

"The difference between $54 allowed as aforesaid and $78.50 claimed by the Company for each passenger so transported by the claimant, is $2,855.38 for the period covered by this suit.

"The court finds that $78.50 is a fair and reasonable rate of compensation to be paid by the defendants for the transportation of a passenger taking a train at Ogden or Council Bluffs and passing over the road between those places, without a through ticket purchased of other roads as aforesaid, and not in excess of the rates charged private parties for the same kind of service.

"In some instances the requisition for transportation presented to the agents of the Company stated on its face that the passenger was bound from seaboard to seaboard, and in others the requisition furnished no information on the subject. [363]

"How much of the sum disallowed was for one and how much for the other kind of requisition is not shown, but the Company concedes the reduction in the former cases."

The contention on the part of the United States is that local passengers carried on its account, between Council Bluffs and Ogden, shall be carried at the same rates as are charged for through passengers passing between those points, as part of a journey over the whole line, although a difference is made in respect to all other persons. But the court of claims has found as a fact that the amount found by it is based upon rates between those points which are fair and reasonable, and not in excess of those charged to private persons for the same service. We cannot review this finding of fact, and no question of law arises upon it, unless it be one whether the service rendered in transporting a local passenger between the two points is in law identical with that rendered in transporting a through passenger between the same points as part of the transit over the distance of the whole line. This we cannot affirm.

As the United States did not appeal from that part of the judgment of the court of claims finding the amount due on account of the counterclaim, no question arises thereon.

We find no error in the judgment, and it is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Ex parte:

In the Matter of PHŒNIX INSURANCE COMPANY OF LONDON, ENGLAND; GUARDIAN FIRE AND LIFE INSURANCE COMPANY OF LONDON, ENGLAND; NORTH BRITISH MERCANTILE INSURANCE COMPANY OF LONDON, ENGLAND, AND EDINBURGH, SCOTLAND; AND COMMERCIAL UNION ASSURANCE COMPANY OF LONDON, ENGLAND. [367]

(See S. C. Reporter's ed. 367-370.)

Jurisdiction—joinder of distinct liabilities to give.

Distinct decrees against distinct parties on distinct causes of action, or on a single cause of action

NOTE.—*Jurisdiction of Supreme Court; dependent on value of matter in controversy.* See Gordon v. Ogden, 28 U. S. bk. 7, 592, note.

in which there are distinct liabilities, cannot be joined to give this court jurisdiction on appeal.

[No. 7 Orig.]

Argued March 22, 1886. Decided March 29, 1886.

ON RETURN to a rule to show cause why a writ of *mandamus* should not issue commanding the Judges of the Circuit Court of the United States for the District of Vermont to allow an appeal.

The case sufficiently appears in the opinion.

Mr. **W. S. B. Hopkins,** for petitioners.

Mr. Martin H. Goddard, filed a brief for the respondents, but the court declined to hear argument on that side.

[369] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

The rule is well settled that distinct decrees against distinct parties on distinct causes of action or on a single cause of action in which there are distinct liabilities, cannot be joined to give this court jurisdiction on appeal. *Seaver* v. *Bigelow*, 5 Wall. 208 [72 U. S. bk. 18, L. ed. 595]; *Ex parte Baltimore & Ohio R. R. Co.; Schwed* v. *Smith; Farmers Loan and Trust Co.* v. *Turner* [*Waterman*], and *Adams* v. *Crittenden*, 106 U. S. 5, 188, 270, 577 [Bk. 27, L. ed. 78, 156, 117, 99]; *Hawley* v. *Fairbanks*, 108 U. S. 548 [Bk. 27, L. ed. 822]; *Fourth National Bank* v. *Stout* 113 U. S. 684 [Bk. 28, L. ed. 1152]; *Stewart* v. *Dunham* [*ante*, 329]. This is such a case. The suit was brought on a single instrument, by which, as it was adjudged, an agent of the several insurance companies named bound them severally, each for its proportionate share of one fourth, to insure the property of Mrs Helen M. Fitton for $12,000; and the decree is against each Company separately for its separate obligation under this instrument, to wit: $3,433.50 and no more. The bill alleged the separate liability of each Company, and prayed, in sub-
[370] stance, for decrees against them severally for the proportion assumed by each in the contract. Each Company answered separately, all setting up the same defenses.

Under these circumstances it was right for the Circuit Court to refuse the allowance of an appeal, and the petition for a mandamus *is consequently denied.*

True copy. Test:
James H. McKenney, Clerk. Sup. Court, U. S.

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[365] PHŒNIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *Plff. in Errr.,*

v.

JOHN H. WALRATH.

(See S. C. Reporter's ed. 365-367.)

Removal of causes—Act of 1875.

The right to remove a suit under the Act of March 3, 1875, is lost by a failure to file a petition before or at the term at which said cause could be first tried and before the trial thereof; and it is not restored by a subsequent amendment of the pleadings presenting different issues.

[No. 196.]

Submitted March 25, 1886. Decided March 29, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The case sufficiently appears in the opinion of the court.

Mr. **George P. Miller,** for plaintiff in error.

Mr. **Jas. G. Jenkins,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The order remanding this case is affirmed. The right to the removal of a suit under the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137, is lost by a failure to file a petition "before or at the term at which said cause could be first tried and before the trial thereof;" and it is not restored by an amendment of the pleadings afterwards so as to present different issues. As was said in *Babbitt* v. *Clark*, 103 U. S. 612 [Bk. 26, L. ed. 509]: "The Act of Congress does not provide for the removal of a cause at the first term at which a trial can be had on the issues, as finally settled by leave of the court or otherwise, but at the first term at which the cause, as a cause, could be tried." This rule has been strictly adhered to. *Edrington* v. *Jefferson*, 111 U. S. 775 [Bk. 28, L. ed. 596]; *Pullman Palace Car Co.* v. *Speck* and *Gregory* v. *Hartley*, 113 U. S. 87, 745 [Bk. 28, L. ed. 926, 1151]. Here the suit was begun July 19, issue joined August 26, 1880, and a trial had February 23, 1881, which resulted in a verdict and judgment for the present plaintiff in error. This judgment was reversed by an appellate court October 19, 1881, and the cause sent back for a new trial. In the trial court an amended answer which contained a counterclaim was filed on leave May 20, 1882, and the petition for removal was not filed until September 13, 1882. This was clearly too late. *Affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

SUSIE M. KERR ET AL. *Appts.*

v.

SOUTH PARK COMMISSIONERS.

(See S. C. Reporter's ed. 379-387.)

Practice—contents of record—setting aside verdict—lands taken for public park—measure of damages.

1. It was not improper for the court below to permit a certificate of the evidence adduced on the trial of an issue sent to the law side of the court, with the charge to the jury, to be filed and made a part of the record at the next succeeding term after that at which the decree was entered.

2. This court refuses to disregard the verdict recited in the decree, although it is alleged that a prior verdict was not properly set aside, upon the ground that the chancellor, in framing the decree, confirmed the action of the circuit judge in setting aside the first verdict.

3. Upon the trial of an issue as to the value of lands taken for a public park, evidence as to prices paid for lands adjoining the park or within its immediate vicinity, on sales made after its boundaries had been laid out, is inadmissible.

[No. 1142.]

Argued Jan. 21, 1886. Decided Mar. 29, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

Statement by *Mr. Justice* **Matthews:**

The proceedings and decree brought here for revision by this appeal are in execution of the mandate of this court affirming a former decree in the cause, the appellants being the executors and devisees of William P. Kerr, the original complainant, in whose names, upon his death since the decree, the cause has been revived.

The original litigation established the title of Kerr to the premises in controversy, subject to the right of the appellees, the South Park Commissioners, who had taken possession of the lands on August 27, 1870, to appropriate them for the public use as a part of a public park in the City of Chicago, on payment of their value on that day.

It was ordered by the decree that the South Park Commissioners pay to the complainant "The value of the premises on the 27th day of August, A. D. 1870, known and described as the south fractional half of section 13, in township 38, north of range 14, east of the third principal meridian, except lots 9, 16 and 15, in Chas. B. Phillips' subdivision of twenty-six acres off the west side of the S. W. ¼ of said section 13, according to plat of same recorded in the recorder's office of Cook County, in book 98 of maps, p. 9, and the east half of said southwest quarter of said section 13, together with interest thereon from the 27th day of August, A. D. 1870, at the rate of 6 per cent per annum, upon the convevance of said premises by the complainant, William P. Kerr, and his assignees, claiming under him since the commencement of this suit, by deed which shall release to the South Park Commissioners all interest of the said complainant and his assignees. And it is further ordered that the value of said premises required to be paid be ascertained as follows: a jury shall be impaneled in this court, on the law side thereof, to hear the evidence submitted by both parties; and said jury shall determine by their verdict the value of the land herein before described on the 27th day of August, A. D. 1870, the time when possession was taken by the South Park Commissioners, and the verdict shall be certified by the clerk to the chancery side of this court, and the amount so found shall be considered as the value of said premises on the day aforesaid, unless set aside or changed by the further order of this court. And it is further ordered that the complainant, William P. Kerr, make a deed and procure deeds to be made by all persons claiming under him since the commencement of this suit, conveying to the South Park Commissioners the premises aforesaid, when they shall pay the amount found to be due, with interest from the 27th day of August, A. D. 1870, at the rate of 6 per centum per annum; and the court denies any relief to the complainant as to the east half of the southwest quarter of section 13 aforesaid, and it is ordered that the bill of complaint be dismissed as to that part of the premises. And it appearing to the court that the South Park Commissioners have commenced proceedings to condemn the undivided one quarter of the west half of the southeast quarter of section twenty-four, in township 38, north of range 14, east of the third principal meridian, another of the tracts described in the bill belonging to the complainant, it is ordered that all questions touching the same be reserved for the further order of the court."

Afterwards, at the October Term, 1884, the issue directed by the decree of October 8, 1878, was tried by a jury, who returned a verdict fixing the value of the tracts of land in controversy, comprising 111 acres, as of the date of August 29, 1870, at $155,400, which verdict was certified by the clerk to the chancery side of the court as by the decree was directed.

And thereupon, on January 20, 1885, the following decree was entered:

"This cause coming on to be heard upon the pleadings, orders, and decree of October 8, 1878, herein, and the mandate of the supreme court herein filed May 17, A. D. 1882, and the verdict of the jury rendered upon the law side of this court on the 16th day of December, A. D. 1884 (the motion to set aside the same having been overruled), and certified by the clerk to the chancery side of this court, determining the value of the tracts of land described in the decree herein entered on the 8th day of October, A. D. 1878, to have been on the 27th day of August, A. D. 1870, the sum of $155,400, and the evidence, rulings and charge of the court upon the trial of the issue as to said value, it is hereby ordered, adjudged and decreed that said amount of $155,400 be, and it is hereby, adjudged to be the value of said tracts of land at that date; and it appearing to the court that the said complainants cannot at present comply with said decree of October 8, 1878, and that various claims are set up as against said complainants to said tract, or portions thereof, it is ordered that the South Park Commissioners pay into court the said sum of $155,400, with interest thereon from the 27th day of August, A. D. 1870, at the rate of 6 per cent per annum to the date of such payment, and that upon such payment into court the said South Park Commissioners be discharged from further liability for interest in the premises, and that the distribution of said money when paid into court be reserved until further order. [382]

"And the South Park Commissioners exhibiting to the court the pleadings, orders, proofs and decree of August 26, 1882, in a certain cause on the chancery side of this court, wherein the South Park Commissioners were complainants, and Susie M. Kerr, Rosa L. Kerr and Joseph B. Kerr, executors, etc., of William P. Kerr, deceased, and others were defendants, wherefrom it appears that on the 29th day of November, 1879, the sum of $82,800, and on the 26th day of February, 1880, the sum of $7,200, of the moneys of the said South Park Commissioners came to the hands of the said Kerrs, complainants in this case, and that the sum of $4,220.19 was paid into this court in that suit December 1, 1882, as appears from the order of this court in that cause on that day entered, all these moneys being paid on account of the lands in this cause mentioned, and it further appearing that the sum of $25,000 was paid into court in this cause on the 18th day of February, 1884, on account of said lands, it is ordered that said several sums of $82,800, with interest from November 29, 1879;

$7,200, with interest from February 26, 1880; $4,220.19 as of the date of the payment into [383] court herein provided for, and $25,000 with interest from February 18, 1884, be applied on said principal sum of $155,400, and interest; and that the South Park Commissioners pay into court under this decree only the balance thereby arrived at, together with the commission provided by law thereon, and the sum of $250, the commission on the sum of $25,000 so paid February 18, 1884, as aforesaid, and interest thereon from that date.

"And it is also ordered that the deed of James R. Doolittle referred to in said decree of August 26, 1882, in the cause of the South Park Commissioners against Susie M. Kerr and others may be executed and delivered to said South Park Commissioners; and that thereupon said sum of $4,220.19 may be taken from the registry of this court by said complainants Kerr without prejudice to any appeal in said cause in which said money was so paid into court, and deed directed to be delivered as aforesaid."

From this decree the complainants have brought the present appeal.

Messrs. **Edward S. Isham** and *Robert T. Lincoln*, for appellants.

Mr. **Melville W. Fuller**, for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

At the next succeeding term of the circuit court after that at which the decree appealed from was entered, it appears by the transcript of the record that the court permitted to be filed and made part of the record a certificate of the evidence adduced on the trial of the issue, together with the charge of the court to the jury, verified by the signature of the circuit judge. It appears also from the recitals in the decree of January 20, 1885, that the hearing had taken place upon the pleadings, orders and decree of October 8, 1878, and the mandate of the supreme court, filed May 17, 1882, and the verdict of the jury rendered upon the law side of the court on December 16, 1884, the motion to set aside the same having been overruled, certified by the clerk to the chancery side of the court, determining the value of the tracts of land described in the decree of October 8, 1878, to have been on August 27, 1870, the sum of $155,400, and the evidence, rulings and charge [384] of the court upon the trial of the issue as to said value.

We cannot, as we are asked to do by counsel for appellees, disregard the evidence and rulings of the court on the trial of the issue, which are certified by the court as authentic and correctly reported, and which the decree recites to be the basis of its findings, because they were not certified and brought on the record at the same term at which the decree was entered. The subsequent certificate merely ascertains and verifies what proceedings took place before the court at the time of the hearing, and although they should regularly have been brought on the record at the same term, we know of no rule of chancery practice or procedure which forbids the making of a *nunc pro tunc* order to supply such an omission and to prevent in justice.

On the other hand, we are asked to disregard the verdict recited in the decree as a nullity, and consequently to reverse the decree itself on that account, because, as it is alleged, there was a prior verdict rendered on the same issue on November 5, 1883, which had never been regularly or lawfully set aside. But no such verdict appears in the record, otherwise than by a recital in an order of the court made on February 18, 1884, by which it is set aside and a new trial awarded. It is objected that that was a proceeding on the law side of the court, and that the verdict was never certified to the chancery side of the court, where alone proceedings to set it aside could have been properly taken. It is a little difficult, no doubt, to keep entirely separate proceedings in the same cause, part of which take place on the law side, and part on the chancery side of the same court, when all are conducted by the same judge; but no confusion results in the present case, because whatever was done on the law side was approved and adopted by the chancellor, who, in framing his decree on the basis of the verdict of December 16, 1884, necessarily confirmed the action of the circuit judge in setting aside the previous verdict of November 5, 1883.

On the trial of the issue before the jury as to the value of the land in question taken by the appellees for the purposes of the park, the appellants offered to prove, as tending to show the value of their land, the prices which had been actually paid on sales of similar property situated so as to adjoin the park, or be within its immediate vicinity, sales which had taken place after the lines of the park boundaries had been definitely ascertained and laid out. This evidence was rejected, and this ruling, together with the charge of the court to the jury on the point, are assigned as error to the prejudice of the appellants.

The portions of the charge of the court to the jury objected to on that ground are as follows:

"A number of witnesses testified that the agitation of the park project, the anticipation that the Legislature would authorize the appropriation of lands to establish a park in the vicinity of the present South Park, and the introduction of the bill into the Legislature, which finally became a law on the——day of February, 1869, materially enhanced the value of lands embraced in the present park lines, as well as the lands adjacent thereto and in that vicinity. Any resulting benefits to the lands within the proposed park from this and other causes, such as the growth and prosperity, or the anticipated growth and prosperity of the City of Chicago, you should take in account in determining the amount that will fairly compensate the owner. But a number of witnesses also testified, and there seemed to be less agreement upon this point than upon some others, that the passage of the Park Act, its ratification by the people, and the fixing of the proposed Park boundaries by the Legislature, gave to the lands immediately fronting upon and in the vicinity of the park, including the Midway Plaisance and the boulevards, an additional value solely on account of their being without the proposed park lines, but adjacent to the park, the plaisance and the boulevards, or near enough thereto to receive the special benefits resulting from such improvements. In the nature of things the lands within the proposed

park, and which were to constitute it, could not have been thus specially benefited; and the owner of the lands in question should be allowed nothing on the ground that his property was thus specially benefited. Even the witnesses who testified upon this branch of the case for the owner admitted that the outlying lands received a benefit from their location or relation to the park which the lands constituting the park did not receive.

"Sales of property of like character and quality, similarly situated and affected by the same causes, made under circumstances likely to produce competition among bidders, are sometimes resorted to in determining the value of lands: but inasmuch as the lands adjacent to and in the vicinity of the park, plaisance and boulevards received a special benefit, and were subject to a special burden by reason of the existence of the park, plaisance and boulevards, their situation and that of lands embraced within the park lines were relatively so different that outside sales afforded no just grounds for determining the character of the lands taken for the park, and hence all evidence of such sales was excluded, and you are again instructed that there is no such evidence before you.

"It is for you to say whether any of the experts in giving their opinions of the value of the two tracts in question were influenced, if at all, by knowledge of sales of lands which received a special benefit by reason of their peculiar relation to the park, plaisance and boulevards. To the extent that any of the witnesses based their opinions upon a knowledge of such sales, their evidence should be disregarded. It is for you to say, however, whether any of the witnesses gave opinions up · this basis.

"Situated as they then were what were they worth in cash or on terms equivalent to cash in the market, if a market then existed for such lands? It is to be borne in mind—it was then known—that these lands were within the park lines and designated for park purposes. What would anyone needing lands for residence, business, or any other purpose, have paid for them in cash? You are not at liberty to place a value upon those lands upon the basis of what some one might have been willing to have bought them for on time at the date named for purely speculative purposes.

"Now, what you are to do is simply determine, as I instructed you yesterday, the value of that land on the 27th of August, 1870. The market value was what land would have sold for in cash, or on such time and terms as would be equivalent to cash. Was there any demand; was there any market for land situated as this was at that time? What evidence is there before you, if any, showing that the lands within the park lines, or the designated park lines were changing hands after the passage of the Park Act?

"In that connection, however, you will bear in mind that many of the witnesses, most of them perhaps, testified that the final passage of the Park Act, and its ratification, resulted in special benefit to the lands around the park and in its vicinity, and that the lands within the park lines did not receive this special benefit. For this special benefit you will allow nothing."

We think the evidence offered was properly excluded, and that the true rule for the valuation of the property was correctly and fairly stated in the charge of the court above quoted. It is strictly in accordance with the law of Illinois as understood and expounded by the Supreme Court of the State.

In *Cook* v. *South Park Commissioners*, 61 Ill. 124, the court says:

"The court did not err in refusing to give the eighth, ninth and tenth instructions for appellant. The eighth and ninth are substantially that if lands adjacent to the park generally increased in value in consequence of the prospect of establishing a public park, then the lands of appellant must share in such increase. This does not fairly or necessarily follow. The lands adjacent to the property, from their peculiar situation, derived a special benefit and were subject to a special burden. The lands needed for the park must be purchased and the park maintained by special assessments upon the adjacent lands. Their situation relatively was so different that they were not a proper standard by which to judge the value of the lands taken for the park."

We find no error in the decree, and it is accordingly affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

SUSIE M. KERR ET AL., Exrs. of WILLIAM P. KERR, Deceased, *Appts.*, [388]
v.
SOUTH PARK COMMISSIONERS.

(See S. C. Reporter's ed. 388, 389.)

The decree in this case is reversed as inconsistent with the decree in the preceding case between the same parties, which decree embraces the subject matter of this cause.

[No. 124.]

Argued Jan. 21, 1886. Decided March 29, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

Messrs. **Edward S. Isham** and *Robert T. Lincoln*, for appellants.

Mr. **Melville E. Fuller**, for appellees.

Mr. Justice **Matthews** delivered the opinion of the court: [388]

The subject matter in litigation in this cause is embraced in the decree between the same parties just affirmed, which settles the whole controversy between them.

In the present suit, the bill of complaint was filed by the South Park Commissioners, who, in pursuance of negotiations with Kerr, had advanced certain sums of money to enable the latter to protect his title to a part of the lands taken for the purposes of the park, and as security for the same took an assignment of certain incumbrances by way of mortgage or deed of trust upon the premises, but in fact intending that the money so advanced should be treated as a payment on account of the value of the lands of Kerr taken by them for public uses. Notwithstanding that, the present suit was pressed to a decree for the foreclosure of

the lands covered by the deed of trust, and a strict foreclosure in substance was decreed, by directing that unless the representatives of Kerr repaid to the complainants the amount of their advances, the trustee holding the legal title to the premises in controversy should convey them to the complainants in payment of a further small sum of $3,454.[illegible] The present appeal is from this decree.

In the cause just disposed of, the same advances made by the South Park Commissioners are allowed to them in the decree as credits on account of payment of the value of the whole tract of [illegible] acres, which, of course, is inconsistent with the decree now complained of.

[369] *That decree is accordingly reversed, and the cause is remanded for further proceedings in conformity with equity and justice and not inconsistent with this opinion.*

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[496] **SIOUX CITY AND ST. PAUL RAILROAD COMPANY AND ALEXANDER H. RICE AND E. F. DRAKE, Trustees, *Appts.*,**

v.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, *Appt.*,

v.

SIOUX CITY AND ST. PAUL RAILROAD COMPANY, ALEXANDER H. RICE, ELIAS F. DRAKE, JOHN H. GEAR, ET AL.

(See S. C. Reporter's ed. 496-528.)

Land grants in aid of railroads—overlapping claims—construction of grants—costs.

1. Where in case of a grant, by an Act of Congress to a State in trust for each of two railroads, of every alternate section of land for ten miles in width on each side of the roads, and in case any of these lands had been disposed of, a grant of lands in lieu of them to be selected within twenty miles of the road, it was found that the grants overlapped, held:

a. That the title acquired from the United States related back to the date of the grant and that neither company could, by any act of its own (as by prior location or construction) or by any omission of the other company, obtain any superiority, provided there was no forfeiture of the grant.

b. That this principle did not apply to lieu lands, outside the ten mile limit.

c. That as to overlapping lands within ten miles of each road the companies each took an undivided moiety.

d. That as to lands within ten miles of one road and more than ten miles from the other, the nearest took the entire title, though otherwise the further road might have been entitled to indemnity lands therein.

e. That as to lands more than ten miles but less than twenty from each road, the decree of the court below, dividing these lands equally was, under the circumstances, correct.

2. Each party having appe[illegible]y having secured the reversal of the judgment in an important point, the costs in this court are divided.

[Nos. 169, 517.]

Argued and submitted March 16, 1896. Decided March 29, 1896.

APPEALS from the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Mess. John C. Spooner and J. H. Swan, for the Sioux City and St. P. R. R. Co. *et al.*

Mr. John W. Cary, for Chicago, M. & St. P. R. Co.

Mr. Justice **Miller** delivered the opinion of the court:

These are cross appeals from a decree of the Circuit Court for the District of Iowa.

In that court the Chicago, Milwaukee and St. Paul Railroad Company brought its bill in chancery on the 4th day of March, 1879, against the Sioux City and St. Paul Railroad Company, which in due time was answered.

The subject of contest in this suit was the right to certain lands granted by Congress to the State of Iowa to aid in building two railroads, whose right to the lands became vested in one or both of these companies, however named originally. The grant of the lands was by a single statute, and was to the State as a trust for the construction of two roads which necessarily crossed each other, and by the Act of Congress the place of crossing was to be in O'Brien County. The Act granted for the aid of each road every alternate section of land designated by odd numbers for ten sections in width on each side of said roads; and in the event that any of these odd sections had, when the lines of the roads were definitely located, been sold or otherwise disposed of, the usual grant of lands in lieu of them should, by the Secretary of the Interior, be caused to be selected, provided they were in no case to be located more than twenty miles from the lines of the roads. 13 Stat. at L. 72, chap. 84.

The roads to be benefited by this grant have both been completed, and both Companies are entitled to the odd sections within ten miles of their lines of road, and to the indemnity lands so far as they can be found of odd numbers within twenty miles. But as these roads cross each other these limits also cross and overlap, and the claims to the odd sections within those limits necessarily conflict. This presents questions which, at the time the suit was brought, were important, because the value of the land in controversy is large and because many other land grants to railroad companies presented the same difficulty. But during the pendency of this suit in the circuit court and on appeal here all these questions have, it is believed, been decided by this court, so that nothing remains but to apply the principles of these decisions to the admitted facts of this case. *Cedar Rapids, etc. R. R. Co.* v. *Herring*, 110 U. S. 27; *Kansas Pacific R. Co.* v. *Atchison, Topeka & Santa Fé R. R. Co.* and *St. Paul, etc. R. R. Co.* v. *Winona, etc. R. R. Co.* 112 U. S. 414, 720 [Bk. 28, L. ed. 56, 794, 872].

1. It was claimed by the Chicago, Milwaukee and St. Paul Company, which, for brevity will be called the Milwaukee Company, that by

reason of the prior location of the line of its road through the lands where the crossing finally took place, it acquired a priority for its entire claim to the exclusion of the other Company, within the limits of the lap. That is, that when its line was definitely located it became immediately entitled to every odd section within ten miles of the road and to the paramount right of selection of indemnity lands within twenty miles.

2. The Sioux City road asserted, by virtue of the fact of the *prior construction* of its road through the overlapping lines of the grant, that it had secured the paramount right which the other Company claimed by reason of prior location.

Both these contentions are wrong. The title acquired from the United States relates back to the date of the grant; and neither Company can obtain any superiority of title by any act done by it or by any omission to act by the other, provided there is no forfeiture of the grant. This principle is fully decided in the case of *St. Paul, etc. R. R. Co.* v. *Winona, etc. R. R. Co.* [*supra*]. In such case the companies take the lands coming within the conflicting lines in equal undivided moieties.

In the opinion above referred to it was held that while this rule applied to what are called lands in place, that is, those odd sections found within the ten mile limit of the road, as those ten miles conflicted with each other, it did not apply to lieu lands or indemnity lands which were to be *selected* outside of the ten mile limit. The reason of this was said to be that, with regard to the odd sections found within the original limits of the grant undisposed of when the line of the road was definitely located, that location ascertained the sections which passed by the grant and fixed the right to such sections, whether it was the whole or the moiety of them.

But no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior. In a case, therefore, where two companies had this right of selection within the same limits, priority of title might be created by priority of selection, or some other mode than location of the road or priority of construction.

The circuit court, in its decree, disregarded this distinction between lands found in place within ten miles of each road and those within the indemnity limits, and applied the tenancy-in-common principle to the lands claimed as indemnity for others not found within the ten miles, as well as to those found within those limits and not sold or disposed of.

It appears from the record in this case that there are within the lap of the twenty mile limits of both roads, subject to the grants to these roads, both for lands in place and for lieu or indemnity lands, $189,595\frac{95}{100}$ acres which constituted the subject matter of this controversy.

1. Of these, $63,796\frac{24}{100}$ acres are within the ten mile limit of the Sioux City road, and *not* within the ten mile limit of the Milwaukee road, although they are within its twenty mile limit. The result of the rule on which the circuit court acted was to divide these lands equally between the two Companies.

But the principles we have stated, and which were fully considered in *St. Paul, etc. R. R. Co.* v. *Winona, etc. R. R. Co.* exclude the Milwaukee Company in this case from invading the ten mile limit of the Sioux City road to seek indemnity for losses by reason of lands within its own ten mile limit previously disposed of. This $63,796\frac{24}{100}$ acres being odd sections within the ten mile limit of the Sioux City road, and not within the ten mile limit of the Milwaukee road, belonged exclusively to the former, and the latter Company had no interest in them. The decree is in that respect erroneous and must be reversed, and all these lands given to the Sioux City Company.

2. Of the lands in controversy there were $33,071\frac{8}{100}$ acres within the ten mile limit of the Milwaukee road and *not* within the ten mile limit of the Sioux City road, but within its twenty mile limit, which, according to the ruling of the circuit court, were equally divided between the two Companies. For the same reasons which govern with regard to the $63,796\frac{24}{100}$ acres just disposed of, *this part of the decree must be reversed* and these $33,071\frac{8}{100}$ acres given to the Milwaukee Company.

3. Of the lands in controversy there were $50,539\frac{73}{100}$ acres within the ten mile limits of both roads. This the decree of the circuit court held to belong to the companies in equal undivided moieties, and appointed commissioners to make partition of them. This part of the decree was upon the principles we have stated correct, and must be affirmed.

4. There remains to be considered $42,188\frac{88}{100}$ acres found to be within the twenty mile or indemnity limit of both roads, and not within the ten mile or absolute grant limit of either road. As these lands are within the category of those to which no title accrued until a *selection* of them was made for one road or the other, there might arise some difficulty about priority of right between the two Companies. But we are of opinion that the circumstances in which the title to these lands has been placed by the action of the State of Iowa, which was a trustee in the matter for both parties, and of the Commissioner of the General Land-Office, the decree of the court dividing these lands equally between the parties was just. [410]

So far as any selection was made of these lands it was by the State of Iowa, and the legal title was conveyed to her. Though they were certified to her by the Secretary of the Interior for the benefit of the Sioux City Company, and though the State conveyed them to that Company, it is obvious that both the Secretary of the Interior and the Governor of Iowa acted under the mistaken idea that the earlier construction of its road or its earlier location by the Sioux City Company gave it a priority of right in these indemnity lands; and as there was not enough to satisfy the demands of both Companies nor, indeed, of either of them, they, for that reason, conveyed them all to the Sioux City Company. We think the action of the Secretary of the Interior and of the Governor of Iowa, under this mistake of law and of their powers, and especially the Governor of Iowa, the common trustee of both of these Companies, cannot have the effect of destroying the rights of the parties. There was in fact no selection. All were wrongfully conveyed to the Sioux City Company.

That part of the decree, therefore, which divides these lands equally and directs the commissioners to make partition of them *is also affirmed*.

As both parties appealed from the decree of the circuit court, and as each of them has succeeded in obtaining a reversal of an important part of the decree, the *costs of the appeal will be equally divided between them*, and the case remanded to the Circuit Court, with instruction to render a decree in conformity with this opinion.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CALVIN LITTLEFIELD, *Appt.*,

[419] *v.*

WILLIAM D. BLOXHAM, Governor, HENRY A. PENGLE, Treasurer, WILLIAM D. BARNES, Comptroller, J. P. RANEY, Attorney-General, AND P. W. WHITE, Commissioner of Land and Emigration of the STATE OF FLORIDA, Trustees of the INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA.

EDWARD J. REED, *Appt.*,

v.

WILLIAM D. BLOXHAM, Governor, HENRY A. PENGLE, Treasurer, WILLIAM D. BARNES, Comptroller, J. P. RANEY, Attorney-General, AND P. W. WHITE, Commissioner of Land and Emigration of the STATE OF FLORIDA, Trustees of the INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA.

(See S. C. Reporter's ed. 419-430.)

Ownership of bonds—foreclosure of R. R. mortgages—practice—estoppel.

Where trustees of a state fund had sold certain railroads under authority of law, and claimed as part of the purchase money certain mortgage bonds of said roads, and during the pendency of a suit to establish their title, other parties proceeded to foreclose a mortgage junior to theirs, and it became necessary to fix the amount of their prior lien, and the trustees to save themselves from loss in case their claim to the ownership of the bonds should be defeated, took a decree in such foreclosure suit for what would be their due if their title should fail, such action on their part, and the ascertainment of the amount so due, will not estop them in the pending proceedings to establish their title to the bonds.

[Nos. 155, 174.]

Argued and submitted Mar. 9, 10, 1886. Decided Mar. 29, 1886.

APPEALS from the Circuit Court of the United States for the Northern District of Florida.

The case is stated by the court.

Mr. **Horatio Bisbee, Jr.**, for appellant Littlefield.

Messrs. J. Aug. Johnson and **John A. Henderson**, for appellant Reed.

Mr **Wayne MacVeagh**, for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

These appeals relate to the ownership of $103,000 in amount of certain bonds of the Pensacola and Georgia Railroad Company and the Tallahassee Railroad Company. For convenience they will be hereinafter referred to as "one hundred and three bonds." Many of the matters involved were under consideration by this court in *Florida* v. *Anderson*, 91 U. S. 667 [Bk. 23, L. ed. 290], and *R. R. Cos.* v. *Schutte*, 103 U. S. 118 [Bk. 26, L. ed. 327], to which reference is made for a general history of the transactions out of which the present controversy arose.

The facts on which the rights of these parties depend we find to be as follows:

The railroads of the two companies above named were sold by the Trustees of the Internal Improvement Fund of the State of Florida on the 20th of March, 1869, under the provisions of the Internal Improvement Act of Florida, passed January 6, 1855, to pay certain bonds, of which those now in dispute are a part. A statement of the provisions of this Act will be found in the report of the case of *Florida* v. *Anderson*, beginning at page 670 [294]. A conveyance of the railroads to the purchasers at the sales was obtained, to use the language of the counsel for the appellant in *Littlefield's Case*, "through a well planned and cleverly executed fraud," without the payment of about $472,000 of the purchase money. This sum represented an equal amount of bonds outstanding, which included the 103 now in question. A history of the facts connected with this transaction will be found in the report of *Railroad Companies* v. *Schutte*, beginning at page 121 [328]. George W. Swepson was under obligations to pay what remained due on the purchase money, or, which is the same thing, to get up and surrender to the Trustees of the Internal Improvement Fund the outstanding bonds for cancellation.

On the 24th of June, 1869, an Act was passed by the General Assembly of Florida, by which George W. Swepson, Milton S. Littlefield, and their associates, were incorporated under the name of the Jacksonville, Pensacola and Mobile Railroad Company. The important provisions of the charter of this company will be found in the report of the *Schutte Case* at page 123 [329] and following. Afterwards the title to the two railroads which had been purchased was transferred to the corporation thus created. On or before the 10th of November, 1869, Milton S. Littlefield succeeded to all the rights of George W. Swepson in the premises, and became bound to take up and surrender the outstanding bonds, or pay the balance due on the purchase money in cash.

On the 2d of August, 1869, drafts were drawn by George W. Swepson on and accepted by Milton S. Littlefield, in favor of Edward Houston, for $109,140. These drafts grew out of transactions between the parties relative to the Jacksonville, Pensacola and Mobile Railroad Company and the Florida Central Railroad Company; and in some way Houston held 110 of the bonds of the Pensacola and Georgia Railroad Company and Tallahassee Railroad Company as collateral security. These bonds were part of those outstanding which Swepson was

bound to take up and surrender, and they included the one hundred and three now involved. The drafts were likewise among the obligations which Littlefield assumed to pay when, in November following, he took Swepson's place in these transactions.

On the 13th of May, 1870, Littlefield entered into a contract with Houston, by which he bought the drafts above mentioned, and certain shares of the stock of the Florida Central Railroad Company, and gave his draft for $163,020.70 on S. W. Hopkins & Co., the financial agents of the Jacksonville, Pensacola and Mobile Company, therefor. Under this contract Houston was to hold the one hundred and ten bonds as collateral for the draft then given, and to deliver them to Littlefield when this draft was paid. Various other contracts were afterwards made between Littlefield and Houston which looked to a payment of the draft through the securities of the Florida Central Railroad Company, but no payment was in fact made before June 8, 1870, when Littlefield, as president of the Jacksonville, Pensacola and Mobile Company, was in negotiation with Harrison Reed, Governor of Florida, for an exchange of the bonds of the company for those of the State, under the provisions of the charter. In the progress of these negotiations it was found that the unpaid purchase money stood in the way of the exchange, and thereupon Littlefield, still acting as president of the company, addressed a letter to the Governor, who was also *ex officio* one of the Trustees of the Internal Improvement Fund, a copy of which is as follows:

"Tallahassee, Fla., June 8, 1870.

"Hon. Harrison Reed, Gov. State of Florida.

Sir: I have the honor to state that in addition to the bonds of the Pen. & Geo. and Tallahassee Railroad Companies already deposited with the Board of Trustees Int. Imp. Fund, I have at the railroad office $41,350.

Bro't over		$41,350
And have secured	$110,000	
" "	70,000	
" "	15,000	
		195,000
		$236,850
Total outstanding		$227,250

Respectfully, M. S. Littlefield,
Pres't J., P. & M. R. R. Co."

The $110,000 bonds here referred to were those held under the contracts between Littlefield and Houston. After this letter Littlefield delivered to the Governor a draft of which the following is a copy:

"$227,250. Tallahassee, June 8, 1870.

On demand, when in funds, pay to the order of His Excellency, Harrison Reed, Gov., two hundred and twenty-seven thousand two hundred and fifty dollars, value received, and charge the same to account of—

M. S. Littlefield,
Pres't J., P. & M. R. R. Co.

To Messrs. S. W. Hopkins & Co., 71 Broadway, N. Y."

This draft was never paid, but on its delivery the exchange of bonds of the State for those of the company was made by the Governor, acting for the State, and by Littlefield, acting for the railroad company. Out of this exchange, the suits of *Florida* v. *Anderson* and *Railroad Companies* v. *Schutte* arose, as well as much other litigation in the courts of the State and of the United States. [423]

After the delivery of the state bonds to Littlefield the draft of $163,020.70 held by Houston was paid by Hopkins & Co. out of the proceeds of the sale of these bonds, or upon their security, and on the 12th of April, 1871, an agreement was made between Houston and S. W. Hopkins & Co., the drawees, by which the 103 bonds in question were deposited with Mariano D. Papy, to be held by him and not delivered to any person unless directed to do so by M. S. Littlefield and S. W. Hopkins & Co. jointly, or unless directed to be delivered to Littlefield by Hopkins & Co., or to Hopkins & Co. by Littlefield. It was also further agreed that there should be no delivery to Littlefield until certain suits, which had been begun against Houston and which were particularly described, had been dismissed. On the 14th of June, 1872, Papy was directed by Hopkins to deliver the bonds to Littlefield on the dismissal of the suits. It was stipulated at the hearing of the present case below, that these suits had then been dismissed, but at what precise time does not appear.

On the 17th of July, 1872, Edward C. Anderson, Jr., and others, holders of some of the $472,000 of unpaid bonds, began a suit in the Circuit Court of the United States for the Northern District of Florida, for themselves and all other holders of like bonds who might choose to become parties plaintiff, on the usual terms, against the Jacksonville, Pensacola and Mobile Railroad Company and others, including Milton S. Littlefield and the Trustees of the Internal Improvement Fund, to subject the railroad of the railroad company, defendant, to the payment of their bonds.

On the same day the 103 bonds in the hands of Papy were by him delivered, under an order of the Superior Court of Chatham County, Georgia, to "T. Mayhew Cunningham, cashier of the Central Railroad and Banking Company of Georgia, to be by him deposited in the vault of the said bank, and there to be safely kept subject to the further order of the court." Afterwards, in April, 1873, they were deposited by Cunningham with the Circuit Court of the United States for the Northern District of Florida, subject to the orders of that court in the Anderson suit, where they have ever since remained. [424]

On the 18th of June, 1875, the following order in reference to these bonds was entered in the Anderson suit:

"It is further ordered, that the said master shall give immediate notice through the public gazettes heretofore used by him for such purpose, to all parties who may claim an interest, direct or indirect, in the bonds which have been deposited with him by T. Mayhew Cunningham, trustee, that he holds said bonds in his custody subject to the final order of this court; that the said bonds are claimed by the Trustees of the Internal Improvement Fund as having been purchased from Edward Houston by the Jacksonville, Pensacola and Mobile Railroad Company, under agreement with said trustees, for the purpose of cancellation; that

upon petition filed with him, the said master, and ten days' notice to the said trustees, and at any time before the first day of the next term of the court, he will take testimony touching the claim or interest or title of any such petitioner upon or to the said bonds, or any part thereof; and that unless petition be filed in accordance with this order, all right, title and interest of any such person to or in the said bonds would be forever adjudged to be barred."

The notice required by this order was duly given, and on the 13th of July, 1876, the Trustees of the Internal Improvement Fund filed their petition in the master's office, asking that the bonds be delivered to them, claiming title under the transaction between Littlefield and the Governor on the 8th of June, 1870, at the time of the exchange of bonds, and also under a decree of the Circuit Court of Duval County, Florida, on the 20th of August, 1875, in a suit brought by them on the 20th of March, 1872, against the Jacksonville, Pensacola and Mobile Railroad Company, Milton S. Littlefield and others, in which their right to the bonds under their claim was fully established as against all the parties to that suit. Calvin Littlefield was, however, not a party.

[425] On the 18th of March, 1872, John H. Miller began a suit against Milton S. Littlefield in the Circuit Court of Duval County, Florida, to recover a debt of $50,000. In this suit a judgment was rendered April 18, 1872, for $50,708, and on the 15th of November, 1872, Miller filed a creditors' bill in the Circuit Court of the United States for the Northern District of Florida to subject the 108 bonds to the payment of the judgment as the property of Milton S. Littlefield. Under this bill a decree was rendered December 2, 1873, directing a sale of the bonds for that purpose. Afterwards, on the 5th of August, 1875, the bonds were sold to Robert J. Washington, whereupon he appeared in the Anderson suit and asked leave to defend his interest and title. Washington afterwards, on the 22d of December, 1881, assigned his interest in the bonds to Edward J. Reed.

On the 23d of May, 1877, J. Fred. Schutte and others, holders of state bonds given in exchange for the bonds of the Jacksonville, Pensacola and Mobile Railroad Company, brought a suit in the Circuit Court of the United States for the Northern District of Florida for the foreclosure of the statutory lien of the State as security for the bonds of the railroad company given in exchange for those of the State. In the bill it was claimed, among other things, that this lien of the State was superior to that of the Trustees of the Internal Improvement Fund for the balance of the original purchase money, and as to the one hundred and three bonds the following averment was made:

"Complainants are informed and believe that said defendant, Milton S. Littlefield, made some agreement with said George W. Swepson to perform the obligations which the latter undertook with said trustees to do, viz.: to purchase said unpaid Pensacola and Georgia and Tallahassee Railroad Companies' bonds; that said Littlefield did in fact purchase of said Edward Houston one hundred and three of said bonds in performance of such contract, which bonds are now deposited in the registry of this court to the credit of a cause therein pending, in which Edward C. Anderson *et al.* are plaintiffs and the Jacksonville, Pensacola and Mobile Company *et al.* are defendants; that said bonds are claimed by divers persons under some contract with said Littlefield, which persons had full knowledge that said bonds were paid for out of the money for which the bonds issued by Governor Reed to the said Jacksonville, Pensacola and Mobile Company were sold as before set forth; said one hundred and three bonds have never been in the actual possession of said Littlefield. Complainants are advised that they should be delivered to said Trustees of the Internal Improvement Fund, and they should take such proceedings as may be necessary to procure the same to be done."

On the 31st of May, 1879, a decree was entered in the cause declaring that the Trustees of the Internal Improvement Fund had a first lien on the property of the Jacksonville, Pensacola and Mobile Company "to secure the payment to said trustees of the sum of $463,175.27, and interest thereon since March 20, 1869, at the rate of 8 per cent per annum," and directing a sale for the benefit of the Schutte bondholders, subject to this prior lien. This prior lien was on account of the unpaid purchase money at the original sale, and the amount found due included the one hundred and three bonds; but there was no express adjudication as to the ownership of these bonds, or as to the right of the railroad company or of the Schutte bondholders to have them applied towards the satisfaction of the debt to the trustees. From this decree the Schutte bondholders did not appeal, but on appeals by some of the other parties to the suit the decree was affirmed by this court January 17, 1881 (*Railroad Companies* v. *Schutte*), and under its authority the road was afterwards sold.

On the 14th of February, 1882, Calvin Littlefield filed in the Anderson suit a petition to have the one hundred and three bonds delivered to him, and in his petition he stated that the Trustees of the Internal Improvement Fund and Edward J. Reed also claimed an interest. As to his own title, he stated that on the 13th of July, 1871, Milton S. Littlefield assigned the bonds "in possession and control of M. D. Papy" to him as security for the payment of a debt of $50,000, and that on the 11th of January, 1872, this assignment was made absolute, "that the expenses of a foreclosure may be avoided."

The evidence shows that while the suit of *Miller* v. *Littlefield*, above referred to, was pending, and under which the bonds were sold to Washington, these title papers of Calvin Littlefield were sent by him to J. J. Finlay, an attorney at law at Jacksonville, Florida, for some purpose, and that under date of December 24, 1873, Finlay wrote a letter to Littlefield which contained the following:

"As General Littlefield had not yet been examined before the master in chancery in the matter of the creditor's bill, about which I wrote you in my last, the agreement above mentioned reached me in time to enable him to answer more fully and satisfactorily as to the ownership of the stocks and bonds mentioned in said agreement. He will answer that these securities belong to you and not to him. I am of the opinion that you are the *bona fide* owner of

these securities under and by virtue of said agreement, and that any decree made in the case of *Miller* v. *Littlefield* is not binding on you, for the reason that you were not and are not a party to said suit. For the present, therefore, I do not see that it is necessary to take any step or incur the expense of any independent proceeding in the matter. As things progress, however, if it should become important for the protection of your interests to institute proceedings it can be done."

It does not appear that Calvin Littlefield gave any notice of this assignment to Papy while the bonds were in his hands, or to any one else claiming an adverse interest prior to the filing of his petition.

Edward J. Reed answered the petition, setting up his title as the assignee of Washington, and asking that the bonds be delivered to him. The Trustees of the Internal Improvement Fund also answered, setting up their title and asking that the bonds be surrendered to them and credited on the decree in the *Schutte Case* "as of and for the amount due on said bonds, principal and interest, on the 12th of April, 1871."

The circuit court, on the 23d of June, 1882, decreed that the bonds be surrendered to the Trustees of the Internal Improvement Fund, and applied in accordance with the prayer of their answer. From this decree Calvin Littlefield and Edward J. Reed took appeals, which have been docketed here as separate causes.

Upon the facts found, and about which there is substantially no dispute, we have no hesitation in affirming the action of the circuit court. Although the contracts under which the bonds passed from the hands of Houston to Papy, and from Papy to the circuit court in the Anderson suit, were in the name of Milton S. Littlefield, all payments for the bonds after June 8, 1870, were made from the funds of the Jacksonville, Pensacola and Mobile Company. What was done by Littlefield, at the time of the exchange of bonds with the Governor, had the effect of transferring the one hundred and three bonds to the Trustees of the Internal Improvement Fund, subject to the lien of Houston as security for his draft of $163,020.70. When that draft was paid and the lien satisfied, the equitable title of the trustees was perfected, and thereafter the bonds were held by Papy and his successors in possession, for them. It follows that at the time Littlefield undertook to transfer the bonds to Calvin Littlefield, he had nothing to transfer. All his interest had long before been passed to the trustees. Neither does Calvin Littlefield occupy the position of a purchaser without notice of the prior claim of the trustees, because when he took his title the bonds were in the possession of Papy, who was in legal effect trustee for whom it might concern.

The same is true of the claim under which Edward J. Reed holds. When the bill was filed by Miller to subject the bonds to the payment of his judgment against Littlefield, they belonged to the trustees and not to Littlefield, and consequently nothing passed by the sale in that suit.

It is contended, however, that, as the trustees "insisted in the *Schutte Case* on a lien for the full amount of the unpaid purchase money which was decreed to them, and that the 103 bonds were outstanding," they "are estopped now from claiming that these 103 bonds should be delivered to them and cancelled, and a credit given therefor on such decree." This it is claimed amounted to an abandonment by the trustees of their title to the bonds under the arrangement between Littlefield and the Gov- [429] ernor, which inured to the benefit of Milton S. Littlefield or his assigns. To this we cannot agree. No issue was made in that suit as to the actual ownership of the bonds. The Trustees of the Improvement Fund did not claim that they were not entitled to the bonds, nor that the amount due on them should not be credited on the account for unpaid purchase money if their title should be established, but that until it was established no such credit should be given. Neither did the Schutte bondholders claim that the credit should be given at once, but that the necessary proceedings be had to establish the title and thus secure the application. When the decree was rendered the title had not been settled, and so no credit was then allowed, but nothing was done to prevent the trustees from making good their claim then pending in the Anderson suit, and, if successful, from giving the proper credit on the decree. That is what they are seeking to do here. Having presented their petition for a delivery of the bonds, they were met by the counter petitions of Calvin Littlefield and Reed, and thus the rights of all the parties have been presented for final adjudication. The question involved is not one of security but of title. The bonds are held by the court for whom it may concern, and the point to be settled is to whom shall they be delivered. Aside from the claim of abandonment put forth by Calvin Littlefield, they belong, as we have seen, to the Trustees of the Improvement Fund, as Milton S. Littlefield, the common source of title, first conveyed to them. It is conceded that the trustees have never actually reconveyed to Milton S. Littlefield; neither have they executed any formal conveyance or release to Calvin Littlefield. All they have done is to take a decree in their favor for what would be due them if their title should fail; and this, while a suit was pending to establish that title. Other parties were foreclosing a mortgage junior to theirs, and it became necessary to fix the amount of their prior lien. This the other parties were willing should be done before their disputed title was settled, and so to save themselves from loss in case of defeat they took a decree for what would be their due in that event. To that the junior mortgagees did not [430] object. Their effort had been to defeat the prior lien altogether. Having failed in that, they were willing to submit to a decree for the larger amount, leaving the disputed question as to the 103 bonds to be settled afterwards in the proceeding that had been begun for that purpose, or any other that might be instituted. This was not an abandonment by either party. The decree was silent as to these bonds, and the petition for their delivery to the trustees on file in the Anderson suit, where the bonds were, was allowed to remain. It is now being prosecuted by the trustees as a mode of obtaining satisfaction of the decree in their favor. If they succeed it may inure to the benefit of the purchasers at the sale under the Schutte decree, but of this Calvin Littlefield has no right to complain.

If he did not own the bonds it is a matter of no importance to him what disposition the trustees may make of them. All his rights depend alone on his ownership. If he is not the owner he is entirely out of all the litigation between the rest of the parties. Neither the railroad company nor the Schutte bondholders, who are alone interested in the amount for which the sale was made, are here to complain. The trustees alone can control the bonds. Having protected all who had the right to look to the original unpaid purchase money for the satisfaction of their bonds, they have performed their whole duty as trustees, so far as the bondholders are concerned.

The decree of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[519] NEW YORK LIFE INSURANCE COMPANY, *Plff. in Err.*,

v.

THOMAS C. FLETCHER, EXR. of CHINONDA S. ALFORD, Deceased.

(See S. C. Reporter's ed. 519-536.)

Life insurance—fraudulent acts of agent—when policy avoided—ratification by insured—retention of policy.

1. Where both the assured and the insurer are deceived by fraudulent acts of an agent in inserting in the application false answers, where the assured answered truthfully, if both parties acted *bona fide*, the policy should be canceled and the premiums returned.

2. An insurance company can limit the authority of its agents and thus bind all parties dealing with them with knowledge of the limitation. A party insured is presumed to have read his application and to be cognizant of the limitations therein expressed.

3. An instruction that the assured was bound by his application, if it was not avoided for fraud, and that it was so avoided, and that, therefore, the representatives of the assured could recover, was incorrect. If the application was avoided, the policy was also avoided.

4. A retention of the policy containing a copy of the application was an approval of the application by the assured.

[No. 184.]

Argued March 19, 1886. Decided March 29, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated by the court.

Messrs. **Frederick N. Judson** and **John H. Overall**, for plaintiff in error:

The limitation upon the authority of the soliciting agent having been brought home to the knowledge of the insured by the express terms of the application and policy, such limitation was binding, and the written application was thereby made the sole basis of the contract of insurance, and oral statements, by and to the soliciting agent and not reduced to writing, were expressly excluded from consideration.

Globe, etc. Ins. Co. v. *Wolff*, 95 U.S. 329 and *Ins. Co.* v. *Norton*, 96 U.S. 240 (Bk. 24, L.ed. 388, 691); *Loehner* v. *Home M. Ins. Co.* 17 Mo. 250; *Richardson* v. *Maine Ins. Co.* 46 Me. 394; *Chase* v. *Hamilton Ins. Co.* 20 N.Y. 52; May, Ins. §§ 137, 140, 141; *Planters Ins. Co.* v. *Meyers*, 55 Miss. 479; *Ryan* v. *World Mut. Life Ins. Co.* 41 Conn. 168; *Ins. Co.* v. *Wilkinson*, 13 Wall. 222 (80 U. S. bk. 20, L. ed. 617); *Ins. Co.* v. *Mahone*, 21 Wall. 152 (88 U. S. bk. 22, L. ed. 598); *Hoffman* v. *Ins. Co.* 92 U. S. 164 (Bk. 23, L. ed. 541); *Ins. Co.* v. *McCain*, 96 U. S. 86 (Bk. 24, L. ed. 654); *Geib* v. *Ins. Co.* 1 Dill. 449; *Baubie* v. *Ætna Ins. Co.* 2 Dill. 158); *Flynn* v. *Equitable L. Ins. Co.* 78 N.Y. 568; *Ins. Co.* v. *Davis*, 95 U. S. 428 (Bk. 24, L. ed. 454); *Shattuck* v. *Mut. Life Ins. Co.* 4 Cliff. 608.

As a corollary from the foregoing, written application thus being the sole basis of the contract of insurance, the insured cannot "avoid" the effect of materially false statements therein contained, and recover on the policy, by proof that such statements were inserted in the application before signature by him, through fraud on part of the soliciting agent.

Ryan v. *World Mut. Life Ins. Co.* 41 Conn. 168 *Loehner* v. *Home M. Ins. Co.* 17 Mo. 250; *Pomery* v. *Rocky Mt. Ins. Co.* 14 Ins. L. J. 708.

Irrespective of the foregoing, the acceptance and retention by Alford, of the policy with copy of the application thereto attached, for a period of nearly three years, his attention being specifically called to the importance of correcting errors or omissions thereon, was in law a waiver of an objection to the written application as the basis of the policy; and his representative is bound in an action on the policy by the answers contained in the said application.

Swan v. *Watertown F. Ins. Co.* 96 Pa. St. 43 *Am. Ins. Co.* v. *Neiberger*, 74 Mo. 173; *Goddard* v. *Monitor M. F. Ins. Co.* 108 Mass. 57; *Richardson* v. *Maine Ins. Co.* 46 Me. 394.

Even conceding all the foregoing propositions, and resting the case upon the court's theory of the law, there was no evidence warranting the finding that Alford did not knowingly sign the application. And on this ground alone the court should have directed a verdict for defendant.

Mr. **George D. Reynolds**, for defendant in error:

The main question presented by the case is, whether the clause in the application and in the policy, to the effect that no statements, representations or information made or given by or to the person soliciting or taking the application, or to any person, shall be binding on the Company, or in any manner affect its rights unless such statements, etc., be reduced to writing and presented to the officers of the Company at the home office, in the application referred to, is such a notice to the applicant or to the insured, of the limitation of the powers of the soliciting agent, as exempts the Company from responsibility and liability on the policy, when the solicitor is proved to have fraudulently inserted wrong answers and concealed the fact that he had done so from the applicant.

As to this, it is respectfully submitted that this clause is nothing more than an attempt to make the solicitor the agent of the applicant, instead of the agent of the insurer; and that it falls within the principle of the cases of *Insurance Co.* v. *Wilkinson* and *Insurance Co.* v. *Mahone, supra; N. J. Mut. Life Ins. Co.*

NOTE.—*Life insurance: effect of agent's inserting false statements in application.* See Union Mut. Ins. Co. v. Wilkinson, 80 U. S., bk. 20, 617, note.

v. *Baker*, 94 U. S. 610 (Bk. 24, L. ed. 268); *Carpenter* v. *Washington Ins. Co.* 2 Am. L. Cas. 919.

A man cannot adopt or profit by a contract without becoming responsible for the means through which it was procured, although they may have been used without his knowledge or contrary to his express commands. He may, no doubt, return what he has received within a reasonable time, and rescind the contract; but this cannot be done after a breach has occurred and when it is too late to restore the other party to his original position.

The authorities supporting the above propositions are numerous and are fully collated in the work referred to.

See also, Bliss, Life Ins. 2d ed. §§ 76–81, and 290–297.

It is to be remembered that Roeslein was the person who solicited the risk, who delivered the policy, who collected the first premium and the subsequent renewals. So far as Alford was concerned, Roeslein was the Company. Roeslein knew of the fraud he had perpetrated on Alford.

Alford did not write any of the answers; they were all written by the solicitor for the Company.

He delivered it to Alford for the Company, with full knowledge of facts upon which its validity could be disputed; "then to insist upon these facts as grounds of avoidance, is to attempt a fraud."

May, Insurance, 2d ed. ch. 22, § 497, and also § 498.

Roeslein continued, as agent of plaintiff in error, to receive the premiums. He knew of the false statements in the application but, notwithstanding that knowledge, went on receiving the premiums. His act estops his principal, the plaintiff in error.

Wing v. *Harvey*, 27 Eng. L. & E. 140; *Ins. Co.* v. *McCain*, 96 U. S. 84 (Bk. 24, L. ed. 653).

Notwithstanding the clause in the policy, he was the agent of the Company in soliciting the insurance and in collecting the premiums. These matters are within the scope of his agency, and the Company is bound by his acts.

Bliss, Life Ins. 2d ed. § 81; *Commercial Ins. Co.* v. *Ives*, 56 Ill. 402. Also cases *supra;* May, Insurance, 2d ed. § 142.

The Company selected him; it is the one to bear the consequences of his fraud.

Ætna Ins. Co. v. *Maguire*, 51 Ill. 342.

The second point made in the brief by counsel for plaintiff in error, that the written application was the sole basis of the contract, and that to avoid the effect of false statements in that, and recover notwithstanding their insertion, is to recover on a new and different contract, is a point always made by counsel for the insurance companies in cases of this kind.

A notable instance of that is the very able brief of counsel in the *Wilkie* v. *Case*, Bk. 20, L. ed. at pages 617 to 621

But this court has there settled the point against plaintiff in error.

See also Bliss, Life Ins. 2d ed. §§ 80, 81; *Horwitz* v. *Eq. Mut. Ins. Co.* 40 Mo. 557; *Franklin* v. *Atlantic Fire Ins. Co.* 42 Mo. 456; *Combs* v. *Hannibal S. & I. Co.* 43 Mo. 148; *Hayward* v. *Nat. Ins. Co.* 52 Mo. 181.

Mr. Justice **Field** delivered the opinion of the court:

The New York Life Insurance Company, on the 22d of December, 1877, issued at its home [519] office in the City of New York to Chinonda S. Alford a policy of insurance upon his life for the sum of $10,000. The consideration was $263.80 paid at the time, and the promise to pay a like sum on the 22d of December each year. The Company is a corporation under the laws of New York, but it also transacts business in Missouri through agents residing there; and of course, with reference to the business done in that State is subject to its laws. The assured was a resident of Missouri, and in December, 1877, he applied to an agent of the Company there for such a policy, and submitted to an [520] examination. He also made certain statements and representations respecting himself, his life and his past and present health, to which he appended a declaration, warranting their truthfulness and agreeing that they should be the basis of any contract between him and the Company, and that if they or any of them were in any respect untrue, the policy which might be issued thereon should be void, and that all moneys paid on account of the insurance should be forfeited; and further agreeing that, inasmuch as only the officers at the home office had authority to determine whether or not a policy should issue on any application, and as they acted only on the written statements and representations referred to, no statements or representations made or information given to the persons soliciting or taking the application for the policy, should be binding on the Company or in any manner affect its rights, unless they were reduced to writing and presented at the home office in the application. The statements and representations with this declaration accompanying the application and forming a part of it, were forwarded to the home office. The policy was thereupon issued and sent to its agent at St. Louis for delivery to the assured. It recited that it was issued in consideration and upon the faith of the statements and representations contained in his application; all of which had been warranted by him to be true, and also in consideration of the cash payment and the annual premiums to be paid. It stipulated for the payment of the amount of the insurance within sixty days after due notice and satisfactory proof of his death, subject to the conditions specified therein. To the policy was annexed a copy of the application, and upon it was indorsed the following notice in red type and conspicuously printed:

"For the information of the assured, and in order that any unintentional errors or omissions which hereafter may be found to exist may be corrected, an abstract of the application upon which this policy is based may be found in the third page within. If corrections are desired, when satisfactory to the Company, a certificate to that effect will be issued over the signature of the president and actuary."

The cash payment was made by the assured [521] on the receipt of the policy, and the subsequent annual premiums were regularly paid to the agents of the Company in Missouri until his death, which occurred September 24, 1880. The plaintiff was appointed his executor. Due no-

[illegible]

[illegible]

[illegible]

[illegible] Dr. Brokaw for diabetes, and that the doctor's office was adjacent, and they could go there and find out all concerning, they wanted to know and the agent, not knowingly misrepresented in the questions, but the agents inserted in the blank line answers that he had no reason to suppose that the answers were taken down differently from those given; that after answering all their questions he was asked to sign his name to the paper to identify him as the party for whose benefit the policy was to be issued; and for that purpose he signed the paper twice, without reading it or the written answers; that the agents did not read to him any part of the application except the questions, and did not read the clause set forth in the defendant's answer, nor call attention to the fact that his signatures were intended as an acceptance or assent to that clause; that when the policy was delivered to him he neither read it nor the copy of the application attached to it; that the agent who delivered it informed him that it was all right, and he was insured, and he gave no further attention to the matter; that the annual premiums, as they fell due, were paid to said agent, who received them with full knowledge of all the facts; and that, therefore, the Company was estopped from pretending that any of the answers as written rendered the policy void.

The Company demurred to this reply, as constituting in law no cause of action and no reply to the facts set forth in the answer; but the demurrer was overruled.

On the trial it was proved by the Company that the assured was a resident of St. Louis; and that Dr. Brokaw had been his regular physician for ten years, and had treated him some years before his death for diabetes, of which disease he died.

It was also proved that on the day he made application to the defendant he also applied to the Penn Mutual Life Insurance Company, of Pennsylvania, for insurance on his life, and stated that he had had diabetes in 1875, and that Dr. Brokaw was his physician. That Company refused to issue a life policy, but granted a fifteen year endowment policy at a largely increased premium.

It was also proved that diabetes is commonly known as a disease of the kidneys, though primarily a disease of nutrition and not necessarily affecting their structure in its early stages; that it is a very serious disease and of doubtful curability; that the policy was issued solely upon the written application; and that no other application, statement or representation was received from the applicant.

The law of Missouri provides that "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury" (R. S. Mo. § 596); and that in suits brought upon life policies "No defense based upon misrepresentation in obtaining or securing the same shall be valid unless the defendant shall, at or before the trial, deposit in court, for the benefit of the plaintiffs, the premiums received on such policies." *Id.* § 597.

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Under this last section the defendant tendered in court to the plaintiff $888.26, the premiums received, with interest to the date of trial; but the plaintiff declined to receive the amount in full payment.

On the part of the plaintiff a witness was allowed, against the objection of the defendant, to testify to statements made by the assured and the agent at the time of the application, tending to establish some of the matters alleged in reply to the answer. He could not give the specific words used, but he remembered that in one part of the conversation Alford stood up, at the time he was asked as to his having had kidney disease, and pointed through the window and said: 'My medical examiner has an office across the way; you can go there and find out from him. I have been afflicted in the kidneys, but he says I am well, and I feel well now." He also testified that at one time he heard the assured say to the agent: "Your Company ought not to insure me; you know I have been afflicted with kidney disease;" and that the agent replied: "Just give me your application and I will see if I can get it through."

The witness was also permitted to testify that he did not think the paper was read over to the assured. He did not hear it read, nor did he remember the questions asked, except the specific one as to the kidneys; and he remembered that because the assured stood up and pointed across the street.

There was no evidence that the application was not read by the assured before he signed it, or that there was any imposition practised upon him, or that after receiving the policy he applied to correct his answers, which, as written down, are conceded to be false.

Upon the conclusion of the testimony, the defendant requested the court to charge the jury, among other things, substantially as follows:

1. That it is competent for any party, corporation or individual employing an agent in the negotiation of a contract, whether of insur-
[525] ance or otherwise, to limit his powers, provided the limitation is brought home to the knowledge of the other contracting party, otherwise the principal will be bound by the apparent as well as the actual powers of the agent; and as, in this case, the limitation was made a part of the contract between the parties, it was binding upon them.

2. That the stipulation between the parties, limiting the powers of the soliciting agent and providing that the contract should be based upon the written application, was binding upon the parties, and it was, therefore, immaterial what may have been said by or to the agent at the time of making the application, which was not reduced to writing and presented to the officers of the Company at the home office in New York.

3. That whether the statements and answers contained in the application of the assured were made by him or not, yet when he afterwards received the policy, with a copy of the application attached and a memorandum indorsed thereon, calling his attention to the copy thus attached, with a request that any errors in the application be reported to the Company for correction, it was his duty to report any answers incorrectly written down and thus enable the Company to correct them; and that by his failure to do so he must be presumed to have accepted the policy upon the faith of the answers, and to have acquiesced and agreed that it should remain as the basis of the contract of insurance. But the court refused to give any of these instructions, and the defendant excepted. It recognized, however, in its charge, the competency of the Company to limit the powers of the agent, and the binding force of the limitation if brought home to the other contracting party; and instructed the jury that there was such limitation in the present case; that the Company was not bound by any representations to or by the assured, unless they were put in writing and submitted to the Company; that, therefore, what was contained in the application must be regarded as constituting the basis of the contract, unless it could be avoided for fraud; that if the jury found that at the time of making the application he told the agent that he had had diabetes and referred him to his physician concerning it, and that [526]
such agent committed a fraud upon the assured by inserting false answers in the application and by suppressing the answers actually given, and by concealing from the assured what he had written in the application, and thereby induced him to sign it without knowing what it contained, then the plaintiff was not estopped to recover. The court also charged that if the assured ascertained before the contract was consummated, that is, before the policy was delivered to him and the first premium paid, that the agent had committed a fraud upon him and upon the Company, it was his duty to stop and decline to go any further with the transaction; but if he did not discover this before the policy was delivered and the first premium paid, he was not called upon afterwards to take any steps for the cancellation of the contract. To this the defendant excepted. The plaintiff obtained a verdict for the full amount of the insurance money with interest, upon which judgment was rendered.

It is conceded that the statements and repre-
[528] sentations contained in the answers, as written, of the assured to the questions propounded to him in his application, respecting his past and present health, were material to the risk to be assumed by the Company, and that the insurance was made upon the faith of them and upon his agreement accompanying them, that if they were false in any respect, the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he never made the statements and representations to which his name is signed; that he truthfully answered those questions; that false answers written by an agent of the Company were inserted in place of those actually given, and were forwarded with the application to the home office; and it is contended that such proof being made, the plaintiff is not estopped from recovering. But on the assumption that the fact as to the answers was as stated, and that no further obligation rested upon the assured in connection with the policy, it is not easy to perceive how the Company can be precluded from setting [529]
up their falsity, or how any rights upon the policy ever accrued to him. It is, of course,

not necessary to assume that the agent had no authority from the Company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the Company were deceived by the fraudulent contract of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the Company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. As the present action is not for such a cancellation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premiums paid, and to that only would he be entitled by virtue of the statute of Missouri.

But the case as presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed [530] lines of his application, he would have seen that it stipulated that the rights of the Company could in no respect be affected by his verbal statements or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The Company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed.

In *Globe, etc. Ins. Co.* v. *Wolff*, 95 U. S. 329 [Bk. 24, L. ed. 388], the policy declared that the agents of the company were not authorized to waive forfeitures, and this court held that effect must be given to the provision, except so far as the subsequent acts of the company permitted it to be disregarded.

In *Ins. Co.* v. *Norton*, 96 U. S. 240 [Bk. 24, L. ed. 691], the policy contained an express declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeitures; and this court held that the company could have insisted upon those terms had it so chosen.

In *Ledwar* v. *Home Mutual Ins. Co.* 17 Mo. 256, the Supreme Court of Missouri passed upon this point. The charter of that company provided that if the assured failed to state in his application, which was made a part of the policy, any incumbrance that existed on the insured premises, his policy should be void. There was also indorsed on the policy a memorandum that the company would not be bound by any statement of the agent unless contained in the application. The answer to the action on the policy set up that the application did not truly state the incumbrances. A small incumbrance upon the premises was not stated, and on the trial evidence was offered that its existence was made known to the agent of the company at the time of the application, but that he refused to write it down, saying that the amount was too trifling. The evidence was excluded, and the supreme court sustained the ruling, holding that the objection that the incumbrance was not stated could not be obviated in that way. "Independently of the statute of the State," said the court, "which requires the incumbrance to be expressed in the policy at the peril [5
of its being void, there was a memorandum indorsed on it which made known that the company would be bound by no statement made by the agent not contained in the application. The facts being as represented, they could not give the plaintiff a right of action on the policy in the teeth of the statute and against the terms of the contract. If the conduct of the agent was such as is alleged, he was guilty of a gross fraud, as is shown by his setting up this defense, which would avoid the policy and give a right of action for the recovery of the premium, but could not for the reason given, entitle the plaintiff to an action on the policy."

The present case is very different from *Ins. Co.* v. *Wilkinson*, 13 Wall. 222 [80 U. S. bk. 20, L. ed. 617], and from *Ins. Co.* v. *Mahone*, 21 Wall. 152 [88 U. S. bk. 22, L. ed. 593]. In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. Reference was made to the interested and officious zeal of insurance agents to procure contracts, and to the fact that parties who were induced to take out policies rarely knew anything concerning the company or its officers, but relied upon the agent who had persuaded them to effect insurance, "as the full and complete representative of the company in all that is said or done in making the contract," and the court held that the powers of the agent are *prima facie* coextensive with the business intrusted to his care, and would not be narrowed by limitations not communicated to the person with whom he dealt. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, although nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed

to have read. He is, therefore, bound by its statements.

The case of *Ryan* v. *World Mutual Life Ins. Co.* is in some respects similar to the one before us. There a policy obtained on the life of Patrick Ryan for the benefit of his wife declared that it was issued and accepted on the condition and agreement that the statements and declarations made in the application therefor, and on the faith of which it was issued, were in all respects true. The application was a part of the policy. It appeared that when the application was made, he was asked whether he had had any of the following diseases: bronchitis, consumption, spitting of blood, or any serious disease; and the answer, as written, was that he had had "none of them." To the inquiry, whether, during the previous seven years, he had had any severe sickness or disease, or had employed or consulted any physician, the answer as written was "no." The authority of the agent was limited to receiving the application, forwarding it to the home office, receiving, countersigning and delivering the policy, and collecting the premiums. The insured having died, action upon the policy was brought by his widow. On the trial she offered to prove, not that the answers were true, but that different answers were in fact given, both by her and him; and that the answers were wrongly written by the local agent of the company without the knowledge or consent of herself or her husband. The application was signed without being read. It was held that the company was not bound by the policy; that the power of the agent would not be extended to an act done by him in fraud of the company and for the benefit of the insured, especially where it was in the power of the assured, by reasonable diligence, to defeat the fraudulent intent; that the signing of the application without reading it or hearing it read, was inexcusable negligence; and that a party is bound to know what he signs. After observing that the courts of the State had construed the powers of an insurance agent liberally, and held that, in writing the application and explaining interrogatories and the meaning of the terms used, he was to be regarded as the agent of the company, and, referring to the case of *Ins. Co.* v. *Wilkinson*, [*supra*] the court said: "But it cannot be supposed that these defendants intended to clothe this agent with authority to perpetrate a fraud upon themselves. That he deliberately intended to defraud them is manifest. He well knew that if correct answers were given no policy would issue. Prompted by some motive he sought to obtain a policy by means of false answers. His duty required him not only to write the answers truly as given by the applicant, but also to communicate to his principal any other fact material to the risk which might come to his knowledge from any other source. His conduct in this case was a gross violation of duty, in fraud of his principal, and in the interest of the other party. To hold the principal responsible for his acts, and assist in the consummation of the fraud, would be monstrous injustice. When an agent is apparently acting for his principal, but is really acting for himself or third persons and against his principal, there is no agency in respect to that transaction, at least as between the agent himself, or the person for whom he is really acting, and the principal. * * * The fraud could not be perpetrated by the agent alone. The aid of the plaintiff or the insured, either as an accomplice or as an instrument, was essential. If she was an accomplice, then she participated in the fraud, and the case falls within the principle of *Lewis* v. *Phœnix Mutual Life Ins. Co.* 39 Conn. 100. If she was an instrument she was so because of her own negligence, and that is equally a bar to her right to recover. She says that she and her husband signed the application without reading it and without its being read to them. That of itself was inexcusable negligence. The application contained her agreements and representations in an important contract. When she signed it she was bound to know what she signed. The law requires that the insured shall not only, in good faith, answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written. It is for his interest to do so, and the insurer has the right to presume that he will do it. He has it in his power to prevent this species of fraud and the insurer has not." 41 Conn. 168-171, 172. With these views we fully agree.

The instruction given to the jury in the case before us is, in effect, that the assured was bound by his application if it was not avoided for fraud; and that it was so avoided by reason of the false statements contained in it; and that, therefore, the plaintiff, as his representative, could recover. But if the application was avoided, it would seem to be a necessary consequence that the policy itself was also avoided, and his right limited to recovering the premiums paid. But such was not the conclusion of the court. It directed the jury that if the application was avoided for fraud, he could recover. It does not seem to have occurred to the court that had the answers been truthfully reported, and the fact of the assured having had diabetes within a recent period been thus disclosed, the insurance would in all probability have been refused. If the policy can stand with the application avoided, it must stand upon parol statements not communicated to the Company. This, of course, cannot be seriously maintained in the face of its notice that only statements in writing forwarded to its officers would be considered. A curious result is the outcome of the instruction. If the agents committed no fraud the plaintiff cannot recover, for the answers reported are not true; but if they did commit the imputed fraud he may recover, although, upon the answers actually given, if truly reported, no policy would have issued. Such anomalous conclusions cannot be maintained.

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There is another view of this case equally fatal to a recovery; assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated not only upon himself but upon the Company, and it would have been his duty to make the fact known to the Company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The re-

[illegible]

[illegible] The court held, [illegible] by accepting the policy, was [illegible] and that he ratified the [illegible]

[illegible] the subject further. [illegible] the court below erred, both in [illegible] asked and in its [illegible] the particulars mentioned. [illegible] *therefore be reversed, and the* [illegible] *for a new trial.*

[illegible]

[illegible] Clerk, Sup. Court, U. S.

[illegible] Assignee in Bankruptcy of [illegible], *Appt.*,

v.

[illegible] AND WILLIAM HARMON.

([illegible])

[illegible] contract—partnership—assignment—sections [illegible] and [illegible] R. S.—estoppel—evidence—contribution to expenses of litigation.

1. Where three persons form a partnership and agree to bear the losses and share the profits in proportion to their contribution to the capital and two of the partners furnish all the capital and do all the work, they are entitled to be repaid their advances out of the assets before payment of the individual creditors of the other partner.

2. Where a person, in anticipation of obtaining a government contract, forms a partnership with two other parties for the execution of the contract, such partnership contract was not, under the circumstances, a violation of sections 3677 and 3737, R. S.

3. When two or three partners are entitled, under the articles of partnership, to a sum due from the government on a contract with the third partner, an agreement executed by the third partner to pay the sum due to each out of moneys he might thereafter receive from the government does not deprive the other partners of their right to the funds paid by the government as against the assignee in bankruptcy of such third partner.

4. The right of action for the recovery by two of three partners, as assets of the firm, of moneys collected on a contract (the subject of the partnership between the third partner and the government, does not accrue until the money has been actually received by the defendant. The bankruptcy and death of the third partner and the substitution of his assignee as defendant in no respect affects this question.

5. The exceptions in section 858, R. S., to the provisions that parties can testify in federal courts in their own behalf, cannot be extended by the court so as to exclude parties from testifying in their own behalf against assignees in bankruptcy.

6. Where, in an action by one of three partners against the government, the other two partners testify in behalf of the plaintiff that they have no interest in the claim except as shown by a certain memorandum, such witnesses are not estopped thereby from showing (in an action by them against the assignee of the claimant) that they had an interest.

7. Where one brings adversary proceedings to take possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, he has no right to reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.

[No. 170.]

Argued March 17, 18, 1886. Decided March 29, 1886.

APPEAL from the Circuit Court of the United States for the Southern District of Iowa.

Statement by *Mr. Justice* **Woods:**

The appellees were the plaintiffs in the circuit court. The record showed the following facts: On August 19, 1876, Major Card, a quartermaster in the Army of the United States, advertised for bids for furnishing 6,000 cords of wood and 800 tons of hay at the Tongue River Military Station, in Montana Territory. Campbell K. Peck, whose assignee in bankruptcy is the appellant, put in a bid, and, believing that the contract would be awarded to him, on August 19, 1876, entered into articles of copartnership with the plaintiffs, McLean and Harmon, for the purpose of carrying out the contract with the United States which he expected to make. These articles provided that Peck should furnish one half the capital necessary to carry on the partnership business, and McLean and Harmon each one fourth, and that the profits and losses of the partnership should be divided in like proportions. Harmon agreed to take charge of the office of this partnership, which was to be at Fort Lincoln, and superintend the business at that place, and McLean agreed to go to the place of delivery on the Yellowstone, and superintend the business there, but neither was to make any charges for his services. The articles of partnership further provided that when the contract with the government was completed, a settlement of profits and losses should be made "on the basis of the above terms of partnership;" and, "if a dissolution is decided on, first, all debts shall be paid, and then all profits divided in the proportions heretofore mentioned." After the signing of these partnership articles the bid of Peck was accepted, and on August 25 the contract between him and the United States was signed and delivered.

The partners did not deliver the hay required by the contract, because, as they claimed, they were prevented from so doing by the officers of the Army of the United States, but did cut and deliver the wood. McLean and Harmon did all the work that was done, and advanced all the money that was expended in performing the contract, except about $100, which was furnished by Peck.

The wood delivered under the contract amounted in value at the contract price to $51,900, but the United States refused to pay that sum, claiming damages for the failure to deliver the hay; but consented to pay and did pay, $10,919.37. McLean and Harmon received $10,000 of this sum, and Peck $919.37, which was over $800 more than he advanced for the performance of the contract. The parties interested being dissatisfied with the action of the government in refusing payment in full for the wood delivered, Peck, who was the only person to whom the government was bound, filed, on November 7, 1877, his petition in the court of claims against the United States, demanding $55,003.63 damages for the breach of the contract. The United States traversed the petition, and upon final hearing in the court of claims, judgment was rendered for Peck, the claimant, for $43,113.63. From this judgment both parties appealed to this court, which, in February, 1880, affirmed the judgment of the court of claims and allowed the claimant, in addition to the amount already awarded him, the further sum of $2,660, making the entire judgment in favor of the claimant $45,773.63.

While the case was pending in the court of claims, to wit: on August 31, 1878, Peck was, on his own petition adjudicated a bankrupt in the District Court of the United States for the District of Iowa, and Hobbs, the appellant in the present case, was appointed assignee. While [570] the case was pending in this court Peck, on December 2, 1879, died, and his widow, Helen A. Peck, was afterwards appointed his administratrix, and in January, 1880, was substituted in the place of her intestate as the plaintiff in the cause. The case still being in this court, and after Mrs. Peck had, as administratrix, been made party plaintiff, Hobbs, as assignee, moved the court to be substituted as plaintiff in her stead, which motion was denied. The cause having been remanded to the court of claims, Hobbs, the assignee in bankruptcy, moved that court to substitute him as plaintiff in place of the administratrix, which motion was, on May 10, 1880, granted, and the money recovered from the United States was, after deducting about $10,000 attorney's fees, paid over to Hobbs, the assignee.

McLean and Harmon, fearing that Hobbs would distribute the fund thus recovered among the general creditors of Peck, and believing that the fund belonged to them, filed in the Circuit Court for the Southern District of Iowa the bill in the present case, to which they made Hobbs, as assignee in bankruptcy of Peck, and John B. Sanborn and Charles King, lately partners as Sanborn & King, and Edward F. Brownell, defendants, and in which they set out in detail the facts above recited, set up their claim to the fund as surviving partners, and prayed that the balance found due them from the partnership on an accounting might be paid them out of the fund, so far as it should be sufficient to pay the same.

The defendant Hobbs, as assignee, answered the bill, and the plaintiffs filed the general replication. Upon final hearing upon pleadings and proofs the circuit court adjudged and decreed as follows: after reciting the making of the partnership between the plaintiffs and Peck and the performance by the partnership of the contract made by Peck with the United States, it found that after charging to the partners all the moneys received by them respectively, it appeared that Peck had received more money than he had paid out in performing the contract, and that the plaintiffs had expended for the same purpose $41,032.31, more than they had received; that Hobbs, the assignee, had collected and received on the judgment against the United States recovered by Peck's administratrix $35,773.63; and it was, therefore, adjudged and decreed that said sum was the money and [571] property of the plaintiffs, and that they recover it of the defendant Hobbs, who was ordered to pay it to the plaintiffs, with interest on the investment thereof, and that the plaintiffs also recover of Hobbs, as assignee, their costs and disbursements in the suit, to be paid by him out of any money in his hands as assignee. The appeal of Hobbs, as assignee, brings this decree under review.

Messrs. **James Hagerman,** *Frank Hagerman* and *John H. Craig,* for appellant:

The alleged partnership agreement and assignments are illegal, null and void, as to passing any interest in Peck's contract or claim as between assignor and assignee; and also as between the United States and assignee:

Secs. 3477, 3737, R. S.; *Burke* v. *Child*, 21 Wall. 441 (88 U. S. bk. 22, L. ed. 623); *U. S.* v. *Gillis*, 95 U. S. 407, and *Spofford* v. *Kirk*, 97 U. S. 484 (Bk. 24, L. ed. 503, 1032); *Wanlass* v. *U. S.* 6 Ct. of Cl. 123; *St. Paul, etc. R. R. Co.* v. *U. S.* and *Flint & Pere Marquette R. R. Co.* v. *U. S.* 112 U. S. 733, 737 (Bk. 28, L. ed. 861, 862); *Billings* v. *O'Brien*, 45 How. Pr. 399; *Wack* v. *Bosworth*, 61 Wis. 78; *Mellison* v. *Allen*, 30 Kan. 382.

The sworn testimony of complainants in the court of claims, that they had no interest in Peck's contract, and the verification of their attorney to their petition in that case, were solemn admissions of record which, in the absence of testimony or pleading that they were made through mistake or under misapprehension, become conclusive.

2 Whart. Ev. § 1110; 1 Greenl. Ev. § 204–206; *Mulligan* v. *Illinois Cent. R. R. Co.* 36 Iowa, 181; *Marsh* v. *Mitchell*, 26 N. J. Eq. 497; *Gridley* v. *Conner*, 4 La. Ann. 416; *Denton* v. *Erwin*, 5 La. Ann. 18; *Edson* v. *Pavet*, 11 La. Ann. 710.

Such testimony and such verification operate as an estoppel.

1 Greenl. Ev. § 204; R. S. §§ 1079, 1072, 3737; *Brenson* v. *Worth*, 17 Wall. 82 (84 U. S. bk. 21, L. ed. 566); *Stone* v. *U. S.* 19 Wall. 13 (86 U. S. bk. 22, L. ed. 144); *Stagg* v. *Ins. Co.* 10 Wall. 569 (77 U. S. bk. 19, L. ed. 1068); *U. S.* v. *Bank of Metropolis*, 15 Pet. 377 (40 U. S. bk. 10, L. ed. 774); *Bank of Pittsburg* v. *Neal*, 22 How. 96 (63 U. S. bk. 16, L. ed. 326).

As impeaching testimony, the evidence of complainants in the court of claims destroys their credibility as witnesses.

1 Greenl. Ev. § 462; 1 Whart. Ev. § 412; 2 *Id.* § 1120; *The Santissima Trinidad*, 7 Wheat. 286 (20 U. S. bk. 5, L. ed. 454); Starkie, Ev. 873; *Stoffer* v. *State*, 15 Ohio St. 47; *Paulette* v. *Brown*, 40 Mo. 52; *State* v. *Mix*, 15 Mo. 153; *Hargraves* v. *Miller*, 16 Ohio, 338; *Burbaker* v. *Taylor*, 76 Pa. St. 83.

Under general principles of law the oaths of complainants without corroboration are insufficient to prove any transaction with Peck, who is dead.

1 Whart. Ev. § 466.

Complainants were incompetent witnesses under section 858 R. S. Assignees in bankruptcy are within the intent of this statute as if fully written therein.

Crocker v. *National Bank*, 4 Dill. 359; *Tiffany* v. *Boatman's Sav. Inst.*, and *Tiffany* v. *National Bank*, 18 Wall. 375, 409 (85 U. S. bk. 21, L. ed. 868, 862); *Hogan* v. *Page*, 2 Wall. 605 (69 U. S. bk. 17, L. ed. 854); *Carpenter* v. *Rannels*, 19 Wall. 138 (86 U. S. bk. 22, L. ed. 77); Bishop, Stat. Crimes, 2d ed. §§ 189, 190, 190a, 190b, 212, 213, 243, 1102, 1105; 1 Bl. Com. 87–91; Bacon, Abr. Stat. 1; 1 Swift, Digest pp. 11–13; Potter's Dwarris, Stat. pp. 47, 51, 67, 121, 146, 174, 264; Sedgwick, Stat. & Const. Law, pp. 225, 246; Cooley, Const. Lim. 188; *Decatur Bank* v. *St. Louis Bank*, 21 Wall. 294 (88 U. S. bk. 22, L. ed. 560); *Pensacola Tel. Co.* v. *W. U. Tel. Co.* 96 U. S. 1 (Bk. 24, L. ed. 708).

The assignee is entitled in any event to have compensation from the fund, for services, expenses and attorneys' fees.

Trustees v. *Greenough*, 105 U. S. 527 (Bk. 26, L. ed. 1157); *Central R. R. etc. Co.* v. *Pettus*, 113 U. S. 116 (Bk. 28, L. ed. 915).

Mesrs. **Charles E. Flandrau and Walter H. Sanborn**, for respondents:

The court will see that the claim made by Peck against the United States was based upon a violation by the United States of its contract with him, and that he alone was entitled to urge said claim. But the court will also see that this claim grew out of the money advanced by the complainants in this suit, and out of their labor performed to carry out said contract of Peck; that such advances of labor and money made them in equity the owners of such claim; that Peck never owned such claim except subject to the equities of these complainants, and that we claim our interest in the judgment of the court of claims and supreme court, not by virtue of any assignment either in law or fact, but solely on the ground of such equities.

"Indeed, there is in general no difficulty in equity, in establishing a lien, not only on real estate but on personal property, or on money in the hands of a third person, whenever that is a matter of agreement, at least as against the party himself and third persons who are volunteers or have notice; for it is a general principle in equity that as against the party himself and any claiming under him, voluntarily or with notice, such an agreement raises a trust.

2 Story, Eq. Jur. §§ 1131, 1228, 1249; 2 Story, C. C. 566; *Warmstry* v. *Lady Tanfield*, 1 Ch. Rep. 29; 3 Smith, L. Cas. pp. 279, 280, 343; 1 Ves. 331; *Whitfield* v. *Fausset*, and *Wright* v. *Wright*, 1 Ves. 387, 408; *Allston* v. *Bank*, 2 Hill Ch. (S. C.) 235; *Crocker* v. *Whitney*, 10 Mass. 316; *Bigelow* v. *Wilson*, 1 Pick. 485; *Gardner* v. *Hoeg*, 18 Pick. 168; *Mitchell* v. *Winslow*, 2 Story 630.

There is no case in which a court of equity will not enforce equities growing out of advances made in good faith; the only exception is where fraud has entered into the transaction. This case is free from even the suspicion of fraud.

2 Story, C. C. 564.

It will probably be contended that as Peck could not make a valid assignment of any part of this claim, no equities can arise or grow out of it. It will be seen at a glance that although such a position might have some force as to equities arising after the creation of the claim, it can have none as to those existing prior to its inception.

U. S. v. *Gillis*, 95 U. S. 407, and *Spofford* v. *Kirk*, 97 U. S. 484 (Bk. 24, L. ed. 503, 1032); *Goodman* v. *Niblack*, 102 U. S. 556 (Bk. 26, L. ed. 229); *Erwin* v. *U. S.* 97 U. S. 392 (Bk. 24, L. ed. 1065).

These cases put an end to all controversy that such claims do pass by operation of law, by will, in bankruptcy; and that all equities arising by advances of the money out of which the claim arose create a valid lien upon it, as between the original parties and all claiming under them as volunteers or with notice.

It is a perfectly well settled principle that the assignee in bankruptcy takes property and rights in the same plight and condition, and

with all the equities attached thereto, in the same manner as the bankrupt himself held them.

2 Story, C. C. 564. *Brown's Assignee* v. *Heathcote*, 1 Atk. 160; 2 Vern. 564; 2 Story, Eq. Jur. § 1411.

Mr. Justice **Woods** delivered the opinion of the court:

The findings of fact made by the circuit court in its final decree are, in our opinion, amply sustained by the evidence. These findings, and other facts not disputed, establish *prima facie* the justice and equity of the decree.

Upon the facts of the case, the decree of the court is simply to this effect: that where three persons form a partnership and agree to bear the losses and share the profits of the partnership venture in proportion to their contributions to its capital, and two of the partners furnish all the money and do all the work, they are entitled to be repaid their advances out of its assets before payment of the individual creditors of the partner who paid nothing and did nothing to promote the partnership business. The decree may stand on even stronger grounds. There is no evidence in the record to show that there were any unpaid debts outstanding against the partnership of which Peck and the plaintiffs were the members. The decree of the court is based on the assumption that there were no such debts. The money, therefore, collected on the judgment recovered by Peck's administratrix was assets of the partnership, to which the partners were entitled in proportion to the amount paid in by them, and the record clearly shows that the money so collected was the only assets of the partnership. As McLean and Harmon had paid in all the money, they were entitled to all the money collected on the judgment, not by reason of any right to priority of payment, nor by reason of any lien, but because it was their property, and no other person had any claim to it. The plaintiffs' right to the fund was not at all impaired by the bankruptcy or death of Peck. Their claim was just as strong as if Peck were still living and had received and collected the judgment in his own name, and the money had been taken from his hands and impounded in the registry of the court. The decree might, therefore, stand on the ground which it in fact asserts: that the money in controversy was the absolute property of the plaintiffs.

The defendant, however, assails the decree on several grounds, which we shall proceed to notice.

It was shown by the evidence that on July 20, 1877, Peck executed and delivered to Harmon a paper, of which the following is a copy:

"Fort Abraham Lincoln, July 20, 1877.

For value received, I promise to pay to William Harmon, or order, twenty-three thousand dollars, out of moneys I may hereafter receive on account of my claim against the United States Government, for contract for wood, at Tongue River cantonment, on the Yellowstone River. C. K. Peck."

On the same day he executed and delivered to McLean a paper, similar in terms, for the payment to him of $17,000 out of the same fund. The appellant insists that the contract of partnership between Peck and the plaintiffs, and the promises of Peck above mentioned, were forbidden by the Statutes of the United States, and were, therefore, illegal and void, and gave no rights to the plaintiffs to the fund in controversy. The statutes relied on are sections 3477 and 3737 of the Revised Statutes, which read as follows:

"Sec. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

"Sec. 3737. No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States." [575]

We shall first consider these two sections in their bearing upon the contract of partnership between Peck and the plaintiffs. It is obvious that section 3477, which forbids assignments of claims against the United States or any interest therein, unless under the circumstances therein stated, can have no reference to such a contract as the partnership articles between Peck and the plaintiffs. When those articles were signed there was no claim against the United States to be transferred. Peck had at that time no contract even, with the United States, and there was no certainty that he would have one. What is a claim against the United States is well understood. It is a right to demand money from the United States. Peck acquired no claim in any sense until after he had made and performed wholly or in part his contract with the United States. Section 3477, it is clear, only refers to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment, or may be prosecuted in the court of claims. The section simply forbids the assignment of such claims before their allowance, the ascertainment of the amount due thereon, and the issue of a warrant for their payment. When the contract of partnership was made Peck had no claim which he could present for payment or on which he could have brought suit. He, therefore had no claim the assignment of which the statute forbids. It is so clear that the articles of partnership do not constitute such an assignment as is forbidden by the section under consideration, that it would be a waste of words further to discuss the point.

Nor are the articles of partnership forbidden by section 3737. They do not transfer the contract or any interest therein to the plaintiffs, and cannot fairly be construed to do so. But if the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination to and not in violation of section 3737; and if they can be [576] construed consistently with the prohibitions of

[illegible]

[illegible] the plaintiffs, respectively, under the articles of partnership. It would be a strange conclusion to hold that by accepting these papers the plaintiffs lost their right, which they had already acquired under the articles of partnership to have the money therein mentioned [illegible] to them when it should be collected by Peck, their copartner. If the obligation assumed by Peck in his articles of partnership was valid and binding, it was not impaired or [illegible] by the giving and the acceptance of these memoranda. From what we have already said in discussing the articles of partnership, it is clear that they were not forbidden by the language or policy of the sections prohibiting the transfer of claims and contracts.

It is next assigned for error, that the circuit [illegible] did not give effect to the defense of the Statute of Limitation of two years, prescribed by section [illegible] of the Revised Statutes, which was [illegible] in the answer of the defendant.

The section mentioned forms a part of section [illegible] of the Bankrupt Act of March 2, 1867, chap. [illegible], 14 Stat. at L. 517, and provides that no suit at law or in equity shall be maintained in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property, transferable to or vested in such assignee, unless [illegible] within two years from the time when the cause of action accrued for or against such assignee.

It is plain that the facts shown by the record [illegible] this defense. This suit is for the [illegible] as assets of a partnership, of the money [illegible] on the contract between Peck and the United States, and its distribution among the partners on a settlement of the partnership affairs. If Peck had lived and had not been adjudicated bankrupt, the plaintiffs could not have maintained this suit against him until the money which is the subject of this controversy had been collected from the United States. They had no right under this contract with Peck to demand their share of the money until the money had come to his hands. The bankruptcy and death of Peck did not change the terms of the contract. They could not sue his assignee for a distribution of the fund until the fund had been received. The judgment against the United States in favor of Peck's administratrix was not affirmed by this court until February 10, 1880; and the money was not received by the defendant until after he had been substituted as claimant in the case in place of Helen A. Peck, administratrix, by order of the court of claims, on May 10, 1880. This suit was begun September 22, 1880.

A bill like the present, for the settlement of the affairs of the partnership and the distribution of its assets among the partners, would have been premature until the final determination of the suit of Peck against the United States, for that suit involved all the assets of the partnership, and until it was decided there could be no adjustment of the partnership concerns and no distribution of its assets; in fact, it was uncertain whether there would be any assets to distribute. As, therefore, the plaintiffs were not entitled to the relief prayed in the bill until final judgment in the suit of Peck against the United States, and especially had no demand against the defendant until the fund,

which they assert was assets of the partnership, came to his hands, it is plain that the Statute of Limitations was not well pleaded.

It is next assigned for error that the circuit court admitted the testimony of McLean and Harmon, the plaintiffs, offered in their own behalf, in regard to transactions with and statements by Peck, he being dead, and the suit being against his assignee in bankruptcy. It is insisted that the testimony of these witnesses was incompetent under section 858 of the Revised Statutes which provides as follows: "In the courts of the United States no witness shall be excluded * * * in any action because he is a party to or interested in the issue tried; *Provided*, That, in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of the witnesses in the courts of the United States, in trials at common law, and in equity and admiralty."

The witnesses admitted by the circuit court were not excluded by the terms of this statute. The suit in which they testified was not an action by or against an executor, administrator or guardian. But the council for the defendant insists that the policy of the Act applies to suits by or against assignees as well as to suits by or against executors, administrators or guardians, and that we ought to construe the Act so as to include such suits. We cannot concur in this view. The purpose of the Act was to remove generally the old incapacity to testify, imposed on parties or persons interested in the suit. This was done by a sweeping provision, subject to certain well defined exceptions; but the exceptions did not include suits by or against assignees in bankruptcy. We cannot insert the exception. When a provision is left out of a statute, either by design or mistake of the Legislature, the courts have no power to supply it. To do so would be to legislate and not to construe. "We are bound," says *Mr. Justice* Buller, in *Jones* v. *Smart*, 1 T. R. 44, "to take the Act of Parliament as they have made it;" and *Mr. Justice* Story, in *Smith* v. *Rines*, 2 Sumn. 854, 855, observes: "It is not for courts of justice *proprio marte* to provide for all the defects or mischiefs of imperfect legislation." See also *King* v. *Burrell*, 12 A. & E. 460; *Lamond* v. *Eiffe*, 8 Q. B. 910; *Bloxam* v. *Elsee*, 6 B & C. 169; *Bartlett* v. *Morris*, 9 Port. (Ala.) 266. The objection made to the admission of the testimony of the plaintiffs was properly overruled.

The next ground of complaint against the decree of the circuit court is that the court did not hold the plaintiffs estopped from asserting title to the fund in controversy, by the fact that they each testified, in the suit of Peck against the United States in which the fund was recovered, that he had no interest, direct or indirect, in the claim of Peck, except that he held one of the notes or memoranda made by Peck, a copy of one of which has already been given.

It must be conceded that this testimony was evasive and disingenuous, but it was not false. But admitting that the testimony was untrue, it is difficult to see how any estoppel is raised which the defendant can set up against a recovery in this case by the plaintiffs. An equitable estoppel is raised when there is some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. *Brant* v. *Va. Coal & Iron Co.* 93 U. S. 326 [Bk. 23, L. ed. 927]. If any estoppel could be set up in this case by reason of the testimony of the plaintiffs, it would be one in favor of the United States, who alone could have been injured by that testimony.

It is clear that the estoppel could not be set up by the defendant, for the evidence was given on his side of the controversy, and he is now in possession of and claims the fund which that testimony aided Peck, whose assignee he is, to recover. There was, therefore, no injury to the defendant and no estoppel which he could set up against these plaintiffs. See *Cushing* v. *Laird*, 107 U. S. 69 [Bk. 27, L. ed. 391].

It is true, his counsel say that, by reason of the denial by the plaintiffs that they had any interest in Peck's claim, the defendant was induced to employ counsel and move both this [581] court and the court of claims, that he be made, as assignee of Peck, the party plaintiff in the suit against the United States, and to expend a large sum of money in prosecuting his motions. As we have already found that the plaintiffs were entitled to the fund in controversy, and the defendant was not, this contention amounts to this: that the plaintiffs should be precluded from a recovery of their own property, and it ought to be turned over to the defendant, because the defendant, misled by the testimony of the plaintiffs given in a case to which he was not at the time either a party or privy, was induced to expend money in a proceeding to get possession of the subject matter of the controversy, to which, as it turned out, he had no title whatever. Upon such a state of facts no estoppel is raised. But there is no proof in the record that the defendant was misled by the testimony of the plaintiffs, or that he did not know the exact truth when he took the proceedings referred to. In no point of view, therefore, can the defendant assert that the plaintiffs are estopped to claim the fund in controversy.

Lastly, the defendant insists that the circuit court erred in not allowing him compensation for his services, expenses, and attorney's fees in recovering the fund in the court of claims from the United States. In reply to this contention, it is sufficient to say that the defendant rendered no services whatever in the recovery of the fund. Judgment had been rendered in the court of claims in favor of the administratrix of Peck, and had been affirmed by this court, and the mandate of this court had been sent to the court of claims, before the defendant was admitted as plaintiff in the suit for the recovery of the fund. All he did was to get the fund into his possession. As in our view the fund belongs to the plaintiffs in this suit, all that comes out of it for the compensation of the defendant comes out of their pockets. We see no reason why they should pay the defendant,

[illegible]

[illegible]

[illegible]

District of Columbia in its conduct of certain public work on which, at the time of such injuries, he was engaged as a laborer in its employment.

It appears that one Smallwood, the supervisor of county roads, undertook the repair of a public highway by the use of material obtained from a gravel bank. McElligott and one Meacham constituted a part of the force of laborers employed for that work. The special duty assigned to Meacham was to prepare gravel to be hauled away, while McElligott was to fill the carts in which the gravel was transported to the place where it was to be used by the supervisor. They reached the bank between 8 and 9 o'clock on the morning of June 12, 1878, observing, upon their arrival, that it had been [625] undermined at one side for two or three feet, and a chamber cut into it; a condition which to some extent increased the chances of the bank falling.

The plaintiff insists that there was evidence tending to show the following facts: that while Meacham and McElligott were at work, Smallwood was giving his attention to the repairing of the public road with the material brought from the gravel bank; that between 9 and 10 o'clock in the morning McElligott sent word to him to provide two additional men for the work at that place, one to watch the bank and the other to aid in filling the carts; that within a very short time an answer came to the effect that the request would be complied with; that plaintiff stopped work at noon for dinner, but before doing so sent a second message, which Smallwood received, to send more men, one to watch the bank and one to assist in loading the carts; that he resumed work about 1 o'clock, and about a half hour after that time (no men having been sent by Smallwood) the bank fell while he was at work five or six feet from it; that the falling bank caught him, despite his efforts to escape, burying him for a time beneath the gravel and inflicting upon him injuries of a serious and permanent character; that, to use the language of the witness Meacham, "it is not safe to stand under a bank that has been undermined;" and that although McElligott recognized from the outset that it was dangerous for him to do his work, without some one being present whose special duty was to give timely notice of the first indications of the bank's falling, he continued to work in reliance upon Smallwood's promise to send some one to watch the bank.

The District claims that there was evidence tending to show that Smallwood did not receive a message from McElligott to send men to watch the bank or to aid in loading the carts; that the former was not in the habit of providing men to watch a gravel bank, except when it was intended to have a "fall;" that there was no such intention on the day McElligott was injured; and that neither the latter nor Meacham had any instructions to make a "fall."

The point upon which the evidence was conflicting was as to whether Smallwood, in fact, [626] received notice that a man was needed to watch the bank while he and Meacham were at work. McElligott states that his first message was sent by Tracey, one of the drivers of the carts, and his second by Anderson, another driver. In his examination in chief by the plaintiff Tracey testified that McElligott told him "to tell Smallwood to send two men out there to help load the carts, and that the other might have the opportunity to watch the bank in case of danger," and that he "delivered the message to Smallwood, at Mr. Brown's, between 9 and 10 o'clock, and he said that he would send men, but he did not do it until after McElligott was hurt." He testified that he told McElligott what Smallwood said; also that "it is necessary to have a man to watch the bank when people are digging under a gravel bank; the bank was undermined that morning when he went there; it is not safe to work at a bank like that without having it watched."

But upon cross examination the same witness, being asked to state what reason was given by McElligott for wanting men to watch the bank said: "He wanted men to load the carts; *he did not say anything to me about watching the bank;* he simply sent a message to Smallwood to send two men to help load these carts, and that was all; *he did not at any time say he wanted a man to watch the bank;* I don't recollect his sending a message by any one to Smallwood that he wanted that he should send a man to watch the bank; *I don't recollect that I heard anything said about a man to watch the bank before this accident;* I told Mr. Smallwood that Mr. McElligott said: send a couple of men to help load the carts; I found Mr. Smallwood near Brown's; I delivered the message to Mr. Mahoney; Smallwood said that he would send a man or two." Upon re-examination the same witness said: "I delivered the message to Smallwood, what McElligott told me; *I do not recollect* whether what McElligott told me to tell Smallwood was to send men to watch the bank *or* load the carts; McElligott told me to tell Smallwood to send a couple of men to help load the carts; to help them out; I delivered whatever message McElligott told me to tell Smallwood, no matter what it was."

Anderson, by whom the plaintiff claims to have sent the second message, testifies that he did inform Smallwood, in the morning, of the [627] former's wish, that men be sent "to help load the carts and watch the bank," and that Smallwood said "all right." He did not, however, notify McElligott of what Smallwood said, because he did not himself return to the gravel bank. There was no proof that plaintiff was informed, prior to his being injured, of what it is claimed passed between Smallwood and Anderson. The only evidence tending to show that the plaintiff continued to work at the bank, in reliance upon Smallwood's alleged promise or assurance that he would send some one to watch it, was in the testimony of Tracey.

At the instance of the District, the court gave numerous instructions to the jury. They embodied, among others, these propositions: that it was implied in the contract between the plaintiff and the District, that the former took the risk of the dangers which ordinarily attend or are incident to the business in which he voluntarily engaged for compensation, among which was the carelessness of those in the same work or employment, with whose habits, conduct and capacity he had, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he could take such precautions as his inclination or judgment

[illegible] that, although Smallwood was [illegible] of the highways of the District, and [illegible] such employed and controlled the services of the plaintiff, the latter could not recover on account of any neglect or misconduct of the former in and about the work in which they were both engaged, unless it was shown that Smallwood was incompetent and unfit for the discharge of the duties of his position, of which the District had or ought to have had knowledge; that in contemplation of law the plaintiff took upon himself the risk arising from the negligence of his fellow workmen, including Smallwood; and that, if the plaintiff, believing that the gravel bed was in such condition as to make it dangerous for him to continue work there without some one being appointed to watch the bank while he was so engaged, and deliberately exposed himself to the accident by which he was injured, he was guilty of contributory negligence and could not recover in this action.

[628] To the granting of these instructions the plaintiff made no objection. The parties went to the jury agreeing, in effect, that the principles which those instructions announced should control the determination of their respective rights. We have, therefore, no occasion to consider the general question whether the District of Columbia is, in every case, exempt from liability for the negligence of its supervisor, resulting in personal injury to those who labor under his direction on public work, nor the narrower question whether Smallwood and McElligott were fellow servants within the meaning of the general rule that the common employer is not responsible to one employee for injuries caused by the negligence of a coemployee in the same branch of service. No such questions arise upon the present hearing. We have only to deal with the assignments of error, relating to material matters not covered by the instructions which were given at the request of the defendant, without objection upon the part of the plaintiff. And those matters are to be found in the charge of the court to the jury.

After expressing its approval of the principles announced in those instructions, and referring to the precaution taken by the plaintiff to inform Smallwood of the necessity of providing some one to watch the bank while he and Meacham were engaged in the special work assigned to them, the court said to the jury:

"Now, it is said that if Mr. Smallwood still neglected, after such notice, it would still be a neglect of a fellow servant for which no servant could ever recover any damage. But I have, for the purposes of this trial, instructed you that if the fact of the dangerous condition of that bank was communicated to Smallwood, and a request made of him to send a man there to watch it, and he gave assurance, in reply, that a man would be sent there for that purpose, the plaintiff here might labor, without any imputation of any negligence on his part, for such a length of time as within which that promise might be fulfilled; not to continue there and labor any longer than that, because it would be as much negligence after a reasonable period had expired after receiving this assurance as if no assurance had been given. The law requires
[629] that he shall not needlessly expose himself to any danger, to any peril whatever.

"And if he has taken this precaution the decision in *Hough v. R. Co.* 100 U. S. 213 [Bk. 25, L. ed. 612], is to the effect that it would not be negligence for him to remain a sufficient length of time to give opportunity to have a man sent there.

"Now, this is about all that is necessary to say upon this point.

"The proposition, then, is, if the bank was in a dangerous condition, and the plaintiff sent a notice to that effect to Smallwood, and Mr. Smallwood gave, in reply, this assurance that a man would be sent there, then, until a sufficient length of time had expired within which that promise might be fulfilled, the plaintiff might remain there at his work; and if any injury happened to him by the falling of the bank during that time the District might then be imputed with this negligence. If he remained a longer time than within which the promise might be fulfilled, or if he gave no such notice at all, or no such notice was given to Smallwood, then the plaintiff is without any remedy, however serious that injury may be.

"I do not think that it makes any difference here whether Smallwood had any man he could send there or not.

"Now, the main question, therefore, is, and the one difficulty probably which the jury will have in determining anything in this case will be, as to this matter of notice. On that subject Mr. Smallwood has been examined, as also Mr. Tracey and Mr. Anderson.

"Now, the plaintiff names Tracey and Anderson as the persons by whom he sent this message, first by Tracey and then by Anderson.

"From Anderson he received no response, because Anderson did not return. He had, therefore, no assurance in reply to that message whatever, and I think, upon the whole, that he had no reason to expect any relief, unless he received assurance such as that given in the case in the supreme court. Beyond that I do not think that I ought to go, and I repeat that without he received this assurance of assistance he took the risk of the falling of the bank upon himself."

To so much of the charge as declared that if plaintiff notified Smallwood of the dangerous condition of the bank he would be relieved from the imputation of negligence during such time as was sufficient for Smallwood to provide a man to watch the bank, and to so much of it as declared that the alleged notice by the plaintiff to Smallwood, and the latter's reply thereto, took the case out of the rule laid down in the instructions previously given, the District excepted in proper form.

We are of opinion that, upon the theory of the case declared in the special instructions given, the charge was erroneous. As the court, at the request of the District, instructed the jury that the negligence of Smallwood was one of the risks which the plaintiff took upon himself, and that it was not liable in this action unless he was incompetent for his position, and such incompetency was known, or ought to have been known to the District; as it was neither alleged nor proved that he was incompetent; and as the only neglect complained of, or to which the evidence was directed, was his failure to provide a man to watch the bank after notice of the necessity therefor, it is difficult to perceive how it became

important for the jury to inquire whether McElligott continued at work longer than was reasonably sufficient for Smallwood to appoint some one to the duty of watching the bank while the plaintiff and his coemployee, Meacham, were at work. The time during which the plaintiff continued at work after giving the alleged notice, and after receiving an assurance that his request would be complied with, has no relation whatever to the only contingency in which the District, according to the special instructions was liable, viz.: its negligence in employing as supervisor of roads one who was unfit for the place. If the principles embodied in those instructions are sound, upon which point we are not now required to express an opinion, the court would have been justified in directing a verdict for the District. The charge was inconsistent with the instructions previously given, and was calculated to mislead the jury, for it submitted to them a question which those instructions had, in effect if not in terms, declared to be immaterial in the case.

We are also of opinion that the charge was erroneous in its statement of the grounds upon which the jury should determine the particular point submitted to them. It involved a misapprehension of the decision in *Hough* v. *R. Co.* [*supra*], where the court had occasion to consider, among other questions, that of contributory negligence by the party who sues his employer for injuries resulting from the negligence of another employee in the same general service. That was an action against a railroad company, by the representatives of a locomotive engineer. The negligence there complained of and to which, as was claimed, was to be solely attributed the death of the intestate, was that of the company's officers in assigning to the intestate, for his use, an engine which, by proper diligence on the part of such officers might have been ascertained to be defective and unsafe. One of the defects there complained of was in the cow-catcher or pilot of the engine; the other was that the whistle was insecurely fastened to the boiler. By reason of the defect in the cow-catcher, the engine was thrown from the track, whereby the whistle fastened to the boiler was displaced, and from the opening thus made hot water and steam issued, fatally scalding the deceased. It was admitted that the engineer had knowledge of the defect in the cow-catcher; but it was not claimed that he was aware of the insufficient fastening of the whistle, or that the defect, if any, in that respect was of such a character that he should have become advised of it while using the engine on the road. It was proved that he had given notice to the proper officers of the company of the defect in the cow-catcher, and they promised that it should be remedied. But the court of original jurisdiction, in effect, held that knowledge on the part of the engineer of the defect in the cow-catcher was itself sufficient to defeat the action, without reference to the assurances given that the defect in it should be remedied. In considering the question whether his use of the engine with that knowledge was such negligence as prevented a recovery, so far as that defect was the efficient cause of death, the court referred to the general rule upon the subject of contributory negligence, that where a master or his representative has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, or for an injury suffered within any period which would not preclude a rational expectation that the promise might be kept. But to avoid misapprehension arising from the broad terms in which the general rule was frequently expressed, and that its application in that particular case might be clearly understood, the court said: "We may add that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, could have used the engine without it being removed. If, under all the circumstances and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as a matter of law, absolutely conclusive of want of due care on his part." That knowledge, it was held, was a fact to be considered by the jury, in connection with other facts, in determining whether the engineer exercised that caution which all the circumstances required. [632]

These principles were not applied in the trial of the case now before us; for, in effect, the jury were instructed that, in determining the question of contributory negligence, they need only inquire whether plaintiff continued at his work longer than was reasonably sufficient to enable Smallwood to provide some one to watch the bank. If that question was solved in favor of the plaintiff, then they were at liberty, under the charge, to find that he was not guilty of contributory negligence, although they may have believed from the evidence that no man of ordinary prudence would have entered upon and continued in the work for any time, however brief, without some one being appointed to watch the bank; in other words, that if the plaintiff, in fact, relied upon the alleged promise of Smallwood, he was not chargeable with contributory negligence, although the jury may have believed that, under all the circumstances, he so acted as to show himself utterly careless of his safety. But such is not a sound exposition of the principles which regulate the rights and obligations of employer and employee. Assuming that the District might be responsible under some circumstances for injuries resulting from the negligence of its supervisor, it certainly would not be liable if the danger which the plaintiff apprehended from the beginning was so imminent or manifest as to prevent a reasonably prudent man from risking it upon a promise or assurance by the proper authority that the cause from which the peril arose would be removed. The plaintiff had had experience in the kind of business in which he was engaged at the time of his injury. He recognized from the beginning, the peril to which he was exposed while working at the gravel bank. There was no express undertaking, upon the part of the District, by its supervisor, that it would save him harmless as [633]

to any injury he might suffer prior to the designation of some one to watch the bank; and it was not implied in the contract between him and the District that he might needlessly or rashly expose himself to danger. On the contrary, if liability might come upon the District for the negligence of its officers controlling his services, he was under an obligation to exercise due care in protecting himself from personal harm while discharging duties out of which such liability might arise. If he failed to exercise such care; if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the District supervisor of the character alleged, be guilty of such contributory negligence as would defeat his claim for injuries so received.

Whether, therefore, we look at the case upon the theory embodied in the instructions given at the request of the District, or as depending upon the issue as to contributory negligence upon the part of the plaintiff, the judgment must be reversed and a new trial awarded.

Reversed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

YALE LOCK MANUFACTURING COMPANY, *Appt.*,
[373]
v.
JAMES SARGENT.

(See S. C. Reporter's ed. 373-378.)

Patent law—infringement.

A variation of eccentricity in the rollers is a material feature of the invention secured by letters patent No. 98622, for an improvement in permutation locks, or is made so by the description and claim; and said patent is not infringed by a lock in which the same combination or an equivalent is not used.

[No. 165.]

Argued March 15, 16, 1886. Decided March 29, 1886.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. **Frederick H. Betts**, for appellant.

Messrs. **Edward Wetmore** and *George Ticknor Curtis*, for appellee.

Mr. Justice **Matthews** delivered the opin-
[373] ion of the court:

The bill in this case was filed by the appellee for an injunction to restrain the defendant below, the appellant, from an alleged infringement of letters patent No. 98622, dated January 4, 1870, granted to James Sargent, for an improvement in permutation locks; and for an account, etc. On final hearing on bill, answer, replication and proofs, there was a final decree for the complainant for an injunction and for $400.75 damages and costs. The defendant has appealed.

The question involved is the fact of infringement, and that in its turn depends upon the proper construction of the complainant's patent.

The specifications and claim of the patent, with the accompanying drawings are as follows:

"Figure 1 is an elevation of the lock, with the back plate removed to show the interior.

Figure 2, a vertical cross section of the same.

Figure 3, a diagram, showing the cam and and the disconcerting eccentrics in perspective.

Like letters of reference indicate corresponding parts in all the figures.

Nature of the Invention.

This lock is an improvement upon that of Linus Yale, in which an eccentric roller is combined with the cam for disconcerting the action upon tumblers.

The invention consists in combining with the cam an arrangement of two or more eccentric rollers, of varying eccentricity, turning upon the same bearing, so that in revolving one or both may turn and alternate in action, thereby greatly increasing the difficulty of mapping out or locating the position of either.

General Description.

In the drawings—

A represents the case of the lock;

B, the cylinder for holding the tumblers or wheels;

C, the spindle;

D, the cam;

E, the dog, which falls to release the bolt, and,

G, the bolt.

These are the ordinary parts employed in combination locks, and may be arranged in any desired manner; hence, they need no special description here.

A single eccentric roller, H, pivoted, at *a*, to a suitable arm or bearing, and resting upon the cam D, has been before employed, as already stated.

Its object is to disconcert the action inside the lock, so that an expert lock pick or burglar cannot tell the position of the tumblers when operating upon the lock.

It has been found by experiment, however, that such a device is not proof against the skill of an expert lock pick, for, by the use of a delicate instrument attached to the spindle outside, and by careful manipulation, the shape and position of this roller can be actually mapped out or ascertained and the lock opened.

To obviate this difficulty as far as possible, I combine with this roller one or more rollers H', pivoted to the same arm or bearing, and resting upon the periphery of the cam in the same manner; but all these rollers are made of varying eccentricity, and of different shape, and therefore, when the cam is turned, the several rollers strike at different positions, and when one touches the other may be removed from contact, thus alternating in action. They may also turn in different directions.

By this means, owing to the different contact of the several rollers, the difficulty of mapping out and locating the same is very greatly increased.

In transferring the action from one roller to the next, the loss of contact with the first

disarranges the position, and thus renders it indefinite.

In this manner, and for this reason, the addition of another roller to the one already in use does not produce an accumulation of the same effect in action, but produces a different action altogether, by breaking the continuity of rotation and movement and contact.

I disclaim the employment of a single eccentric; but what I claim as my invention, and desire to secure by letters patent, is,

The arrangement of two or more rollers, H, H', of varying eccentricity, when combined with the cam, in the manner and for the purpose specified."

Mr. Henry B. Renwick, an expert called by the complainant, in explanation of the patent, says:

"I have examined the patent, and believe that the words 'varying eccentricity,' as applied

Fig. 1.

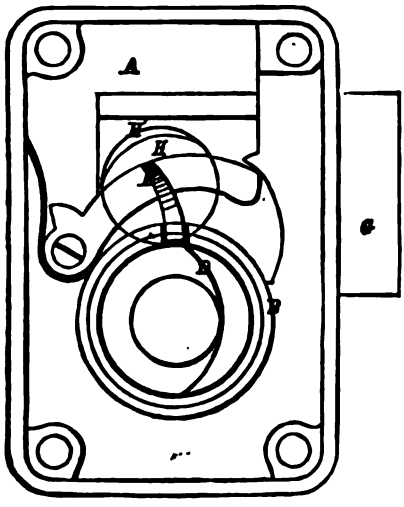


Fig. 2.

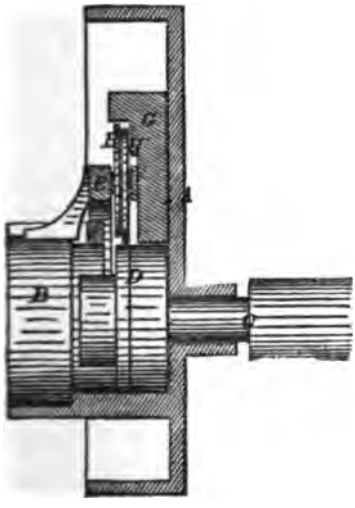
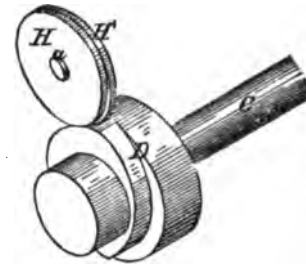


Fig. 3.



to the rollers, mean that the rollers shall have their axes at different points in their diameters. If the two rollers be each $\frac{1}{4}$ of an inch in diameter, and one have its axis $\frac{15}{1000}$ of an inch from the nearest point in its periphery, and the other have its axis $\frac{40}{1000}$ of an inch from the nearest point of its periphery, then they will be of [376] varying eccentricity. This variation of distance of the axis from the nearest point of the periphery need be no greater than the smallest distance that can be measured by the sensitive micrometers used in lock-picking, for the reason that the whole aim of the patented contrivance is to avoid picking by means of a micrometer." [377]

The same witness was also examined upon the question of infringement, upon a comparison with the patent, of a lock made by the defendant, marked as an Exhibit Cole No. 1. He said:

"I have examined the lock Cole No. 1. It has two disconcerting rollers in combination with a cam upon which they ride. These rollers being for the purpose of preventing a lock picker from ascertaining the position of the rotary tumblers by means of a micrometer, in this respect it is substantially identical with the contrivance described in the patent. Whether these rollers in the exhibit are of varying eccentricity or not I cannot positively determine, although they appear to be so by examination of them without instruments. A variation of eccentricity between the two rollers, which could be measured by a micrometer only, would be sufficient to secure the object which these rollers are designed to effect, and they may have such eccentricity, and yet it may be impossible to determine it by the eye alone."

On cross examination he admitted that he could not tell with certainty whether the rollers were or were not of varying eccentricity. No other witness on the part of the complainant is able to prove the fact of a variation of eccentricity between the rollers used by the defendant; while on the other hand the testimony on the part of the defendant does not permit us to doubt that the rollers used in its locks are identical in their eccentricity and shape.

If, therefore, a variation of eccentricity in the rollers is a material feature of the invention, or is made material by the description and claim of the patent, no infringement has been proved.

It does not meet and answer the difficulty to say, as has been suggested in argument, that although the rollers in the defendant's locks may be of the same eccentricity and shape as respects

each other, yet that when in revolution they vary in eccentricity in reference to the cam [378] which operates them, so that in action their eccentricity varies, and the same result is produced. Because the description in the patent and the claim require that the variation of eccentricity should be between the rollers themselves, and not a variation in action in reference to the cam, and unless the same result is produced by the same means, there is no infringement of the invention. Besides, the fact is not as claimed. It is impossible mechanically for the rollers, being identical in eccentricity and shape with each other, to have the same relation at all times to the cam as though they varied in eccentricity. For, as is pointed out in the evidence on the part of the defendant, when the rollers are the same in eccentricity and shape with each other, there must be intervals of time at which "the two rollers having been rotated to a point at which their peripheries exactly coincided, both would revolve together for a short period, until some slight impediment or change in the periphery of the cam would cause one to bear more directly than the other upon the periphery of the cam, when this one would revolve with the cam, the other remaining stationary; and so on." And this feature in the action of two rollers, identical in eccentricity, it is said, introduces an additional irregularity into the operation of the mechanism, which increases its disconcerting power and adds to the difficulty of calculating the movement which enables the expert to pick the lock. So that the mode of operation is different, accordingly as the rollers are of the same or varying eccentricities.

Were it otherwise, however, it would still be necessary to regard the feature of a variation of eccentricity as essential to the invention, because made so by the description and claim of the patent, although an equally good or even the same result might be obtained without it. The defendant does not use the same combination, and employs no device as an equivalent and substitute for the omitted element. It is not, therefore, liable as an infringer, *Water Meter Co.* v. *Desper*, 101 U. S. 332 [Bk. 25, L. ed. 1024]; *Gage* v. *Herring*, 107 U. S. 640 [Bk. 27, L. ed. 601].

The decree of the Circuit Court is accordingly reversed and the cause is remanded, with directions to dismiss the bill.

True copy. Test:
James H. McKenney, Clerk, Sup. Ct. U. S.

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[554]

YALE LOCK MANUFACTURING COMPANY, *Appt.*,
v.
HALBERT S. GREENLEAF.

(See S. C. Reporter's ed. 554-559.)

Construction of letters patent—what patentable—claim anticipated.

1. The scope of letters patent must be limited to the invention covered by the claim, which may be illustrated but cannot be enlarged by language used in other parts of the specification.
2. A change in a mechanical device which would occur to an unskilled mechanic is not patentable.
3. The first claim of reissued letters patent granted to George Rosner, July 25, 1871, for an improvement in permutation locks was anticipated and is therefore void.

[No. 166.]

Argued March 16, 1886. Decided March 29, 1886.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

Statement by *Mr. Justice* **Woods:**

This was a bill in equity brought by the appellee, Halbert S. Greenleaf, to restrain the infringement by the appellant, the Yale Lock Manufacturing Company, of the first and fourth claims of the reissued letters patent granted to George Rosner, July 25, 1871, for an improvement in permutation locks. The original patent bore date September 18, 1866.

The defense was that the alleged invention and substantial and material parts thereof claimed as new were, prior to any invention thereof by said George Rosner, known and publicly used by divers persons in this country, and that among such persons were D. H. Rickards, of Boston, and the firm of Evans & Watson, of Philadelphia.

The circuit court decided that the patent was valid, and that the defendant had infringed, and, upon the report of a master of the damages sustained by the plaintiff, rendered a decree in his favor for $2,968.50. The present appeal brings that decree under review.

Mr. **Frederick H. Betts,** for appellant.
Messrs. **Edward Wetmore** and *George Ticknor Curtis*, for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

It is conceded that the damages for which the court rendered its decree were allowed for the infringement of the first claim only of the Rosner patent, which, therefore, is alone to be considered upon this appeal.

The invention covered by this claim was described as follows in the specification:

"This invention consists in combining with a set of permutation wheels or tumblers, constructed each of a rim and center, an arrangement of bolts or equivalent devices, which fasten and unfasten said rims and centers by the use of a key inserted through holes in the cams in the wheels, by which said bolts or equivalent devices are operated, the effect being to enable the relative position of the rims and centers to be changed so as to make a new combination, by moving the driving pins to different positions relatively to the slots in the wheels. It further consists in the arrangement of parts as hereinafter described. * * *

"Prior to my invention, in order to change the combination, where a single set of wheels only was used, made up each of a center hub and rim, the wheels had to be removed from the lock and adjusted by hand and then replaced.

"I obviate this difficulty by the following arrangement: opposite the center or hub *o* of each wheel, and located in the outer rim, I place a locking device or bolt, *r*, which, when forced

in against the said center or hub, holds the same firmly in place with the outer rim; but, when thrown out, disengages said parts and allows the centers to turn free while the rims remain stationary. Against the locking device or bolt *r* rests a cam or eccentric, *s*. Through each or all of these cams, and also through the back plate of the lock, is inserted a key, P, fig. 6, by turning which it will be seen that said locking or fastening device may be forced in or drawn out at pleasure. When the key is inserted and the fastening device thrown back, it will be seen that the rims of the wheels are held stationary by the key, while the centers may be turned to any different position by the spindle, thus setting the lock to a new combination. * * * "The novelty in the first part of my invention consists in the combination of the fastening devices *r* with the wheels, constructed of three parts each, an outer rim and a center or hub composed of two parts, secured together so that by inserting the key the parts composing the wheels may be loosened and the outer rims held stationary, while the centers or hubs are turned to a different position by the action of the spindle, to rearrange the combination, and then the parts locked in place again, [557] and all accomplished without removing the wheels themselves from the lock. In all prior locks with a single set of wheels (each wheel made up of a rim and center hub), so far as I am aware, the wheels had to be removed from the lock and the combination changed by hand. * * * "What I claim, and desire to secure by letters patent, is:

"1. In a permutation lock, in combination with a set of wheels consisting each of an outer ring or rim and a central disc or hub, a set of fastening devices or bolts, *r r*, which is made to fasten or unfasten said parts composing the wheels, by the insertion of a key through each or all of the wheels, whereby the combination of the lock may be changed, substantially as herein specified."

The testimony showed that on the 18th of March, 1852, the D. H. Rickards named in the answer of the defendant, filed in the patent office an application for a patent for an improvement in locks, which was either rejected or withdrawn; and that locks made substantially in accordance with the description contained in Rickards' specification were manufactured and sold by Evans & Watson, safe makers, of Philadelphia, as early as the year 1853. A copy of the application of Rickards is found in the record, and one of the locks made by Evans & Watson in 1853 was produced as an exhibit upon the trial in this court.

A comparison of the specification and model of the plaintiff's patent with the application of Rickards and the lock made by Evans & Watson shows that the device of Rickards and the lock of Evans & Watson were an anticipation of the invention covered by the first claim of the plaintiff's patent.

It is clear from the statement in the specification of Rosner's patent that he believed that prior to his invention it was necessary, in order to change the combination in a permutation lock, to remove the wheels from the lock case and adjust them by hand and then replace them.

But Rosner was in error in making this statement. The evidence shows that what Rosner thought had never been done before had been done by means of the device of Rickards, embodied in the lock of Evans & Watson, which [558] is substantially the same contrivance as that covered by the first claim of Rosner's patent.

The Rickards device embraces a set of wheels consisting of an outer rim or hub and a set of fastening devices or bolts, so constructed as to engage and disengage with a set of cogs on the central hub. When the bolts are in place the outer rim and the central hub are firmly fastened together, when withdrawn the hub may be made to revolve without moving the rim. The bolts are withdrawn by means of a key. Each of the wheels has an opening in it for the passage of the key by which the bolts are moved; these openings in the wheels are placed opposite each other and also opposite a key hole in the lock case, so that the key may be passed from the exterior of the lock case through all the wheels, and thus withdraw the bolts which fasten the rims to the hubs of the wheels; thereby permitting the hubs to be moved and a change to be made in the combination of the lock. When the change is made the key is withdrawn and the bolts are forced back into their places by springs. By this means the combination of the lock is changed without removing the wheels from the lock case, or even opening the case.

The only difference between the Rosner device and that of Rickards which the plaintiff's counsel have been able to point out is thus stated: in the Rosner contrivance the key, in addition to locking and unlocking the fastening devices, performs, when in the lock, the function of holding the outer rims in place while the combination of the lock is changed by moving the hubs. It is insisted that this key is adapted to perform this office by the fact that it fits snugly the series of holes in the rims of the wheels through which it passes, and thereby prevents any motion of the rims.

The Rickards device has a key hole in the lock case which the key neatly fits. But the holes in the rims of the wheels through which the key passes are irregular apertures, not fitted to the shape or size of the key, so that they allow some motion to the rims of the wheels.

We think this difference between the two locks does not give validity to the Rosner pa- [559] tent, for two reasons: first, because the shape and size of the key hole is not mentioned in the claim of the Rosner patent as one of the elements of the combination. The scope of letters patent must be limited to the invention covered by the claim, and while the claim may be illustrated it cannot be enlarged by language used in other parts of the specification. *Keystone Bridge Co.* v. *Phœnix Iron Co.* 95 U. S. 274 [Bk. 24, L. ed. 344]; *Railroad Co.* v. *Mellon*, 104 U. S. 112 [Bk. 26, L. ed. 639]. Secondly, if it were found to be necessary to hold the rims of the wheels rigidly immovable while the combination of the lock was being changed, the idea of changing the irregular aperture in the wheels through which the key in the Rickards device was thrust to one of the shape and size of the key would occur to the rudest and most unskilled mechanic. The suggestion of such a change could not be called invention, and ought not to be dignified by letters patent. *Atlantic Works* v. *Brady* and *Slawson* v. *Grand Street R.*

R. Co. 107 U. S. 192, 649 [Bk. 27, L. ed. 438, 576]; *Phillips* v. *Detroit*, 111 U. S. 604 [Bk. 28, L. ed. 532].

We are of opinion, therefore, that the first claim of the plaintiff's patent was anticipated by the application and specification of Rickards and by the locks manufactured by Evans & Watson and that it is, therefore, void.

It follows that the decree of the Circuit Court must be reversed and the cause remanded, with directions to dismiss the bill; and it is so ordered.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[536] YALE LOCK MANUFACTURING COMPANY, *Appt.*,

v.

JAMES SARGENT.

(See S. C. Reporter's ed. 536-554.)

Patent law—reissue—novelty—infringement—measure of damages—parties—disclaimer—costs.

1. The first claim of reissued letters patent No. 4696, for an improvement in locks, is not an unlawful expansion of the claims of the original patent.
2. The complainant's patent for an improvement in locks is not void for want of novelty.
3. The complainant's patent is infringed by the device of the defendant.
4. In an action for an infringement of a patent for a turning bolt device, an improvement in locks, where the complainant had granted no licenses but was himself the manufacturer of his locks, and where the patented device was an essential feature, both of complainant's and of the infringing lock, and where the patented device could not be sold except as embodied in a lock, and where the complainant had been compelled to reduce the price of his locks by defendant's competition, the defendant's infringement must be held to have caused the entire loss of complainant by reason of such reduction of price, allowance being made for other causes which give the defendant an advantage in selling his locks.
5. The owner of the patent is the proper party to sue to recover damages for infringement, although he may have a partner engaged with him in the manufacture of the patented article.
6. Where a bill alleged infringement of a reissued patent generally, and one claim of the reissue was invalid, but recovery was had for infringement of a valid claim of the reissue, and there had been no unreasonable delay in filing a disclaimer of the invalid claim, this court reverses the decree of the circuit court so far as it awarded costs to the complainant, and orders each party to bear his own costs in this court and one half the expense of printing the record.

[No. 164.]

Argued March 12, 15, 1886. Decided April 5, 1886.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. F. H. Betts, for appellant.

Messrs. George Ticknor Curtis and *Edmund Wetmore*, for appellee.

[537] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York, by James Sargent against the Yale Lock Manufacturing Company, to recover for the infringement of reissued letters patent No. 4696, granted to Sargent, January 2, 1872, for an "improvement in locks," on an application therefor filed September 25, 1871 (the original patent, No. 57574 having been granted to him August 28, 1866).

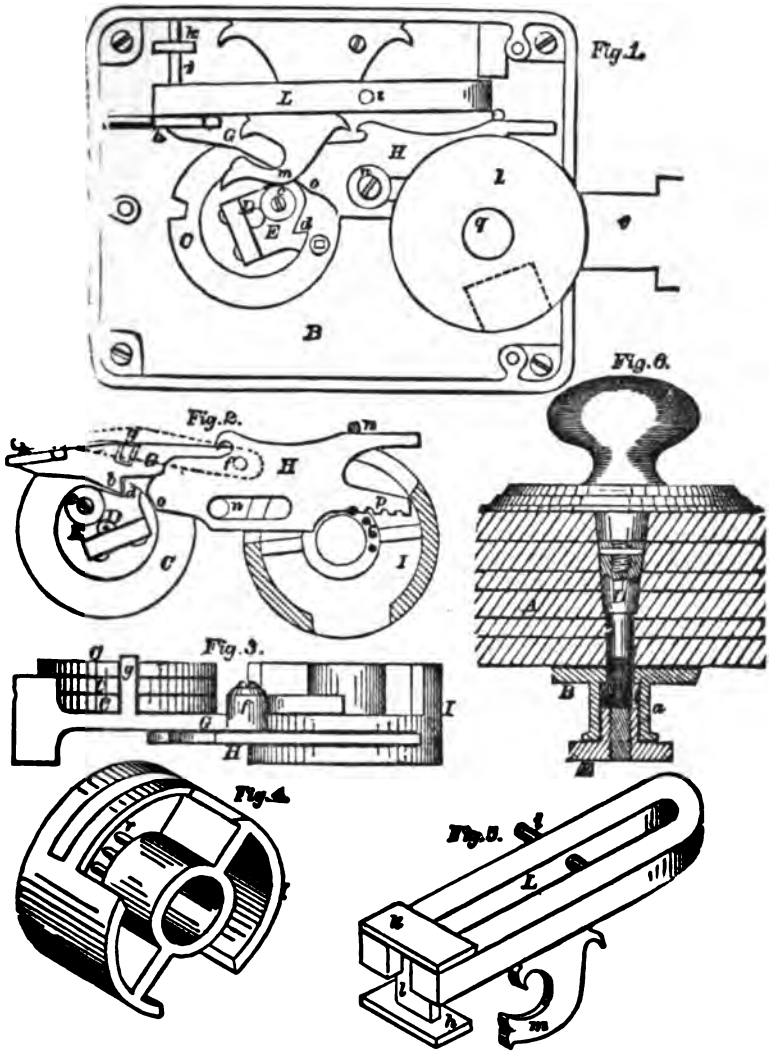
The specification and drawings of the reissue are as follows:

"My invention consists in combining with the ordinary combination wheels and the other working parts of a combination lock which has no sliding lock bolt, a bolt turning on a pivot or bearing, which is so isolated or removed from contact with the said wheels as to receive any pressure or strain which may be applied through the separate bolt work of the safe or vault door, and cut off the communication between the bolt work of the door and the wheels or fence lever of the lock, whereby the position of the slots in the wheels can be determined and the lock 'picked,' as can be done in most cases where the ordinary sliding bolt is used without some mechanical device to prevent.

In the drawings, figure 1 is an elevation of my improved lock, with the back plate removed; figures 2 and 3, an elevation and top view, respectively, of the pivoted bolt, the combination wheels, the cam and the lever work that connects them; figure 4, a perspective view of the pivoted bolt; figure 5, a similar view of the magnet and armatures; figure 6, a view showing the manner of applying the spindle and cam to a safe or vault door.

A, represents the plate of a safe door, and B, the case of the lock which is applied thereto. C, C, C, are the combination wheels, and D, the operating spindle. The spindle passes through a hollow stud, *a*, of the case, and has screwed upon its inner end the cam E, as shown most clearly in figure 6. The wheels themselves rest on the stud *a*. I, is the bolt, turning on a pivot or bearing, *q*. Its location is such as to rest closely in the rear of the stem, *t*, of the heavy bolt work of the door, and to hold it out when in one position, but to allow it to retract, to free the bolt work, when in the other position, said bolt I, turning on its pivot or bearing to allow this to be done. H is a sliding bar, which gives motion to the bolt as it is thrown forward or backward, being connected together by cog teeth *p r*. The bar slides on studs, *n n*, by which it keeps its horizontal position. G is a lever pivoted at *f*, to bar H, and serving to throw the latter back. It has a hook, *b*, figure 2, which engages with the bit, *d*, of the cam, to draw the bar back. The forward motion is given by the cam striking the end *o*, of the bar H. L is a magnet of the form shown in figure 5, which is suspended on a pivot, *i*. Its open end rests between armatures *h k*, which are separated by a brass pendant *l*. The armature *h* is attached to the end of lever G. When the magnet is in contact with the lower armature *h*, the dog *g* will be held away from the wheels; but when raised and brought in contact with the upper armature *k*, the lever is released and the dog is then allowed to fall into the notches of the wheels, to release the bolt. The magnet is raised by a roller, *c*, of the cam, which strikes a bearing, *m*, of the magnet.

In general principle the magnet is the same as that covered by the patent of Sargent and Covert, May 2, 1865; but the construction and arrangement of the magnet and armatures are



much simpler and more effective and constitute one feature of my present invention.

An important feature in my invention is the employment of the bolt I, turning on a pivot or bearing, instead of the sliding bolt heretofore in use. It is isolated, so to speak, from the combination wheels and the other main working parts of the lock; and, therefore, any strain which is brought to bear upon it by the heavy bolt work will be expended on the bolt itself and not upon the wheels. In the old form of lock the sliding bolt extends back so as to connect with or come near to the wheels, and any strain thereon is liable to disarrange the lock works.

Another important advantage of the isolation of the bolt is that it increases the difficulty of 'picking,' by being removed from all contact with the wheels. A common mode of picking ordinary locks is to force the bolt back, so as to get a contact with it and the edges of the wheels, by which their position is ascertained. In my lock this cannot occur, as the bolt simply turns on its bearing or pivot; and no back action can bring it or the lever work against the wheels.

The bolt may not only be of the circular form shown in the drawings, but of a segmental form, which will serve the same purpose. [540]

I am aware that the combination wheels themselves have been made with notches, and so arranged that the ordinary sliding bolt which rests against their edges may fall back and within the notches, when they are all set. Such is not the equivalent of my invention, as my express purpose is to avoid all contact of the bolt with the edges of the wheels." [541]

The claims of the reissue, five in number, are as follows, but only claim 1 is alleged to have been infringed:

"1. In a combination lock for safe or vault doors, a bolt, I, which turns on a pivot or bearing, when said bolt, I, is used in a lock having no ordinary sliding lock bolt, and in connection with the separate bolt work of the door, and

so arranged as to receive the pressure of the said bolt work without transmitting it to the wheels or other equivalent works of the lock.

2. In a combination lock for safe and vault doors, I claim the combination of the bolt I, bar H, and cog connection *p r*, when said bolt, I, turns on a pivot or bearing, and receives the pressure of the bolt work situated outside the lock works, and intervenes between the bolt work and the wheels.

3. I claim, in combination with the bolt I, the bar H and lever G, arranged and operating as herein set forth.

4. I claim, in combination with the vibrating magnet L, the armatures *h k* and pendant *l*, arranged as herein described.

5. I claim the combination and arrangement of the wheels C C, cam E, lever G, bar H, and bolt I, as herein described."

The defenses set up were want of novelty, noninfringement, and invalidity of the reissue. After a hearing on pleadings and proofs, an interlocutory decree was entered finding the reissued patent to be valid and to have been infringed, and awarding a perpetual injunction and an account of profits and damages. The master reported $7,771 damages in favor of the plaintiff. The defendant excepted to the report, but the exceptions were overruled by the court and a final decree was entered for the plaintiff, for $7,771 damages and $650.17 costs. The defendant has appealed to this court.

It is contended that the first claim of the reissue is void for unlawful expansion, after unreasonable delay in applying for the reissue.

The original patent had three claims, as follows:

"1. The rotating tumbler I, when separated and isolated in action from the permutation wheels, and so arranged that any inward pressure upon the bolt will be exerted on the bearing of said tumbler, and have no action or effect upon the said permutation wheels, substantially as and for the purpose herein specified.

[542]

2. In combination with the turning tumbler I, the cog bar H and lever G, arranged and operating as herein set forth.

3. The combination and arrangement of the combination wheels C, cam disk E, pivoted lever G, cog bar H, and turning tumbler I, the whole operating as herein specified."

Claim 3 of the reissue is substantially the same as claim 2 of the original, and claim 5 of the reissue is substantially the same as claim 3 of the original, while claims 2 and 4 of the reissue are new claims.

The defendant directs attention to these facts. When Sargent applied originally for his patent, on February 6, 1866, he asked for claim 1 in this form: "The turning bolt I, resting on its bearing *q*, in combination with the mechanism of a combination lock, in such manner as to practically isolate or disconnect it from the main operating parts, substantially as set forth." Claim 1 having been rejected on the 24th of March, 1866, Sargent on the 29th of June, 1866, changed the claim to the form it has in the original patent as issued, and his attorneys at the same time, in a letter to the patent office, explained the new form of claim thus: "The substance of the first substituted claim consists essentially in providing a rotating tumbler in connection with the bearing on which it rests and the stem of the bolt work which rests against it, when said tumbler is isolated or disconnected from the combination wheels, so that any inward motion of the bolt against this tumbler will expend its force against the bearing on which the tumbler turns and rests, and will not reach or affect the permutation wheels." The attorneys also said: "In Mr. Sargent's device it will be observed that the combination or permutation wheels are on a different bearing, and located at a distance from the revolving tumbler I, and never in contact therewith, so that the two are practically isolated from each other, and there is no connection between them except through the lever H, which is not within the reach or influence of the pick lock." And the specification of the original patent contained this language: "The principal advantage of this tumbler consists in its isolation, so to speak, from the combination wheels and the main working parts. It rests alone on its bearing *q*, the only part connected being the cog bar H. In ordinary locks the sliding bolt extends back in direct connection with the main working mechanism, and by its constant action and the strain that comes upon it frequently disarranges those parts. This is especially true when the stem or projection *t* of the heavy bolt of the safe door rests against the sliding bolt. In this case, when force is applied to the bolt, the wrenching strain upon the bolt and mechanism is very great. In my lock it will be seen that this difficulty is obviated, for any strain that comes upon the circular tumbler, either from the stem *t* or any other source, is simply expended upon the strong bearing *q*, and does not reach back to the combination wheels or any part of the working mechanism. This is of the utmost importance."

It is urged that emphasis was thus laid on the fact that the turning bolt or tumbler was mounted on a different bearing from the permutation wheels, and that it was that arrangement which prevented pressure on it from reaching back to the permutation wheels; that the original claim, in speaking of the rotating tumbler as "separated and isolated in action from the permutation wheels," meant that it was mounted on its own separate bearing, and did not allow of its being mounted in any other way; that the specification of the reissue does not say that the tumbler I "rests alone on its bearing *q*;" that the limitation thus contained in claim 1 of the original patent is not found in claim 1 of the reissue; and that thereby an unlawful expansion was made, the application for the reissue having been filed more than five years after the original patent was granted.

But we think the reissue is not fairly open to this objection. The tumbler in the one claim and the bolt in the other are the same instrument. The words "rotating tumbler I," in the original claim, refer to the tumbler described as resting on a bearing "around which it turns." The claim of the reissue, in saying that the bolt I "turns on a pivot or bearing," expresses the same idea. The words in the claim of the reissue, "when said bolt I is used in a lock having no ordinary sliding lock bolt, and in connection with the separate bolt work of the door, and so arranged as to receive the pressure of the said bolt work without transmitting it to

the wheels or other equivalent works of the lock," are justified by these words in the original claim, "and so arranged that any inward pressure upon the bolt will be exerted on the bearing of said tumbler, and have no action or effect upon the said permutation wheels." The word "bolt" in the claim of the original meant what in the claim of the reissue is called "the separate bolt work of the door," because what is called in the former "the rotating tumbler I," is called in the latter "a bolt, I, which turns on a pivot or bearing." The proviso in the claim of the reissue, that the bolt I is to be "used in a lock having no ordinary sliding lock bolt" does not expand the claim but, if anything, restricts it. The statement, in the claim of the reissue, that the bolt I is so arranged as to receive the pressure of the separate bolt work of the door without transmitting it to the wheels, is justified by the statement in the original claim, that the rotating tumbler I is so arranged that any inward pressure upon the bolt will be exerted on the bearing of the tumbler, and have no action or effect on the permutation wheels.

The words in the original claim, "when separated and isolated in action from the permutation wheels," applied to the rotating tumbler, do not indicate that the mounting of the tumbler alone on its bearing is required, but mean no more than that the tumbler shall be separated and isolated in action from the wheels; and the words of the claim of the reissue have no broader meaning in that regard. If the rotating tumbler or bolt is thus isolated in action from the wheels, the arrangement referred to in both claims is reached. The patentee set forth, as he was bound to do, the method he used and which he thought advisable; but any method of mounting the revolving bolt which effects the isolation referred to is within either claim. The words "or other equivalent works of the lock" have no expanding force.

The invention of Sargent consists in combining with the ordinary combination wheels, and the other working parts of a combination lock which has no sliding lock bolt, a bolt turning on a pivot or bearing, which is so isolated or removed from contact with the said wheels as to receive any pressure or strain which may be applied through the separate bolt work of a safe door, and cut off the communication between the bolt work of the door and the wheels or fence lever of the lock, so that the position of the slots in the wheels cannot be determined, for picking the lock, as in the use of the ordinary sliding lock bolt, which extends back so as to connect with the wheels. The turning bolt is an incomplete cylinder, or one in which parts of the periphery are cut away. An extended part of the bolt work of the door bears against a part of the complete periphery of the turning bolt, in such manner that the turning bolt receives all pressure and does not allow it to reach the combination wheels. The ordinary sliding lock bolt is, therefore, dispensed with.

Three alleged anticipating devices are set up: defendant's exhibit A, defendant's exhibits C and D, and defendant's exhibit E.

Exhibit A has in the lock casing a sliding bolt and also what is alleged to be a turning bolt. But the latter is only the well known swiveling dog, long used to prevent the retraction of sliding bolts, and so arranged as to be swiveled by a spring when the combination wheels are gated. As a consequence, the stump or fence bears on the wheels not only with the pressure of its own weight but with the added force of the spring. Any swiveling force applied to the dog causes the stump to bear on the peripheries of the wheels, and the picking of the lock is facilitated. The dog prevents the retraction of the sliding bolt. In Sargent's patent the lever which carries the stump is so constructed that no turning of the revolving bolt can bring the lever work against the wheels. The Sargent revolving bolt must be acted upon by the user, while the swiveling dog in exhibit A is an automatic latch. In Sargent's structure the revolving bolt, the lever which carries the stump, and the wheels are sufficient to prevent the retraction of the bolt work; while in exhibit A the sliding bolt, the swiveling dog, the stump lever and the wheels are all of them necessary.

The drawings exhibits C and D show the [546] Linus Yale lock, which is also illustrated by a lock mechanism. It is a revolving lock which permits and prevents the retraction of the bolt work of the door, and there is no sliding bolt. But there are no permutation wheels or revolving tumblers, nor any oscillating or sliding tumblers; but the ancient device of pins is used to prevent the revolution of the bolt, the pins entering into holes in the bolt; and a cross strain can be brought upon the pins, making the picking of the lock comparatively easy. Moreover, the bolt is not isolated from the pins as it is from the wheels in Sargent's lock, but parts of the pins are in sockets in the bolt. The pins are thus in immediate connection with the bolt, while Sargent interposes lever work between the bolt and the wheels, to effect the isolation of the bolt.

In the Butterworth padlock, exhibit E, there is a revolving bolt combined with the wheel tumblers by means of a lever; but there is no "separate bolt work of the door," which is one element of the claim in Sargent's reissue. Of this padlock the plaintiff's expert, Mr. Henry B. Renwick, says: "The padlock has the ordinary hasp attached to the case, and the bolt acts to prevent this hasp from being drawn away from the axis upon which the bolt revolves, and not to prevent bolt works from being forced towards that same axis. The hasp is a contrivance which must be used with two staples, or one staple and a slotted bar, all of which must be outside of the door. Whereas, on the contrary, bolt works must be inside of the door, and shoot into sockets in the jambs, it being clear that the hasp could not be used in place of bolt works, or bolt works in place of a hasp, even if the former were located outside of the door. I do not think that this lock would even suggest the idea of the combination referred to in the first claim of the Sargent reissue. In order to make the lock fit to be used in combination with bolt works, even after such idea had been suggested, it would be necessary: first, to provide the lock case with means of securing it to the door; second, to elongate the spindle and so contrive it and the dial plate that they could be separated from the wheel tumblers and put together again, with the door between them; [547] third, to alter the direction of the slot in the case through which the hasp enters, so that the

tail of the bolt works could press upon the revolving bolt in the line of a radius thereof. If the tail of bolt works were introduced into the present slot, any hammering of the bolt works by the handle upon the periphery of the revolving bolt would tend to turn the revolving bolt upon its axis, and thus cause the stump to be pressed upon the wheel tumblers in such a manner as to facilitate picking, this result being due to the fact that the line of direction through the slot is not in line of the radius to the bolt, but in line of a sector thereof; further, the revolving bolt in a padlock, owing to its being necessary that it should enter a slot in the hasp, is weakest at the very point where it should be strongest, if it were to be used in connection with bolt work; and any good constructer would alter the revolving bolt of the padlock, so that it would be strongest where it is now weakest, in case it was desired to use a revolving bolt in combination with bolt works." It is a marked feature of Sargent's lock that the direction of the pressure of the bolt work of the door on the revolving bolt is in the line of a radius of that bolt, so that the pressure has no tendency to revolve the bolt. This feature is not found in the Butterworth padlock.

We are of opinion that, as against anything found in the old structures, there was patentable novelty in what Sargent did and what he claimed.

As to the question of infringement, the defendant's lock, Cole No. 2, has in it a bolt which turns on a pivot, and is substantially identical with the like bolt in Sargent's patent. It prevents and permits the retraction of the bolt work of the door in the same manner as Sargent's bolt. There is no sliding bolt. The turning bolt is arranged to serve as a stop to two sets of bolt works, instead of one; but in respect to one set, there is the same mode of operation in both locks. As the claim of Sargent's reissue does not require that the bearing of the rotating bolt should be distinct from the bearing of the wheels, the fact that in Cole No. 2 the bearing of the turning bolt is on the stud on which the wheels turn, makes no difference in principle, because the action of the bolt is as wholly separated and isolated from the wheels in the one lock as in the other, and in each the [548] strain from the bolt work is expended on the turning bolt and not on the wheels. So, too, the fact that in Sargent's patent the fence lever is connected with the turning bolt by a rack on the end of the lever engaging with cog teeth on the bolt; while in Cole No. 2 the end of the lever is pivoted directly to the turning bolt, does not affect the identity of the arrangement as part of the combination covered by claim 1 of the reissue. The defendant's lock must be held to infringe that claim.

On the question of damages, the defendant contends, that there was no sufficient or legal proof that the plaintiff suffered the damages reported and adjudged, or any other damages. The action of the master, the character of the exceptions to his report, and the view taken by the circuit court, are fully shown by its opinion, reported in 17 Blatchf. C. C. 244, which was as follows:

"The master reports that there is no basis, from the proofs adduced before him, to find what profits have been made by the defendant by the use of the 'turning bolt' (the infringing device) in the locks made and sold by it; and that therefore, on the testimony before him, he cannot find what profits, if any, are due from the defendant for the use of the 'turning bolt.'

The patent on which this suit is brought is a reissue granted January 2, 1872. The master reports that, after that time and in 1873, in consequence of the defendant's offering and selling to the plaintiff's principal customers and to the trade generally, locks containing the infringing device, at a less price than the plaintiff was obtaining, a reduction of prices was enforced on the plaintiff, such reduction being, in round numbers, $1 on each No. 5 lock and $2 on each No. 8 lock. Exception one, of the defendant, is to such finding and report, and alleges that the master should have reported that no such reduction was enforced and that there was no proof of the amount of any reduction caused by the defendant's infringement and that there was no method of computing such reduction, even if it actually existed.

The master also reports that it is in evidence that, during the period covered by the accounting, the plaintiff could have manufactured, in addition to the locks he did manufacture and without materially increasing his manufacturing facilities, all the locks manufactured and sold by the defendant. Exception 2 of the defendant is to such finding and report, and alleges that the master should have reported that no such additional manufacture by the plaintiff was possible, or that it was impossible without a very great extension of his facilities.

The master also reports that it is in evidence that, during the period covered by the accounting, the plaintiff would have made sales to many of the persons who were induced to purchase from the defendant, at his own established prices, had not the defendant offered its locks at lower prices. Exception 3 of the defendant is to that part of the report, and alleges that the master should have found and reported that no such sales would have been made; or that, even if made, they would not have been at the plaintiff's own established prices.

The master also reports that the plaintiff has suffered damage in respect to the matters to which exceptions 2 and 3 relate. Exception 4 of the defendant is to that part of the report, and alleges that the master should have found and reported no damage whatever from the competition of the defendant.

The master further reports that the locks sold by the defendant contained, in addition to the 'turning bolt,' a device patented by the Rosner patent, for which infringement a claim is made against the defendant in another suit; that as to the proportion of the reduction of prices above set forth, which should be allowed to the device claimed under the Rosner patent, it is claimed by the plaintiff and nowhere effectually disputed by the defendant, 'that, in computing the profits on these locks, one third belonged to and was charged by him to the Rosner patent;' and that, admitting this proportion, and allowing, in addition thereto, for any superior external attractions of the defendant's locks, and for the number of combinations which they had over those of the plaintiff, and for the shape of the case of the lock, and for the commercial success of the defendant in effect-

ing sales, where the plaintiff would have failed, the master is of opinion that the plaintiff is entitled to recover from the defendant, as damages, one half of the amount of the reduction in prices caused by the defendant since January 2, 1872; that is, on 1,009 No. 3 locks, $1 per lock, being $1,009, and on 13,524 No. 5 locks, at 50c. per lock, $6,762, being a total of $7,771. Exception 5 of the defendant excepts to the finding and report that the plaintiff is entitled to recover from the defendant, as damages, one half of the amount of the reduction in prices caused by the defendant since January 2, 1872, and alleges that the master should have reported 'no reduction in prices, or no proof of such,' caused by any infringement by the defendant since said date, and 'hence no damages' to the plaintiff, 'and, consequently, no method of calculating them.' Exception 6 of the defendant excepts to the report for that the master erred in making the apportionment of the alleged reduction in the plaintiff's prices, charging one half thereof to the alleged infringement of the 'turning bolt' patent, and alleges that no basis existed, in the proof or in law, for such or for any apportionment, or for any award of damages. Exception 7 of the defendant excepts to the report for that the master erred in assessing damages which are not the damages suffered by the plaintiff, but are those suffered by the firm of Sargent & Greenleaf, and alleges that the master should have reported that the damage, if any, found to have been suffered by said firm, is not the damage of the plaintiff, who is only one member of said firm, but that the plaintiff's damage is merely a portion thereof. Exception 8 of the defendant excepts to the report for that the master erred in finding and reporting, as damages, the sum mentioned in his report, or any damages whatsoever, and in not reporting that there was no proof of any actual damage suffered by the plaintiff from the alleged infringement.

The defendant contends that the competition of the defendant was not the sole cause of the reduction of the plaintiff's prices, and that the proportionate effect of the defendant's competition is not attempted to be estimated or ascertained by the proofs. It alleges that the defendant is not responsible for the reduction made in 1873; that there were many other causes which contributed to this reduction; and that the lowering of prices was caused principally by the competition of other fire-proof safe lock makers, and notably the New Britain Lock Co., by the fact that safe makers were making and threatening to make their own safe locks, and by the general lowering of the prices of material and labor and the depression of business.

Reduction of prices, and consequent loss of profits, enforced by infringing competition, is a proper ground for awarding damages. The only question is as to the character and sufficiency of the evidence, in the particular case. I think that on the whole evidence, the reduction of prices by the plaintiff, after January 2, 1872, on safe locks containing his invention, is shown to have been directly and solely caused by the defendant's infringement.

The master, in his report, allows damages only for the reduction of prices on the locks sold by the plaintiff; that is, 1,009 No. 3 locks and 13,524 No. 5 locks. Although the master states that the plaintiff suffered damage in losing the sale of locks sold by the defendant, he awards no damages for that cause. He confines his award to the loss on the locks which the plaintiff sold.

The defendant also contends that the plaintiff is not entitled to recover from the defendant, as damages, the entire amount of the reduction enforced by the defendant's competition, but only the damages occasioned by the effect of the presence of the infringement; that the burden of proof is on the plaintiff to fix the value of, and to separate the effect of, the infringing devices; that he failed to do so by any proper proof; and that no basis was afforded to the master on which such damages could be computed. But, as the master allowed damages only for the reduction of prices on the locks sold by the plaintiff, and as the essential feature of those locks was the 'turning bolt' device, and as an essential feature of the infringing locks was the infringing 'turning bolt' device in them, and as the plaintiff could not sell his 'turning bolt' device unless it was embodied in a lock, and as he was thereby enabled to make his profit on the entire lock, and as he was deprived (by the acts of the defendant in selling at low prices locks containing the patented 'turning bolt' device) of the profit he would otherwise have made on the locks which [552] he actually sold containing the 'turning bolt' device, it seems plain that the defendant's infringement must be held to have caused the entire loss of the plaintiff by the reduction of prices, after allowing a proper sum for any other patented device contained in the defendant's locks and for any other causes which gave to the defendant an advantage in selling its locks. This is the basis on which the master proceeded, and it seems to me, on a consideration of the evidence, that the master has made all proper allowances and has arrived at a correct conclusion in fixing as damages, one half of the amount of reduction in prices.

The plaintiff, as the owner of the patent, is entitled to recover the damages in this case. He may be accountable to his copartner for a part of them, but the copartner could not sue on the patent, for such damages or any part of them."

This is a case where the patentee granted no licenses and had no established license fee, but supplied the demand for his lock himself, and was able to supply that demand. The market for the lock was limited to safe makers. No one but a safe maker wanted or would buy such a lock. The master was unable to determine, from the proofs, what profits, if any, the defendant had made from the use of the turning bolt. He disallowed all items of damage from the loss to the plaintiff of the sale of infringing locks sold by the defendant, and confined his award to the enforced reduction of price on the locks which the plaintiff sold, caused by the infringement. That this is a proper item of damages, if proved, is clear. It is a pecuniary injury caused by the infringement, and is the subject of an award of damages, although the defendant may have made no profits and the plaintiff may have had no established license fee. As the plaintiff, at the time of the infringement, availed himself of his

exclusive right by keeping his patent a monopoly, and granting no licenses, the difference between his pecuniary condition after the infringement and what his condition would have been if the infringement had not occurred is to be measured, so far as his own sales of locks [553] are concerned, by the difference between the money he would have realized from such sales if the infringement had not interfered with such monopoly, and the money he did realize from such sales. If such difference can be ascertained by proper and satisfactory evidence, it is a proper measure of damages. The damages to be recovered (R. S. §§ 4919, 4921) are "actual damages;" and they may properly include such losses to the plaintiff as were allowed in this case. *McComb* v. *Brodie*, 1 Woods, 153, 161; *Philp* v. *Nock*, 17 Wall. 460, 462 [84 U. S. bk. 21, L. ed. 679].

The turning bolt was the essential feature of the Sargent lock. The defendant adopted Sargent's arrangement, and then reduced the price of the lock, forcing Sargent to do the same in order to hold his trade. The evidence shows that the reduction of prices by Sargent was solely due to the defendant's infringement. The only competitor with Sargent in the use of his turning bolt arrangement, during the period covered by the accounting, was the defendant.

We think the master made proper allowances for all other causes which could have affected the plaintiff's prices; that the proper deduction was made for the use of the Rosner device in the defendant's lock; and that the damages awarded are no greater than the testimony warranted.

The decision that the plaintiff, as owner of the patent, was entitled to recover the damages, was correct.

The bill alleges infringement of the reissue generally and especially of the first claim. The answer alleges that the reissue is not for the same invention as the original patent. The defendant contends that this is true as to claims 2 and 4 of the reissue, and that as no disclaimer of those claims was entered at the patent office before this suit was brought, the recovery in this case should have been without costs, under the provisions of sections 4917 and 4922 of the Revised Statutes, and the decision in *Gage* v. *Herring*, 107 U. S. 640, 648 [Bk. 27, L. ed. 605]. That case holds that the invalidity of a new claim in a reissue does not impair the validity of a claim in it which is only a repetition and separate statement of a claim in the original patent. It also holds that a reissued patent is within the letter and the spirit of the provisions of sections 4917 and 4922; and that where a [554] defendant has infringed such a restated valid claim of a reissue, the plaintiff, on filing a disclaimer of the new and invalid claims of the reissue, may have a decree, without costs, for the infringement of such valid claim, where there has been no unreasonable delay in entering the disclaimer.

There can be no doubt that claim 4 of the reissue was invalid, as an unlawful expansion of the original patent, on an application for the reissue filed more than five years after the original patent was granted. But the patent has expired, and therefore no disclaimer can now be filed. There was no unreasonable delay in filing a disclaimer, as the validity of claim 4 was sanctioned by the commissioner of patents in granting the reissue, and this suit was commenced in July, 1872, and the claim was not held invalid by the circuit court (both the interlocutory and final decrees having been entered before the decisions of this court, at October term, 1881, on the subject of reissued patents, were made).

The result, therefore, is that *the decree below must be reversed as to the award of costs and affirmed in all other respects*, with interest until paid, at the same rate per annum that decrees bear in the courts of the State of New York, and the case be remanded to the Circuit Court, with a direction to modify the decree accordingly. Each party will bear his own costs in this court and one half of the expense of printing the record. *Silsby* v. *Foote*, 20 How. 378, 387 [61 U. S. bk. 15, L. ed. 953, 956].

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ABBY KNAPP, *Plff. in Err.*,
v.
HOMŒOPATHIC MUTUAL LIFE INSURANCE COMPANY.

(See S. C. Reporter's ed. 411-415.)

Life insurance—construction of policy.

A policy of insurance provided that after two annual premiums had been paid, the insured should, in case of default in payment of premiums, be entitled to have the policy continued in force for a period of time to be determined in a way provided, or to receive a paid up policy for the full amount of premium paid, but with this proviso: "that unless this policy shall be surrendered, and such paid up policy shall be applied for within ninety days after such nonpayment as aforesaid, then this policy shall be void and of no effect." Held, that failure of the insured to surrender the policy and make election within ninety days after default deprived her of the right to have the policy temporarily continued in force, as well as of the right to a paid up policy.

[No. 167.]

Submitted Mar. 16, 1886. Decided Apr. 5, 1886.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

Statement by *Mr. Justice* **Gray**:

This was an action brought March 19, 1878, by a citizen of Massachusetts against a corporation established by the laws of New York, upon a policy of insurance, by which the Company, "in consideration of the representations made to them in the application for this policy, which is hereby made a part of this contract, and of the sum of $47.40 to them in hand paid by Abby Knapp, wife of Charles L. Knapp, and of the quarterly payment of a like amount on or before the sixteenth days of July, October, January and April in every year during the continuance of this policy," insured the life of the husband, for the sole use of the wife, in the amount of $5,000 for the term of his natural life, beginning on April 16, 1869, payable at the office of the Company in New York to her, if living, in thirty days after notice and proof of his death.

The application declared that "neglect to pay the premium on or before the day it becomes due shall and will render the policy null and

void, and forfeit all payments made thereon, unless otherwise specially provided for in the policy."

The policy contained the following clause: "This policy of insurance, after two annual premiums shall have been paid thereon, shall not be forfeited or become void by reason of the nonpayment of premium; but the party insured shall be entitled to have it continued in force for a period to be determined as follows, to wit: the net value of the policy when the premium becomes due and is not paid shall be ascertained according to the 'combined experience' or 'actuaries' rate of mortality, with interest at 4 per cent per annum. Four fifths of such net value shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium and the assumptions of mortality and interest aforesaid; or, at his option, may receive a paid up policy for the full amount of premium paid; Provided, that unless this policy shall be surrendered and such paid up policy shall be applied for within ninety days after such nonpayment as aforesaid, then this policy shall be void and of no effect."

A trial by jury having been duly waived, the circuit court found the following facts: the policy was issued April 14, 1869, in the City of New York, where the husband and wife then lived. It was taken out by the husband, who signed the application in the wife's name as her attorney. It was in the possession of the wife in 1871, and of the husband before and afterwards. The premiums were paid for several years, mostly by the husband, but one or two by the wife. She lived apart from her husband nearly all the time after February, 1872. On January 16, 1874, a premium became due and was not paid. On February 26, 1874, the husband represented to the Company that his wife was dead; the Company believed the representation to be true, and he surrendered the policy, taking from the Company $260 in money, and a new policy, concerning which the only evidence was that it had been forfeited before his death, which happened September 17, 1874. Very soon after his death, the wife sent to the Company for information about the policy, and her agent was told by the Company that it was forfeited. A considerable time after this, being advised that she might have some rights under the policy, she gave due notice and proof of loss, and more than thirty days afterwards brought this action to recover the full amount insured. The net value of the policy when the nonpayment of the premium occurred, if reckoned in the mode pointed out in the policy, would have been sufficient to continue it in force until after the death of the husband.

On these facts, the circuit court ruled as matter of law that the policy was forfeited by the neglect to pay the premiums and to call for a paid-up policy, and rendered judgment for the defendant and allowed a bill of exceptions tendered by the plaintiff.

Messrs. **Saml. W. Clifford, Jr.,** and **Mark A. Blaisdell,** for plaintiff in error.

Messrs. **Stillman B. Allen** and **Alfred Hemenway,** for defendant in error.

Mr. Justice **Gray,** after stating the case as above reported, delivered the opinion of the court: [413]

The canceling of the policy, in consequence of the husband's fraudulent representation that the wife was dead, had no effect upon her rights. It is not relied on by the defendant, and there is nothing in the case to show that it in any way influenced the conduct of the plaintiff by preventing her from paying the premiums or making the election required by the policy.

The contract of insurance, made and to be performed in New York, between a corporation and a citizen of that State, is to be governed by the law of New York. By that law, in respect to the payment of or the neglect to pay premiums, a married woman stands like any other person insured. *Baker* v. *Union Mut. L. Ins. Co.* 43 N. Y. 283. And there is no statute which affects this case. [414]

The decision, therefore, depends upon the true construction of the nonforfeiture clause in the policy.

The single purpose of this clause is that, after two annual premiums shall have been paid, a failure to pay any subsequent premium shall not have the effect of avoiding the whole insurance, but the assured shall have the right to an insurance for such a sum and such a time as the premiums already paid would equitably cover. The policy does not declare that it shall continue of itself, without any act of the assured. On the contrary, it stipulates that "The party insured shall be entitled to have it continued in force for a period to be determined" by ascertaining, according to certain rules, the net value of the policy at the time of failure to pay a premium, and making the amount of that value, considered as a single premium, the basis for determining the time for which there shall be a temporary insurance for the full amount of the original policy. It then prescribes an alternative by which the party insured, "at his option, may receive a paid-up policy for the full amount of premium paid."

In short, the forfeiture of the policy, by a failure to pay any premium after the first two, is not absolute but qualified; and the party insured is entitled to be insured according to the sum already paid in premiums, either for the full amount of the original policy, so long as that sum would pay for it, or else for the full term of the original policy for such amount as that sum would pay for.

Then follows the proviso "that unless this policy shall be surrendered and such paid-up policy shall be applied for within ninety days after such nonpayment as aforesaid, then this policy shall be void and of no effect."

It is contended on behalf of the plaintiff that the words "such paid-up policy" show that this provision refers only to a new insurance determined by the second method; that is, for the full term of the original policy and for an amount depending upon the sum already paid in premiums; and that if the assured does not seasonably apply for such an insurance, she still remains insured for the full amount for a time computed according to the sum paid. [415]

But the proviso does not say that upon a failure to surrender the original policy and to ap-

ply for a paid-up policy, the original policy shall stand good for a temporary insurance; but that it "shall be void and of no effect." The result of either of the two methods already prescribed, for determining the extent of the insurance, is a paid-up policy. According to either method, there is to be no further payment of premium, nor is the original policy continued in force; but the assured is to have the benefit of the sum already paid in premiums, by being insured, either for the amount of the original policy for a time to be determined, or for the time of the original policy for an amount to be determined. Taking the whole clause together, it is clear that the assured is to have the benefit of that sum in one of two ways at her election, and that election must be made within a certain time. As that time expired without any election or any excuse for not making one, the forfeiture became complete under the express provisions of the policy, and the circuit court rightly held that the action could not be maintained.

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

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[430] WILLIAM STONE, *Plf. in Err.*,

v.

STATE OF SOUTH CAROLINA.

(See S. C. Reporter's ed. 430-433.

Removal of causes—when jurisdiction of state court ceases—trial of issues—State as party—separable controversy.

1. A state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer.

2. All issues of fact made on the petition for removal must be tried in the circuit court, but the state court is at liberty to determine for itself whether, on the face of the record, a removal has been effected; and if it decides against the removal, its action will, after final judgment, be reviewable in this court.

3. An action in which a State is a party is not removable from a state to a federal court, on the ground of citizenship.

4. An action against partners for money paid to them as such is not removable, unless all the parties on one side of the controversy unite in the petition for removal.

[No. 144.]

Argued Mar. 5, 1886. Decided Apr. 5, 1886.

IN ERROR to the Supreme Court of the State of South Carolina.

The case is stated by the court.

Mr. **Wm. E. Earle**, for plaintiff in error.

Messrs. **Charles Richardson Miles**, *Atty-Gen. of South Carolina*, and **James Lowndes**, for defendant in error.

[431] *Mr. Chief Justice* **Waite** delivered the opinion of the court:

This suit was brought by the State of South Carolina, in the Court of Common Pleas of Richland County, on the first of August, 1877, against Daniel T. Corbin and William Stone, partners, as attorneys at law under the name of Corbin & Stone, to recover a balance claimed to be due for moneys collected by the firm for the State and not paid over. On the 27th of April, 1878, Stone presented to the court a petition for the removal of the suit to the Circuit Court of the United States for the District of South Carolina. The statement in the petition material to the question arising on this writ of error is as follows

"That the petitioner is now, and was at the time when this action was commenced, a citizen of the State of New York and a resident therein; and his codefendant is a citizen of South Carolina; and the plaintiff is also a citizen of the State of South Carolina. That under and by virtue of the Statutes of the United States and of the State of South Carolina, this suit is one in which there can be a final determination of the controversy, so far as the petitioner is concerned, without the presence of his codefendant as a party to the cause."

The state court proceeded with the suit notwithstanding the petition, and after a trial gave judgment against both defendants. During the whole of such proceeding Stone denied the jurisdiction of the court after the filing of his petition. The supreme court of the State affirmed the judgment of the common pleas; and to reverse this judgment of affirmance the present writ of error was brought.

A state court is not bound to surrender its jurisdiction of a suit on a petition for removal, until a case has been made which on its face shows that the petitioner has a right to the transfer. *Yules* v. *Voss*, 99 U. S. 545, and *Removal Cases*, 100 U. S. 474 [Bk. 25, L. ed. 356, 600]. It is undoubtedly true, as was said in *Steamship Co.* v. *Tugman*, 106 U. S. 122 [Bk. 27, L. ed. 89], that upon the filing of the petition and bond—the suit being removable under the statute—the jurisdiction of the state court absolutely ceases, and that of the Circuit Court of the United States immediately attaches; but still, as the right of removal is statutory, before a party can avail himself of it, he must show upon the record that his is a case which comes within the provision of the statute. As was said in *Ins. Co.* v. *Pechner*, 95 U. S. 185 [Bk. 24, L. ed. 427], "His petition for removal when filed becomes a part of the record in the cause. It should state facts which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot 'proceed further with the suit.' Having once acquired jurisdiction, the court may proceed until it has been judicially informed that its power over the cause has been suspended." The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the state court in the case ends and that of the circuit court begins.

All issues of fact made upon the petition for removal must be tried in the circuit court, but the state court is at liberty to determine for itself whether, on the face of the record, a removal has been effected. If it decides against the removal and proceeds with the cause notwithstanding the petition, its ruling on that question will be reviewable here after final judgment under section 709 of the Revised Statutes.

Removal Cases [*supra*]; *R. R. Co.* v. *Miss.* 102 U. S. 141; *Kern* v. *Huidekoper*, 103 U. S. 485, and *R. R. Co.* v. *Koontz*, 104 U. S. 15 [Bk. 26, L. ed. 98, 354, 646]; *Chesapeake & Ohio R. R. Co.* v. *White*, 111 U. S. 137 [Bk. 28, L. ed. 379]. If the state court proceeds after a petition for removal it does so at the risk of having its final judgment reversed if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction. What effect the writ of *certiorari* provided for in section 7 of the Act of 1875, to require the state court to make return of the record to the circuit court, would have upon the further power of the state court to proceed, we do not now decide, as no such writ was issued in this case.

It only remains to consider whether on the face of this record it appears that the suit was removed from the state court by the presentation of the petition of Stone, and about that little need be said. It is not pretended that the suit was one arising under the Constitution or laws of the United States, and it certainly is not one between citizens of different States. The State of South Carolina is the sole plaintiff; and the defendants are citizens, one of South Carolina and the other of New York. The cause of action is joint, and only one of the defendants petitions for removal. There is no statute which authorizes the removal of a suit between a State and citizens on the ground of citizenship, for a State cannot in the nature of things be a citizen of any State. In *Ames* v. *Kansas*, 111 U. S. 449 [Bk. 28, L. ed. 482], the removal of a suit arising under the Constitution and laws of the United States brought by a State against a corporation amenable to its own process, was sustained; but this was because of the subject matter of the action, and not because of the citizenship of the parties.

Neither is there any separable controversy in the case such as might, if the necessary citizenship existed, allow Stone alone to remove the suit without joining Corbin with him in the petition for removal. The money sued for was received by the defendants as partners, and they are liable jointly for its payment, if they are liable at all. Such a case is not removable unless all the parties on one side of the controversy unite in the petition. *Removal Cases*, 100 U. S. 457 [Bk. 25, L. ed. 593]; *Blake* v. *McKim*, 103 U. S. 336, and *Hyde* v. *Ruble*, 104 U. S. 409 [Bk. 26, L. ed. 563, 824].

The judgment of the Supreme Court of South Carolina is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

UNION TRUST COMPANY OF NEW YORK, *Appt.*,
v.
ILLINOIS MIDLAND RAILWAY COMPANY ET AL.

SIMON BORG ET AL., Partners, as S. BORG AND CO., *Appts.*,
v.
ILLINOIS MIDLAND RAILWAY COMPANY ET AL.

WILLIAM WARING ET AL., Partners, as WARING BROTHERS, *Appts.*,
v.
UNION TRUST COMPANY OF NEW YORK ET AL.

STOUGHTON J. FLETCHER ET AL., Partners, as S. A. FLETCHER & CO., *Appts.*
v.
ILLINOIS MIDLAND RAILWAY COMPANY ET AL.

(See S. C. Reporter's ed. 434-451.)

Railroads—consolidation—bond secured by mortgages—receiver's certificates—priority of lien—jurisdiction—practice—notice—costs.

The Peoria, Atlanta and Decatur Railroad Company, the Paris and Decatur Railroad Company, and the Paris and Terre Haute Railroad Company, three Illinois corporations, each constructed a certain line of road and issued bonds secured by mortgages thereon. Subsequently each of the other companies conveyed all of its property to the Peoria, Atlanta and Decatur Company, and that company soon thereafter changed its name to that of the Illinois Midland Railway Company, and issued its bonds secured by a mortgage to the Union Trust Company covering all of its property, including that purchased from the other companies. Pending subsequent litigation in a state court and the court below, to which various stockholders, judgment creditors, bondholders and others were or became parties, the property was controlled and operated under direction of said courts by successive receivers, who issued eighteen distinct series of receiver's certificates on account of repairs, taxes, betterments and operating expenses. Many of the questions presented here arise out of the issue of said receiver's certificates, the contest being substantially one between the Paris and Decatur bondholders and those who claim priority of lien as holders of said certificates or otherwise; and this court holds:

1. That certificates issued for necessary repairs are entitled to priority.
2. That the power of a court of equity having charge of railroad property to make necessary repairs does not depend upon the consent of those interested, nor upon prior notice to them.
3. That a subsequent opportunity to be heard, on evidence, as to the propriety of the expenditures and of making them a first lien, is judicially equivalent to prior notice, the receiver and those lending money to him, on certificates issued on orders made without prior notice, taking the risk of the final action of the court. But such action will only be affected by such objections to the merits of the orders as would have been availing if made before their entry.
4. That the bill filed in the state court by Hervey (the holder of a majority of the stock of the corporations), and certain judgment creditors, was sufficient to enable the court to administer the property as a trust fund and marshal the debts, making proper parties before adjudging the merits.
5. That certificates issued to pay tax liens are entitled to priority.
6. That third persons, not connected with the case or with the parties, who bought directly from the receiver his certificates, were not bound to see to the application of the proceeds.
7. That holders of certificates sold within the limit of discount fixed by the court, are entitled to their face with interest.
8. That certificates issued to replace earnings diverted from paying for operating expenses and ordinary repairs, to pay for necessary betterments or improvements, leaving large debts on account of such expenses and repairs, are entitled to priority.
9. That, in view of the facts of the case, the Paris and Decatur bondholders cannot insist that the want of affirmative assent by them or their trustee deprived the court of power to create, on the *corpus* of the property, any lien taking priority over the mortgage lien.
10. That while the ordinary expenses of the re-

ceiver in operating the road are first payable out of income, if any, the *corpus* may be resorted to when the items are proper, after scrutiny and opportunity for those opposing to be heard.

11. That wages due the employés of the Illinois Midland Company within six months immediately preceding the appointment of the first receiver, were properly allowed priority.

12. That the terms of the orders appointing the various receivers did not impair or exclude the ample authority of the court to order said ordinary expenses and "six months' labor claims" paid out of of the property itself, with priority.

13. That the final decree of the court below properly provided that the receiver's certificates, so made liens prior to the bonds, should be borne by the three several railroad properties in proportion to their relative lengths, although the terminal rentals and charges of the different roads were relatively unequal.

14. That the legality of the sales of their properties by the other companies to the Peoria, Atlanta and Decatur Company cannot now be questioned by the Paris and Decatur bondholders, their acquiescence pending the litigation and the contraction of debts by the receivers, with respect to the whole line operated as a unit, amounting to an estoppel.

15. That the expenses of the various receivership, incurred under the direction of the court for the benefit of all the roads, should be borne by each in proportion to its length, such expenses not being chargeable to the purchasing company alone.

16. That 994 bonds of the Paris and Decatur issue held by Waring Brothers, having been surrendered and exchanged for Illinois Midland bonds, were canceled and are now invalid and cannot be placed on a footing with other Paris and Decatur bonds not so exchanged, surrendered and canceled.

17. That no valid objection lies to the clause in the decree which provides that the several properties shall be offered for sale separately and then *en masse*; that the highest bid received for the entire properties shall be accepted, if it exceeds the aggregate of the highest bids for them when offered separately; and that the proceeds shall then be applied in proportion to said separate bids.

18. That certain claims for terminal facilities, track rents, traffic balances and labor performed, are entitled to priority.

19. That claims for certain large amounts borrowed from various banks by one of the receivers without previous authority of the court are not entitled to priority, although they were applied toward the payment of the proper expenses of the receivership.

20. That eight receiver's notes aggregating a large amount, although representing, in the main at least, proper expenses of the receivership are not entitled to priority, the receiver having borrowed the money for which they were given without previous authority of the court.

21. That claims for rent and extraordinary depreciation of rolling stock, right of way and certain other claims, are not entitled to priority.

22. That, with the exception of debts for taxes and receiver's certificates issued to pay taxes, there should be no priority or preference among debts and claims allowed precedence over mortgage bonds of any road, notwithstanding certain orders made by the court below.

[Nos. 1212, 1213, 1214, 1225.]

Submitted Jan. 11, 1886. Decided April 5, 1886.

APPEALS from the Circuit Court of the United States for the Southern District of Illinois.

The history and facts of the case appear in the opinion of the court:

Messrs. Wheeler H. Peckham, and *Edward S. Isham*, for the Union Trust Company.

Messrs. Edward S. Isham, Robert T. Lincoln and *Leopold Wallach*, for Simon Borg and others, partners, as Borg & Co.

Messrs. John M. Palmer and *Josiah M. Clokey*, for William T. Sylvester and others.

Messrs. John M. Butler, John T. Dye and *W. P. Fishback*, for Fletcher and Churchman.

Messrs. H. Crea and *Charles A. Ewing*, for Waring Brothers.

Mr. H. S. Greene, for the Wabash, St. Louis & Pacific R. Co.

Mr. Justice, **Blatchford** delivered the opinion of the court:

The Peoria, Atlanta and Decatur Railroad Company was incorporated as an Illinois corporation, in 1869, to construct a railroad from Peoria, in Tazewell County, in a general southeasterly direction, through Atlanta, in Logan County, to Decatur, in Macon County. Such of the road as was constructed was built in 1873 and 1874, from a point five miles east of Peoria, on what is now the Wabash, St. Louis and Pacific Railroad, to a place called Maroa, on the Illinois Central Railroad, thirteen miles north of Decatur. It did not reach either Peoria or Decatur, and the company owned no station grounds or terminal facilities at either place, but used, by lease, five miles of what is now the Wabash, St. Louis and Pacific Railroad, to reach Peoria, and thirteen miles of the Illinois Central Railroad, to reach Decatur. On the 25th of April, 1872, the company executed a mortgage to James F. Secor, as trustee. The mortgage recited that the company had commenced to construct a railroad to "extend from Cunningham's crossing, five miles from the City of Peoria, on the Toledo, Peoria and Warsaw Railway, thence southeast, to a point at or near to the City of Decatur," "a distance of about sixty-seven miles," and it covered the company's franchises, and its road and property, as constructed and to be constructed, acquired and to be acquired, "commencing at Cunningham's crossing, five miles from the City of Peoria, on the Toledo, Peoria and Warsaw Railway, to the City of Decatur," "a distance of sixty-seven miles." It was given to secure 1,300 coupon bonds of the company, of $1,000 each, payable to bearer, amounting to $1,300,000, carrying semi-annual interest at 7 per cent per annum, and payable May 1, 1902. The mortgage provided that on default continuing more than sixty days in the payment of any interest on any bond, the trustee, on the request of the holders of a majority of the bonds, might and should take actual possession of the mortgaged property, and operate the road, and receive its income, to pay the bonds, or, on the written request of the holders of at least one half of the outstanding bonds, cause the mortgaged property to be sold at public auction, and convey it to the purchaser, and, "after deducting from the proceeds of said sale the costs and expenses thereof, and of managing such property," apply the proceeds to pay the principal and interest of the bonds. The mortgage also provided that the trustee should "be entitled to have proper compensation for every labor or service performed by him in the discharge of this trust, in case he shall be compelled to take possession of said premises and manage the same." This mortgage was delivered and duly recorded.

The Paris and Decatur Railroad Company was incorporated as an Illinois corporation, in 1861, to construct a railroad from Paris, in Edgar County, westwardly to reach Decatur. This road was constructed, in 1871 and 1872, from Paris to a point on the Illinois Central Railroad about two miles south of Decatur, and although it had its own station and grounds at

Decatur, it entered them by using, by lease, about two miles of the track of the Illinois Central Railroad. On the first of July, 1871, the Paris and Decatur Company executed a mortgage to Joseph U. Orvis and William Adams, Senior, covering its franchises and its line of road and property, constructed and to be constructed, acquired and to be acquired, extending from Paris to Decatur, "a distance of seventy-five miles," to secure 800 coupon bonds of $1,000 each, and 800 coupon bonds of $500 each, in all $1,200,000. The mortgage was delivered and recorded, and the bonds were put into the hands of the trustees, and some of them were issued but afterwards retired, and all of them were destroyed, but the mortgage remains on record, not released. On the first of July, 1872, the Paris and Decatur Company executed a mortgage to the Union Trust Company, a New York corporation, covering its franchises, and its road and property, constructed and to be constructed, acquired and to be acquired, extending from Paris to Decatur, "a distance of seventy-five miles," to secure 2,400 coupon bonds, of $500 each, payable to bearer, in all $1,200,000, carrying semi-annual interest at 7 per cent per annum, and payable July 1, 1892. The mortgage provided that in case default in paying any interest on any bond should continue for six months after demand, the principal of all the bonds should forthwith become due, and the lien might be at once enforced, in which case it should be lawful for the trustee to enter on the mortgaged property, and to use and operate it until it should be sold under the power contained in the mortgage, or under the decree of a competent court; "And until such time, and from time to time, to make all needful repairs and replacements, and such useful alterations, additions and improvements to said railroad as may be necessary for the proper working of the same, and to receive the tolls, freights, incomes, rents, issues and profits thereof, and after deducting the expenses of operating and managing the said railroad and other property, and of the said repairs, replacements, additions and improvements, as well as just compensation for its own services and for the services and disbursements of such attorneys and counsel as it may employ, to apply the moneys accruing as aforesaid to the payment of said bonds *pro rata*." The mortgage also provided that, in case default should be made and should continue as aforesaid, the trustee might and, upon the written request of the holders of at least one thousand of the bonds outstanding, should, foreclose the mortgage by legal proceedings, or should sell the mortgaged property at public auction at New York or at Paris, and convey it to the purchaser; and that in case of such sale, the trustee should deduct from the proceeds its just allowances for the expenses thereof, including attorney's and counsel fees and disbursements, "and all expenses which may be incurred in operating, managing or maintaining the said railroad, or in managing the business thereof, as well as just compensation for the services of said trustee," and thereafter apply the proceeds to pay the principal and interest of the bonds *pro rata*. This mortgage was delivered and duly recorded.

The Paris and Terre Haute Railroad Company was organized as a corporation, under the general railroad laws of Illinois, in 1873, and the road was built in 1873 and 1874. It runs eastwardly from Paris to Farrington, in Illinois, a point on the St. Louis, Vandalia and Terre Haute Railroad, seven miles west of Terre Haute, and the company uses, by lease, the track of the latter road to reach Terre Haute. On the first of April, 1874, the company executed a mortgage to the Union Trust Company covering its franchises and its road and property, constructed and to be constructed, acquired and to be acquired, extending from Paris to the junction with the St. Louis, Vandalia and Terre Haute Railroad, a distance of about fourteen miles, to secure 280 coupon bonds, of $1,000 each, payable to bearer, in all $280,000, carrying semi-annual interest at the rate of 7 per cent per annum, and payable April 1, 1894. The mortgage contained like provisions with the Paris and Decatur mortgage as to what might be done after six months' default in interest, and as to taking possession of the property, and as to the powers of the trustee, and as to foreclosure or sale and disposition of the proceeds. This mortgage was delivered and duly recorded.

On the 19th of September, 1874, the Paris and Decatur Company, conveyed by deed to the Peoria and Atlanta and Decatur Company in consideration that the latter company thereby assumed all the bonded and floating indebtedness of the former company, the railroad then in operation, described as extending from Paris to Decatur, "passing into and through the Counties of Edgar, Coles, Douglas, Moultrie and Macon," including the franchises of the former company, and all its property acquired and to be acquired. [441]

On the same day the Paris and Terre Haute Company conveyed by deed to the Peoria, Atlanta and Decatur Company, in consideration that the latter company thereby assumed the payment of "all the bonded and floating indebtedness" of the former company, the railroad then in operation, described as extending from Paris to the line between Indiana and Illinois, "passing into the Counties of Edgar and Clark," including the franchises of the former company, and all its property acquired and to be acquired.

These purchases on these terms were authorized by the stockholders and directors of the purchasing company, and by the respective stockholders and directors of the selling companies, and the deeds were delivered and duly recorded.

On November 2, 1874, the Peoria, Atlanta and Decatur Company, under the provisions of the general law of Illinois, changed its name to that of the "Illinois Midland Railway Company." On the first of January, 1875, that company executed to the Union Trust Company a mortgage covering all of its property, including that so purchased, to secure 8,350 coupon bonds, of $500 each, in all $4,175,000, bearing semi-annual interest at 7 per cent per annum, and payable January 1, 1905. This mortgage was delivered and recorded.

On the 11th of September, 1875, Robert G. Hervey and two other parties filed a bill in equity in the Circuit Court of Edgar County, Illinois, against the Illinois Midland Railway Company. It set forth that Hervey owned a majority of the stock of the corporations above

named, and that the other plaintiffs were judgment creditors of the Paris and Decatur Company, with executions returned unsatisfied; that [442] there were judgments to the amount of about $200,000 against the Illinois Midland Company, on account of the construction and operation of the various corporations, and pending suits against it for about $100,000, on like account and executions out against it for over $100,000, on debts of the various corporations, on which its property was advertised for sale; that certain creditors and stockholders of the Paris and Decatur Company, a minority in number and amount, were threatening to have the Illinois Midland Company and its property placed in the hands of a receiver; that the plaintiffs represented a majority of the stock in all of the corporations, and desired to have a receiver of the franchises, railways and rolling stock of the corporations appointed immediately and without further notice, or the rights of the creditors and stockholders would be irreparably prejudiced; that negotiations were pending, which the plaintiffs believed would be successful, to raise sufficient money to pay off all judgments, liens and claims against the company, if left under the present control, or under that of the holders of a majority of the stock; that to effect such loans or advances of money it was absolutely necessary that the respective debts of the various corporations should be ascertained, and when their respective liabilities to each other and to their respective creditors were fixed, they could, on their joint stock and assets, raise sufficient money to relieve them from their embarrassments and pay all their creditors; that, if a receiver was appointed to take charge of them and settle their affairs, their credit would be restored as soon as their condition should be adjudged by the court; and that they had ample assets, if not sacrificed by sales on execution and construction liens, to pay all indebtedness and leave a sufficient surplus to run the road for the benefit of the stockholders. The prayer of the bill was that a receiver be appointed of all the rights and franchises of the Illinois Midland Company, and of all the property in its control; and that an account be taken of all the claims, liens and liabilities of its stockholders and creditors, and of those of the corporations above named, and they be ordered to be paid and adjusted, as the respective rights [443] and interests of such stockholders and creditors should appear; and for further and other relief, according to equity.

On the same day the Illinois Midland Company appeared to the bill by attorney, and waived notice and submitted itself to the court for such order in the premises as might in equity be right and proper; and the judge of the court, at chambers, made an order appointing as receiver George Dole, of Paris, and requiring him to give a bond for $75,000, with security, and then to "forthwith take possession of all the personal, real and mixed property of every kind belonging to or in the possession of said Illinois Midland Railway Company, including the property formerly owned and possessed by the Peoria, Atlanta and Decatur Railroad Company, the Paris and Decatur Railroad Company, and the Paris and Terre Haute Railroad Company; and if necessary to sue for, in the name of said receiver, and recover, all the property of said company or companies, whether real, personal or mixed, and whether in possession or in action." The order also provided as follows:

"It is further ordered, adjudged and decreed, that said receiver be and is hereby empowered and directed to carry on the business of said railway companies until the respective rights of the parties in interest can be fully ascertained and determined, under and subject to the revision and direction of this court, and until otherwise ordered by this court, and to use and employ the property, franchises, rights of way, roadbed, tracks, locomotives, rolling stock, machinery, fixtures, and property of whatever kind or nature; and said receiver shall be, and hereby is, invested with all the rights and franchises vested by law in said railway company or companies, in the execution of the duties and trusts aforesaid. Said receiver shall have authority to employ all necessary and proper agents, attorneys, officers and laborers, and to fix and alter the compensation of said agents, attorneys, officers and laborers, subject to the revision of this court. Said receiver shall also have authority, subject to the revision of this court, to make such repairs and necessary additions to said railway, or railroads, and property, as may be essential to the interests and safety of the same, and proper in his judgment for carrying on said business; also to make all contracts that may be necessary in carrying on the business of said company or companies, subject to like supervision of this court; also to collect in his own name, as receiver aforesaid, all debts, claims or demands, of whatever kind or nature, owing, or that may become due and owing, to the said company or companies, or to said receiver, from any and all sources. Said receiver is also ordered to make a full, true and correct inventory of all the property that may come into his hands as such receiver. It is further ordered, adjudged and decreed, that, out of the moneys that shall come into the hands of said receiver from the operation of said railway, he shall: first, pay all current expenses incident to the creation or administration of this trust, and to the operating of said railway or railroads; second, pay all sums due or to become due connecting or intersecting lines of railroads, arising from the interchange of business, and for track service of other railroads used by said Illinois Midland Railway Company in the operation of its lines, and all amounts now legally due from said railway company or companies for taxes; third, pay all amounts due to all operatives and employés, and attorneys and agents of said company or companies, for any service rendered said company or companies since the 11th day of March, A. D. 1875; fourth, pay all amounts due for supplies purchased and used in operating said railway or railroads by said company or companies, for supplies furnished to laborers and credited against their labor, since the 11th day of March, A. D. 1875; fifth, and all amounts due from said railway company for or on account of the rental of rolling stock; and the money belonging to said railway company, except as heretofore directed, shall be held by said receiver until he is authorized to disburse the same under the order or decree of this court,

sixth, and said receiver is further authorized, in case it is proper in his judgment, with the sanction of the court, to use any balance of funds arising from the operating of said railway or railroads, for the purpose of protecting such of the real or personal property of said corporation or corporations, under lien, sale, pledge, mortgage or contract, from sacrifice, by the payment of interest or principal or otherwise, or by the renewal of such pledge or lien, mortgage or contract. It is further ordered that, upon demand, the said company or companies, their officers or agents, shall forthwith [445] deliver over to the receiver all the property aforesaid, and that neither said company or companies, nor any officer or agent or employé of said companies, shall interfere with or molest the possession or enjoyment of any of said property in the possession of or placed under the control of said receiver. It is further ordered that said receiver shall retain possession and continue to discharge the duties and trusts aforesaid, until the further order of this court in the premises; and that he shall, from time to time, make report of his doings in the premises, and may, from time to time, apply to this court for such other and further order and direction in the premises as he may deem necessary and requisite to a due administration of said trust; and said receiver is hereby vested, in addition to the powers aforesaid, with all the general powers of receiver in cases of this kind, subject to the supervision of this court." The bond was given, and was approved by the court, and at September Term, 1875, an order was made entering of record the order at chambers, and the receiver's bond and oath, and directing him to proceed, as before ordered.

On the 16th of October, 1875, an amended bill was filed, the plaintiffs in which were Hervey, and also William Waring, Henry Waring and Charles Waring, partners as Waring Brothers, and thirty-one other persons. It set forth that Hervey then owned 27,500 shares, or $1,375,000, of the 32,000 shares, at $50 each, or $1,600,000, of the capital stock of the Paris and Decatur Company; and 14,200 shares, or $1,420,000, of the 20,000 shares, at $100 each, or $2,000,000, of the capital stock of the Peoria, Atlanta and Decatur Company; and 4,500 shares, at $100 each, or $450,000, being the entire capital stock of the Paris and Terre Haute Company. It also set forth that Waring Brothers then owned one fourth or $500,000 of the capital stock of the Illinois Midland Company, and 1,548 of the bonds of that Company, and 885 others of its bonds, which they had taken in exchange for 885 bonds of the Paris and Decatur Company, of like amount. The other plaintiffs were judgment and general creditors of the four corporations, whose debts were stated at $106,112.23, on account of the construction and operation of the various companies. The amended bill averred that, in con- [446] sequence of the facts set forth in the original bill and which were repeated, the Illinois Midland Company was unable to transact its necessary business; that the executions and levies referred to had removed from its use a large portion of its rolling stock; that the suits and judgments had seriously impaired its credit, and it was unable to procure the necessary supplies, materials and labor to successfully operate the road; and that some of the hands employed in maintaining its track had declined to labor further, whereby its track had become unsafe. The prayer of the amended bill was the same as that of the original bill.

The further action of the court, in regard to the receiver and his successors and their proceedings, will be referred to hereafter, as questions in regard to those proceedings shall be considered.

On the 15th of February, 1876, Albert Grant and Maurice Grant, partners, as Grant Brothers & Co., of London, and also James F. Secor, petitioned and were admitted to be defendants, and on the same day they filed their respective answers to the amended bill; Grant Brothers & Co. claimed to own 1,200, or one half of the Paris and Decatur bonds, 1,200 of the 1,800 Peoria, Atlanta and Decatur bonds, and all (280) of the Paris and Terre Haute bonds; and that the lien of their bonds was superior to the claims of any of the plaintiffs.

The answer of Secor set up his mortgage, and alleged that none of the interest due May 1st, 1875, on the bonds of the Peoria, Atlanta and Decatur Company had been paid, and he had been requested by the holders of a majority of those bonds to take steps to protect their interests; and that by the terms of the mortgage he was entitled to take possession of the road for the benefit of the bondholders. He asked that the court would order the receiver to turn over to him the property covered by the mortgage of the Peoria, Atlanta and Decatur Company.

On the 4th of October, 1876, the Paris and Decatur Company and the Paris and Terre Haute Company were made defendants to the bill, and they severally appeared on October 10, 1876, and at the March Term, 1877, put in answers.

On the 5th of December, 1876, the Union Trust Company filed a bill in the Circuit Court [447] of the United States for the Southern District of Illinois, against the four corporations and Hervey and Secor, to foreclose the three mortgages made to the Union Trust Company. But this suit does not appear to have been further prosecuted, except that by the interlocutory decree of June 11, 1884, hereafter mentioned, it was consolidated with the other causes.

At September Term, 1877, the Union Trust Company was, by order, made a party defendant in the Hervey suit, "with all the rights and privileges as though it had been an original defendant," on its petition setting forth a default July 1, 1875, in the payment of interest on the Paris and Decatur bonds, and that it had demanded and been refused payment of such interest, and that the principal and interest of the bonds had become due, and that a majority of the holders of the bonds had required it to proceed to foreclose the mortgage; and that the same was true as to a default October 1, 1875, in the payment of the interest on the Paris and Terre Haute bonds, and as to a default July 1, 1875, in the payment of the interest on the Illinois Midland bonds.

On the 15th of February, 1878, the Union Trust Company filed a bill in the Circuit Court of the United States for the Southern District of Illinois, against the Paris and Decatur Company and the Illinois Midland Company, to foreclose the Paris and Decatur mortgage.

alleging a default January 1, 1876, in the payment of interest on the Paris and Decatur bonds; that the Illinois Midland Company, in issuing its 8,350 bonds, intended to exchange them, dollar for dollar, for the bonds of the other three corporations; and that more or less of the Paris and Decatur bonds were exchanged, and some were, on exchange, marked canceled, but the persons who exchanged them claimed that the purchases by the Peoria, Atlanta and Decatur Company of the other two roads were void, and that the bonds issued by the Midland Company were void, and that the exchange and cancellation of the Paris and Decatur bonds were void, and that those bonds remained the property of their former owners.

[448] On the same day the Union Trust Company filed a bill in the same federal court against the Paris and Terre Haute Company and the Illinois Midland Company, to foreclose the Paris and Terre Haute mortgage, alleging a default October 1, 1875, in the payment of interest on the Paris and Terre Haute bonds, and containing, in regard to the exchange of those bonds, like allegations with those above set forth as to Paris and Decatur bonds, in the bill to foreclose the Paris and Decatur mortgage.

On the same day Secor filed a bill in the same federal court, against the Illinois Midland Company, to foreclose the Peoria, Atlanta and Decatur mortgage, alleging a default May 1, 1875, in the payment of interest on the Peoria, Atlanta and Decatur bonds.

On the 6th of April, 1878, by an order of the state court, the Hervey suit was, on a petition filed by the Union Trust Company, removed into the Circuit Court of the United States for the Southern District of Illinois.

On the 13th of August, 1879, the last two suits brought by the Union Trust Company and the suit brought by Secor were consolidated by the federal court.

On the 31st of August, 1881, Abe Freidenberg, on behalf of himself and other holders of Paris and Decatur bonds, filed a bill to foreclose the Paris and Decatur mortgage, in the same federal court.

The last two suits brought by the Union Trust Company, the suit brought by Secor, the Hervey suit, the Freidenberg suit, and a suit which had been brought in the same federal court by the Kansas Rolling Mill Company, in January Term, 1879, against the Illinois Midland Railway Company and others, were consolidated by an order made June 23, 1882.

Many of the contested questions in these cases arises out of the transactions of the receiver originally appointed and his successors, especially in issuing receiver's certificates; and the contest, as presented to this court, is substantially one between the Paris and Decatur bondholders on one side, and those who claim a priority of lien over the bonds on the other.

On the 31st of August, 1876, Richard J. Rees was, by an order made at chambers, by the judge of the state court, in the Hervey suit, ap-
[449] pointed receiver in the place of Dole, resigned, and the order was confirmed by the court at the September Term, 1876. On the 10th of December, 1878, Louis Genis was, by an order made by the federal court in the Hervey suit, appointed receiver in the place of Rees, resigned. On the 4th of April, 1882, by an order made in the Freidenberg suit, David H. Conklin was appointed receiver in the place of Rees, resigned, and on the 13th of April, 1882, a like order was made in the *Hervey Case*. Genis having filed his final report, the court made an order, on May 13, 1882, appointing a special commissioner to examine and report thereon, and on the correctness of Genis' accounts. By an order made June 13, 1882, power was given to the commissioner to examine witnesses as to the contents of the report and the acts of Genis as receiver. By an order made June 22, 1882, the commissioner was directed to investigate and report in detail the number and amount of certificates of indebtedness issued by the several receivers, and for what purpose they were issued and to whom, and the number and amount of such as were special liens on any of the property, and the character of the charge of all which were not specific liens. By an order made June 23, 1882, it was ordered that the issues in the consolidated causes be made up by a day named, and that by that day the commissioner report the amount of receiver's certificates outstanding, for what they were given and by whom held, and the amount of the receiver's indebtedness and to whom due.

On the 18th of April, 1883, the commissioner made a report as to the matters referred to him, to which exceptions were filed by Freidenberg, by the Union Trust Company and Secor, and by judgment creditors of the Paris and Decatur Company, and by Adams and Orvis. On the 7th of June, 1884, the commissioner filed a supplemental report. He also reported the testimony taken before him. The cases were brought to a hearing in the circuit court before *Mr. Justice* Harlan (all orders made in them prior to that time, in the federal court, having been made by the district judge), and he passed on the various questions raised, in an opinion [4
filed February 29, 1884. An interlocutory decree was entered June 11, 1884, confirming the report of the commissioner in all things, and making specific adjudications as to the validity and status of eighteen different series of receiver's certificates and of other debts incurred by the receiver, and referring it to the same commissioner to take certain accounts, and to report the amounts due on the various outstanding bonds, and the numbers and amounts of the bonds of the sectional mortgages which had been surrendered and exchanged for Illinois Midland bonds, and what Paris and Decatur bonds remained outstanding, which had not been exchanged for Illinois Midland bonds, and the amount due from one to the other of the three sectional roads, making proper allowance for the use by them respectively of rolling stock or terminal facilities belonging to the others, and for moneys paid by one for expenses or debts properly payable by another; and to report a proper distribution of the liens or obligations on or of the different roads, to pay any of the receiver's certificates or indebtedness; and as to which road should pay for terminal facilities, and what indebtedness the receivers had incurred therefor, and for rent of rolling stock, motive power, and other matters; and to take and report all other testimony offered by any party, pertinent to the issues. The commissioner was also directed to take an account of all the indebtedness of the receivership, and of

all claims of employés which accrued within six months before the first appointment of a receiver, and of all claims for rights of way or lands used for railroad purposes, not paid for, and of all bonded indebtedness of the four corporations, properly classified; and to report as to all contested claims, with the testimony thereon.

The commissioner made his report on the 15th of January, 1885, accompanied by the additional testimony he had taken. Freidenberg and other holders of Paris and Decatur bonds filed exceptions to it, as did Waring Brothers and certain judgment creditors of the Paris and Decatur Company and of the Illinois Midland Company.

The case was heard in the circuit court by *Mr. Justice* Harlan, and on the third of June, 1885, a final decree was entered disposing of the [1] questions litigated, and providing for a sale of the mortgaged property and the distribution of the proceeds. Freidenberg appealed to this court from specified parts of the decree of June 11, 1884, and from specified parts of the decree of June 3, 1885, as representing holders of Paris and Decatur bonds; but this appeal was not perfected and in place of it, Simon Borg, Leo Speyer, and Samuel Lichtenstadter were admitted as parties to the consolidated causes, as holders of Paris and Decatur bonds, and by leave took and perfected an appeal from specified parts of both decrees. Waring Brothers and the Union Trust Company have taken separate appeals from the last decree; and Stoughton J. Fletcher and Francis M. Churchman, partners, as S. A. Fletcher and Company, have appealed, as holders of receiver's certificates, from that decree.

It will be proper to first consider the question of the receiver's certificates.

The final decree declares that the lien of the Paris and Decatur bonds is subject to certain receiver's certificates of the 8th, 12th, 14th, 16th, 17th and 18th series, which are to have priority in payment to the Paris and Decatur bonds, out of the proceeds of sale of the Paris and Decatur road, and which amount, with interest to January 15, 1885, to $200,408.87.

There are six certificates of $5,000 each, of the 8th series, bearing 10 per cent interest. They were issued under an order made October 9, 1876, which states that the court finds that the entire line from Peoria to Terre Haute is in great need of immediate repair, and in an unsafe condition to be operated, and that the line between Paris and Decatur is in a worse condition than any of said line, and requires an immediate outlay, for iron, ties, and other materials, ballasting and labor, to put it in a safe condition, of $34,076, and authorizes the receiver to borrow $34,860, to be expended in repairing the Paris and Decatur road, and to issue receiver's certificates therefor in sums of $5,000 each, bearing 10 per cent interest, and declares that the certificates "shall be a first lien on the right of way, iron, ties, bridges and and entire railway property on said portion of the line between Paris and Decatur." The com- [2] missioner finds that the moneys were expended in accordance with the order.

There is one certificate of the 12th series, for $32,475.20, with 10 per cent interest, issued under two orders, to borrow money to pay off tax liens, the orders declaring that it should be a lien on the Paris and Decatur line superior to the mortgage and to all prior certificates. It was taken at par. When it was issued the legal rate of interest was 8 per cent, 10 per cent having been the legal rate at the time of the first order, and having been the rate specified in that order, and the authority conferred by the first order being made part of the second. The commissioner states that the only dispute was as to the rate of interest; that the money was advanced under the first order, made July 26, 1878, before the issue of the certificate, and at a time when the legal rate of interest was 10 per cent; that that order authorized the sale of the certificate at ninety cents on the dollar; that the mortgagees and bondholders waived any plea of usury, and the corporation itself could not plead usury; and that that defense was made only by the trustee for the holders of surrendered bonds and by judgment creditors. The commissioner reported it as his opinion that the certificate should have effect, as to its amount and lien and rate of interest, as authorized, and according to its purport. The circuit court confirmed this view.

There is one certificate of the 14th series, for $4,876 and 8 per cent interest, issued under the before named order of October 9, 1876, and a subsequent order made January 29, 1881, for money to repair the Paris and Decatur road, being for the balance of money authorized by the first order, the second order declaring the like lien as the first order.

There are one certificate of the 16th series, for $9,505 and 8 per cent interest, and three certificates of the 17th series, two of them for $10,000 each, and one for $5,495, all with 8 per cent interest, issued under an order made June 29, 1881, which set forth that it was necessary to the protection of the railroad property that an outlay should be made forthwith for betterments; and authorized the receiver to expend in betterments on the line between Paris and Decatur $35,000, and to issue certificates [453] to procure money for that purpose, and sell them at not less than ninety cents on the dollar, the same to be a special charge on the line and railroad property between Paris and Decatur, superior to all liens and debts, except receiver's debts before declared by order of court to be special charges or liens on that portion of the railroad. The commissioner states that these certificates were sold, some at 4 and some at 6 per cent discount; and that the holders of the certificates, when they bought them, had no connection with the case or with the parties.

There are four certificates of the 18th series, three of them for $10,000 each, and one for $8,288.98, all at 8 per cent interest, issued under another order made June 29, 1881, which set forth that the receiver had expended on the Illinois Midland road, for side tracks and other betterments, $80,037.98, of which $42,664.98 had been expended on the line between Paris and Decatur; that of the $80,037.98 $63,037.98 had been paid paid out of the earnings of the line, of which $38,288.98 was expended on the line between Paris and Decatur; that the earnings of the whole line had not been sufficient to meet the usual expenses of operation and the ordinary repairs of the permanent way; and that the receiver had incurred unpaid debts to

a larger amount than $63,097.88, in the usual operation of the line and in ordinary repairs of the permanent way. The order approved and confirmed the appropriation of the $63,037.98 out of the earnings in payment for betterments; declared that that sum was a special charge and lien on the several portions of the line in proportion to the amounts expended on the respective portions; and authorized the receiver to issue certificates to the amount of $38,288.98, at 8 per cent interest, as representing so much of the $63,037.98 as was expended for betterments on the line between Paris and Decatur, the same to be a special charge and lien on the line and railroad property between Paris and Decatur, superior to all liens and debts except receiver's debts before declared by order of court to be special charges and liens on that portion of the railway; and the certificates to be sold at not less than ninety cents on the dollar. The [454] certificates were sold at a discount within that permitted.

Simon Borg and others appeal because of the priority awarded to the above named sixteen receiver's certificates.

When the order of October 9, 1876, was made, under which the six certificates of the 8th series were issued, neither the trustee nor any of the bondholders of the Paris and Decatur Company were parties to the suit. But before any other order was made under which any of the sixteen certificates referred to were issued, the Union Trust Company had become a party to the Hervey suit as trustee in the Paris and Decatur mortgage, and the default in the payment of the interest on the Paris and Decatur bonds had occurred by January 1, 1876.

The certificates of the 8th and 14th series were issued for necessary repairs; that of the 12th to pay tax liens; those of the 16th and 17th for betterments; and those of the 18th to replace earnings diverted from paying for operating expenses and ordinary repairs, to pay for betterments, while debts to a larger amount had been incurred for the operating expenses and ordinary repairs.

In regard to the certificates issued for necessary repairs there can be no doubt, either on authority or on principle. In *Wallace* v. *Loomis*, 97 U. S. 146 [Bk. 24, L. ed. 895], on the filing of a bill by the trustees of the first mortgage on a railroad, to foreclose it, the court appointed receivers, "with power to put the road and property in repair, and to complete any uncompleted portions thereof, and to procure rolling stock, and to manage and operate the road to the best advantage, so as to prevent the property from further deteriorating, and to save and preserve it for the benefit and interest of the first mortgage bondholders and all others having an interest therein;" and with power, also, for those purposes, to raise money, by loan, to an amount limited in the order, by issuing certificates "which should be a first lien on the property." The final decree declared that the moneys raised by loan, or advanced by the receivers and expended on the road pursuant to the order, were a lien paramount to the first mortgage, and should be paid out of the proceeds of sale before the first mortgage bonds were paid. A holder of second mortgage bonds objected to such priority. On that subject, this court said, by *Mr. Justice* Bradley: "The power of a court of equity to appoint managing receivers of such property as a railroad, when [4 taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution, and if possible with the consent or acquiescence of the parties interested in the fund." It is true that the second mortgage trustees in that case were parties to the suit when the order was made, and had due notice of the application, and made no objection. As to that the court said that the bondholders were represented by their trustees and must be regarded as bound by their acts, at least so far as concerned "the power of the court to act, in making the order, and so far as the interest of third persons acting upon the faith of it might be affected." It also said that when the appellant became a party, he suggested no objection to the terms of the order appointing the receivers, and that there was no just exception to the order or the decree.

Property subject to liens and claims and debts of various characters and ranks, which is brought within the cognizance of a court of equity for administration and conversion into money, and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court, through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but if perishable, it must be sold, by way of preservation. A railroad, and its appurtenances is a peculiar species of property. Not only will its structures deteriorate and decay and perish if not cared for and kept up, but its business and good will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given not merely for [4 private gain to the corporators, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations, must necessarily be held to do so in the view, that, if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property by a sale, into other hands, to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and, under some circumstances it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent, nor on prior notice. Consent is desirable but is seldom practicable, where the debts exceed the value of the property. Though prior notice to persons interested, by notifying them as parties, first requiring them to be made parties if they are not, is generally the better

way, yet many circumstances may be judicially equivalent to prior notice. A full opportunity, as in this case, to be heard, on evidence as to the propriety of the expenditures and of making them a first lien, is judicially equivalent. The receiver, and those lending money to him on certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court in regard to the loans. The court always retains control of the matter, its records are accessible to lenders and subsequent holders, and the certificates are not negotiable instruments.

The principle laid down in *Wallace* v. *Loomis* was applied in *Miltenberger* v. *Logansport R. Co.* 106 U. S. 286 [Bk. 27, L. ed. 117]. In that case a bill was filed by a second mortgagee, against the mortgagor, and a first mortgagee, and judgment creditors of the mortgagor, to foreclose a mortgage on a railroad. On the day the bill was filed, and without notice to the first mortgagee, a receiver was appointed and power given him to operate and manage the road, "receive its revenues, pay its operating expenses, make repairs, and manage its entire business; and to pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and to pay into the court all revenue over operating expenses." [7] After that, and without notice to the first mortgagee, who had not appeared, although notified of the order appointing the receiver, and of the pendency of the suit, the court authorized the receiver to purchase engines and cars, and to adjust liens on cars owned by the mortgagor, and to pay indebtedness not exceeding $10,000, to other connecting lines of road, in settlement of ticket and freight accounts and balances, and for materials and repairs, which had accrued in part more than ninety days before the order appointing the receiver was made, and to construct five miles of new road, and a bridge. The petition for the order stated the necessity for the rolling stock and for the adjustment of the liens; that the payment to the connecting lines was indispensable to the business of the road, and it would suffer great detriment unless that was provided for; and that the new road and the bridge would come under the mortgages, and their construction would be to the advantage of the bondholders. After the first mortgagee had appeared and answered, an order was made, but not on prior notice to it, authorizing the receiver to issue certificates to pay for rolling stock he had bought under orders of the court, and to pay debts incurred for building the five miles of road and the bridge, under those orders, and to pay debts incurred for taxes, and rights of way, and back pay and supplies in operating the road, the certificates to be payable out of income, and, if not so paid, to be provided for by the court in its final order. Claims thus arising were afterwards allowed, to be paid out of the proceeds of sale, before the mortgage bonds. This court upheld such priority, as to the debts for the purchase of rolling stock and for the adjustment of liens and for the construction of the five miles of road and the bridge and for the amount due connecting lines, some of which was incurred more than ninety days before the receiver was appointed. On the latter branch of the subject it said: "It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, [458] or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of nonpayment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien. This view of the public interest in such a highway for public use as a railroad is, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court, speaking by *Mr. Justice* Woods, in *Barton* v. *Barbour*, 104 U. S. 126 [Bk. 26, L. ed. 672]."

In allowing the certificates of the 8th and 14th series, for necessary repairs, with priority, the master acted, and we think properly, on the authority of the cases of *Wallace* v. *Loomis* and *Miltenberger* v. *Logansport Railway Co.*

In this connection it is objected that in those cases the suits were foreclosure suits brought by trustees under mortgages, and that a different rule should obtain in a case where the trustees or the bondholders do not come into court initially, asking the aid of equity in the appointment of a receiver. It is said that the Hervey suit was not such a suit. But the co-plaintiffs with Hervey were judgment creditors [459] of the Paris and Decatur Company, with executions returned unsatisfied. The bill set out the precarious condition of all the property held and used by the Illinois Midland Company, and the necessity for a receiver in the interest of all the creditors of all four of the corporations, to prevent the levy of executions on such property; and it prayed for a judicial ascertainment and marshaling of all the debts of all the corporations, and their payment and adjustment as the respective rights and interests of the creditors might appear, and for general relief. The plaintiffs set forth that they represented a majority of the stock in all the corporations. This bill was quite sufficient to enable

a court of equity to administer the property and marshal the debts, including those due the mortgage bondholders, making proper parties before adjudging the merits.

In regard to the fact that neither the Paris and Decatur bondholders nor their trustee were parties to the suit when the order of October 9, 1876, was made, the commissioner took the view, which the circuit court confirmed, that while they ought to be heard before the order was made conclusive against them, yet, as the objections to the merits of the order would not have been availing if made before it was entered, and the money had been actually and faithfully applied, under the order of the court, to the improvement of the mortgaged property, no equitable reason appeared why the bondholders should keep the benefits and escape the burden.

The certificate of the fourteenth series was issued not only under the order of October 9th, 1876, but under that of January 29, 1881. The Union Trust Company was admitted, on its own petition, to be a party defendant in the Hervey suit in September, 1877. That petition stated that the interest on the Paris and Decatur bonds had been in default since July 1, 1875. The order of January 29, 1881, was made by the federal court. The Union Trust Company had removed the Hervey suit into the federal court in April, 1878, and had filed in that court a foreclosure bill on the Paris and Decatur mortgage as early as December, 1876, and another such bill in February, 1878. The interest on the Paris and Decatur bonds had been in [460] default, as the latter bill alleged, since January 1, 1876, and the receiver was in open possession of the entire line of road and running it, and exercising the powers which the orders of the courts had conferred upon him. Under these circumstances, the Paris and Decatur trustee and its bondholders in court, through it, can be heard to make no other objections to the orders except such as arise as to the merits of the expenditures made under them. The view of the commissioner and the circuit court was that the bondholders should have such rights and equities as they could have properly claimed as parties *ab initio*, and that this view should apply against them as well as for them. In this we concur.

The principles properly applicable to this branch of the case were well expressed by *Mr. Justice* Harlan in his opinion of February 29, 1884, as follows: "Those who take receiver's certificates must be deemed to have taken them subject to the rights of parties who have prior liens upon the property, and who have not, but should have, been brought before the court. While the court, under some circumstances, and for some purposes, and in advance of the prior lienholders being made parties, may have jurisdiction to charge the property with the amount of receiver's certificates issued by its authority, it cannot, without giving such parties their day in court, deprive them of their priority of lien. When such prior lienholders are brought before the court, they become entitled, upon the plainest principles of justice and equity, to contest the necessity, validity, effect, and amount of all such certificates, as fully as if such questions were then, for the first time, presented for determination. If it appears that they ought not to have been made a charge upon the property, superior to the lien created by the mortgages, then the contract rights of the prior lienholders must be protected. On the other hand, if it appears that the court did what ought to have been done, even had the trustee and the bondholders been before it when the certificates were authorized to be issued, the property should not be relieved from the charge made upon it, in good faith, for its protection and preservation. Of these rules or principles the parties who inaugurated this litigation cannot justly complain. They were not ignorant of the fact that there were existing mortgages upon this property, and that fact should have been brought to the attention of the court at the very outset. Nor have the bondholders any ground of complaint if the court charges upon the property such expenditures as now appear to have been rightfully made in the interest of all concerned in its management, while in the hands of a receiver. As to receiver's certificates issued, with the sanction of the court, after the trustees became parties, the purchasers and holders should be accorded such rights as, by the settled principles of equity, are accorded to those who deal with judicial tribunals having jurisdiction in the premises."

The propriety of the allowance of the certificate of the twelfth series for tax liens needs no argument, and we think the interest, as allowed, was proper.

As to the $35,000 of certificates of the sixteenth and seventeenth series, issued to pay for betterments, the present holders, who bought them directly from the receiver, had no connection with the case or with the parties. A question was made before the commissioner that the receiver did not faithfully apply the money as directed by the court. He held, and the circuit court sustained him, that these purchasers were not bound to see to the application of the proceeds, citing the decision to that effect by *Mr. Justice* Woods, in *Stanton* v. *Alabama, etc. R. R. Co.* 2 Woods, 506. In this view we concur.

It was also contended before the commissioner that all that the holders of these certificates were equitably entitled to was the money they paid, and without interest, and not the face of the certificates and interest. The view taken by the commissioner, and confirmed by the circuit court, was that as the certificates were issued for debts contracted by the court, when it had jurisdiction of the parties and of the subject matter, to persons who in good faith invested their money, for the benefit of the property in the possession of the court, the certificates should be paid according to their tenor, as authorized. We concur in these views. It may be added that as the order of June 29, 1881, authorized the certificates to be sold at not more than 10 per cent discount, it must be presumed that the parties taking the certificates relied on the promise to pay their face, and would not otherwise have trusted the receiver or the fund. The court which made that order thought the limit of discount a reasonable one, and the certificates were sold within that limit.

In regard to what the order calls "betterments," it appears from the petition of the receiver, on which the order was made, that the

$35,000 were to be expended for ties, rails, new turn table and foundations, bridges and fences, on the existing line of road, and not for any new extent of road. An affidavit annexed to the petition, made by the road master of the Illinois Midland Company, states that in order to place the railway in a suitable condition for the safe transportation of business, the expenditure contemplated was absolutely necessary. The commissioner finds that the money was expended in substantial compliance with the order of the court, and that the improvements made by the receiver no more than made up for the deterioration of the road, especially in view of its imperfect construction and inferior material from the beginning. This finding was approved by the circuit court.

As to the certificates of the eighteenth series, issued to replace earnings diverted from paying for operating expenses and ordinary repairs, to pay for betterments, while debts to a large amount had been incurred for the operating expenses and ordinary repairs,—it appears by the petition of the receiver, and the affidavit of the road master annexed to it, on which the order of June 29, 1881, under which the certificates were issued, was made, that the expenditures for new side tracks and betterments so paid for out of earnings consisted principally of expenditures for roadbed, bridges, iron and ties, which were in a worn out and insufficient condition.

The commissioner and the circuit court rested the allowance of these certificates on what was said by this court in the case of *Fosdick* v. *Schall*, 99 U. S. 235, 253, 254 [Bk. 25, L. ed. 339, 343], which views were applied in *Burnham* v. *Bowen*, 111 U. S. 776 [Bk. 28, L. ed. 596], to the effect that when the current income of a railroad in the hands of a receiver is diverted to the improvement of the property by the receiver, and debts for operating expenses are not paid, provision should be made, in foreclosing a mortgage on the road, to pay such debts out of the proceeds of the sale of the property. See also *Union Trust Co.* v. *Souther*, 107 U. S. 591 [Bk. 27, L. ed. 488].

The general principles hereinbefore stated on which the receiver's certificates referred to are allowed, are those sanctioned in *Meyer* v. *Johnston*, 53 Ala. 237, and *Hoover* v. *Montclair etc. R. Co.* 29 N. J. Eq. 4.

The strenuous contention on the part of the Paris and Decatur bondholders is that a court of chancery had no power, by a receiver and without their consent, to create, on the *corpus* of the property, any lien taking priority over the mortgage lien. But these bondholders were represented by their trustee, the Union Trust Company. It filed a bill in the federal court as early as December, 1876, to foreclose the Paris and Decatur mortgage; and it was made a party, on its own petition, to the suit in the state court, in September, 1877. The Paris and Decatur mortgage provided that in case of default for six months in paying interest on the bonds (and such default occurred at latest on January 1, 1876, and the six months expired July 1, 1876, more than three months before any order was made on which any of the certificates were issued), all the bonds should become due and the lien might be enforced, and the trustee might enter on the property and operate it till sold, and make all needful repairs and replacements, and such useful alterations, additions and improvements to the road as might be necessary for its proper working, and pay for them out of the income; and also that in case of a default so continuing, the trustee might foreclose the mortgage by legal proceedings or sell the property by public auction; and should, in case of such sale, deduct from the proceeds all expenses incurred in operating, managing or maintaining the road or in managing its business, and thereafter apply the proceeds to pay the bonds. In the face of these provisions of the mortgage under which the bonds are held, and of the facts before recited as to the negligence of the trustee all the while the property was in the hands of the court, it does not at all comport with the principles of equity for the bondholders now to insist that the want of affirmative consent by them [464] or their trustee could paralyze the arm of the court in the discharge of its duty. The want of that aid which it was the duty of the trustee and the bondholders to give to the court in discharging its responsible functions, with the road openly in charge of the receiver and being run by him, and his acts plain to view, and the interest on the bonds in arrear, cannot be urged to a court of equity as a ground for denying its power to do what was thought by it best for the interests of all concerned, including even those who thus willfully stood aloof.

The appellants Borg and others also complain of provisions in the final decree, giving priority over the Paris and Decatur bonds to just and equitable proportions of the following items: 1, amount of wages due employés of receivers Dole, Rees and Genis, as shown by schedules J and K of the report of the commissioner, the total amount being $76,820.90; 2, the indebtedness due from the receivership to railroad companies, as shown by schedule L of the report, amounting to $84,615.21; 3, the general indebtedness of the receivership, as shown by schedule M of the report, under the head of supplies, amounting to $67,787.76, and under the head of "damages" amounting to $5,871.04, and forty-four items under the head of "miscellaneous," amounting to $32,937.49; 4, seven claims theretofore allowed and ordered to be paid by the court, amounting to $1,498.18; 5, four claims on intervening petitions, allowed at $11,642.29; 6, amount of wages due employés of the Illinois Midland Company within six months immediately preceding the appointment of the first receiver, as shown by schedule H of the report; such equitable proportions of the receivers' indebtedness and of the six months' labor claims to be ascertained in the manner provided by the decree.

As to items 1, 2, 3, 4 and 5; while it is admitted that these debts were incurred for the ordinary expenses of the receivers in operating the road, it is contended that they are entitled to priority only out of the income of the road, and not out of the proceeds of the property itself. Of course, such items are payable out of income, if any, before the *corpus* is resorted to, but that may be resorted to when the items are proper ones to be allowed for operating expenses, after scrutiny and opportunity for those [465]

opposing to be heard. This view is in accordance with the principles above laid down and the authorities above cited.

It is contended, however, that, in the order of September 11, 1875, appointing Dole receiver, while authority was given to him to carry on the business of the road and to make repairs and additions essential to its interests and safety, it was provided that, out of the moneys he should receive from its operations, he should pay for the expenses of operation; that he was not authorized by that order to contract any debt which the receipts of the road would not pay; that the terms of the order were such as to exclude the payment of any of the expenses embraced in the six items above named out of any fund other than the receipts from the operation of the road; and that the orders appointing Rees and Genis were equally limited. But we think this view is not correct. The terms of these orders do not impair or exclude the ample authority which the court would otherwise have, and otherwise has, to order the claims in question to be paid out of the property itself, with priority.

The claims embraced in the six items have been carefully scrutinized and reported on favorably by the commissioner, and allowed by the circuit court, within and in accordance with the principles above laid down, and we think that all of them, including the "six months' labor claims," were properly allowed.

The appellants Borg and others also complain that the final decree declares that the just and equitable proportion of the floating indebtedness of the receivership, and of the six months' labor claims, so made liens prior to the bonds, shall be borne by and imposed upon the three several railroad properties, on the basis of the relative lengths of the roads, being for the Paris and Decatur sixty-seven miles, the Peoria, Atlanta and Decatur 60¼, and the Paris and Terre Haute 13¾. It is urged that in the total amount of debt to be thus apportioned among the several roads there are included debts which, as against the Paris and Decatur bondholders, belong distinctively to the other two roads, and should be charged exclusively on them. This view is based on these allegations: that the Peoria, Atlanta and Decatur road was never finished at either end, and always paid rent for access to Peoria at one end and to Decatur at the other; that the Paris and Terre Haute road uses the track of another road to reach Terre Haute, and its terminal facilities there, and does not own one half in value of the track between Paris and Terre Haute; and that the Paris and Decatur road uses only two miles of another road at Decatur, and has good eastern connections at Paris. In this view it is insisted that each road should pay its own terminal charges, and the cost of reaching its own charter points. The terminal expenses and track rentals of the two roads, other than the Paris and Decatur, were always charged by the receivers against the combined Illinois Midland road. The view taken by the commissioner and the circuit court was that the receiver took the roads as he found them; each incomplete and no one reaching any important point, and was obliged to continue the leasing arrangements of the Illinois Midland Company, so as to have a continuous line from Peoria to Terre Haute, which he operated as an entirety. The commissioner stated his conclusions thus: "In the operation of the road, no separate accounts of receipts or disbursements for each section, nor of the amount of business contributed by each section, nor of the extent of the use of each road, in the transaction of the various items of business taken at the several stations, were kept; nor indeed has it been possible to keep such accounts. The Paris and Decatur road received its share of the benefits accruing from the use of the leased lines; the exact relative proportion of benefits to each sectional road it is impossible to ascertain. The operating expenses have been incurred in the management of a single undertaking for the common benefit of all parties in interest. The use of the several leased tracks was necessary for that common undertaking. Without the use of the leased tracks the road could not have entered either of its terminal points nor the City of Decatur, which was equally essential. Neither of the sectional roads enters any one of the three main points on the line. Indeed, without the leased lines the operation of the road or either of the sections would have been impracticable. And it seems to me that the rentals for the use of the leased lines were incurred as much for the common benefit as were the expenses for employés and supplies along the line. If the management of the road had been so profitable as to have left a net income to apply on the mortgage debt, the Paris and Decatur bondholders would have been entitled to their proportionate share of the income derived from the use of the leased lines; they could scarcely have expected that without contributing to the payment for the use of those lines." These views apply equally to the terminal facilities furnished by the leasing roads.

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In opposition to these considerations it is urged that while they may properly apply among the companies which were parties to the sales and purchases, they do not apply to the holders of unsurrendered and unexchanged Paris and Decatur bonds, on the ground that they had nothing to do with the conduct of a joint enterprise, and could derive no benefit therefrom; and that they denied, in the pleadings of their trustee, and now deny, the validity of the sales, and did not acquiesce in any act of union of the roads.

An argument is made that there was no affirmative legislative authority for the purchase and sale of the Paris and Decatur road. This question was considered by the circuit court in its opinion, and it said that while the question was by no means free from difficulty, it was inclined to think that the warrant for the purchase was found in the charter of the purchasing company; and that, as the effect of the arrangement was to establish a continuous line from Peoria, via Decatur, to Terre Haute, to be operated under a common management, and as there was nothing in the charters of the selling companies expressly forbidding the arrangements they made with the purchasing company, and as what was done was fully executed, and its validity had never been questioned in a direct proceeding by the State or by those interested in the selling companies, it was not disposed to make the rights of the parties in this

litigation depend upon the inquiry whether the contracts were technically valid or not. Its conclusion was stated thus: "In *Thomas* v. *Railroad Co.* 101 U. S. 71 [Bk. 25, L. ed. 950], the court said that 'there can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred;' further, 'that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it;' still further, 'that contracts which, though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transaction.' I am the more readily inclined to act upon the view indicated, because, as said by *Judge* Drummond, in *Dimpfel* v. *Ohio, etc. R. Co.* 9 Biss. 129, 'both by the legislation of the State and by the construction of the same by its highest court, great encouragement has been given to the union of lines of railroad for the purpose of having them operated under some general management; the result of which has been the consolidation of many lines of road which were originally separate and distinct, but which are now operated under a uniform system.' Those who were parties to the arrangement in question, those who acquiesced in it, and those who failed in due time, by some proper proceeding, to question its validity, should be held to be estopped to raise any such question in these causes. The litigation must, therefore, be conducted to a conclusion upon the basis that the sale and transfer by the Paris and Decatur Railroad Company and the Paris and Terre Haute Railroad Company to the Peoria, Atlanta and Decatur Railroad Company is not to be here questioned." Independently of this, it is entirely sufficient to rest our conclusion on the principle, that nonaction on the part of the Paris and Decatur bondholders and their trustee, which allowed the court and the receivers to go on during the entire litigation, contracting debts in respect to the whole line operated as a unit, and administering the property as one, under circumstances where, as shown, it was and is impossible to separate the interests as to expenditures and benefits, in respect to the matters now questioned, and where important rights have accrued on the faith of the unity of the interests, amounts to such acquiescence as should operate as an estoppel. The interlocutory decree contains a clause in accordance with the foregoing conclusion, and for the reasons above stated we think it is right.

It is further contended, on behalf of Borg and others, that all of the receiver's debt should be borne primarily by the Peoria, Atlanta and Decatur Company, in exoneration of the Paris and Decatur mortgage, on the ground that, by the terms of the conveyance from the Paris and Decatur Company to the purchasing company, the latter assumed "all the bonded and floating indebtedness" of the selling company. It is contended that, both from the contract and by general principles, the purchasing company is bound to bear alone all expenses that will impair the security of the Paris and Decatur mortgage, and especially the expenses of running the road as a public servitude; and that the court and the receivers are bound by the same limitation. The idea underlying this view is, that the receiver appointed by the court is merely the agent of the purchasing company, and his management of the purchased road is merely a continuation of the management of the purchasing company. The view taken by the commissioner and confirmed by the circuit court was, that the receiver, as an executive officer of the court, was entrusted with all the properties committed to his charge, to use and preserve them, under the direction of the court, for the benefit of all parties in interest; that the receiver sustained the same relation to the bondholders of each of the constituent companies; that, as the property of each of them has been used and preserved for the benefit of its bondholders, it is equitable that each property should contribute its just proportion towards defraying the necessary expenses; that as the Peoria, Atlanta and Decatur mortgage was executed more than two years before the purchase of the Paris and Decatur road, and as the obligation of operating the latter road, assumed by the purchasing company, was an ordinary liability and an unsecured obligation, the equities of the Peoria, Atlanta and Decatur bondholders require that the expenses of operating the purchased road, whether [470] before or after the appointment of a receiver, should not take precedence, out of the *corpus* of the property of the purchasing company, over its bonds, issued and negotiated before the transfer, to the exoneration of the bonds of the purchased road; and that it is more equitable that the expenses of the receivership, incurred under the direction of the court for the benefit of one road as well as the other, should be borne by each proportionally. We think these views are correct, and that it is right to measure the proportions according to the lengths of the roads.

Borg and others complain of the following part of the final decree: "That Waring Brothers hold nine hundred and ninety-four (994) bonds of the Paris and Decatur Railroad Company, from which the first five coupons have been detached, the numbers of which bonds are given in 'Schedule F—Exchanged Paris and Decatur bonds,' attached to said special commissioner's last mentioned report" (filed January 15, 1885); "that there is now due on said 994 bonds the principal sum of $497,000, with interest thereon as provided in said bonds and the coupons thereto attached, the principal and interest to this date amounting to the sum of $859,589.13; and that said Waring Brothers are entitled to the full benefit and advantage of said 994 bonds, the same as if said bonds had not been exchanged for those of the Illinois Midland Railway Company, and as if there had been no cancellation or attempted cancellation of the same; and it is ordered by the court, that, upon the surrender into court, for cancellation, by said Waring Brothers, of bonds of the Illinois Midland Company to an amount equal to the said 994 bonds of the Paris and Decatur Railroad Company, then the said 994 bonds of the Paris and Decatur Railroad Company shall be held, and are hereby declared to be, in full

force and unsatisfied, in the hands of said Waring Brothers, the same and with like effect as the other said valid outstanding bonds of the said Paris and Decatur Railroad Company, any exchange or cancellation thereof to the contrary notwithstanding; and the special commissioner hereinafter appointed is directed to hold for cancellation such Illinois Midland Railway [471] bonds, when so surrendered, and to report the fact of such surrender and holding for cancellation, to the court." The report of the commissioner shows that each of the 994 bonds has the word "canceled" stamped thereon, and each has a hole punched through the signature of the president of the company.

The argument on the part of Waring Brothers, to sustain the above provisions of the decree in regard to the 994 bonds, is that the Illinois Midland bonds, amounting to $4,175,000, were intended to be largely used in retiring, by exchange, the bonds of the the three sectional roads, amounting to $2,780,000; that, in the agreements made between Hervey and Grant Brothers & Co., and between Hervey and Waring Brothers, and between Waring Brothers and Grant Brothers & Co., in regard to the issuing of Illinois Midland bonds, and the exchange of the bonds of the sectional roads for them, the underlying contract was that the three sectional companies should be legally consolidated, so as to make the new Illinois Midland mortgage to be issued a first lien on the entire property; that the three parties above named owned, among them, all but a few of the Peoria, Atlanta and Decatur bonds, and all of the Paris and Terre Haute bonds, and a large portion of the Paris and Decatur bonds; that the agreement was, as understood by all parties, that the sectional bonds should be exchanged for the new Illinois Midland bonds, dollar for dollar, and that, as to such of the Paris and Decatur bonds as should not be retired by exchange, an equal amount of the new Illinois Midland bonds should be destroyed; that, under this arrangement, Grant Brothers & Co., and Waring Brothers, would surrender their sectional bonds, secured by sectional first mortgages, and accept in lieu thereof Illinois Midland bonds, secured by what would be a first mortgage on the three roads, subject to the unexchanged Paris and Decatur bonds; that the written contracts on the subject stipulated that the three railroads should be "consolidated into one company under the name of the Illinois Midland Railroad Company;" that the purchases and fusion which took place were not a consolidation, within the meaning of the contracts; and that what was contracted for was to be not merely [472] a consolidation of the properties of the three companies, so that all those properties should pass to the ownership of one of the companies, but a consolidation of the companies themselves, they to be so united as to become one company and one artificial body.

We are unable to concur in this view, and are of opinion that what was done was a substantial compliance with the contracts. What Hervey did in procuring the sales of the roads, and the change of the name of the purchasing company, and in making the new mortgage and bonds, was done with the concurrence of Grant Brothers & Co., and Waring Brothers. The exchanges made of the Paris and Decatur bonds for the Midland bonds were not isolated transactions, but followed as parts of one transaction, by which the roads were united and the new bonds created and exchanged. The transaction contemplated by the contracts was fully performed, and the Paris and Decatur bonds which Waring Brothers surrendered were exchanged and surrendered specifically for cancellation. In the contract of July 4, 1874, between Waring Brothers and Grant Brothers & Co., it was provided that 907 Paris and Decatur bonds held by Waring Brothers should be exchanged for 907 of the new bonds of the Illinois Midland Company, and canceled. The evidence and the written contracts show that it was contemplated by the parties, including Waring Brothers, that such of the Paris and Decatur bonds as should not be surrendered and exchanged should retain their precedence over the Illinois Midland bonds, and their priority of lien on the Paris and Decatur property. In the contract between Hervey and Grant Brothers & Co., July 4, 1874, it was agreed that the latter should retain in their hands Illinois Midland bonds equal in amount to any Paris and Decatur bonds which should be outstanding, and should cancel and return to Hervey all Paris and Decatur bonds which should be exchanged by their holders for Illinois Midland bonds; and that if, after July 1, 1876, there should be any outstanding unexchanged Paris and Decatur bonds, Grant Brothers & Co. should cancel and return to Hervey an amount of Illinois Midland bonds equal to the amount of the then outstanding unexchanged Paris and Decatur bonds. In the schedule to the agreement of July 4, 1874, between Grant Brothers & Co. and Waring Brothers, it was stated that the Illinois Midland bonds were to be issued "subject and in subordination only to such bonds already issued by the Paris and Decatur Railroad Company as for the time being shall be existing and be preferentially charged on the portion of the undertaking which shall have been constituted with or represent the undertaking of the said last mentioned railway company." The president of the Union Trust Company was advised of these agreements, in December, 1874. Waring Brothers surrendered to Grant Brothers & Co. 887 Paris and Decatur bonds and took from them this receipt:

"London, February 17, 1875.

"Received from Messrs. Waring Brothers, 885 bonds of Paris and Decatur Railroad Co., as per attached list, in exchange for a like number of Illinois Midland bonds, in fulfilment of first clause of our agreement of July 4, 1874, the difference between 885 bonds and 907 bonds mentioned in agreement having been drawn and canceled between date of agreement and the present time, which 885 bonds of Paris and Decatur Railroad Co. are to be canceled forthwith, in accordance with said agreement.

Grant Brothers & Co."

In the agreement made as late as May 4, 1877, between Grant Brothers & Co. and Waring Brothers, it was agreed that the former should use their best exertions "to obtain the exchange of the outstanding Paris and Decatur bonds which have not yet been exchanged for Illinois Midland bonds, so as to complete the amalgamation."

The exchange and surrender of the 885 bonds

was a completed transaction. No surrender of any of the Paris and Decatur bonds by anyone was made dependent on the surrender of any others of them or of the whole. Each person who surrendered gave up his lien under the Paris and Decatur mortgage, and took one under the Illinois and Midland mortgage, as it was, and took the risk of its value. He left those who did not surrender to hold under the
4] Paris and Decatur mortgage. There was no contingency and no reservation on the part of those surrendering. The surrender was for cancellation and was cancellation. The Illinois Midland mortgage and bonds were and are valid. All parties got what they contracted for.

In regard to the other 109 Paris and Decatur bonds (to make up the 994 exchanged bonds now presented by Waring Brothers, as holders), each of them is stamped with the word "canceled," and each has a hole punched through the signature of the president of the company. In 1872, Waring Brothers purchased from Grant Brothers & Co. 928 Paris and Decatur bonds. July 4, 1874, they still held 907 of them. February 17, 1875, they had only 885. Afterwards Genis, acting for them and for Grant Brothers & Co., brought with him from London to the United States all the Paris and Decatur bonds which had been surrendered by any one and canceled, receiving them from the custody of Grant Brothers & Co. These bonds included not only the 885, but undoubtedly the 22 others mentioned in the receipt, and 87 more, necessary to make up the 994. All of the 109 bonds being marked canceled, and the evidence as to the entire 994 being what it is, it must be held that the 109, as well as the 885, were exchanged, surrendered and canceled, and that the decree is erroneous and must be reversed in regard to all of the 994.

The decree provides that the special commissioner, charged with its execution as to a sale, shall first offer the three railroad properties for sale each separately, and four locomotive engines (on which there is a specific lien) separately, and all other property acquired by the receivers otherwise than from said railroad companies separately, and, after having so offered said properties, shall then offer the whole of them for sale *en masse;* and, if the highest bid received by him for the entire properties shall exceed the aggregate amount of the several highest bids for them when offered separately, then the whole shall be struck off and sold as an entirety to the person making the bid, and the proceeds be divided into five parts, in proportion to the amounts bid separately on the five constituent parts, and distributed to the lienholders and bondholders in the same
5] manner as if the five constituent parts had been sold separately

Borg and others object to that provision, and claim that the holders of the unexchanged Paris and Decatur bonds are entitled to have a separate sale of the property covered by the Paris and Decatur mortgage. We have considered the views urged in opposition to the above clause, but are of opinion that under it, taken in connection with all the other provisions of the decree, the rights of the Paris and Decatur bondholders are sufficiently secured, and that they have substantially the benefit of a separate sale. No one of all parties can get less by the sale in gross.

The appeal of the Union Trust Company does not cover anything not embraced in the appeal of Borg and others.

The appeal of Waring Brothers is next to be considered. They object that certain claims of theirs under the head of "Miscellaneous" in schedule M to the commissioner's report, part of the receiver's indebtedness, are by the decree declared to be subordinate to the mortgages and bonds of the three sectional roads, namely:

"$30,322.09. Claim assigned by Terre Haute and Indianapolis Railroad Company.

$14,140.67. Terminal facilities at west end; assigned by Toledo, Peoria and Warsaw Railroad Company.

$54,900. Loan account; allowed by order of court, June 11, 1884.

$32,000. Loan account; allowed by order of court, June 11, 1884.

$29,064.84. Recs' notes; allowed by order of court, June 11, 1884."

As to the $30,322.09, Waring Brothers bought the claim in August, 1877, from the Terre Haute and Indianapolis Company. The receivership owed that amount to that company for rent of track, materials supplied and traffic balances. The $14,140.67 was a claim bought by Waring Brothers, in September, 1877, from the receiver of the Toledo, Peoria and Warsaw Company. [476]
It was for rent of track, stores supplied and labor performed. As to both of these items, the debts were contracted by the receiver, and fall within the principle under which claims of like character are allowed priority.

As to the items of $54,900 and $32,000, "Loan Account," the commissioner, in his first report, made this statement: "The Loan Account. Receiver Genis borrowed of the First National Bank of Terre Haute the sum of $57,400 for the current expenses of the road, upon which he paid $2,500, leaving a balance due the bank of $54,900. He had also a running loan account with McKeen & Co., another banking house in Terre Haute, for moneys borrowed for the use of the road, upon which there is a balance due the bank of $32,000. These moneys were borrowed by the receiver as such, but the greater part thereof was further secured by the personal obligations of Mr. Genis or Waring Brothers. The transactions are, therefore, characterized by Mr. Freidenberg's counsel, as the personal accounts of those parties, and not the accounts of the receiver as such. But, even if it were true that these moneys were those of Mr. Genis individually, yet, if it were further true that Mr. Genis was authorized to make the expenditures for the protection, reparation or safety of the trust estate, and if he advanced his own moneys for that purpose, he could, I think, on principle, have a lien on the trust estate for moneys so advanced. *New* v. *Nicoll*, 73 N. Y. 131. But there appears to have been no express authority from the court to borrow these moneys. While a receiver entrusted with the operation of a railroad must necessarily be allowed a certain discretion as to outlays of money made in good faith in the ordinary course of business, and to a certain extent the details of the business must be left to his discretion, yet transactions of such

magnitude as the loans in question are, I think, unwarrantable without the previous authority of the court; and the conduct of the receiver in this respect ought not to be sanctioned, and certainly cannot be permitted to become a precedent. At the same time, the evidence appears to show that the sums so borrowed were [477] applied directly to pay the expenses of the receivership, repairs, supplies, pay rolls, or to replace moneys which had been so applied. Mr. Genis' testimony is very specific on these points. He says that after applying the income of the road towards expenses (repairs, supplies, pay rolls) and, when he could not longer postpone payment of balance, he had to borrow. While reprehending this unauthorized action, yet as the money was applied for repairs on the property and expenses of adminstering the trust, and as the transaction was thus beneficial to the parties in interest, and as no bad faith appears to be imputed to the lenders, it seems to me that the rejection of these claims, as against the lenders, would be harsh and inequitable. And as Waring Brothers, upon whose credit, in part at least, these sums were advanced, have since paid the same to the original lenders, and taken an assignment of the claims, I see no reason why they are not likewise entitled to payment." In the opinion on this report the circuit court said that it approved the conclusions of the commissioner as to "Loan Account." In the interlocutory decree of June 11, 1884, is this clause: "And the court approves the findings and conclusions of the said special commissioner under the head of 'The Loan Account,' in said report, and finds that the receiver borrowed of the First National Bank of Terre Haute, Ind., and of McKeen & Co., bankers, certain sums of money, which he applied directly to pay the necessary expenses of the execution of his trust herein, and that there are balances of $54,900 and $32,000, respectively, due on account of such loans; and the court orders, adjudges and decrees that the holders of said claims are entitled to priority of payment out of the trust estate, before payment of bonds." But by the final decree, the items of $54,900 and $32,000 are declared to be subordinate to the mortgage bonds, while allowed as indebtedness contracted by the receivers. We are of opinion that these two claims ought not to be allowed priority. The debts were contracted without the previous authority of the court. The amounts were large; and we cannot sanction the action of the receiver in borrowing sums of money so large in amount, without the previous authority of the court, even though the purposes to which the moneys were applied were such as is shown.

As to the item of $29,064.84, it consists of [478] eight notes given by receiver Rees, in May and December, 1878, as shown by exhibit X to the first report of the commissioner, in regard to which the commissioner said, in that report, under the head of "Accounts of Waring Brothers:" "The acceptances or notes of Dole and Rees, exhibit X, aggregating $29,064.84, are contested upon the ground that those receivers had no power to contract the debts. Mr. Genis' explanation of the item appears on page 140 of the abstract. Seven of the eight notes appear to have been given for legitimate and necessary purposes, such as rent of railroad track, repairing of engine, purchase of stationary engine, money advanced for general expenses, etc., etc. The several amounts were small and, I think, within the discretion of the receiver to contract. It would be very trying on the court as well as receiver, if the latter, in operating a railroad, were compelled to obtain the sanction of the court for all sums as small as these. The last item, of $7,000, is more vigorously contested. An account of the transaction is given by Mr. Genis (abstract, 192). Waring Brothers were desirous that Rees should resign; and Genis, on their behalf, acceded to his demand for the payment of a forfeiture provided in Rees' private contract of employment with Waring Brothers, as a condition precedent to his resignation; and thus he ended his agency and his receivership at the same time. The payment of the forfeiture was made out of Waring Brothers' own funds, and there is no claim that it is a charge against the trust fund. On the day Rees resigned, he further insisted that Waring Brothers should advance moneys with which to pay a certain claim before he resigned. This was a debt of $7,000 to a bank. It was a debt of the receivership, upon which he was also personally liable. On page 141, abstract, speaking of this item, Mr. Genis says: 'The last item, $7,000, is cash given Mr. Rees, as receiver, and passed into the general funds, as the books will show.' It is broadly charged that this transaction was bribery, and that the bribe is now asked to be repaid out of the trust funds. Undoubtedly the debt paid was a debt of the receivership, the trust fund got the benefit of the payment, and the only benefit Rees received was his release as surety upon a debt of the receivership. Waring Brothers' money was loaned to the receiver, and was used by him to pay a debt for which the receivership was primarily liable; and the fact that such payment was demanded by the retiring receiver, does not make it any the less a present debt against the receivership." In its opinion on that report the circuit court said that it approved the commissioner's conclusions as to "Accounts of Waring Brothers;" and, in the decree of June 11, 1884, it stated that "the court approves the findings and conclusions of said special commissioner under the head of 'Accounts of Waring Brothers,'" but the question of the priority of the item of $29,064.84 over the bonds appears to have been reserved by that decree. In the final report of the commissioner, under the head of "Relative equities of receiver's floating indebtedness and the mortgage bonds," after discussing the subject at length, he said: "I am, therefore, of opinion that all just indebtedness contracted by the receivers in the execution of their trust and in the operation of the road, including claims for labor and supplies, liabilities incurred in sustaining necessary business relations with other railroad companies, liabilities as a common carrier, damages to persons and property in operating the roads, obligations to shippers properly incurred in due course of business, and other claims, if any, of like character and coming within the same principle, are entitled to priority in payment over bonds." But in the final decree, the item of $29,064.84 is not given such priority. We are of opinion that this item cannot be allowed priority, for the reason that the borrowing of the money for which the

notes were given was not sanctioned in advance by the court. Though made up of amounts not, perhaps large in themselves, the aggregate cannot be called small; and there never could be any difficulty in obtaining an order of the court, if one were proper, to borrow money to a specified total amount, for specific purposes. In any event, the item of $7,000 could not be allowed priority, as the purposes for which that sum was used were not sufficiently shown.

Waring Brothers also object because the final decree orders that the "rents due Waring Brothers, for use of rolling stock, as shown by schedules U and W of" the final "report of the special commissioner," and "the sum of $21,099.43 due Waring Brothers for extraordinary depreciation of rolling stock," be subordinated to the mortgage bonds of the three sectional roads, respectively. The net amount due for the above rents, as stated in those schedules, with interest to January 15, 1885, is $325,354.35, and that amount is allowed as a debt by the commissioner. The court did not allow it priority, and we see no sufficient ground for reversing the decision. The same conclusion is reached as to the item for $21,099.43.

Waring Brothers also object because the court did not, in the final decree, specifically allow ten claims of theirs, amounting to $67,488.81, set forth under the head of "Right of way claims and outstanding titles," in schedule I to the second report of the commissioner, and give them priority to the mortgage bonds, and because that decree remitted the holders of those claims to such suits as they might "properly bring in any court of competent jurisdiction against the company alleged to be liable thereon, or against the purchaser or purchasers" at the sale to be made under the decree. We see no error in the decree in this respect; nor in its failure to allow interest on the items of $4,500, $9,100, and $17,001.47; nor in its failure to allow more to Waring Brothers for right of way, land, buildings and mechanics' liens, or to make any different provision from that made in regard to the use of any claims by them in payment of the railroad property, if they should purchase it; nor in its failure to give precedence over the mortgage bonds to the claims of Waring Brothers, called "six months' supply claims."

We come now to the appeal of S. A. Fletcher & Co. They are the holders of the three certificates of the seventeenth series, and the four certificates of the eighteenth series, before mentioned, and allowed with priority, and of seven other receiver's certificates named in schedule N to the commissioner's second report, and allowed with priority; seven of the entire fourteen having been issued under one of the two orders before mentioned, each dated June 29, 1881, and the other seven under the other of those two orders. The circuit court, in its final decree, reserved for future determination all questions of the relative priorities and equities among those who were given liens prior to the mortgage bonds, in case the respective properties should not sell for amounts in excess respectively of the liens to which precedence was given over the mortgage debts. S. A. Fletcher & Co. appeal from that part of the decree, and insist that the decree ought to have found that the receiver's certificates held by them were liens of the force, character and effect, and to the extent, provided by the two orders of June 29, 1881, according to the purport of the certificates, and entitled to priority of payment over all bonds and debts, and all receiver's debts and certificates, except the receiver's certificates specially excepted in those orders. By each of the orders of June 29, 1881, each certificate to be issued under it was declared to be a special charge and lien on the line and property in respect of which it should be issued, superior in lien to all mortgage bonds, and debts of the company, and receiver's debts, except such receiver's debts as had theretofore been declared by order of court to be special charges and liens on such line and property. We are of opinion that (with the exception of debts for taxes, and receiver's certificates issued to borrow money to pay taxes, or to discharge tax liens), there should be no priority or preference among the debts and claims, whether receiver's certificates or other debts, which are allowed precedence over the mortgage bonds of any road; but that all should stand alike, notwithstanding any orders heretofore made, and that the decree should so provide.

It results that *the decrees are reversed* so far as they allow to Waring Brothers the benefit of the 994 Paris and Decatur bonds as unexchanged and uncanceled bonds, and so far as they deny priority over the Paris and Decatur bonds to the items of $30,822.09 and $14,140.67, and so far as they fail to provide that there shall be no priority or preference, with the exception above stated, among the debts and claims, whether receiver's certificates or other debts, which are allowed precedence over the mortgage bonds of any road; *and the causes are remanded* to the circuit court, with a direction to make those modifications in the decrees; and in all other respects the decrees are affirmed. *No costs are allowed* in this court for or against any party, and the expense of printing the record is to be borne equally by Borg and others and Waring Brothers.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

WALTON FERGUSON, *Plf. in Err.*, [482]
v.
CHESTER A. ARTHUR, Late Collector of the PORT OF NEW YORK.

(See S. C. Reporter's ed. 482-490.)

Import duty on proprietary medicines.

Henry's calcined magnesia being a medicinal preparation, imported in bottles and recommended to the public as a proprietary medicine, is subject to a duty of 50 per cent *ad valorem*, under section 2504 R. S. schedule M, and not twelve cents per pound under the same section and schedule.

[No. 190.]

Argued Mar 24, 1886. Decided Apr. 5, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr **Edwin B. Smith**, for plaintiff in error.

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, for defendant in error.

[482] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is an action brought by Walton Ferguson, in the Supreme Court of the State of New York, and removed into the Circuit Court of the United States for the Southern District of New York, against the Collector of the Port of New York, to recover moneys paid under pro-
[483] test, in January, 1876, as duties on an importation of Henry's calcined magnesia, made by said Ferguson, doing business as J. & S. Ferguson. The Collector exacted on the merchandise a duty of 50 per cent *ad valorem*, under the following provision of the Revised Statutes, (sec. 2504, schedule M, p. 480, 2d ed.):

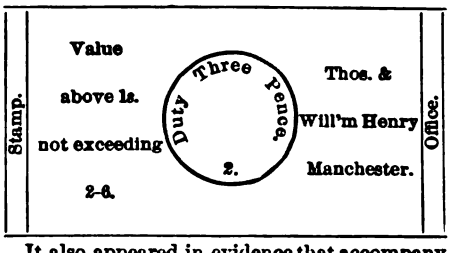
"Proprietary medicines: pills, powders, tinctures, troches or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils, or other medicinal preparations or compositions, recommended to the public as proprietary medicines, or prepared according to some private formula or secret art as remedies or specifics for any disease or diseases or affections whatever affecting the human or animal body; 50 per centum *ad valorem*."

The plaintiff contended that the article was dutiable at twelve cents per pound, under this provision of the same section and schedule (p. 477): "Magnesia: carbonate, six cents per pound; calcined, twelve cents per pound."

At the trial there was a verdict for the defendant, and he had judgment, and the plaintiff has brought a writ of error.

The bill of exceptions contains the following statements:

"The merchandise in question was Henry's calcined magnesia, prepared by Thomas and William Henry, manufacturing chemists, of Manchester, England, and put up in ounce bottles; in the glass of each bottle was blown the words 'Henry's calcined magnesia, Manchester,' and over one end of each bottle was pasted a stamp, of which the following is a copy:



It also appeared in evidence that accompanying each bottle thereof was a wrapper; that upon said wrapper was a circular; that of the said labels the following are copies:

'Henry's calcined magnesia.
[484] 'Price 2s 9d. Stamp included.
'*Caution.*

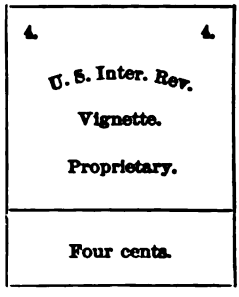
'The purchasers of this article are requested to observe that the words Thos. and William Henry, Manchester, are engraved on the government stamp pasted over the cork of each bottle. This is the only effectual security against the counterfeited imitations which are sold in bottles similarly moulded, under their names. Trade-mark, 'Henry's Calcined Magnesia.'

'*Caution.*

'Messrs. Thos. & Wm. Henry, of Manchester, have received frequent complaints that their calcined magnesia is counterfeited in the United States, and, having been furnished with specimens of spurious and very inferior imitations there vended, in bottles similarly moulded, and with forged stamps and bills of direction, beg leave to caution the consumers of their magnesia in America to purchase it only of persons whose character is such as to preclude their selling a spurious article knowing it to be such.

'Druggists and storekeepers are informed that Messrs. J. & S. Ferguson, late Ogden, Ferguson & Co., merchants, of New York, are the sole wholesale agents authorized by Messrs. Henry in the United States, and that the article may be constantly had of them genuine and on the best terms. Trade-mark, Henry's Calcined Magnesia.'

That upon the first of the aforesaid labels was pasted a stamp; that the following is a copy thereof:



That the following is a copy of the aforesaid circular:

'Trade Mark:
'Henry's Calcined Magnesia.
'Genuine Calcined Magnesia.
'Prepared by
'Thomas and William Henry,
'Manufacturing
'Chemists,
'East St. and St. Peters, Manchester.

'And sold wholesale by them, and in London by Bayley & Company, Cockspur St.; Barclay & Sons, Farmington St.; Butler & Crispe, 4 Cheapside; Edwards, 157 Queen Victoria Street; F. Newberry & Sons, 37 Newgate Street; J Sanger & Sons, 150 & 252 Oxford Street; Sutton (late Diccy & Co.), 10 Bow Church Yard, and Savory & Moore, 143 New Bond Street, in bottles at 2s. 9d., or with ground stoppers at 4s. 6d., stamps included (the names of the preparers being engraved upon each government stamp, pasted over the cork or stopper of each bottle, which in British dominions, where the forgery of the stamp is highly penal, is the best security against counterfeits), and retail by at least one agent in every country town.'"

The circular went on to set forth the beneficial use of calcined magnesia in certain specified diseases, and in complaints of children; and the dose required for children and for adults; and wherein calcined magnesia is superior to common or uncalcined magnesia alba, and then proceeded: "In consequence of improvements which they have made in the manufacture of calcined magnesia, Messrs. Henry are enabled to offer to the public their preparation of this medicine, which has already been

honored with the approbation of some of the first chemists and physicians of the age, with increased confidence in its superior quality. The calcined magnesia prepared by them will be found to be perfectly deprived of carbonic acid, free from taste, smell or other disagreeable property, and without roughness or grittiness to the touch or the palate."

The bill of exceptions further says: "Plaintiff's testimony proved that all calcined magnesia is a well known medicinal preparation of magnesia, made from sulphate of magnesia, bicarbonate of soda, and calcined by heat. A formula for the preparation is contained in the dispensatories, and first class chemists frequently prepare the article for their own use. The article comes in bulk and is sold at $2.50 per pound. Henry's calcined magnesia is universally known by that name and has a character of its own, distinct from ordinary calcined magnesia, although it is used for the same purposes. It has been prepared by the same family, a firm of manufacturing chemists in Manchester, England, for the last one hundred years, and has a peculiar value in the market. It sells in this country, at wholesale, by the dozen, ounce bottles, for $8.50, and for twenty-seven shillings in England; whereas, Husband's preparation, the American preparation of the highest repute, sells at $3.00 or $3.50 per dozen. Henry's preparation has a peculiar reputation on account of the nicety with which it is prepared. Whether it is prepared according to the formula given in the dispensatory no witness knew. There was no dispute, upon the above facts, in regard to the history of Henry's magnesia and its peculiar value and reputation, and the form and style and representations under which it has been and is presented to the public."

At the close of the evidence on both sides, the defendant moved the court to direct a verdict for him, upon the ground that the plaintiff had failed to show that his merchandise was not "a proprietary medicine or medicinal preparation," within the meaning of the above provision under which the duty was exacted. Before a ruling was made on that motion, the plaintiff requested the court to submit the question of fact to the jury, on the ground that there was a substantial question of fact which was in dispute. The court denied the plaintiff's request, and he excepted. The court then directed the jury to find a verdict for the defendant, on the ground that there was no material question of fact in dispute, and to such ruling the plaintiff excepted. The jury thereupon rendered a verdict for the defendant.

That the article in question is a medicinal preparation there can be no doubt. The circular sets forth its virtues as a remedy in disease, and calls it a "medicine."

Is it recommended to the public as a proprietary medicine? "Proprietary" is defined thus —in The Imperial Dictionary: "belonging to ownership; as, proprietary rights"—in Webster: "belonging, or pertaining, to a proprietor;" "proprietor" being defined, "one who has the legal right or exclusive title to anything, whether in possession or not; an owner —in Worcester: "relating to a certain owner or proprietor."

It is quite plain, we think, that Thomas and William Henry recommended their calcined magnesia to the public as a medicine in which they had a proprietary right, as owning all that there was of good will and business reputation appurtenant to the article, resulting from its name and from what they stated about its manufacture. They prepared it and put it up in glass bottles, in each of which was blown the words "Henry's Calcined Magnesia, Manchester." Over one end of each bottle was pasted an English revenue stamp, with their name on it. They announced a property in the trade-mark, "Henry's Calcined Magnesia." They called it "their calcined magnesia." They announced J. & S. Ferguson as their sole wholesale agents in the United States. They recommended the article as of superior quality, because of improvements which they had made in its manufacture, and stated, as a result of those improvements, that the article had no carbonic acid, no taste, smell or other disagreeable property, and no roughness or grittiness to the touch or palate. To complete this proprietary character, they put on each bottle a four cent United States internal revenue proprietary stamp. Although it appeared at the trial that all calcined magnesia "is a well known medicinal preparation of magnesia, made from sulphate of magnesia, bicarbonate of soda, and calcined by heat," and that a formula for the preparation was contained in the dispensatories, it did not appear that Henry's preparation was made according to that formula; while it did appear that it was universally known by the name of "Henry's Calcined Magnesia," and had a character of its own, distinct from ordinary calcined magnesia, although used for the same purposes, and that it had been prepared by the same family at Manchester for 100 years, and had a peculiar reputation on account of the nicety with which it was prepared, and a peculiar value in the market, shown by the price it commanded. [488]

We cannot doubt that this was an article recommended to the public as a proprietary medicine, within the statute. It may fall within that clause, without being prepared according to some private formula or secret art, as a remedy for disease. The statute is in the alternative.

A reference to the internal revenue law (Schedule A to sec. 3419, R. S. p. 678, 2d ed.) shows the sense in which Congress used the word "proprietary." It imposed internal revenue taxes on medicinal preparations, where the person making or preparing them, 1, had or claimed a private formula or secret or art; 2, had or claimed an exclusive right or title to the making or preparing them; 3, made or sold them under a patent; 4, recommended them to the public as proprietary medicines, or as remedies for disease. Thus, a medicinal preparation might be proprietary, without being made by a private formula, or under an exclusive right claimed to the making or preparing it, or under a patent. These internal revenue provisions had their inception in the Act of July 1, 1862, chap. 119 (12 Stat. at L. 484), while both of the customs provisions above cited are first found in the Act of July 14, 1862, chap. 163 (12 Stat. at L. 548, 549). The word

"proprietary," as applied to a medicinal preparation, in the revenue laws, had its origin then.

The plaintiff contends that because a duty of so much a pound is laid on calcined magnesia by that specific name, this Henry's calcined magnesia, imported in bottles and sold by the bottle, by that name, cannot be dutiable under the general designation of a proprietary medicine. But this article is not and does not purport to be the calcined magnesia dutiable at twelve cents a pound. By the mode of manufacture used, the carbonic acid is eliminated, the taste and smell are destroyed, other disagreeable qualities are removed, and all grittiness is got rid of. It "has a character of its own, distinct from ordinary calcined magnesia," as the bill of exceptions states, which must arise from the special mode of manufacture. The "ordinary calcined magnesia" is that sold in bulk and by the pound, and dutiable at twelve cents a pound. It was undoubtedly to reach just such medicinal preparations [489] as this—the monopoly of a particular person, commanding a price due to a special mode of manufacture, sold in bottles, having a name attached identifying the manufacturer as the proprietor of all that imparted the special merit and produced the special price—that the special revenue tax was laid.

The duty by the pound on calcined magnesia, and the *ad valorem* duty on proprietary medicines, starting together, as they did, in the Act of July 14, 1862, and continued in the same language in the Revised Statutes, and reproduced in the Act of March 3, 1883, chap. 121 (22 Stat. at L. 493, 494), with the duty on calcined magnesia put at ten cents per pound, and the word "proprietary" extended to all proprietary articles, and not confined to proprietary medicines, the principle of the cases cited for the plaintiff does not apply.

In *Homer* v. *Collector*, 1 Wall. 486 [68 U. S. bk. 17, L. ed. 688], "almonds" had been dutiable *eo nomine* almost immemorially, and an *ad valorem* duty was imposed on them, as "almonds," in the Act of 1846; and it was held that, under the Act of 1857, they were not subject to a less duty, as "fruits, green, ripe and dried."

In *Movius* v. *Arthur*, 95 U. S. 144 [Bk. 24, L. ed. 420], "patent leather" was dutiable by that name, in the Acts of 1861 and 1862. The Act of 1872 imposed a less duty on "skins dressed and finished, of all kinds." It was held that the old duty on patent leather continued, because, though it was a finished skin, something was done to it after it could be called a finished skin, to make patent leather of it. In the case at bar, Henry's article is not the ordinary calcined magnesia, dutiable by the pound, but something is done to that ordinary calcined magnesia by the Henrys, which, in connection with the manner in which it is put up and sent forth, makes it a proprietary medicine, although the base of it is magnesia, calcined.

In *Arthur* v. *Stephani*, 96 U. S. 125 [Bk. 24, L. ed. 771], "confectionery" was, by the Act of 1864, dutiable at fifty cents a pound, and by the Act of 1872 a duty of five cents a pound was laid on chocolate. It was held that an article which was simply chocolate was dutiable as chocolate and not as confectionery.

A like case is that of *Arthur* v. *Rheims*, 96 U. S. 143 [Bk. 24, L. ed. 813], where "artificial flowers," an article made of cotton, being dutiable by that name in the Act of 1864, it was held that they were not dutiable at a less rate, by the imposition of a less duty on manufactures of cotton, in the Act of 1872.

There was no question of fact for the jury, and it was proper for the court to direct a verdict for the defendant. *Improvement Co.* v. *Munson*, 14 Wall. 442 [81 U. S. bk. 20, L. ed. 867]; *Pleasants* v. *Fant*, 22 Wall. 116; [89 U. S. bk. 22, L. ed. 780]; *Herbert* v. *Butler*, 97 U. S. 319 [Bk. 24, L. ed. 958]; *Bowditch* v. *Boston*, 101 U. S. 16 [Bk. 25, L. ed. 980]; *Griggs* v. *Houston*, 104 U. S. 553 [Bk. 26, L. ed. 840]; *Randall* v. *Baltimore & Ohio R. R. Co.* 109 U. S. 478 [Bk. 27, L. ed. 1003]; *Anderson Co. Comrs.* v. *Beal*, and *Baylis* v. *Travellers' Ins. Co.* 113 U. S. 227, 316 [Bk. 28, L.ed. 966, 989]; *Schofield* v. *Chicago, etc. R. Co.* [*ante*, 224].

Judgment affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

TOWN OF MAHOMET, *Plf. in Err.*,
v.
JOHN M. QUACKENBUSH.

(See S. C. Reporter's ed. 508-514.)

Municipal bonds.

Article 3, section 23 of the Illinois Constitution of 1848, providing that no private local law shall embrace more than one subject and that it shall be expressed in the title, is satisfied if the law has but one general object, which is clearly expressed in the title, and the body of the Act is germane to the title.

Anderson v. Santa Anna, *ante*, affirmed.

[No. 145.]

Submitted Mar. 8, 1886. Decided April 5, 1886.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The case is stated in the opinion of the court and in the case therein referred to.

Messrs. John McNulta, R. A. Lemon and *John J. Weed*, for plaintiff in error.

Mr. T. C. Mather, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The facts of this case are identical with those of *Anderson* v. *Santa Anna*, [*ante* 633], except that here the bonds were issued by one township on the line of the Danville, Urbana, Bloomington and Pekin Railroad, and there by another. The bonds in the two cases are the same in form and the statutory authority for their issue the same. All questions actually decided in the other case are concluded in this, but one point is made now that was not presented then, and it arises on these facts:

Article 3, section 23 of the Illinois Constitution of 1848, which was in force when the statutes on which the case depends were passed, contained this provision:

"And no private or local law which may be passed by the General Assembly shall embrace

more than one subject, and that shall be expressed in the title."

The Act of 1867, under which the bonds were issued, was a private or local law with the following title:

"An Act to Amend the Articles of Association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and to Extend the Powers of and Confer a Charter upon the Same."

The parts of the Act pertinent to the present inquiry are sections 1, 12 and 13. These are as follows:

"Section 1. *Be it enacted by the people of the State of Illinois represented in the General Assembly*, That the said corporation is hereby created a body politic and corporate under the name and style of 'The Danville, Urbana, Bloomington and Pekin Railroad Company,' etc. And the said company is authorized and empowered to locate, construct and complete a railroad, extending from the City of Pekin, in Tazewell County, Illinois, through or as near as practicable to the Towns of Tremont, Mackinatown, Concord, Bloomington, Leroy, Mount Pleasant, Mahomet, Champaign City, Urbana and St. Joseph to the east boundary of the State of Illinois," etc.

"Section 12. To further aid in the construction of said road by said company, any incorporated town or township in counties acting under the township organization law, along the route of said road, may subscribe to the capital stock of said company in any sum not exceeding $250,000.

"Section 13. No such subscription shall be made until the question has been submitted to the legal voters of such incorporation, town or township in which the subscription is proposed to be made; and the clerk of each of said towns or townships is hereby required, upon the presentation of a petition signed by at least ten citizens, who are legal voters and taxpayers of such town or township for which he is clerk, and in which petition the amount proposed to be subscribed shall be stated, to post up notices in at least three public places in each town or township, which notice shall be posted not less than thirty days before the day of holding such election, notifying the legal voters of such town or township to meet at the usual place of holding elections in such town or township, or some other convenient place named in such notice, for the purpose of voting for or against such subscription; *Provided*, That where elections may have already been held, and a majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, then, and in that case, no other election need be had, and the amount so voted for shall be subscribed as in this Act provided. And such elections are hereby declared to be legal and valid, as though this Act had been in force at the time thereof, and all the provisions hereof had been complied with."

The point now made is that the statute, so far as it undertakes to authorize municipalities to subscribe to the capital stock of the corporation, is unconstitutional because it embraces two distinct subjects, one the incorporation of the railroad company, and the other an enlargement of the corporate powers of municipal corporations, the first of which alone is expressed in the title. This objection, it seems to us, is fully disposed of by the case of *Supervisors of Schuyler Co.* v. *Rock Island, etc. R. R. Co.* 25 Ill. 182, decided by the Supreme Court of Illinois in 1860. There the title was "An Act to Incorporate the Rock Island & Alton Railroad Company," and the Act, besides incorporating the company, authorized counties to subscribe to the stock. As to this the court said, speaking through *Chief Justice* Caton: "We think the title of this Act sufficient to embrace the whole of the law, and that it is in compliance with the constitutional requirement All the provisions of the Act are appropriately designed to carry out the object of the corporation. If it was proper to authorize subscriptions to the stock, it was certainly proper to enable individuals or counties to subscribe and specify the terms and conditions on which they might subscribe, and the mode of making the subscription."

In States where constitutional provisions like that now under consideration have been decided to be mandatory, and not directory only, it has generally been held that the requirement is satisfied if the law has but one general object, and that is clearly expressed in the title. It is enough if the body of the Act is germane to the title. This is certainly the well established rule in Illinois, where, as was said by *Mr. Justice* Breese, dissenting in *O'Leary* v. *County of Cook*, 28 Ill. 543, decided in 1862, the "court has leaned rather in favor of the validity of private acts, when the subjects of the acts are multifarious." In that case a provision in a law entitled "An Act to Amend an Act Entitled 'An Act to Incorporate the North Western University,'" which prohibited "the sale of spirituous liquors within four miles of the university, under a special penalty to be recovered by the County of Cook," was held by a majority of the court not to be repugnant to this provision of the Constitution, and it was said, p. 538: "The object of the charter was to create an institution for the education of young men; and it was competent for the Legislature to embrace [512] within it everything which was designed to facilitate that object. Every provision which was intended to promote the well being of the institution, or its students, was within the proper subject matter of the law." As early as 1858 it was decided in *Belleville, etc. R. R. Co.* v. *Gregory*, 15 Ill. 29, that in an Act to incorporate the Belleville and Illinoistown Railroad Company, authority could be given the company "to extend and unite with any other railroad in this State." So, too, in *Firemen's Benevolent Asso.* v. *Lounsbury*, 21 Ill. 511, it was held, in 1859, that, in a law entitled "An Act to Incorporate the Firemen's Benevolent Association and for Other Purposes," it was competent to provide that the agents of all foreign insurance companies doing business in Chicago should pay the association $2 on every $100 of premiums received by them during a year, the court simply remarking on this branch of the case, p. 575: "We think the sixth section germane to the objects of the bill and embraced properly in the same subject, the whole of which is sufficiently expressed in the title." The same general principle has been fully recognized and enforced in *Neifing* v. *Pontiac*, 56 Ill. 172; *People* v. *Wright*, 70 Ill. 396; *People* v. *Brislin*, 80 Ill. 423, where it was

said, p. 433: "This court has gone very far to uphold statutes supposed to be within the objection;" "the body of the Act in question is germane to the title of the bill;" *Guild* v. *Chicago*, 82 Ill. 475; and *Fuller* v. *People*, 92 Ill. 185. This court also decided to the same effect in *Jonesboro City* v. *Cairo & St. Louis R. R. Co.* 110 U. S. 199 [Bk. 28, L. ed. 118], as to a similar provision in the Illinois Constitution of 1870.

It is further insisted, however, that if this law is good, so far as the general authority to subscribe is concerned, it is bad to the extent that it seeks to give effect to elections which were unauthorized at the time they were held, and we are referred to the cases of *Lockport* v. *Gaylord*, 61 Ill. 276, and *Middleport* v. *Ætna Life Ins. Co.* 82 Ill. 562, in support of this position. In *Lockport* v. *Gaylord*, it was decided that a provision legalizing certain appropria-
[513] tions theretofore made by the president and trustees of the village and certain orders drawn by the clerk was not germane to the title of "An Act to Amend the Charter of the Village of Lockport," passed February 12, 1853, and in *Middleport* v. *Ins. Co.* that authority to issue bonds in liquidation of appropriations voted under a prior Act was not germane to the title of "An Act to Legalize Certain Aids Heretofore Voted and Granted to Aid in the Construction" of a proposed railroad. The first of these cases was decided in 1871, and the last in 1876. In the present case, however, the provision relates only to the terms and conditions on which subscription to the stock of the railroad company might be made, which it was said in *Supervisors of Schuyler Co.* v. *Rock Island, etc. R. R. Co.* was germane to the general subject of a bill to incorporate a railroad company. It is nothing more nor less than a requirement of a vote of the people as authority for the subscription, with a proviso that if the vote had already been taken it need not be taken over again. This, as it seems to us, comes within both the letter and spirit of the earlier adjudications, and that these have not been overthrown by the later cases. We are aware that in *Welch* v *Post*, 99 Ill. 474, decided in 1881, the court said that "on the authority of *Middleport* v. *Ætna Ins. Co*" it was "inclined to hold" that power could not be given to municipal corporations to subscribe to the stock of a railroad company in an Act entitled substantially like that now under consideration, but as neither in this case, nor in that of *Middleport* v. *Ins. Co.*, nor in that of *Lockport* v. *Gaylord*, was any reference whatever made to the earlier decisions, which seem to be so decidedly the other way, we do not feel ourselves called upon to depart from the long settled practice in the State by what has yet been done towards making a change. In fact, in *Fuller* v. *People*, before cited, which was decided eight years after the *Lockport Case*, and three years after that of *Middleport*, the following quotation is made with approval from Cooley on Const. Lim. 1st ed. 144, § 2: "The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of
[514] this general object to be provided for by a separate Act relating to that alone would not only be unreasonable, but would actually render legislation impossible." And again, from *Sun M. Ins. Co.* v. *Mayor*, 8 N. Y. 253: "There must be but one subject, but the mode in which the subject is treated, or the reasons which influenced the legislation, could not and need not be stated in the title, according to the letter and spirit of the Constitution."

In *Montclair* v. *Ramsdell*, 107 U. S. 147 [Bk. 27, L. ed. 431]; *Otoe County* v. *Baldwin*, 111 U. S. 16, and *Ackley School District* v. *Hall*, 113 U. S. 135 [Bk. 28, L. ed. 836, 954], we had occasion to consider the same general question, with the same result, in connection with similar provisions in the Constitutions of New Jersey, Nebraska and Iowa respectively.

Finding nothing in this case to distinguish it from Anderson *v.* Santa Anna, *the judgment is affirmed on that authority.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JAMES B. DINGLEY ET AL., Copartners, as DINGLEY BROTHERS, *Plffs. in Err.*,

v.

WESLEY M. OLER ET AL., Copartners, as W. M. OLER & Co.

WESLEY M. OLER ET AL., Copartners, as W. M. OLER & Co., *Plffs. in Err.*,

v.

JAMES B. DINGLEY ET AL., Copartners, as DINGLEY BROTHERS.

(See S. C. Reporter's ed. 490–504.)

Executory contract—time for performance—refusal to perform—when right of action accrues.

1. Where a contract is made between two firms, dealers in ice, through an offer by one firm to take from the other a cargo of ice, and "return the same to you next year from our houses" which offer was accepted and acted upon, it can be executed by the first firm by a delivery of the ice called for by the contract at any time during the shipping season of the next year. The first firm is not bound to deliver at any time on demand of the second firm.

2. The refusal of a party to perform an executory contract, in order to authorize the other party to commence suit for nonfulfilment, must be distinct, absolute and unequivocal. Where one party has the right at any time during a certain season to deliver goods under contract, a refusal to comply with a particular demand for an immediate delivery does not authorize the party making the demand to commence suit.

3. The refusal of one party to deliver goods under a contract, if not treated as final by the party making the demand, cannot afterwards be treated as a refusal authorizing the commencement of suit.

[Nos. 149, 150.]

Argued March 8, 9, 1886. Decided April 5, 1886.

IN ERROR to the Circuit Court of the United States for the District of Maine.

The case is stated by the court.

Messrs. **Orville D. Baker** and *Leslie C. Cornish*, for Dingley brothers:

The court below has found that during the delivery time the plaintiffs demanded and the defendants unqualifiedly refused to deliver any ice during the season.

Even where the demand is before the contract time for performance has begun, a distinct and unequivocal refusal to perform at all may be treated as a breach and action may be brought at once.

It has been frequently held in the case of an executory contract that if the promisor has by any positive act rendered himself unable to perform his part, it not only serves to dispense with the performance of any conditions precedent on the part of the promisee before bringing his action, but also is itself a breach of the contract.

Short v. *Stone*, 8 Ad. & Ell. N. S. 358; *Lovelock* v. *Franklyn*, 8 Ad. & Ell. N. S. 371; *Ford* v. *Tiley*, 6 Barn. & C. 327; *Heard* v. *Bowers*, 23 Pick. 455; *Kenerson* v. *Henry*, 101 Mass. 152; Leake, Contracts, p. 460; 2 Chitty, Contracts, p. 1067; 2 Parsons, Contracts, p. 667; Benj. Sales, § 567.

We also maintain that when one party to an executory contract absolutely refuses to perform his contract and, before the time arrives for performance, distinctly and unqualifiedly communicates that refusal to the other party, that other party can if he choose treat that refusal as a breach and commence action at once therefor.

Cort v. *Ambergate R. Co.* 17 Ad. & Ell. N. S. 127; *Hochster* v. *De La Tour*, 2 Ell. & Bl. 678; *Danube & B. S. R. Co.* v. *Xenos*, 11 C. B. N. S. 152; *Frost* v. *Knight*, L. R. 5 Exch. 322; L. R. 7 Exch. 111; *Crabtree* v. *Messersmith*, 19 Iowa. 179; *Holloway* v. *Griffith*, 32 Iowa, 409; *Fox* v. *Kitton*, 19 Ill. 519; *Chamber of Commerce* v. *Sollitt*, 43 Ill. 519; *Dugan* v. *Anderson*, 36 Md. 567; *Burtis* v. *Thompson*, 42 N. Y. 246; *Howard* v. *Daly*, 61 N. Y. 362; *Hancock* v. *N. Y. Life Ins. Co.* 13 Am. L. Reg. 108; *Ex parte Pollard*, 2 Lowell, 411; *Smoot's Case*, 15 Wall. 36; Leake, Contracts, p. 462; Benj. Sales, § 518; 2 Chitty, Contracts, 11th ed. p. 1067; 2 Parsons, Contracts, p. 666; Sedgwick, Damages, p. 419, note.

Such then we find to be the law in the case of a bilateral contract; that is, a contract where both parties are bound and where the consideration of each promise is the promise of the other party.

But the principle applies with much more reason in the case of a unilateral contract, as is the one at bar; one party having already performed the consideration and the other being alone bound.

See *Masterton* v. *Mayor*, 7 Hill, 61; *Dugan* v. *Anderson*, 36 Md. 567.

Mr. **Bernard Carter**, for Oler & Company:

By the true construction of the contract Oler & Co. were only bound to return the ice, provided they could do so without loss to them; and therefore they had a right to refuse to do more than pay the price the ice was worth in 1879, when they took it as an accommodation, if the Dingleys were not willing to wait for the delivery until it fell to such price.

Oler & Co. had all of the season of 1880 to deliver the ice, and could not be required to deliver it or any part of it in July, 1880.

We understand it to be settled law that where there is an undertaking to do a thing in a certain year or month or any other determinate time, the party so undertaking has the whole year, month, etc., to perform his undertaking, and is in no default until the expiration of the period.

2 Wharton, Cont. 884; Benj. Sales, 684.

Having all the season of 1880 to deliver the ice, this action was prematurely brought in July, 1880, which was long prior to the close of the season, even though the court should find that the defendants, by their letters of July 7 and 15, 1880, declared that they would not deliver the ice during the season.

2 Parsons, Cont. foot 809.

The principle here stated was, until quite recently, the recognized law in England.

Phillpotts v. *Evans*, Mees. & W. 475; *Ripley* v. *McLure*, 8 Add. & Ell. N. S. 378; *Frost* v. *Knight*, Law Rep. 5 Exch. 326.

It is not denied that the English courts have more recently departed from this doctrine

Nor must we omit to say that this court, in *Smoot's Case*, 15 Wall. 48 (82 U. S bk. 21, L. ed. 107), in mentioning the case of *Hochster* v. *De La Tour* incidentally, does not signify any disapproval of it.

But the doctrine of the older English cases is maintained by the Supreme Court of Massachusetts, in a very ably reasoned opinion in which all the cases are reviewed; and it is respectfully submitted that the doctrine there maintained is the correct one.

Daniels v. *Newton*, 114 Mass. 539. See also *Day* v. *Ins. Co.* 45 Conn. 496. See 61 N. Y. 496.

There was no such absolute and unequivocal refusal of Oler & Co. to deliver the ice during the season of 1880 as authorized the plaintiffs to bring this action before the end of the season; the defendant having, as we here assume, until the end of the season to make the delivery.

Hochster v. *De La Tour*, 2 Ell. & Bl. 679; *Frost* v. *Knight*, L. R. 7 Exch. 118; *Smoot's Case*, *supra*; *Avery* v. *Bowden*, 5 Ell. & Bl. 714; *Freeth* v. *Burr*, L. R. 9 C. P. 214.

Mr. Justice **Matthews** delivered the opinion of the court:

This was an action of *assumpsit* brought by Dingley Brothers in the Superior Court of the County of Kennebec, in Maine, against W. M. Oler & Co., of Baltimore, to recover damages for the alleged breach of an agreement whereby, it was averred, the defendants undertook and promised, in consideration of $3,245\frac{25}{100}$ tons of ice delivered to them by the plaintiffs in 1879, to return and deliver to the plaintiffs the same quantity of ice from the defendants' ice houses in the year 1880. [491]

The case was removed by the defendants into the Circuit Court of the United States for the District of Maine, when the cause was put at issue by a plea of *non assumpsit*, and was submitted to the court by the parties, the intervention of a jury having been duly waived.

The court made a special finding of the facts, and, in pursuance of the conclusions of law based thereon, rendered judgment in favor of the plaintiffs for the sum of $7,335.85.

Exceptions were taken by each party to rulings of the court, on which errors are assigned, the cause being brought here for review on writs of error sued out by the respective parties.

The court found, as matter of fact, that late in the season of 1879, the plaintiffs, finding themselves in possession of a large quantity of ice undisposed of, and which threatened to be a total loss, pressed the defendants to buy some [492]

or all of it. Both parties were dealers in ice, cutting it upon the Kennebec River and shipping it thence during the season; that is, while the river is open.

The offers of the plaintiffs were rejected, but the defendants, by their letter of 6th September, 1879, made a counter offer to take a cargo and "return the same to you next year from our houses." The plaintiffs by their letter of September, 1879, accepted this offer and several cargoes were delivered upon the same terms; the total delivery was 3,245.25 tons.

In July, 1880, one of the plaintiffs spoke to one of the defendants about delivering the ice; and he replied that he did not know about that, delivering ice when it was worth $5 a ton, which they had taken when it was worth fifty cents a ton, but he promised to write an answer. July 7, 1880, the defendants wrote, repeating their objections and saying, among other things: "We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash at the price you offered other parties here (that is, fifty cents), or give you ice when the market reaches that point."

The plaintiffs, 10th July, 1880, wrote that they had a right to the ice, and had sold it in expectation of its delivery, to which the defendants answered 15th July, 1880, reciting the circumstances of the case and the hardship of such a demand, and again denying the obligation. The letter contains this sentence: "We cannot, therefore, comply with your request to deliver you the ice claimed, and respectfully submit that you ought not to ask this of us," etc., asking for a reply or a personal interview. Neither appears to have been given, and this action was commenced July 21, 1880. The court further found that ice was worth $5 a ton in July, 1880, and fell later in the season to $2 a ton.

Thereupon the court held, as matter of law, that there was a contract executed by the plaintiffs, and to be executed by the defendants, who were bound to deliver $3,245\frac{25}{100}$ tons of ice from their houses on the Kennebec River during [493] the year of 1880; that the year means the shipping season; and that the defendants had the whole season, if they chose to demand it, in which to make delivery, and that the letters of July 7 and 15, from the defendants to the plaintiffs, contained an unequivocal refusal to deliver any ice during the season; that the defendants having unqualifiedly refused to ship the ice, this action can be maintained though brought before the close of the season, but that the damages are not to be reckoned by the price of ice in July; that what the plaintiffs lost was $3,245\frac{25}{100}$ tons of ice some time during the season; that the price of ice went down after July to $2 a ton, and the measure of damages must be reckoned at this rate, with interest from the date of the writ.

To these conclusions of law the plaintiffs below excepted, contending that the right to fix the time for delivery under the contract had vested in them, that it was properly exercised by their demand in July, 1880, that the refusal to deliver at that time constituted the breach of the contract by the defendants, and fixed the damages at $5 per ton, the market value of the ice on that day.

The defendants below excepted, contending on their part that the letters of July 7 and 15 did not constitute an unequivocal refusal to deliver any ice during the season, amounting to a renunciation, and, in that sense, a breach of the contract; and that the action was prematurely brought, the right of action, if any, not accruing until after the expiration of the period within which, by the terms of the contract, they had the option to deliver.

The letter of July 7, 1880, from the defendants to the plaintiffs is as follows:

"Baltimore, Md., 7th July, 1880.

Messrs. Dingley Bros., Gardiner, Me.

Dear Sirs: As per promise of our W. M. O. we write you concerning the ice we got from you last fall. We have before us the whole of the correspondence on that head, and note throughout the same that you promise to stand between us and any loss. We quote from yours of September 9, 1879, on this head, as follows:

'In fact, we do not propose for you to become losers on account of extending us this accommodation.'

Our W. H. O. does not remember your having spoken to him while at Gardiner about your intention of selling the ice, and was very much surprised when informed that you had done so.

We are very sorry indeed that this question should have arisen between us, who have been on such friendly terms hitherto, but we feel that it is not just or equitable for you (in consideration of the ice being used by us only upon your earnest solicitation, and upon your representation that you would lose the whole unless we assisted you by taking some) to expect us to give you ice now worth $5 per ton, when we have letters of yours offering the ice that we got at 50 cents per ton. We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point. Again expressing our sincere regret that any complication should arise between us, and assuring you of our innocence in the matter, we are,

Yours Truly, W. M. Oler & Co."

The letter was answered by Dingley Bros. on July 10, as follows:

"Gardiner, July 10, 1880.

Messrs. W. M. Oler & Co., Baltimore.

Dear Sirs: Yours of 7th is in hand, and we must say the conclusion you have come to greatly astonishes us.

Our sole object in making this exchange, no one knows better than yourselves, was to tide us over to such a time during this season as the ice could be marketed at some reasonable figure, and in confirmation of this we refer you to your proposition, made under date of September 6, viz:

'It would, of course, be more convenient for us to ship this cargo from our own houses; but remembering past favors, we feel inclined to assist you in your present difficulty, and will load this cargo from your house, should our terms be agreeable to you.

'We, of course, do not entertain the idea of buying, having a superabundance on hand, but

will take this cargo and return same to you next year from our houses.'

Upon this we have acted, and in the utmost good faith made sale of the ice; and now, after all of this, and having refused to buy it yourselves, for you to ask a postponement in the delivery, seems to us hardly right.

Now, whatever the final settlement of this matter is to be, we want you to fill our order; otherwise, we cannot tell what the result might be.

It is not in our minds to do otherwise than right with anyone, and certainly with yourselves; and it is our great desire not to get complicated with the third party in that matter, and assure you that your regrets cannot exceed ours that there should have arisen any difference of opinion concerning this affair, and certain it is that neither of us can afford to do wrong by the other in it; and hoping you will take a more favorable view upon further reflection, we remain,

Truly Yours, Dingley Bros."

The defendants' letter of July 15 was in reply to this, and is as follows:

"Baltimore, Md., 15th July, 1880.

Messrs. Dingley Bros., Gardiner, Me.

Gentlemen: Yours of 10th July received, and in reply would state that our desire to do right is quite as sincere and earnest as your own, and that we regret our inability to see the matter referred to in the same form in which you state it. The case, briefly stated, appears to us thus, as we think the correspondence of last year will show: being very much troubled with the quantity of ice left on your hands by an unfortunate contract with the Messrs. Barker, you repeatedly urged and importuned us to help you out, and promised us if we would do so that no loss should result to us from the transaction. Under these assurances we at length agreed, purely for your accommodation and relief, to take one cargo, and later, under the same influences took more. Now you ask us, at a time when we are pressed by our sales and by short supply threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated. This does not seem to us to be fair, and certainly does not comport or agree in any way with your agreement to protect us from loss by means of the favor we were intending to do you. We are reluctant to have a disagreement or difference of opinion with old friends, but regard it our duty to protect our own interests, always, however, with a proper regard to the dictates of right. We cannot, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the fact stated herein and in ours of the 7th.

You do not reply to our arguments, but simply ask us to surrender our well formed opinion.

Can you reasonably ask us to do this?

Is not your usually clear and equitable judgment clouded by the manifest considerations of self interest pressing upon you?

We beg you to consider anew all the circumstances of the transaction and your assurances to us as inducements to make it with you, and cannot doubt that you will be led thereby to admit that your request is not reasonable. We will be glad to hear from you in reply, but would be more pleased to have a personal interview, and venture to suggest that you come here for the purpose. Our business is now more active and confining than ever before. We are deprived of the services of W. Geo., and therefore cannot come to see you.

With regards, we are,

Yours Truly, W. M. Oler & Co."

To this letter no answer was returned and the present suit was brought six days after its date.

We agree in opinion with the circuit court [500] that, according to the terms of the contract, the defendants had the option of delivering the ice contracted for at any time during the whole shipping season of 1880, giving to the plaintiffs reasonable notice of the time when fixed and an opportunity to prepare for receiving and taking it away from the defendants' houses. The language of the contract was that the defendants were to "return the same (the ice) to you next year from our houses." [501] Next year, it is not denied, means the shipping season of 1880, during which navigation was open, and in time for the plaintiffs, on notice, to obtain vessels, send them to the ice houses for loading, and get out of the river before it was closed to navigation. The defendants were to deliver, and although that, under the circumstances, required nothing on their part but to be ready for the plaintiffs to receive and load on their vessels, that state of readiness might depend upon other engagements of the defendants in respect to ice in the same houses, so that they had the right under the terms of the contract to consult their convenience as to the particular day when they would furnish to the plaintiffs the ice for shipment. The first and principal act to be done under the contract was to be done by the defendants, that is, the delivery, and the words of the agreement are fully satisfied when that is done at any reasonable time within the season of 1880. And this confers upon the defendants, bound to make the delivery, the choice of the time within the period permitted by the contract. *Wheeler* v. *New Brunswick, etc. R. R. Co.* [*ante* 341.]

We differ, however, from the opinion of the circuit court, that the defendants are to be considered, from the language of their letters above set out, as having renounced the contract by a refusal to perform, within the meaning of the rule which, it is assumed, in such a case, confers upon the plaintiffs a right of action before the expiration of the contract period for performance. We do not so construe the correspondence between the parties. In the letter of July 7, the defendants say: "We must, therefore, decline to ship the ice for you this season, and claim, as our right, to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point." Although in this extract they decline to ship the ice that season, it is accompanied with the expression of an alternative intention, and that is, to ship it, as must be understood, during that season, if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them. It was not intended, we think, as a final and absolute declaration that the con- [502]

tract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs. For, in their answer of July 10, they repeat their demand for delivery immediately, speak of the letter of the 7th instant as asking "for a postponement of the delivery," urge them "to fill our order," and close with "hoping you (the defendants) will take a more favorable view upon further reflection, etc." Here, certainly, was a *locus pœnitentiæ* conceded to the defendants by the plaintiffs themseles, and a request for further consideration, based upon a renewed demand, instead of abiding by and standing upon the previous one.

Accordingly, on July 15, the defendants replied to the demand for an immediate delivery to meet the exigency of the plaintiffs' sale of the same ice to others, and the letter is evidently and expressly confined to an answer to the particular demand for a delivery at that time. They accordingly say: "Now you ask us at a time when we are pressed by our sales and by short supply threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated. This does not seem to us to be fair," etc., * * * "We cannot, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the fact stated herein and in ours of the 7th." This, we think, is very far from being a positive, unconditional and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced and claimed as a matter of law to follow, the defendants have a right to claim that their expressions, sought to be converted into a renunciation of the contract, shall not be enlarged by construction beyond their strict meaning.

The view taken by the circuit court of the correspondence and conduct of the parties, and which we hold to be erroneous, brought the case within the rule laid down by the English courts in *Hochster* v. *De La Tour*, 2 Ell. & Bl. 678; *Frost* v. *Knight*, L. R. 7 Ex. 111; *Danube, etc. R. Co.* v. *Xenos*, 11 C. B. N. S. 152, and which, in *Roper* v. *Johnson*, L. R. 8 C. P. 167, 178, [503] was called a novel doctrine, followed by the courts of several of the States, *Crabtree* v. *Messersmith*, 19 Iowa, 179; *Holloway* v. *Griffith*, 32 Iowa, 409; *Fox* v. *Kittin*, 19 Ill. 519; *Chamber of Commerce* v. *Sollitt*, 48 Ill. 519; *Dugan* v. *Anderson*, 36 Md. 567; *Burtis* v. *Thompson*, 42 N. Y. 246, but disputed and denied by the Supreme Judicial Court of Massachusetts in *Daniels* v. *Newton*, 114 Mass. 530, and never applied in this court. Accordingly, the right to maintain the present action was justified upon the principle supposed to be established by those cases.

The construction we place upon what passed between the parties renders it unnecessary for us to discuss or decide whether the doctrine of these authorities can be maintained as applicable to the class of cases to which the present belongs; for, upon that construction, this case does not come within the operation of the rule invoked.

In *Smoot's Case*, 15 Wall. 36 [82 U. S. bk 21, L. ed. 107], this court quoted with approval the qualifications stated by Benjamin on Sales, 424, that "A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end."

We do not find any such refusal to have been given or acted upon in the present case, and the facts are not stronger than those in *Avery* v. *Bowden*, 5 Ell & Bl. 714; *S. C.* 6 *Id.* 953; which were held not to constitute a breach or renunciation of the contract. The most recent English case on the subject is that of *Johnstone* v. *Milling*, in the court of appeal, 16 Q. B. D. 460, decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it, and that that does not by itself amount to a breach of the contract unless so acted upon and adopted by the other party.

The present action was prematurely brought before there had been a breach of the contract, even in this sense, by the defendants, for what they said on July 15 amounted merely to a refusal to comply with the particular demand then made for an immediate delivery.

The judgment is accordingly reversed upon the writ of error sued out by the defendants below, and the cause remanded, with instructions to take further proceedings therein according to law; and upon the writ of error of plaintiffs below judgment will be given that they take nothing by their writ of error.

True copy. Test:
James F. McKenney, Clerk, Sup. Court, U. S.

TURPIN AND BROTHER, *Plfs. in Err.*,
v.
RUSH BURGESS, Collector of Internal Revenue for the THIRD DISTRICT OF VIRGINIA.

(See S. C. Reporter's ed. 504-508.)

Constitutional law—exportation stamp—excise tax on tobacco.

*1. The exportation stamp required to be affixed to every package of tobacco intended for exportation, before its removal from the factory, again declared constitutional, and the decision in *Pace* v. *Burgess*, Bk. 23, reaffirmed.

2. An excise laid on tobacco, before its removal from the factory, is not a duty on "exports," or "on articles exported," within the prohibition of the Constitution, even though the tobacco be intended for exportation. The case of *Cox* v. *Errol*, *ante*, cited and applied.

[No. 180.]

Argued March 18, 1886. Decided April 5, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

The case is stated by the court.

Mr. **Charles S. Stringfellow**, for plaintiff in error.

Mr. **John Goode**, *Solicitor-Gen.*, for defendant in error.

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* Head notes by *Mr. Justice* BRADLEY.

[506] *Mr. Justice* **Bradley** delivered the opinion of the court:

This suit was brought to recover from the Internal Revenue Collector of the Third District of Virginia the amount paid by the plaintiffs from 1869 to 1872, inclusive, for stamps affixed to certain cases of tobacco manufactured by them and intended for exportation. The sum paid for the stamps was twenty-five cents each. The ground of action relied on by the plaintiffs is, that the tax was unconstitutional, being, as contended, repugnant to that clause of the Constitution which declares that "No tax or duty shall be laid on articles exported from any State." The stamps were required to be affixed by the Act of July 20, 1868 (15 Stat. at L. 157). By this Act an excise tax of thirty-two cents per pound was imposed on all manufactured tobacco, except smoking tobacco, on which the tax was sixteen cents per pound. This tax was required to be paid by purchasing stamps to be affixed to the packages before the tobacco was allowed to be removed from the manufactory; but tobacco intended for exportation was relieved from the payment of this tax by affixing to each package or box, of whatever size, before removal from the factory, a twenty-five cent stamp, engraved to indicate the intent to export the same. After being thus stamped, and giving bond according to the regulations of the Treasury Department, such tobacco might be removed to any export bonded warehouse at some port of entry, and there kept in bond until actually exported. In 1872 the price of the stamp was reduced to ten cents; and the Act was incorporated in this form in section 3385 of the Revised Statutes.

We had occasion to examine the very question raised in this case in *Pace* v. *Burgess*, reported in 92 U. S. 372 [Bk. 23, L. ed. 657], and were unanimously of opinion that the Act requiring the exportation stamp complained of was a valid and constitutional Act. The reasons for that decision were given at length in the report of that case, and we see no occasion to modify the views then expressed. The finding of facts, so-called, made by the court in the present case by consent of the parties, who waived a jury, does not change the character of the question. Every fact now found was assumed, or virtually involved, in the former case. But since that decision Congress has abolished all charge for the exportation stamp, by an Act passed August 8, 1882, entitled "An Act to Repeal so Much of Section 3385 of the Revised Statutes as Imposes an Export Tax on Tobacco." It is argued that the language of this title is a concession by Congress that the charge for the stamp was an export tax. This argument admits of several answers. The Act was obtained in the interest of the tobacco manufacturers, and was probably proposed by them, or by their counsel, and the expression referred to may have escaped the attention of the members. But if it was intentionally used, it would only be the opinion of one Congress opposed to that of another; for, of course, it cannot be supposed that the Congress which passed the law regarded it as imposing a tax on exports. Besides, an expression of opinion on the part of Congress, however much to be respected, is not binding on us. The counsel for the plaintiff in this case asks us to declare the law unconstitutional, and thereby to declare that the Congress which passed it was mistaken in its opinion.

With the action of Congress in abolishing the charge for the stamp we have nothing to do. That is a matter of pure legislative discretion, and has no bearing on the question.

We are referred to certain expressions in the opinion of the Court of Appeals of Virginia in the case of *Burwell* v. *Burgess*, 32 Gratt. 472, indicating that if it were an original question that court would find it difficult to hold that the money paid for the stamps was not a tax. While entertaining a high respect for the opinions of that eminent court, we cannot surrender our own views on a question which it is our peculiar duty to decide.

There is another view of this subject, however, independent of the considerations which governed our former decision, which is equally decisive of this case. We have lately decided in *Coe* v. *Errol* [*ante*, 715], that goods intended for exportation to another State are liable to taxation as part of the general mass of property of the State of their origin until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose, provided they are taxed in the usual way in which such property is taxed, and not taxed by reason or because of such exportation, or intended exportation, and that the carrying of them to and depositing them at a depot for the purpose of transportation is no part of that transportation. Now the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State. In the one case the words are, "No tax or duty shall be laid on articles exported from any [507] State." Art. I, § 9, par. 5. In the other they are: "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports." Art. I, § 10, par. 2. The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation, or intended exportation, or while they are being exported. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. How can the officers of the United States, or of the State, know that goods apparently part of the general mass, and not in course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This cannot for a moment be contended. It would not be true, and would lead to the greatest frauds.

It is true, as was conceded in *Coe* v. *Errol*, that the prohibition to the States against laying duties on imports or exports related to imports from and exports to foreign countries; yet the decision in that case was based on the postulate that when such imposts or duties are laid on imports or exports from one State to another it amounts to a regulation of commerce among the States, and, therefore, is an invasion of the exclusive power of Congress; so that the anal-

ogy between the two cases holds good, and what would be constitutional or unconstitutional in the one case would be constitutional or unconstitutional in the other.

In the present case, the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer. Had the same excise which was laid upon all other tobacco manufactured by the plaintiffs been laid on the tobacco in question, they could not have complained. But it was not. A special indulgence was granted to them, in [508] common with others, in reference to the particular tobacco which they declared it to be their intention to export. With regard to that, in order to identify it, and to protect the government from fraudulent practices, all that was required of the plaintiffs, was to affix a twenty-five cent stamp of a peculiar design to each package, no matter how much it might contain, and enter into bond either to export it according to the declared intention, or to pay the regular tax, if it should not be exported. In this view of the case, the plaintiffs not only had no ground of complaint, but they were really the objects of favorable treatment on the part of the government, which, on the slight and easy conditions referred to, accepted their declared intention to export the tobacco in question, before it was commenced to be exported, or put in the way of exportation.

On both grounds we are satisfied that the plaintiffs are without any cause of action, and the judgment of the Circuit Court is affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court. U. S.

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[514] ALEXANDER BRUCE AND WILLIAM SHEPARD, *Appts.*,

v.

MANCHESTER AND KEENE RAILROAD.

(See S. C. Reporter's ed. 514-516.)

Jurisdiction—matter in dispute—value, how determined.

1. The matter in dispute on which the jurisdiction of this court depends is the matter directly in dispute in the particular cause in which the judgment or decree sought to be reviewed was rendered, not including its collateral effect in a subsequent suit between the same or other parties.

2. Where a suit is brought to recover the interest on bonds only, the amount of interest determines the jurisdiction, irrespective of the value of the principal of the bonds.

3. This principle holds true in case of a bill in equity to collect interest on certain bonds by a foreclosure of a mortgage, notwithstanding that a collateral effect of the action might be the sale of the mortgaged premises and the summoning of other bondholders before the master for the purpose of determining their interest in the proceeds.

[No. 759.]

Submitted Mar. 22, 1886. Decided April 5, 1886.

APPEAL from the Circuit Court of the United States for the District of New Hampshire.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. J. W. Fellows and *Frank W. Hackett*, for appellee, in support of the motion to dismiss.

Mr. F. A. Brooks, for appellants, *contra*.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit, at the time of the decree appealed from, was by Alexander Bruce, a citizen of Illinois, and William Shepard, a citizen of Massachusetts, against the Manchester and Keene Railroad, a New Hampshire corporation, to collect interest due on certain bonds of the railroad by the foreclosure of a mortgage made to trustees to secure a series of bonds, amounting in the aggregate to $500,000. There were other parties, both plaintiff and defendant, when the suit was begun, but a discontinuance was entered before the decree as to all but these. The bill was filed in behalf of the complainants and all other like creditors, not citizens of New Hampshire, who might come in and contribute to the expenses, but no such creditors had come in or connected themselves with the suit in any way at the time of the decree. The Railroad filed an answer, and upon final hearing the bill was dismissed. The record shows that the complainant Bruce owned bonds for $7,500, on which interest was past due and unpaid to the amount of not more than $3,000, and Shepard $1,000 of bonds, on which not more than $400 of interest was due. After the bill was dismissed the complainants, Bruce and Shepard, took a joint appeal, which the Railroad now moves to dismiss because the value of the matter in dispute does not exceed $5,000.

This motion must be granted. The case comes clearly within the rule established in *Elgin* v. *Marshall*, 106 U. S. 578 [Bk. 27, L. ed. 249], in which it was decided that the matter in dispute, on which our jurisdiction depends, is "the matter which is directly in dispute in the particular cause in which the judgment or decree sought to be reviewed has been rendered" and that we are not permitted, "for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties." Although the principal of the bonds owned by one of the complainants exceeds $5,000, the suit is brought to recover only the interest, which is less. These complainants are in no way authorized to represent the other bondholders. They sued for themselves and all others in like situation who might join with them, but no one saw fit to join. They were allowed to proceed alone, and the payment to them of their interest would have been a bar to the further prosecution of the suit. So, if a decree had been rendered in their favor without others joining in the suit, either by petition or by proof before a master or otherwise, it would have been satisfied by the payment of the amount found due to them, and no further proceedings could thereafter be had. It is true, if such a payment should not be made, and a resort to a sale of the mortgaged property should be necessary to

NOTE.—*Jurisdiction of Supreme Court; dependent on value of matter in controversy.* See Gordon v. Ogden, 28 U. S., bk. 7, 592, note.

collect what was due to them, the other bondholders would have an interest in the proceeds and could be called in before a master for that purpose, but that would be only one of the collateral or indirect effects of the decree not to be considered in determining our jurisdiction. On the case as it stood when the bill was dismissed, the only matter directly involved was the right of Bruce and Shepard to have the mortgaged property sold to pay the several amounts due them respectively for interest on their bonds. This is all that has been denied. It follows that the matter in dispute here is less than our jurisdictional limit.

Dismissed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JAMES N. BURNES, *Plff. in Err.*,

v.

WILLIAM L. SCOTT ET AL., EXRS. OF MILTON COURTRIGHT, Deceased.

(See S. C. Reporter's ed. 582-591.)

Promissory note—parol evidence—champertous contract.

1. Evidence tending to show that a promissory note was not intended by the parties to be such is inadmissible in an action at law brought by the holder on such note.
2. Such evidence is inadmissible in an action at law to show want of consideration where the question of the alleged want of consideration involves the settlement of a partnership and the matter amounts to an equitable defense.
3. A champertous contract cannot be set up in bar of a recovery on the cause of action to which it relates.

[No. 187.]

Argued March 23, 1886. Decided April 5, 1886.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri.

Statement by *Mr. Justice* **Woods:**

This was an action at law brought by Milton Courtright against James N. Burnes, the plaintiff in error, upon the note of the latter made at Chicago, and dated October 10, 1872, whereby he promised to pay, thirty days after date, to the order of F. H. Winston, $7,333, at the Cook County National Bank, in Chicago. Courtright, by indorsement and transfer, became the owner and holder of the note.

The defendant pleaded four pleas. The first of these was a general denial of the averments of the petition.

The second plea was in substance as follows: that when the note was made, the plaintiff Courtright, the defendant Burnes, the said Winston, and one Campbell had been, and were, partners in a contract for building a certain railroad therein named; that prior to the date of the note Winston had received and was in possession, as part of the assets of the partnership, of forty bonds for $1,000 each, of the City of Atchison, subject to the payment of the partnership debts and, after such payment, for distribution among the partners; that a short time before the date of the note, the partners had appointed the defendant a trustee to settle the partnership affairs; that when the note was given the partnership affairs had not been settled and were not settled at the time of filing the plea; that at the time of the making of the note, Winston turned over to defendant the bonds above mentioned, and estimated that there would be due him, as a partner in the firm, from its assets, the sum mentioned in said note; and thereupon requested the defendant, as trustee of the partners, to make the note "with the understanding that the same was not to be sued on, but was to be deemed a mere memorandum of the amount that should be estimated as the share of said Winston, on account of said bonds, in a settlement among said partners;" that the defendant executed the note accordingly, as trustee of the partnership and not as his individual note, and the plaintiff acquired title to the note with knowledge of these facts. [584]

By the third plea it was averred as follows: that the note sued on "was and is wholly without consideration, and is null and void; and that said note is based upon and grew out of transactions relating to the business of said partners; that said partners are interested in the same and are necessary parties to a suit relating to said note; and the amount due in said note, if any, cannot be ascertained until a final settlement of said partnership can be had."

The last plea was that the suit was prosecuted under an agreement between the plaintiff and George W. DeCamp his attorney, whereby the latter undertook to prosecute the suit and to pay all the expenses incident to its prosecution, in consideration that he should receive four tenths of the amount recovered.

The parties waived a trial by jury and submitted the issues of fact as well as of law to the court, which made a general finding for the plaintiff and entered judgment thereon in his favor against the defendant Burnes, for $11,401.60, who thereupon sued out this writ of error. After the record was filed in this court Courtright died, and the executors of his last will were made defendants in error in his stead.

Mr. **B. F. Stringfellow,** for plaintiff in error.

Messrs. **S. M. Brainard and G. W. De Camp,** for defendants in error.

Mr. Justice **Woods** delivered the opinion of the court:

The bill of exceptions shows that upon the trial of the case the defendant, to sustain the issue on his part, offered evidence tending to show that "Winston, the payee and assignor of the note sued on." Courtright, "the plaintiff," Burnes, "the defendant, and one Campbell, were the contractors for the construction of the Chicago and Southwestern Railroad, as partners, and that Winston was entitled to an interest of two fifteenths in such contract; that

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NOTE.—*Notes and bills; parol evidence as to.* See Bank of U. S. v. Dunn, 31 U. S. bk. 8, 316, *note.*

Evidence as to consideration; defenses. See McDonald v. Magruder, 28 U. S. bk. 7, 744, *note.*

Parol evidence; applicability to written contracts generally. See Bradley v. Washington, A. & G. Packet Co., 36 U. S. bk. 10, 72, *note.*

Champerty and maintenance. See Lewis v. Bell, 58 U. S., bk. 15, 208, *note;* McMicken v. Perrin, 58 U. S., bk. 15, 504, *note.*

[585] Winston had charge of the execution of the contract and possession and control of the assets arising from the contract; that after the completion of the road, in October, 1872, Winston delivered to defendant forty bonds of the City of Atchison for $1,000 each, which had been received and were then held by him as part of the assets under such contract; that the bonds were delivered by Winston to and received by defendant as the trustee for the parties in interest in the contract, and that at the time the bonds were so delivered defendant gave to Winston the note sued on."

The defendant also offered evidence to show "that the note sued on when given was not intended by him the maker, nor by Winston the payee, as a promissory note; but was only intended and so given by him and received by Winston as a memorandum of the then estimate of the value of the estimated interest of Winston in the Atchison bonds then delivered as part of the profits of the aforesaid contract for the construction of the Atchison Branch to be accounted for on a settlement between the partners to such contract; * * * that the only consideration of the note sued on was the transfer by Winston to defendant of the interest of Winston in the Atchison bonds, as part of the profits of the contract for the construction of the Atchison branch;" and "that upon a settlement of the partnership accounts, between said Winston and his partners in the contract for the construction of said Atchison branch, the said Winston would have had no interest in the profits of said contract, having received more than his share thereof prior to the giving of said note."

To all of which evidence so offered plaintiff objected as incompetent and irrelevant; and the objections were sustained by the court, and the evidence excluded. The exclusion of the testimony so offered is now assigned for error by the defendant.

So far as the evidence excluded was offered in support of the second plea, it is plain that it was inadmissible. Its purpose was to vary and contradict by an alleged contemporaneous verbal agreement the contract which the parties had reduced to writing. It was offered to show that a promissory note in the usual form was not intended by the parties to be a promissory [586] note, but was a mere memorandum, by which the maker promised nothing, which gave no rights to the payee, and was to all intents and purposes vain, futile and of no force or effect whatever. It is not necessary to cite authority to show that the evidence was inadmissible for such a purpose.

The counsel for defendant, not strenuously insisting that the evidence was admissible to support the second plea, insist that it was competent to prove the third. They argue that as want of consideration may be shown in defense of an action on a promissory note, the evidence should have been received.

As a general rule want of consideration is a defense to a promissory note, but it is not always a defense which can be made at law. It frequently requires the aid of a court of equity to give it effect. The plea, to support which the defendant contends the evidence of want of consideration was admissible, clearly sets up an equitable defense. It alleges that the note sued on is based on the "transactions relating to the business of said partners." Referring, therefore, to the preceding plea, which states the business of the partners, as we are authorized to do, we learn that the partnership business had not at the time of filing the pleas been settled or the interest of Winston therein or in the bonds been ascertained. The plea under consideration further avers that the members of the partnership were interested in the said business and were necessary parties to a suit relating to the note; and that the amount due thereon, if anything, could not be ascertained until the final settlement of the partnership. It is plain, therefore, that the defense set up by the plea is not the legal defense of want of consideration; for the plea admits by implication that there may be something due on the note, but the equitable defense that the amount due on the note, if anything, is dependent on the amount coming to Winston from the assets of the partnership, which cannot be ascertained without a settlement of the partnership affairs in a suit to which all the partners are necessary parties. And yet having so pleaded, the defendant insists in argument that in a trial upon the promissory note in a court of law, and without the presence of two of the four partners, evidence is admissible to settle the partnership, and to prove, without making Winston a party to the suit, that there is nothing due him out of the partnership assets. The pleading and the contention of the defendant appear, therefore, to be contradictory and inconsistent.

Plainly the relief, if any, to which the facts set up in this plea entitles the defendant is an injunction to stay the suit at law upon the note until a settlement of the partnership and an ascertainment of the amount, if anything, coming to Winston out of the assets of the partnership. This is a remedy which a court of equity only can grant. But the defendant insists on a verdict and judgment in his favor, without settlement of the partnership on which, as he asserts, the validity of the note depends.

Under the jurisprudence of the courts of the United States a court of law can no more take cognizance of an equitable defense than a court of equity can entertain a suit upon a purely legal title. "The Constitution of the United States," says *Mr. Chief Justice* Taney, in delivering judgment in the case of *Bennett* v. *Butterworth*, 11 How. 669 [52 U. S. bk. 13, L. ed. 859], "in creating and defining the judicial power of the general government establishes this distinction between law and equity, and a party who claims a legal title must proceed at law. * * * But if the claim is an equitable one, he must proceed according to the rules which this court has prescribed regulating proceedings in equity in the courts of the United States."

So in *Thompson* v. *R. R. Co.* 6 Wall. 134 [73 U. S. bk. 18, L. ed. 765], the court referred to *Bennett* v. *Butterworth*, and cited with approval and adopted the following extract from the opinion in that case: "Although the forms of proceedings and practice in the state courts shall have been adopted in the circuit courts, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended in one suit."

So in the case of *Jones* v. *McMasters*, 20 How.

8 [61 U. S. bk. 15, L. ed. 805], which was an action at law for the recovery of the possession of land, it was held that when the grant from the government on which the plaintiffs relied was regular in form, it was not proper by way of defense, to go behind the survey and location; that, if they were voidable for irregularity or other cause, the question was not one for a court of law in an action to recover possession, but for a court of equity to reform any error or mistake.

So in *Foster* v. *Mora*, 98 U. S. 425 [Bk. 25, L. ed. 191], it was said that "In actions of ejectment in the United States Courts, the strict legal title prevails; if there are equities which would show the right to be in another, these can only be considered on the equity side of the federal courts." To the same effect see *Greer* v. *Mezes*, 24 How. 268 [65 U. S. bk. 16, L. ed. 661]; *Watkins* v. *Holman*, 16 Pet. 25, and *Bagnell* v. *Broderick*, 13 Pet. 436 [41 and 38 U. S. bk. 10, L. ed. 874, 235]; *Bank of Hamilton* v. *Dudley*, 2 Pet. 492 [27 U.S. bk. 7, L. ed. 496]. See also Peeler's Law & Equity in U. S. Courts, chap. 1, and note 26, pp. 28, 29.

If the defense set up in the plea under consideration could be made effectual in an action at law, it would render obsolete in the equity courts of the United States that great head of equity jurisdiction under which injunctions are granted to stay proceedings at law. "The occasions," says *Mr. Justice* Story, "on which an injunction may be used to stay proceedings at law are almost infinite in their nature and circumstances. * * * Thus, an injunction is sometimes granted to stay trial; sometimes after verdict to stay judgment, sometimes after judgment to stay execution, and sometimes after execution to stay the money in the hands of the sheriff," etc. Story, Eq. Jur. §§ 885, 886, and see §§ 881, 882; Eden, Injunctions, chap. 2, p. 3; *Waterlow* v. *Bacon*, L. R. 2 Eq. 514; *Hibbard* v. *Eastman*, 47 N. H. 507; *Hopkins* v. *Fechter*, 47 Miss. 331; *Tommey* v. *Ellis*, 41 Ga. 260.

It is clear, therefore, that the matters set up in the third plea were proper for the consideration of a court of equity, and that they could not be set up as a defense in a court of law. All the evidence offered to prove them was, therefore, properly excluded.

It further appears from the bill of exceptions that in support of the plea that the plaintiff had made a champertous agreement with his counsel for the prosecution of this suit, the defendant offered evidence which tended to prove a contract made by the plaintiff with his counsel, George W. De Camp, by which the latter agreed to prosecute the suit and defray all the expenses thereof, in consideration of which he was to receive a certain proportion of the sum recovered. The court, however, did not give effect to this plea and overruled a motion made by the defendant to dismiss the action on the ground that the plaintiff had made such champertous contract. This action of the court the defendant assigns for error.

At common law and by statute both in England and in many of the United States, champerty was a criminal offense. But at the present time, in most of the States, to aid the the lawful suit of another with money or ser-

s, in consideration of a share in the recovery, is not considered or punished as a crime. But in many of the States champertous contracts are considered void. This is the case in Missouri where the present case was tried, the supreme court so holding, on the ground that the common law had been adopted by statute in that State. See *Duke* v. *Harper*, 66 Mo. 51. The defendant now asks us to go a long step beyond this ruling.

The question raised by the present assignment of error is not whether a champertous contract between counsel and client is void, but whether the making of such a contract can be set up in bar of a recovery on the cause of action to which the champertous contract relates.

We must answer this question in the negative. It was wisely said by the Supreme Court of New York, in the case of *Thalhimer* v. *Brinkerhoff*, 8 Cow. 623, that "The right of litigation may be abused, and proper remedies for groundless and vexatious litigation must exist; but the remedies for the abuse of this right should be such as not to impair the free use of the right itself. As the justice or injustice of the claim cannot be known before the termination of the cause, the checks upon unjust litigation must in general consist, not in excluding the suit or the suitor from the courts, but in redress following the decision of justice upon the merits of the case."

This is in accord with the views of this court. The precise question under consideration was decided in the case of *Boone* v. *Chiles*, 10 Pet. 177 [35 U. S. bk. 9, L. ed. 388]. That was a bill in equity to establish the title to a tract of 700 acres of land in Bourbon County, in the State of Kentucky. Among other defenses it was alleged that an agreement in writing had been made between Boone, the plaintiff, and one Engles, by which Engles undertook at his own expense to prosecute a suit for the 700 acres in dispute; and as a consideration for his trouble was to have one half of the land, and that the suit was prosecuted under that agreement; that it was, therefore, a case of champerty and maintenance forbidden by law, in which the court could give no relief. But the court held that, although the English Statutes which had been adopted in Kentucky punished the offense and declared the contract for maintenance void between the parties, the right of the plaintiff was not forfeited by such an agreement, and it might be asserted against the defendants whether the contract with Engles was valid or void. The same rule has been declared in other American cases. *Whitney* v. *Kirtland*, 27 N. J. Eq. 333; *Robison* v. *Beall*, 26 Ga. 17; *Allison* v. *C. & N. W. Railroad Co.* 42 Iowa, 274.

[590]

So in *Hilton* v. *Woods*, L. R. 4 Eq. 432, it was strenuously urged that the bargain between the plaintiff and Mr. Wright, under which the suit was instituted, amounted to champerty and maintenance, and consequently disqualified the plaintiff to sue, and that the court was bound to dismiss the bill. But the Vice Chancellor said: "I have carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that whenever the right of the plaintiff in respect of which he sues is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But no authority

was cited nor have I met any, which goes the length of deciding that when a plaintiff has an original good title to property he becomes disqualified to sue for it by having ventured into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise." There was, therefore, a decree for the plaintiff, though without costs.

In *Elborough* v. *Ayres*, L. R. 10 Eq. 367, it was conceded that the fact that the plaintiff, in an action for malicious prosecution, had been maintained, would be no bar to the action, and the Vice Chancellor held that such maintenance would be no ground for the interference of a [591] court of equity to prevent the action from going on, citing Vice Chancellor Wigram in *Evans* v. *Prothero* [1 De G. M. & G. 572].

The only cases to which we have been referred in which the rule insisted on by the defendant has been maintained were two cases decided in the Supreme Court of Wisconsin. *Barker* v. *Barker*, 14 Wis. 131, and *Allard* v. *Lamirande*, 29 Wis. 502.

We think, therefore, that, both upon reason and weight of authority, the court did not err in refusing to give effect to the fourth plea of the defendant, or in refusing to dismiss the suit because it was prosecuted under a champertous agreement between the plaintiff and his counsel.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Ex Parte:
[516] In the Matter of CHARLES W. FONDA, *Petitioner.*

(See S. C. Reporter's ed. 516-518.)

Habeas corpus—*jurisdiction—practice.*

Although this court may have legal power on *habeas corpus* to discharge the petitioner, who has been convicted of embezzlement in a state court of the funds of a national bank, where no reason appears why the supreme court of the State may not review the judgment, it will not act in advance of the orderly course of proceeding for a review of the judgment by writ of error.

Submitted March 22, 1886. Decided April 5, 1886.

ON MOTION for leave to file petition for a writ of *habeas corpus.*

The petition in this case set out that the petitioner had been sentenced, by a state court of Michigan, for a term in the penitentiary of that State, and that he was now illegally confined in such penitentiary; that this imprisonment was illegal in this:

1. Because the petitioner was convicted, sentenced and imprisoned contrary to the Constitution of the United States and the laws of Congress.

2. Because the acts described and charged in the counts under which he was convicted (being embezzlement of the funds and property of a national bank by a clerk therein) are cognizable by the federal courts; and the jurisdiction to try the petitioner and to punish such crime is vested exclusively in said courts, the action of the state court being in violation of article 1, § 8, pars. 5, 17, U. S. Const. and of section 711, R. S. par. 1, and section 5209, R. S.

3. Because he was held to answer for and was convicted of an infamous crime as charged in the information, without presentment or indictment by a grand jury.

Mr. Edwin F. Conely, William E. Earle and *Frank P. Guise*, in favor of petitioner.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied on the authority of *Ex parte Royall* [*ante*, 868]. No reason is suggested why the Supreme Court of the State may not review the judgment of the circuit court of the county, upon the question which is raised as to the application of the statute, under which the conviction has been had, to embezzlements by the servants and clerks of national banks; nor why it should not be permitted to do so without interference by the courts of the United States. The question appears to be one which, if properly presented by the record, may be reviewed in this court after a decision by the supreme court adverse to the petitioner. The case as made by the motion papers is not one which, under the principles settled in *Royall's Case*, requires this court to act in advance of the orderly course of proceeding for a review of the judgment by writ of error.

True copy. Test:
James H. McKenney, Clerk Sup. Court, U. S.

ANTHONY W. DIMOCK, *Plff. in Err.*,
v.
REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS.

(See S. C. Reporter's ed. 559-566.)

Jurisdiction—discharge in bankruptcy pending suit—judgment thereafter—discharge no defense to action on such judgment.

1. This court has jurisdiction to review a decision of a state court to the effect that a discharge in bankruptcy of the defendant was not a bar to the action.

2. Where a defendant had a good defense, at the time judgment was rendered against him, as a discharge in bankruptcy, and failed to present it to a court which had jurisdiction of his case and of all the defenses which he might have made, the judgment is valid; and such defense cannot afterwards be set up in an action on the judgment.

[No. 185.]

Argued Mar. 22, 1886. Decided Apr. 5, 1886.

IN ERROR to the Supreme Court of the State of New York.

The case is stated by the court.

Mr. **George Putnam Smith**, for plaintiff in error:

It is immaterial that the form of the debt was changed after the institution of the bankruptcy proceedings, so that instead of a simple contract debt it became a judgment.

Betts v. *Bagley*, 12 Pick, 571; *Clark* v. *Rowling*, 8 N. Y. 216; *Wyman* v. *Mitchell*, 1 Cow. 316.

If, during the pendency of bankruptcy proceedings, a provable claim against the bank-

rupt's estate becomes transformed into a judgment, it will nevertheless be extinguished by a subsequent discharge in bankruptcy.

Monroe v. *Upton*, 50 N. Y. 593; *Ocean Bank* v. *Olcott*, 46 N. Y. 22; *Arnold* v. *Oliver*, 2 N. Y. Civ. Pro. Rep. 457: *Dewey* v. *Moyer*, 72 N. Y. 75.

The fact that the present claim was transformed into a judgment after the discharge was granted does not take it out of the operation of this rule, it being the settled law in New York that a judgment is not a new debt but only a new form of an old debt. Any other rule would narrow section 5119 of the Bankruptcy Act.

The adjudication of the facts in Mr. Dimock's case took place January 25, 1875, when his default was taken.

Huntress v. *Effingham*, 17 N. H. 584; *Bates* v. *Loomis*, 5 Wend. 134.

Among these facts was not involved the question of a discharge in bankruptcy; it did not then exist.

Jarvis v. *Blanchard*, 6 Mass. 4. *Huntress* v. *Effingham*, 17 N. H. 584.

The decisions holding that a discharge in bankruptcy to be effectual must be pleaded in the suit pending on the original claim are either: 1. rendered in States where the law is that a judgment is a new debt and not merely a new form of an old debt; or, 2, rendered in suits which arose under the Acts of 1811 or 1841. There is a vital distinction between these Acts and the Act of 1867. Under the former Acts the discharge could be impeached in state courts.

Alcott v. *Avery*, 1 Barb. Ch. 347; *Cable* v. *Cooper*, 15 Johns. 152.

Otherwise under the later Act.

Ocean Bank v. *Olcott*, 46 N. Y. 12.

The discharge was a complete bar to the action on the judgment.

Anderson v. *Anderson*, 65 Ga. 518; *Braman* v. *Snider*, 21 Fed. Rep. 871; *Clark* v. *Rowling*, 8 N. Y. 222.

Mr. **David Wilcox**, for defendant in error:

The fact that during the pendency of the suit the defendant was adjudicated a bankrupt in no respect impairs the validity or force of the judgment.

Eyster v. *Gaff*, 91 U. S. 521 (Bk. 23, L. ed. 403); *Claflin* v. *Houseman*, 93 U. S. 130 (Bk. 23, L. ed. 833), *McHenry* v. *La Société, etc.* 95 U. S. 60 (Bk. 24, L. ed. 370); *Davis* v. *Friedlander*, 104 U. S. 570 and *Thatcher* v. *Rockwell*, 105 U. S. 467 (Bk. 26, L. ed. 818, 949).

The date as of which the judgment speaks is not that of any interlocutory step in the action, but the date of the recovery of the judgment itself.

McFarland v. *Irwin*, 8 Johns. 77; *Sternbergh* v. *Schoolcraft*, 2 Barb. 153; *Smith* v. *Nelson*, 52 N. Y. 286; *Rees* v. *Butler*, 18 Mo. 174; *Bird* v. *Smith*, 34 Me. 63; Freeman, Judgments, § 435.

Then and not until then are the rights of the parties conclusively adjudicated.

Smith v. *McCool*, 16 Wall. 560 (Bk. 21, L. ed. 324); *Webb* v. *Buckelew*, 82 N. Y. 555.

Even when a defendant is discharged during the pendency of an action and before judgment, he has no absolute right to set up the discharge. It is discretionary with the court; and in cases of laches leave may be refused, or for other sufficient cause.

Medbury v. *Swan*, 46 N. Y. 200; *Holyoke* v. *Adams*, 59 N. Y. 233; *McDonald* v. *Whitney*, 12 Hun, 95.

Mr. Justice **Miller** delivered the opinion of the court:

This case comes here by a writ of error to the Supreme Court of New York, having been decided in the Court of Appeals, and the record remitted to the supreme court that judgment might be finally entered there. [559]

The action was brought in that court on a judgment in favor of the Revere Copper Company, plaintiff, against Anthony W. Dimock, rendered in the Superior Court of the Commonwealth of Massachusetts, for the County of Suffolk, on the first day of April, 1875. [560]

The defendant, Dimock, pleaded, in bar of this action, a discharge in bankruptcy, by the District Court of the United States, for the District of Massachusetts, rendered on the 26th day of March, 1875, five days before judgment in the state court.

The case being submitted to the New York Supreme Court in special term, without a jury, that court found the following facts and conclusions of law thereon:

"*As Findings of Fact.*

"First. That the plaintiff is, and at the times hereinafter mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts.

"Second. That on or about the 18th day of January, 1874, the Revere Copper Company of Boston, Massachusetts, the plaintiff herein, commenced an action in the Superior Court of the Commonwealth of Massachusetts, within and for the County of Suffolk, a court of general jurisdiction, against Anthony W. Dimock, the defendant herein, by the issue of a writ of attachment against the goods, estate and body of the said defendant, and which said writ was duly served on said defendant, and the summons to appear in said action was duly served upon him personally, and that the said defendant thereafter duly appeared in said action by attorney; that the cause of action was an indorsement of said Dimock of two promissory notes made in the City of New York to the order of plaintiff by the Atlantic Mail Steamship Company, and dated December 19, 1872.

"Third. That on or about June 23, 1874, the said defendant, Anthony W. Dimock, filed a petition in bankruptcy, and was duly adjudicated a bankrupt, in the District Court of the United States for the District of Massachusetts; and that such proceedings were thereafter had that, on or about March 26, 1875, the said Dimock was discharged from all debts and claims provable against his estate, and which existed on the 23d day of June, 1874. [561]

"Fourth. That such proceedings were had in the aforesaid action in the Superior Court of the Commonwealth of Massachusetts that on or about April 1, 1875, the plaintiff duly recovered judgment in said action against the defendant for the sum of three thousand five hundred and ninety-five $\frac{14}{100}$ dollars ($3,595.15), and that said judgment was upon that day duly entered.

"Fifth. That no part of said judgment has been paid, and the whole thereof is now due and payable to the plaintiff.

"*As Conclusions of Law*:

"I. That the said proceedings in bankruptcy are no bar to the present action, and constitute no defense herein.

"II. That the plaintiff should have judgment against the defendant for the sum of three thousand five hundred and ninety-five $\frac{15}{100}$ dollars ($3,595.15), with interest from April 1, 1875, amounting to one thousand one hundred and forty-two $\frac{96}{100}$ dollars ($1,142.96), making in all four thousand seven hundred and thirty-eight $\frac{11}{100}$ dollars ($4,738.11), together with the costs of this action, to be taxed; and an allowance, in addition to costs, amounting to the sum of seventy-five dollars."

The judgment rendered on these findings was reversed by the supreme court in general term, and that judgment was in turn reversed by the court of appeals, which restored the judgment of the special term. 90 N. Y. 33.

[564] The only question considered at all these trials was whether the discharge of the defendant in the bankruptcy proceeding is under the facts found by the court a bar to the present action; and as the decision by the New York Court against the plaintiff in error, as to the effect of that order of discharge, is to refuse to him a right claimed under the laws of the United States, this court has jurisdiction to review the decision.

The Superior Court of Massachusetts had jurisdiction of the suit of the Copper Company against Dimock, both as regards the subject matter and the parties. This jurisdiction was rendered complete by service of process and by the appearance of the defendant. All this was before the beginning of the bankruptcy proceeding. Nothing was done to oust this jurisdiction, and the case accordingly proceeded in due order to the rendition of the judgment which is the foundation of this action. It is not argued that this judgment was void, or that the court was ousted of its jurisdiction by anything done in the bankruptcy court. No such argument could be sustained if it were made. In the case of *Eyster* v. *Gaff*, 91 U. S. 521 [Bk. 23, L. ed. 403], which was very similar to this on the point now before the court, it was said: "The court in that case had acquired jurisdiction of the parties and of the subject matter of the suit. It was competent to administer full justice, and was proceeding according to the law which governed such a suit to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might affect the rights of parties to the suit already pending. It was the duty of that court to proceed to a decree between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of the parties to the subject matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void." The court then goes on to show that if the assignee had brought his right, acquired *pendente lite*, to the notice of the court, it would have been protected. *Hill* v. *Harding*, 107 U. S. 631 [Bk. 27, L. ed. 493].

[565] So here, if Dimock had brought his discharge to the attention of the superior court at any time before judgment, it would have been received as a bar to the action; and under proper circumstances, even after judgment, it might be made the foundation for setting it aside and admitting the defense. *Ray* v. *Wight*, 119 Mass. 426; *Page* v. *Cole*, 123 Mass. 93; *Golden* v. *Blaskopf*, 126 Mass. 523. Nothing of the kind was attempted. The question before the Massachusetts court for decision, at the moment it rendered its judgment was whether Dimock was *then* indebted to the Copper Company. Of Dimock and of this question it had complete jurisdiction, and it was bound to decide it on the evidence before it. Its decision was therefore conclusive, as much so as any judgment where the jurisdiction is complete. It concluded Mr. Dimock from ever denying that he was so indebted on that day, wherever that judgment was produced as evidence of the debt. If he had the means at that time to prove that the debt had been paid, released or otherwise satisfied, and did not show it to the court, he cannot be permitted to do it in this suit; and the fact that the evidence that he did not then owe the debt was the discharge in bankruptcy, made five days before, does not differ from a payment and receipt in full or a release for a valuable consideration. *Cromwell* v. *Sac County*, 94 U. S. 357 [Bk. 24, L. ed. 200]. Also, *Claflin* v. *Houseman*, 93 U. S. 134 [Bk. 23, L. ed. 838]. A still stronger case of the validity of judgments of a state court, in their relation to bankruptcy proceedings had *pendente lite*, is that of *Davis* v. *Friedlander*, 104 U. S. 570 [Bk. 26, L. ed. 818].

In the case of *Thatcher* v. *Rockwell*, 105 U. S. 467 [Bk. 26, L. ed. 949], the *Chief Justice*, after alluding to these and other cases, says: "They establish the doctrine that, under the late bankrupt law, the validity of a pending suit or of the judgment or decree thereon was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was or not he was equally bound with any other party acquiring an interest *pendente lite*."

It is said, however, that though the defendant had his discharge before the judgment in the state court was rendered and might have successfully pleaded it in bar of that action and did not do so, the judgment now sued on is the same debt and was one of the debts from which, by the terms of the bankrupt law, he was discharged under the order of the bankruptcy court, and to any attempt to enforce that judgment the discharge may still be shown as a valid defense. That is to say, that the failure of the defendant to plead it when it was properly pleadable, when, if he ever intended to rely on it as a defense, he was bound to set it up, works him no prejudice, because, though he has a dozen judgments rendered against him for this debt after he has received his discharge, he may at any time set it up as a defense when these judgments are sought to be enforced. Upon the same principle, if he had appeared in the state court and pleaded his discharge in bar, and it had been overruled as a sufficient bar, he could, nevertheless, in this action on that judgment, renew the defense.

But in such case his remedy would not lie in renewing the struggle in a new suit on such judgment, but in bringing the first judgment for review before this court where his right under the discharge would have been enforced

then, as he seeks to do it now, after submitting to that judgment without resistance and without complaint.

We are of opinion that, having in his hands a good defense at the time judgment was rendered against him, namely: the order of discharge, and having failed to present it to a court which had jurisdiction of his case, and of all the defenses which he might have made, including this, the judgment is a valid judgment, and that the defense cannot be set up here in an action on that judgment. The case of *Steward* v. *Green*, 11 Paige, 585, seems directly in point. So also are *Hollister* v. *Abbott*, 31 N. H. 442 and *Bradford* v. *Rice*, 102 Mass. 472.

It is clear that until the judgment of the Massachusetts court is set aside or annulled by some direct proceeding in that court, its effect cannot be defeated as a cause of action, when sued in another State, by pleading the discharge as a bar which might have been pleaded in the original action.

The judgment of the New York Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Plff. in Err.*,

v.

JULIA ARMSTRONG, Admrx. of JOHN M. ARMSTRONG, Deceased.

(See S. C. Reporter's ed. 591-600.)

Life insurance—assignability of endowment policy—evidence—fraud.

1. An endowment policy of insurance payable to the assured or his assigns at a certain date, or to his legal representatives if he should die before that time, is assignable by the assured, where the assignment is not made to cover a mere speculative risk; and the insurance passes to the assignee although the assured dies within the endowment period.
2. Evidence tending to prove that the assignee of such a policy caused the death of the assured, by felonious means, is admissible in an action by him against the company to recover on the policy.
3. Evidence tending to show that the assignee effected insurances upon the life of the assured in other companies, at about the same time, is admissible in support of the theory of the defense, that, in obtaining the insurance in question, it was the object of the assignee to cheat and defraud the defendant company.

[No. 173.]

Argued Mar. 16, 17, 1886. Decided Apr. 5, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of New York.

The history and facts of the case appear in the opinion of the court.

Messrs. **Joseph H. Choate,** *Evarts* and *Southmayd*, for plaintiff in error:

The application for the policy by Armstrong was at the instance and procurement of Hunter; its delivery was made by the Company directly to Hunter, for his own benefit, with the assent of Armstrong, as expressed by the assignment executed by Armstrong simultaneously with the making of the application.

These acts constituted a contract between Hunter and the Company, wherein Hunter, and not Armstrong was the principal; and if such contract was induced or effected by Hunter's fraud, such fraud vitiated the contract.

Shilling v. *Accidental Death Ins. Co.* 2 Hurl. & N. 42; *Rawls* v. *Am. Mutual Life Ins. Co.* 27 N.Y. 287; *Prince of Wales Assurance Co.* v. *Palmer*, 25 Beav. 605; *Ford* v. *Belmont*, 7 Robt. 97. See also *Hills* v. *Miller*, 3 Paige, 254; *Parks* v. *Comstock*, 59 Barb. 16.

The whole policy and every right and interest under it were assignable.

St. John v. *Am. Mutual Life Ins. Co.* 18 N. Y. 31; 24 Am. Law Reg. 753, where the cases are digested.

The learned court below held that the making of the policy payable to the legal representatives in the event of Armstrong's death was the designation of a class which took from Armstrong the power to divert the fund from that particular class; in other words, that the contract was with Armstrong's administratrix as a person distinct from Armstrong, which, of course, is a legal impossibility.

Wason v. *Colburn*, 99 Mass. 342; *N. Y. Life Ins. Co.* v. *Flack*, 3 Md. 341; 1 Bigelow, Ins. Rep. 146.

If a policy of life insurance once has a valid inception it may be assigned to any one, whether such assignee has an insurable interest in the life insured or not.

St. John v. *Am. Mut. Life Ins. Co.* 2 Duer, 419; *S. C.* 13 N. Y. 31; *Valton* v. *Nat. Fund Life Ins. Co.* 20 N. Y. 32; *Olmsted* v. *Keyes*, 85 N. Y. 593; *Bond* v. *Bunting*, 78 Pa. St. 210; *Cunningham* v. *Smith*, 70 Pa. St. 450.

The court erred in rejecting evidence of contemporaneous acts of fraud on the part of Hunter, showing or tending to show the formation by him of a wicked and dishonest scheme, of which this swindling of the plaintiff in error was only a part.

Cary v. *Hotailing*, 1 Hill, 311; *Bottomley* v. *U. S.* 1 Story, 135; *Castle* v. *Bullard*, 23 How. 172 (Bk. 16, L. ed. 424); *Butler* v. *Watkins*, 13 Wall. 456 (Bk. 20, L. ed. 629).

Messrs. **Herbert T. Ketcham,** and *George M. Mackellar*, for defendant in error:

Neither the assignment nor its duplicate was the act of Armstrong. Proof, sufficient to sustain a finding, was submitted to the jury that he never executed either paper; never authorized their execution and never made or sanctioned any delivery of either paper; that whether he gave any authority for the delivery or not, no delivery was made; and that any delivery, if made, was void for fraud.

The proposition that the policy in suit was a contract between Hunter and the Company, and as such was void for Hunter's fraud, will not be entertained by this court, since the verdict of the jury must be assumed to embrace a finding that Hunter never took any relation whatever to the contract of insurance.

The contract was in writing and extrinsic evidence cannot be allowed to vary its clear and well defined stipulations.

Rawls v. *Am. Mut. Life Ins. Co.* 27 N.Y. 287, will be found not to have changed the fundamental canon forbidding the variation of express written instruments.

See also *Lawrence* v. *Fox*, 20 N. Y. 268.

Plaintiff in error seeks to avoid the policy by imputing Hunter's fraud to Armstrong, upon the theory that Hunter was Armstrong's agent.

This attempt to exalt the victim of a murder to the position of constructively plotting his own death is neither justified by any principle of law, nor the pleadings or the evidence in this case.

No one but he who owns a right of action can assign it.

We respectfully submit as the result of the authorities that the policy in question, so far as it contained assurance in the event of death, was an irrevocable settlement. The insurance when proposed was subject to Armstrong's complete right of disposition, and he could have preserved the right of assignment. But when he directed its payment to his legal representatives, he exhausted this right and parted with that which until then had been in his control.

It is legally possible for a representative to be vested with rights which were not a part of his intestate's estate.

See *Worley* v. *N. W. Masonic Asso.* 13 Rep. 233; *Kelly* v. *Mann*, 13 Rep. 12; *Greeno* v. *Greeno*, 23 Hun, 478.

The defense that Armstrong misstated his relations to other companies was an affirmative defense and should have been pleaded.

Piedmont v. *Ins. Co.* 92 U. S. 377 (Bk. 23, L. ed. 610); Code Civ. Proc. § 500; *Murray* v. *N. Y. Life Ins. Co.* 85 N. Y. 236.

Where the statements are not vouched for, as absolutely and subjectively true, they affect the validity of the insurance only to the extent to which they in fact induce the contract; for the applicant is bound not by an express engagement but by the general law of morals which governs every transaction, and his policy is not to be avoided save for statements, which are made with the knowledge of their untruth and the intent to deceive.

In one instance, deviation from existing fact is a breach of contract. In the other it is nothing unless fraudulent.

Moulor v. *Am. L. Ins. Co.* 111 U. S. 335 (Bk. 28, L. ed. 447) and cases cited.

Mr. Justice **Field** delivered the opinion of the court:

[592] On the 8th of December, 1877, the Mutual Life Insurance Company of New York issued a policy of insurance on the life of John M. Armstrong, of Philadelphia, for $10,000. It was what is known as an endowment policy; that is, a policy payable to the assured if he live a designated time, but to some other person named if he die before the expiration of that time. It was payable, subject to certain conditions, to the assured *or his assigns* on the 8th of December, 1897, at the office of the Company in New York; or, if he should die before that time, to *his legal representatives*, within sixty days after notice and proof of his death. It recited that it was issued in consideration of his application, and of the statements contained therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in the contract adopted and warranted to be true, and the only statements upon which the contract was made; and in further consideration of the payment of $138.60 quarterly each year during the continuance of the policy.

On the 25th of January, 1878, Armstrong died, and his widow was appointed administratrix of his estate. The required notice and proof of his death were furnished, and the insurance money not being paid, she brought this action for its recovery in a court of the State of New York; and on motion of the Company it was removed to the Circuit Court of the United States.

The Company set up several special defenses to the action. One of them was, that the policy was obtained by one Benjamin Hunter, with the intent to cheat and defraud the Company by compassing the death of the assured by felonious means and collecting the amount of the insurance, and which he attempted to carry out by causing his death; another was that the statements made in the application of the assured as to previous insurances upon his life were false, the amounts being much larger than those stated.

On the trial it appeared in evidence that on the 3d or 4th of December, 1877, Hunter made some inquiries at the office of the Company in Philadelphia as to the rates of insurance on the life of a person aged forty or forty-one years upon an endowment policy of twenty years; stating that he thought of insuring for his own benefit the life of a person in the sum of $10,000. After some conversation on the subject of insurance generally, he left, stating that the person to be insured would probably call in a day or two. On the 5th of the month Armstrong called, and informed the agent that he came at the request of Hunter to make application for a life insurance. He was thereupon examined, and after answering the questions usually propounded to applicants, and among others those in relation to existing insurances on his life, he signed a formal application, leaving, however, blank the place for the amount of the insurance which he desired, and for the answer to the question touching the payments of the premium. He also executed an assignment of the policy, leaving blanks for its date and for that of the policy, and for the name and residence of the assignee. This was his entire connection with the transaction. In the afternoon of the same day, or on the following morning, Hunter informed the office that the amount of the insurance desired was $10,000, and that it would be more convenient for him to pay the premiums quarterly. The term "quarterly" and the sum "$10,000" were, therefore, upon his instructions, inserted in the application which was then sent to New York, and the policy was there executed by the Company. Before the receipt of the policy in Philadelphia he visited the office, and stated that as he intended to leave the city and be absent for some time, he would pay the premium, and that his lawyer would call for the policy. He accordingly paid the stipulated premium, and the fee for the policy. Some days afterwards his lawyer received the policy and also the assignment, which was attached, the blanks having been filled. They were subsequently delivered to Hunter, and were found in his possession at his death.

Within six weeks after the policy was issued, Armstrong was attacked at night in a street in Camden, New Jersey, and received blows on his head which fractured his skull, from the effects of which he died two days afterwards. Suspicion fell upon Hunter as the perpetrator or instigator of the attack. He was accordingly

arrested, and was indicted and tried for the murder of Armstrong in one of the courts of that State, and was convicted. He was sentenced to death, and was hanged. By stipulation the testimony of any living witness might be read from the record of his testimony in that case, with like effect as if he were present and testified in this action, subject to all legal objections to its relevancy, competency and materiality. As the first step in proof of the defense that the policy was obtained to cheat and defraud the Company, the defendant offered to read from that record the testimony of a witness to show that Hunter, being at the time the sole owner of the policy, intentionally caused the death of Armstrong; but the court, upon objection of the plaintiff, excluded the testimony and an exception was taken. The defendant offered in different forms to make this proof; but the court refused to receive it, accompanying its ruling in one instance with this statement to counsel: "I will take your offer as broad as you choose to make it; that you offer the testimony to prove that Hunter procured the application for the policy on Armstrong to be made, and that he did so for the purpose of having the insurance effected, and then disposing of Armstrong, and then getting the money; make it as broad as that, and I will exclude it."

The defendant also offered to prove that about the time the policy in suit was issued, Hunter, with like fraudulent intent, obtained policies of insurance in two other companies upon the life of Armstrong, one made directly to himself and the other to Armstrong, with an assignment executed simultaneously to himself, and that he paid the premiums thereon; one of the policies being for $10,000 and the other for $6,000; but upon the objection of the plaintiff the testimony was excluded, and an exception taken.

The court, among other things, instructed the jury, in substance, that the contract of insurance was divisible; that the last part, providing for the payment of the insurance money to the *legal representatives* of Armstrong in case he should die before the expiration of the policy, was not assignable; that his assignment only transferred the interest, payable at the expiration of the policy; and that the plaintiff was his legal representative, entitled to the policy and to whatever was due upon it. The defendant excepted. A verdict for the full amount of the policy, with interest, was rendered, and judgment entered thereon.

From the charge of the court, and its opinion on the motion for a new trial (20 Blatchf. 493), it appears that the refusal to admit testimony of Hunter's fraudulent purpose in procuring the policy, and his feloniously causing, while the sole owner of it, the death of the assured, was founded upon the assumption that the insurance money, payable in case the death occurred before the expiration of the policy went to the legal representatives of the assured, and was not assignable, and that the assignment not taking effect Hunter had no interest in the policy, and therefore, if he did feloniously cause the death, the fact could have had no effect in controlling the payment.

Assuming this to be the reason for excluding the evidence offered, the ruling cannot be upheld. The position that the assignment did not take effect because the assured died before the expiration of the policy is untenable. The provision for payment in such case to his legal representatives was intended to meet the contingency of his dying without having disposed of his interest, and not to limit his power over the contract during his life, and pass the insurance to those who should represent him after his death. The term "legal representatives" is not necessarily restricted to the personal representatives of one deceased, but is sufficiently broad to cover all persons who, with respect to his property, stand in his place and represent his interests, whether transferred to them by his act or by operation of law. It may, in this case, include assigns as well as executors and administrators. *New York L. Ins. Co.* v. *Flack*, 8 Md. 341.

A policy of life insurance, without restrictive words, is assignable by the assured for a valuable consideration equally with any other chose in action, where the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies; and payment thereof may be enforced for the benefit of the assignee, and under the system of procedure in many States, in his name. *Warnock* v. *Davis*, 104 U.S. 775, 780 [Bk. 26, L. ed. 924, 927]; *Archibald* v. *Mut. Ins. Co. of Chicago*, 38 Wis. 542, 545; *DeRonge* v. *Elliott*, 7 N. J. Eq. 487, 495. The assignee here, Hunter, represented that he was the special partner of Armstrong, and had placed $5,000 in the partnership, and was apprehensive that he might be charged as a general partner. If he was a special partner the contract was not a wager policy. And as it was not a contract for the benefit of the wife of the assured, it does not fall within those cases where, for the protection of the beneficiary the power of the assured to divert the course of payment is restricted.

The assignment conveying to Hunter the whole interest of the assured, his representatives alone would have a valid claim under it, if the policy were not void in its inception. Proof, therefore, that he caused the death of the assured by felonious means must necessarily have defeated a recovery; and the court erred in refusing to admit testimony tending to prove that such was the fact.

The theory of the defense is, that the purpose of Hunter in obtaining the insurance was to cheat and defraud the Company. In support of that position evidence that he effected insurances upon the life of Armstrong in other companies at or about the same time, for a like fraudulent purpose, was admissible. A repetition of acts of the same character naturally indicates the same purpose in all of them; and if when considered together they cannot be reasonably explained without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act. A creditor has an insurable interest in the life of his debtor, and may very properly procure an insurance upon it for an amount sufficient to secure his debt; but if he takes out policies in different companies at or nearly the same time, and thus increases the insurance far beyond any reasonable security for the debt, an inquiry at once arises as to his motive, and it may be considered as governing him in each insurance. In *Castle*

[599] v. *Bullard*, 23 How. 173 [64 U. S. bk. 16, L. ed. 424], where the defendants were charged with having fraudulently sold the goods of the plaintiff, evidence that they had committed similar fraudulent acts at or about the same time was allowed, with a view to establish their alleged intent with respect to the matters in issue. The court said: "Similar fraudulent acts are admissible in cases of this description if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration." In *Lincoln* v. *Claflin*, 7 Wall. 132 [74 U. S. bk. 19, L. ed. 106], an action was brought for fraudulently obtaining property, and evidence of other frauds of a like character, committed by the defendants at or near the same time, was held to be admissible. "Its admissibility," said the court, "is placed on the ground that where transactions of a similar character executed by the same parties are closely connected in time, the inference is reasonable that they proceed from the same motive. The principle is asserted in *Cary* v. *Hotailing*, 1 Hill, 311, and is sustained by numerous authorities. The case of fraud, as there stated, is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge." In *Butler* v. *Watkins*, 13 Wall. 456, 464 [80 U. S. bk. 20, L. ed. 629, 630], speaking on the same subject, this court said: "In actions for fraud large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at or about the same time and in relation to a like subject, was actuated by the same spirit." In *Bottomley* v. U. S., 1 Story, 135, Mr. Justice Story held the same doctrine and cited several instances of its application. Thus, in the case of a prosecution for uttering counterfeit money, the fact that the prisoner has in his possession, or has uttered, other counterfeit money is held to be proper evidence to show his guilty knowledge; and upon an indictment for receiving stolen goods, evidence that the prisoner had received at various other times different parcels of goods which had been stolen from the same persons is held admissible in proof of his guilty knowledge. So in an indictment for a conspiracy to raise sedition, discontent and disaffection, [illegible] is admissible against the prisoner that at another meeting held for an object professedly [illegible] at which the prisoner was chairman, resolutions were passed of a character to create sedition and disaffection. "In short," [illegible] "wherever the intent or guilty knowledge of a party is a material [illegible] in the issue of a cause, these collateral facts tending to establish such intent or [illegible] are proper evidence. In many [illegible] it would be otherwise impossible [illegible] the true nature and [illegible] Many other authorities [illegible] the same purport.

[illegible] Hunter obtained [illegible] in other companies on the life of [illegible] at nearly the same time, was, under these authorities, clearly admissible. It tended to establish the theory of the defendant that the insurance in this case was obtained by Hunter upon the premeditated purpose to cheat and defraud the company. Especially would it have had that effect if followed by proof of the manner of the death of Armstrong.

But independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired

This view renders it unnecessary to consider the effect upon the policy, of the statements made in the application of the assured as to the amount of other insurances on his life.

Judgment reversed, and cause remanded for a new trial.

Mr. Justice **Matthews** did not sit in this case nor take part in its decision.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

STATE OF ALABAMA, JOHN SWANN AND JOHN A. BILLUPS, Trustees and Assignees, *Appts.*

v.

THEODORE G. MONTAGUE ET AL.

(See S. C. Reporter's ed. 602-611.)

Railroad mortgage—"all other property" construed.

The words "all other property" in the mortgage executed March 2, 1870, by the Alabama and Chattanooga Railroad Company, in favor of the State of Alabama, to secure it for a loan of its credit, to said company, do not operate to include within the mortgage all the lands belonging to the company not specifically described.

[No. 984.]

Submitted Mar. 31, 1886. Decided Apr. 12, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Tennessee.

The history and facts of the case appear in the opinion of the court.

Mr. Samuel F. Rice, for appellants:

The statutory provisions of Tennessee, the *lex rei sitæ*, in relation to conveyances of every kind, were intended "to reduce the forms of conveyance to their simplest elements, and to give the largest meaning to granting words, unless limited by the instrument itself."

Daley v. *Willis*, 5 Lea, 104. See also *Pennock* v. *Coe*, 23 How. 117 (64 U. S. Bk. 16, L. ed. 436); *Irvine* v. *Irvine*, 9 Wall. 625 (76 U. S. Bk. 19, L. ed. 800); *Stott* v. *Rutherford*, 92 U. S. 107 (Bk. 23, L. ed. 486); *Bank of Greensboro* v. *Clapp*, 76 N. C. 482.

The conveyance of McMillan to the company, as against the defendants, who acquired or derived their only claim to the lands from or

under the mortgagor, by transactions entirely subsequent to the registration of the mortgage, converted the equitable title of the company into a legal title which at once, by operation of law, inured to the benefit of the mortgagee.

Skidmore v. *Pitts. Cin. & St. L. R. R. Co.* 112 U. S. 83 (Bk. 28, L. ed. 626); *Bush* v. *Marshall*, 6 How. 284 (47 U. S. bk. 12, L. ed. 440); *Threadgill* v. *Pintard*, 12 How. 24 (53 U. S. bk. 13, L. ed. 877); *Henshaw* v. *Wells*, 9 Humph. 568; *Crook* v. *Luneford*, 2 Lea, 287; *Bank of Greensboro* v. *Clapp*, 76 N. C. 482; *Crane* v. *Turner*, 7 Hun, 357; *Van Rensselaer* v. *Kearney*, 11 How. 323 (52 U. S. bk. 13, L. ed. 714); *Doe* v. *Larmore*, *ante*, 598.

The parting with or loan of money or its equivalent, upon the faith of the mortgage, is *pro tanto* a sale and gives such a mortgagee, to the extent of the loan, all the rights of a *bona fide* purchaser for value without notice.

Chadwell v. *Wheless*, 6 Lea, 322; *Carpenter* v. *Longan*, 16 Wall. 271 (83 U. S. bk. 21, L. ed. 313).

The objection that the mortgage does not convey the lands here in controversy, by specific designation and description, is clearly insufficient, both upon reason and authority.

McGavock v. *Deery*, 1 Cold. 265; *Seifreid* v. *Peoples Bank*, 2 Tenn. Ch. 17; *Sheets* v. *Selden*, 2 Wall. 177 (67 U. S. bk. 17, L. ed. 822); *Wilson* v. *Boyce*, 92 U. S. 320 (Bk. 23, L. ed. 608); *Spindle* v. *Shreve*, 111 U. S. 542 (Bk. 28, L. ed. 512); *Frey* v. *Clifford*, 44 Cal. 343; *Barton* v. *Morris*, 15 Ohio, 408; *Hoxie* v. *Lawrence*, 117 Mass. 111; *St. Louis, etc. R. Co.* v. *McGee*, *ante*, 446, citing approvingly, *Wilson* v. *Boyce*, 92 U. S. 320 (Bk. 23, L. ed. 608).

The exception made in the mortgage is conclusive that the mortgagor intended to convey and did convey all its property, save only "such and so much of the same," as it had not theretofore conveyed by its two mortgages of 1868.

Gardner v. *Morrison*, 12 Ala. 547; *Pierce* v. *Milwaukee & St. P. R. R. Co.* 24 Wis. 551; *S. C.* 1 Am. Rep. 203.

Mr. Xenophon Wheeler, for appellee:

An after acquired title does not pass to the vendee or mortgagee, unless there is a covenant of warranty in the deed or mortgage.

Jackson v. *Wright*, 14 Johns. 193; *Dosewell* v *Buchanan*, 3 Leigh, 365; *Comstock* v. *Smith*, 13 Pick. 116; *Doane* v. *Wilcutt*, 5 Gray, 328; 3 Washb. Real Prop. 106; Jones, Mort. § 1483; Rawle, Cov. 390 and authorities cited.

As the mortgagor had nothing but the equitable estate in the land sued for, if it had that when it made the mortgage, and the mortgage contained no covenants for title, the subsequently acquired title through the deed of McMillan did not inure to the benefit of the mortgagee.

The land sued for is not embraced in the mortgage.

If the description in the mortgage, which is claimed to embrace the land in controversy, is examined, it will be seen not only that there is no specific description, but that there is nothing that will enable a subsequent purchaser to identify this land as forming any part of the property intended to be included in the mortgage.

The general words "all other property" are restricted by the words preceding them, and are descriptive of all other property of the nature of telegraph lines, telegraph offices and machine shops.

See *Chidsey* v. *Canton*, 17 Conn. 479; *Harwood* v. *Lowell*, 4 Cush. 313; *People* v. *N. Y. & Manhattan Beach R. Co.* 84 N. Y. 565; *Matter of Hermance*, 71 N. Y. 487; *Corning* v. *McCullough*, 1 N. Y. 69; *Clark* v. *Gaskarth*, 8 Taunt. 431; Bish. Wr. L. § 245.

[605] *Mr. Justice* **Miller** delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Eastern District of Tennessee. The suit was originally brought in the Chancery Court of Hamilton County, from which it was removed into the court first mentioned. It was a bill to foreclose a mortgage on twenty-two acres of land in that county, which is described with particularity by metes and bounds in the bill, and is there alleged to have been purchased of J. P. McMillin by the Alabama and Chattanooga Railroad Company, the mortgagor, on the 25th day of March, 1869 No such description of the land is found in the mortgage which is the foundation of this suit; [606] and if it is covered by that mortgage, it is by a phrase which, it must be supposed, was intended to cover it by a general reference to all other property of the mortgagor in the State of Tennessee, rather than by any specification of this property.

The defendants deny that by any fair or just construction of the mortgage, it can be held to include the twenty-two acres in question.

There are other grounds of defense set up, on one of which the decree against plaintiffs was rendered, namely: that the suit was barred by the Statute of Limitations. But if the defendants are right, in the assertion that the land was not conveyed by the mortgage deed, all other questions are immaterial.

It appears that the Legislature of the State of Alabama authorized the Governor of the State to issue to the Alabama and Chattanooga Railroad Company its bonds to the amount of $2,000,000. The statute, however, required the Governor, before he delivered these bonds, to demand of the company its own bonds of an equal amount secured by a mortgage on certain property mentioned in the statute. The mortgage was made and the bonds issued to the State in exchange for bonds of the State delivered to the company.

As the language descriptive of the property to be mortgaged, as found in the statute, is found identically in the reciting part of the mortgage and in its granting clause, and as this question is to be decided by a construction of that language, it will be given here *verbatim* from the mortgage deed:

"EXHIBIT 'C' to original bill.

"This instrument of mortgage, made this second day of March, in the year eighteen hundred and seventy, by and between the Alabama and Chattanooga Railroad Company, a corporation of the States of Alabama, Georgia, Mississippi and Tennessee, the party of the first part, and the State of Alabama, the party of the second part, witnesseth: *That whereas*, said State of Alabama, by an Act entitled 'An Act to Loan the Credit of the State of Alabama

to the Alabama and Chattanooga Railroad Company, for the Purpose of Expediting the [607] Construction of the Railroad of said Company Within the State of Alabama,' and approved February 11, 1870, has granted certain aid to said corporation, and has in and by said Act required the governor of said State to issue bonds of said State to an amount not exceeding $2,000,000 in favor of said company, bearing interest at a rate not — 8 per cent per annum, which said interest shall be payable semi-annually in currency or coin, and the bonds shall be payable at the expiration of not less than fifteen nor more than thirty years upon the terms and conditions in said Act set forth; *And whereas*, Said Act further provides that the Governor of the State shall only issue said bonds upon receiving in exchange therefor an equal amount of first mortgage bonds of said railroad company, bearing the same rate of interest as the above mentioned state bonds, and secured by a first mortgage upon the lands granted by the United States to said railroad company and upon any interest which said company now has or may hereafter lawfully acquire in or to said lands, with this reservation; that the said Alabama and Chattanooga Railroad Company shall have the privilege and right of selling said lands, or any part thereof, in accordance with the Act of Congress granting the same; *Provided, however*, That the proceeds of said sale shall be appropriated to the payment of the aforesaid first mortgage bonds of the said railroad company issued to the State; *Provided, further*, That the Governor shall require said railroad company, before issuing to said company said bonds, to give the State of Alabama a first mortgage on the telegraph line and telegraph offices along the line of said road belonging to said company; also on the machine shops and other property in the State and in Georgia, Tennessee and Mississippi belonging to said company; also on all coal mines now open or hereafter to be opened and worked belonging to said company; also upon all iron or other mineral lands and all iron manufacturing establishments now in operation or hereafter to be constructed; *And whereas*, Said Alabama and Chattanooga Railroad Company, in order to obtain said State aid, proposes to issue to said State bonds of said corporation, secured as is by said Act required, and entitled first [608] mortgage land bonds of the Alabama and Chattanooga Railroad Company:

"Now, therefore, the said Alabama and Chattanooga Railroad Company, in compliance with the terms and conditions of said Act, and for the purpose of obtaining the aid thereby granted to this corporation, and in order to secure the punctual payment of all said first mortgage land bonds of this corporation, does hereby grant, bargain, sell, enfeoff, release, assign and convey unto the State of Alabama, and its successors and assigns, forever, all lands granted by the United States to and for the benefit of this company, and all the right, title, interest and estate which said company now has, or may hereafter lawfully acquire, in or to said lands, subject to this reservation to said company, as by said Act provided; that said company shall have the privilege and right of selling said lands, or any part thereof, in accordance with the Act of Congress granting the same, and entitled 'An Act to Renew Certain Grants of Land to the State of Alabama,' and approved April 10, 1869; *Provided, however*, That the proceeds of said sales shall be appropriated to the payment of the first mortgage land bonds of said company to be issued to the State of Alabama, as aforesaid; also the telegraph line and telegraph offices along the line of said road, and belonging to said company; also the machine shops and all other property in said States of Alabama, Georgia, Tennessee and Mississippi belonging to said company; also all coal mines now open or hereafter to be opened and worked belonging to said company, and all iron or other mineral lands, and all iron manufacturing establishments now in operation and hereafter to be constructed; saving and excepting only from said granted premises such and so much of the same as said company may have heretofore conveyed in mortgage in or by either or both of two indentures of mortgage, both made on December 19, 1868, and covering the railroad and certain other property of said company, for a more specific description whereof reference is hereby made to said two indentures, the same having been recorded in the counties where said road is located."

It is to be observed that the land sued for is nowhere spoken of in this record otherwise than as *land*, pure and simple, nor is there any claim that it was land granted by Congress.

Now, the mortgage deed describes *ex industria* the several species of lands which it conveys. The first of them, by far the most important, is "all lands granted by the United States to and for the benefit of this company, and all right, title, interest or estate which said company now has or may hereafter lawfully acquire in or to said lands." If the company had intended to grant *all its lands* within the States of Alabama, Georgia, Tennessee and Mississippi, and it must have had other lands in these States, why not have said so, instead of saying all the lands granted by the United States? It was, therefore, only this class of lands which was conveyed by this first clause of the deed. After some reservation of the right of the mortgaging company to sell these lands and appropriate the proceeds to payment of the bonds secured by the deed, the granting language proceeds: "Also the telegraph line and telegraph offices along the line of said road and belonging to said company; also the machine shops and *all other property* in said States of Alabama, Georgia, Tennessee and Mississippi belonging to said company; also all coal mines now open or hereafter to be opened and worked belonging to said company, and all iron or other mineral lands, and all iron manufacturing establishments now in operation and hereafter to be constructed."

While the company is thus specific in its description of the subjects of the mortgage, enumerating with great particularity its land grant from Congress, its telegraph lines and offices, its machine shops, and its coal mines, it is quite unreasonable to suppose that the company would have been thus needlessly minute in its description of the property conveyed, enumerating with great particularity the four or five classes of property, mostly real estate, which were intended to pass, if it had also in-

tended that the three words, "All other property," should stand for everything in the four States which the company owned, and especially all its lands.

These words, which are found neither in the beginning of the granting clause as a general phrase to be afterwards emphasized by a more minute description, nor at the end, as a summary of what had preceded them, have their appropriate use in the precise place where they are found. We say they are there appropriate, because in conveying the telegraph offices, the machine shops, the coal mines, the iron mines and the manufacturing establishments, there might in them be found much property belonging to the company about which a doubt would arise whether it was a part of these offices, mines, machine shops and manufacturing establishments. All such doubt or ambiguity is removed by declaring that all the property of the grantors in these places, or used in any of these pursuits, is conveyed. For this purpose the phrase "all other property" is apt, and is used in the right place in a description designedly minute and elaborate. It is among its kind, *ejusdem generis*, and its purpose is answered when its use is limited to explain the other words in this immediate connection.

It is not to be denied that in a writing descriptive of property to be transferred or assigned, the more general words which include all that is intended to be conveyed are not to be frittered away by an attempt at a description of each particular thing fairly included in the more general language. But in such case it must be apparent that the intent was to include all that could be embraced within the more general terms. If, for instance, the description of the property mortgaged had commenced by saying "all the property of the grantor, real, personal and mixed, in the States of Alabama, Georgia, Mississippi and Tennessee," and had then attempted to enumerate this property, but had omitted some of it, this omitted part would have passed as in *Spindle* v. *Shreve*, 111 U. S. 544 [Bk. 28, L. ed. 512]. So where the instrument professes "to convey all my property," or "all my estate," or "all my lands wherever situated." In all these cases referred to in *Wilson* v. *Boyce*, 92 U. S. 325 [Bk. 23, L. ed. 610], there were no words to qualify the generality of this description.

In fact there were no other words of description, and their full effect must be given to them. This latter case is relied on by appellants' counsel as conclusive in the one now under consideration. In that case the bonds issued to certain railroad companies were declared to be a "first lien upon the road and property of the several companies so receiving them," and this was held to cover the lands owned by said companies. It is obvious here the two words "*road* and *property*" of those companies were used as representing all the property they owned. Nothing further in the way of description was needed or was desirable. But this form of words differs widely from the elaborate description of what is conveyed in the deed of the mortgaging company here, and the meaning also is as different. In the latter case the road, its bed, its rolling stock, and much other property probably was *not* conveyed, and no expression is found implying that all its *lands* were conveyed. And if we limit the words "*all other property*" to what we have supposed to be their meaning, there is nothing else to imply that the company intended to mortgage all its property, of every kind and description, whether real or personal.

We do not believe this was intended or can be fairly implied from the language used, the minute descriptive character of which is found three times in this contract, namely: in the statute authorizing the transaction, in the preliminary recital of the mortgage deed, and in its granting clause, all of which is useless if the phrase "all other property," as there used, was intended to include all lands and all interest in lands in the four States through which the road passed.

The decree of the Circuit Court is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

STATE OF ALABAMA, JOHN SWANN AND JOHN A. BILLUPS, Trustees as well as Grantees, *Plffs. in Err.*, [611]

v.

THEODORE G. MONTAGUE, In His Own Right and as Agent of XENOPHON WHEELER, GEORGE M. SHERWOOD, ISAAC H. TOWER ET AL.

(See S. C. Reporter's ed. 611, 612.)

Railroad mortgage—construction of.

The judgment of the court below in this case is affirmed on the opinion in the preceding case, which involved the same question.

[No. 835.]

Submitted March 31, 1886. Decided April 12, 1886.

IN ERROR to the Circuit Court of the United States for the Eastern District of Tennessee.

Mr. Samuel F. Rice, for plaintiffs in error.

Mr. Xenophon Wheeler, for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court: [612]

This was an action of ejectment tried by a jury in the same court which decided the preceding case, in which the plaintiffs in error based their right to recover on the same mortgage which they sought to foreclose in that suit. The court instructed the jury against them on the ground that they had no legal title.

As the foregoing opinion decides that they had no title at all, legal or equitable, the judgment of the court below must be affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

617 FRANCIS M. LONG AND WIFE, Plfs. in Err.,

v.

DANIEL BULLARD

(See S. C. Reporter's ed. 427-421.)

Bankruptcy—what debts not released by discharge.

1. By section 5119 of the Revised Statutes the discharge releases the bankrupt only from debts which were or might have been proved; and by section 5045 debts secured by mortgage or pledge can only be proved for the balance remaining due after deducting the value of the security, unless all claim upon the security is released. Where a creditor neither proved his debt in bankruptcy nor released his lien, his security was preserved notwithstanding the bankruptcy of his debtor.

2. Whether the lien was in existence at the time of the commencement of the proceedings in bankruptcy, depends entirely upon the state laws, as to which the judgment of the state court is final and not subject to review here.

3. The setting apart of the homestead to the bankrupt under section 5045 of the Revised Statutes, does not relieve the property from the operation of liens created by contract before the bankruptcy.

[No. 206.]

Argued April 1, 1886. Decided April 12, 1886.

IN ERROR to the Supreme Court of the State of Georgia.

The history and facts of the case appear in the opinion of the court.

Messrs. R. F. Lyon and **Thomas B. Gresham**, for plaintiffs in error:

This transaction, to secure this debt was made under section 1969 *et seq.* of the Code of Georgia; and according to that statute it amounts to an absolute conveyance, passing the title of the property to the creditor, and upon the further express permission that it shall not be a mortgage. The deed, being given to secure a usurious debt, was void as title.

Code, § 2057.

Being void, it left the transaction where it was before the deed was made: simply a debt of Long to Bullard, unless Bullard had an interest in the title, or the title itself, or such an equity as arises between vendor and vendee for unpaid purchase money, as in *Lewis* v. *Hawkins*, 23 Wall. 119 (90 U. S. bk. 23, L. ed. 113); or *Bayley* v. *Greenleaf*, 7 Wheat. 46 (20 U. S. bk. 5, L. ed. 393); *Brown* v. *Gilman*, 4 Wheat. 255 (17 U. S. bk. 4, L. ed. 564).

Here Bullard's debt was simply one of lending and borrowing; and by the Bankrupt Act (R. S. 5119) the bankrupt by his discharge was released from all debts, except debts created by fraud or embezzlement, or by his defalcation as a public officer, under neither of which heads does this debt come.

But concede that this is a mortgage, which it is not, or even an equitable mortgage; in Georgia, a mortgage is but a security for a debt—it does not give any interest in the title at all.

See Code 1954; 1 Ga. 177; 7 Ga. 183; 35 Ga. 344; 36 Ga. 138; 45 Ga. 628.

As a mortgage is only an incident to the debt, when the debt was extinguished by the discharge in bankruptcy the mortgage fell with it.

1 Hill. Mort. 213-447.

There being no debts, the mortgage had nothing to stand upon.

2 Hill. Mort. 457.

In the case of *Broach* v. *Smith*, not yet published, the court holds that a deed under section 1969 of the Georgia Code is void as title and cannot be enforced as an equitable mortgage, and that the debtor having been adjudged a bankrupt and received his discharge after having given a deed of this character, the debt itself was discharged.

The exemption in bankruptcy was valid as against this debt and against this decree and judgment, under the Act, section 5045, R. S.; and this decree was void, because it was in contravention of that section of the Bankrupt Act. The Bankrupt Act declares that liens shall not be affected by assignment in bankruptcy; but this does not mean that such a lien prevents exemption. It only means in the administration of the bankrupt's estate, that the liens of creditors shall retain their priority; as otherwise, a creditor, by taking a mortgage, would cut off the right of a bankrupt to exemption entirely and defeat the whole bankrupt scheme.

See *Ex parte Christy*, 3 How. 292 (44 U. S. bk. 11, L. ed. 603).

This exemption to the plaintiffs in error was granted by a court having full jurisdiction of this question in proceedings instituted by him to obtain the benefits of that law, of which this exemption was an important and material incident, in which all the creditors were directly interested and this creditor most especially so, that application being accompanied by a claim for exemption on this particular land. Now, inasmuch as this creditor had the notice of this proceeding required by law, and was thus directly interested in the subject matter, and the court had full jurisdiction, why is he not bound by the judgment rendered, as all other parties are, not only as to the final judgment, but as to all the proceedings had by that court under the law? If so, was he not bound to appear in that court? And if he did not so appear, is he not forever estopped by the judgments therein rendered?

Ex parte Christy, 3 How. 292-332 (44 U. S. bk. 11, L. ed. 603-622); *Hogg* v. *Emerson*, 6 How. 486 (47 U. S. bk. 12, L. ed. 505).

Mr. **Clifford Anderson**, for defendant in error:

No federal question is made in the case brought here for review. The judge of the superior court, in his charge to the jury, ruled on the efficacy of Long's exemption; but that ruling was not excepted to by the present plaintiffs in error and has never been passed upon by the State Supreme Court.

Singleton v. *Southwestern R. R. Co.* 70 Ga. 464.

In the case of *Broach* v. *Smith*, the Supreme Court of Georgia has recently held that the only question it decided in this case was that "The money loaned, which was not used in discharging liens on the homestead property, should constitute no part of the judgment of foreclosure."

Section 2921 of the Code of Georgia provides that "All writs of error must be sued out within thirty days from the adjournment of the court where the decision complained of was made; or, if made at chambers, from the time of the decisions."

See also Code, § 4252; 6 Ga. 578, where the court says: "The bill must now be certified and

signed within thirty days from the adjournment of the term. A bill not signed within that time is not, by the law of the State, cognizable by this court; and the bill of the record, or both, must show that it is signed within that time."

The supreme court of the State cannot review its own judgment once made, in a case between the same parties. Such a judgment is irreversible.

69 Ga. 683; *Gray* v. *Obear*, 59 Ga. 675.

The failure to take a writ of error to the judgment of the superior court, subjecting the land to Bullard's lien, notwithstanding the exemption in bankruptcy, could not be cured by interposing the exemption as an objection to the modification of the decree in conformity with the decision of the supreme court. That question was *res judicata*.

59 Ga. 675.

If the court holds that the decision of the state superior court, relative to Long's exemption in bankruptcy, is properly here for review, then it is respectfully contended that Bullard's lien was unaffected by the bankruptcy of Long, or by any proceedings which took place in consequence thereof.

In *Assignee of Wicks* v. *Perkins*, 1 Wood, 383, it is ruled that "The lien of a mortgage creditor, on the real property of a bankrupt, is not lost by his failure to prove his debt, so that after the end of the proceedings in bankruptcy, he cannot enforce his lien."

See *Id.* 661; *Eyster* v. *Gaff*, 91 U. S. 521 (Bk. 23, L. ed. 403); *McHenry* v. *La Société Francaise*, 95 U. S. 58 (Bk. 24, L. ed. 370).

Under the State Constitution of 1868, which was adopted subsequent to April 14 of that year and which was of force in 1871, all homestead exemptions are subject to be sold to pay money borrowed to remove an incumbrance on the property embraced in the homestead.

See Code of 1873, § 5135; 48 Ga; 148; 59 Ga. 220.

When property is incumbered by a lien it is only the bankrupt's *sub modo*.

Bump, Bankruptcy, 8th ed. 152, 153; *Re Dillard*, 9 N. B. Reg. 8; *Re Deckert*, 10 N. B. Reg. 1.

Section 5045 Revised Statutes of the United States exempts only such property as was exempt from sale, etc., by state laws in 1871.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The material facts appearing in this record are as follows:

In the month of December, 1869, parts of lots 5 and 6, in square 90 of the City of Macon, were set off under the laws of Georgia to Betsey A. Long, the wife of Francis M. Long, as a homestead. The property was at the time incumbered by a mortgage made by Francis M. Long to the Ocmulgee Building Association. Proceedings were afterwards had to foreclose this mortgage, and to save the property from sale Francis M. Long applied to Daniel Bullard for a loan of money. This loan was made at usurious interest, and Long and his wife executed to Bullard their joint note, dated November 18, 1872, for $1,220 payable twelve months after date, and conveyed to him the homestead property by a deed absolute on its face as security. On the 29th of May, 1873, Francis M. Long was adjudged a bankrupt, and on the 15th of April, 1874, he received his discharge. In his schedules the debt to Bullard, with its security on the homestead premises, was duly entered. On the 28th of June, 1873, the same premises were set apart to the bankrupt to be retained by him under the bankrupt law as being exempt under the state law from levy and sale upon execution. Bullard did not prove his debt in the bankrupt proceedings.

On the 9th of February, 1878, Bullard brought suit in the Superior Court of Bibb County, Georgia, to subject the property to the payment of his debt. In his bill he alleged that the money he loaned was used to pay off the prior incumbrance on the homestead, and he claimed a valid lien on that account. He also set forth the bankruptcy of Francis M. Long, and the assignment of the property to him under the bankrupt law as a homestead.

Long and his wife in their answer stated that the deed to Bullard was void for usury in the debt for which it was given as security; that only $727.94 of the amount actually lent by Bullard was used to pay off the prior incumbrance; that the money was lent to the husband and not to the wife; and that the husband had been discharged in bankruptcy. Upon these facts, it was insisted that the homestead rights of Mrs. Long and her children were superior to the claim of Bullard under his conveyance, and that the property could not be sold to pay him.

Upon the trial the court charged the jury, in substance, that there could be no personal recovery against the husband upon the note, but [619] that the property could be subjected to the payment of the amount due, as the discharge of Long in bankruptcy did not release the lien of the mortgage. This was excepted to by the Longs. A verdict was returned in favor of Bullard for the amount of money actually lent, excluding the usurious interest. Thereupon the Longs moved for a new trial, on the ground, among others, of error in the instructions to the jury as to the effect of the discharge in bankruptcy. This motion was granted, but only because the property was subjected to the payment of a larger sum than was used to pay off the prior incumbrance. From the order granting a new trial, Bullard took a writ of error to the supreme court, where it was adjudged April 19, 1882, that the judgment of the superior court granting the new trial be affirmed, "unless the plaintiff in error will write off from his verdict in the court below the sum of $300." The only questions decided on this writ of error, as shown by the opinion, were such as related to the right of Bullard to recover the full amount of his loan, instead of the amount used to pay off the incumbrance on the homestead.

When the case got back to the trial court the specified amount was "written off," and a decree entered accordingly for a sale of the property to pay what remained due according to the verdict as reduced. Francis M. Long thereupon excepted to the decree, among other things, because the property ordered to be sold "constitutes and is his homestead, exempted, set apart, and secured to him by the Bankrupt Court of the United States * * * in a bankruptcy proceeding in that court * * * as against

[illegible] there [illegible] and [illegible] secured [illegible] by [illegible] 605 [illegible] [illegible] the [illegible] [illegible] [illegible]

of the proper court to that end. The taxpayer then files his petition, praying "that a jury be impaneled to try the question as to whether they are genuine legal coupons, which are legally receivable for taxes, debts and demands." This is the only issue that can be tried, and if finally decided in favor of the taxpayer, the coupons are to be received by the collector for such of the taxes, dues and demands for which they were tendered as can under the contract of the State be paid in that way. The court has no authority under the law to determine in that proceeding what taxes may be so paid. It thus appears that the issue to be tried cannot involve any question arising under the Constitution or laws of the United States.

Affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

ROBERT G. CAMPBELL, *Plff. in Err.*,
v.
DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 615-617.)

District of Columbia—action against, for work and material.

The plaintiff in error having built a water main for the District of Columbia, under the authority of the contractors and with the permission of the chief engineer in charge, it is held that he was bound by the terms of the contract and of his acceptance of an allowance made by the engineer in full settlement of his claims for extra work.

[No. 207.]

Argued April 1, 2, 1886. Decided April 12, 1886.

IN ERROR to the Supreme Court of the District of Columbia.

This was an action of assumpsit for work done and materials furnished for the District by the plaintiff in error, in the construction of a portion of a water main, authorized by an Act of Congress. The facts sufficiently appear in the opinion.

Mr. **Enoch Totten,** for plaintiff in error.
Mr. **A. G. Riddle,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This judgment is affirmed. There was no evidence whatever in the case tending to prove that the work was done by Campbell otherwise than under the contract of O'Hare, Himber & Co. He took the place of that firm in the contract so far as the work he undertook to do was concerned. Davenport, one of its members, authorized him to do the work and receive the pay upon vouchers, which he, Davenport, agreed to sign. It was upon this authority that Campbell entered upon the work with the permission of the chief engineer in charge. In this way he became bound by the terms of the contract. Under these circumstances, his acceptance of the allowance made by the chief engineer for all his present claims for extra work, as "in full settlement of the above stated claim," operated as a complete discharge of the District from all further liability to him on that account. The provision in the Act of the Legislative Assembly of the District, "that this receipt shall not debar the above named persons from any right they may have in any court," clearly applies only to the claim of Robert Strong & Co. As to all others named in the Act, "the receipt was to be in full of all claims on account of the said work."

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Appt.*, [634]
v.
JONATHAN YOUNG SCAMMON, MARIA S. SCAMMON ET AL.

(See S. C. Reporter's ed. 634-648.)

Foreclosure of mortgage—proceeds of insurance policy—marshaling assets—adjustment of rights of parties in complicated case—costs on part of decree being reversed.

1. Scammon owned in fee an undivided one third of a certain lot, and a life estate in the other two thirds. His two daughters owned the remainder in the last two thirds. The three mortgaged the lot for $30,000. The daughters conveyed to the father's appointee the south two thirds in fee. The father conveyed to the daughters in common the life estate in the north two thirds. On payment of $10,000, the mortgagee released the south one third. A building was erected on the north two thirds and insured for $15,000, payable in case of loss to the mortgagee to be credited on the mortgage. The policy was in Scammon's name. The entire business was conducted by S. who collected the rents and applied them to his own use. The building was entirely destroyed by fire and the $15,000 was paid to the mortgagee. By contract between S. and the mortgagee, of which the daughters had no knowledge, it was provided that the $15,000 should be used in rebuilding, the funds to be deposited in a bank and paid out on the joint order of S. and the mortgagee or the agent of the mortgagee on certain conditions. The money was so deposited, but none of it was ever paid out on checks countersigned by the mortgagee or his agent, none of it was ever used in building, and no building was ever erected on the lot.

In an action to foreclose the mortgage, held:

(*a*). That the policy of insurance was a collateral security for the joint debt, and the mortgagee having received the proceeds thereof could not surrender it to Scammon or divert it from the purpose to which it had been devoted by the mortgagors without the consent of the daughters.

(*b*). If the money could be devoted to rebuilding, the mortgagee was bound to see that it was so applied and, as to the daughters, was responsible for its diversion.

(*c*). The whole indebtedness is a lien on Scammon's estate. The $15,000 is to be credited to the daughters. The excess of the debt is a lien on their estate. The proceeds of S's estate are to be first applied to the debt for which it is the sole security and none of them are to be applied to taxes or costs until the entire debt for which S's estate is the sole security has been extinguished.

2. The decree of the court below as to a strip of the lot covered by a party wall reversed, there being nothing in the pleadings or evidence to support it.

[No. 162.]

Submitted Mar. 12, 1886. Decided Apr. 12, 1886.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. Edward S. Isham and *Robert T. Lincoln* for appellant:

The mere relation of mortgagor and mort-

gagee or of life tenant and reversioner does not give the mortgagor or reversioner any interest in insurance procured by the mortgagee or life tenant. Each of them has a separate insurable interest.

Rimmell v. *Sedford*, 12 How. 130 (52 U. S. bk. 13, L. ed. 987); *Ely* v. *Ely*, 80 Ill. 532; *Hanover* v. *Lamar Ins. Co.*, 51 Ill. 400; *White* v. *Brown*, 2 Cush. 412; *Franklin M. & F. Ins. Co.* v. *Drake*, 2 B. Mon. 47; *Louden* v. *Waddle*, 98 Pa. 242.

In *Redfield* v. *Holland Purchase Ins. Co.* 56 N. Y. 354, the equitable owner of a life estate was held entitled to recover on a policy issued to him in the usual form, it not appearing that the injury to his life estate did not equal the sum for which the property was insured.

Without the mortgage the whole insurance finally collected under the policy issued to Scammon would have belonged to him absolutely, to use as he saw fit; how then has the existence of the mortgage given the reversioners an interest in the insurance money?

On the contrary, we claim that the money was his own, subject to his covenant that the mortgagee might apply it on the debt, at its election; and that it being his own money, if it had been applied on the debt, his co-obligors would, in the absence of some express agreement with him, limiting their liability as between themselves, have been liable to a claim for contribution, each to repay him one third of the amount.

1 Pars. Cont. 31; 1 Hill. Mort. 275, n. (a); *Cumming* v. *Williamson*, 1 Sandf. Ch. 18.

Upon the satisfaction of the mortgage he would have been entitled to be subrogated to the mortgagee to preserve the lien of his claim for any payment beyond his own *pro rata* share of the principal debt, against the separate estate of his co-obligors.

Shinn v. *Shinn*, 91 Ill. 477.

Messrs. W. L. Culver and *Charles F. White*, for appellees:

It is well settled that a creditor holds collateral securities as the agent or trustee of his debtor, and that whenever he undertakes to transfer them without the authority of the debtor the law will hold that he has elected to take them for what appears to be due on their face in satisfaction to that extent of the principal debt.

Hoade v. *Hinchcliff*, 17 Barb. 492; *Sparhawk* v. *Drexel*, 12 N. B. Reg. 450; *Cocke* v. *Chaney*, 14 Ala. 65; *Chamberlain Ins. Co.* v. *Smith*, 11 Pa. 130; *King* v. *Hutchings*, 38 N. H. 561.

But it is contended that this insurance was furnished by Scammon alone, one of the joint mortgagors, and therefore covered only his interest in the buildings, and that he alone was entitled to the benefits arising therefrom.

This position is not tenable.

1. Because the insurance was a part of the original security covenanted in the mortgage to be furnished for the joint benefit of and to secure the joint debt of all the mortgagors, and must in law be treated as furnished by all for the purposes specified in the mortgage.

In South Ins. Brewing Co. 3 Biss. 175; *Thomas* v. *Vanhaff*, 6 Gill & J. 372; *Cromwell* v. *Brooklyn F. Ins. Co.* 39 Barb. 228; Jones, Mort. § 400–404; *Carter* v. *Rockett*, 8 Paige, 437; *Nichols* v. *Baxter*, 5 R. I. 491.

In this case not only the covenant in the mortgage, but the provision in the policy, making the loss payable to the mortgagee, operated to assign the policy in its inception to the mortgagee.

Carpenter v. *Providence Washington Ins. Co.* 16 Pet. 495 (41 U. S. bk. 10, L. ed. 1044); *Motley* v. *Mfrs. Ins. Co.* 29 Me. 387; *Franklin* v. *Nat. Ins. Co.* 43 Mo. 491; *Nat. Fire Ins. Co.* v. *Crane*, 16 Md. 260.

Treated as a question of insurance law simply, Scammon had an undoubted right to effect insurance on the buildings in his own name, and such insurance, if so intended, would inure to the benefit of the appellees as well as himself.

Blanchard v. *Waite*, 28 Me. 59; *Finney* v. *Fairhaven Ins. Co.* 5 Met. 192; Wood, Insurance, 507 and cases cited; *Hagedorn* v. *Oliverson*, 2 Maule & Sel. 485; *Miltenberger* v. *Becom*, 9 Pa. 198; *Murray* v. *Columbia Ins. Co.* 11 Johns. 302; *Graves* v. *Boston Mar. Ins. Co.* 2 Cranch, 419 (6 U. S. bk. 2, L. ed. 324; *Manhattan Ins. Co.* v. *Webster*, 59 Pa. 227; *Keith* v. *Globe Ins. Co.* 52 Ill. 518.

The form of the policy is immaterial, provided the Insurance Company has not been deceived. The question as to who is entitled to the benefit of an insurance policy is one of fact, depending upon the purposes for which the insurance was effected.

Fleming v. *Marine Ins. Co.* 4 Whart. 59; 2 Am. L. Cas. 797; *De Rolle* v *Penn Ins. Co.* 4 Whart. 68; *Augusta Ins. Co.* v. *Abbott*, 12 Md. 348; *Steele* v. *Ins. Co.* 17 Pa. 290.

Mr. Justice **Blatchford** delivered the opinion of the court:

On the 10th of September, 1866, J. Young Scammon, of Chicago, Illinois, and Florence A. D. Scammon and Arianna E. Scammon, his daughters, were the owners of a lot of land in Chicago, No. 90 Michigan Avenue, known as "lot number five (5), in block number eleven (11), in Fort Dearborn Addition to Chicago;" the father being the owner in fee of an equal undivided one third part of the lot, and having a tenancy for life in the other equal undivided two third parts; and his two daughters being each the owner in fee of an equal undivided one third part, subject to such tenancy for life of the father. The lot had descended to the two daughters and a brother of theirs from their mother, subject to the tenancy for life of the father, and he had purchased from the son the fee of his equal undivided one third part.

On the day above named, Scammon and his daughters executed to the Connecticut Mutual Life Insurance Company, a corporation of Hartford, Connecticut, a mortgage covering the above lot by the above description, to secure the payment of $30,000, in five years, with semi-annual interest at 8 per cent per annum, according to the condition of a bond which they at the same time executed. The bond stated that it was given for an actual loan of money made by the obligee to the obligors on the day of its date.

The mortgage contained the following covenant on the part of the mortgagors: "And further, that they, their heirs, executors and administrators, shall and will, at all times hereafter, until said principal sum of money and all arrearages of interest thereon shall be

fully paid, keep all the buildings (outhouses excepted) now situate, or that hereafter may be erected, upon said premises, fully insured against loss or damage by fire, in some good and responsible insurance company or companies (satisfactory to the said party of the second part, its successor or assigns, or its or their authorized agent), in the fair insurable value of such buildings, and will legally and properly assign and deliver to the said party of the second part, its successors or assigns, each, all and every, the policies of insurance therefor, as soon as and whenever such insurance shall be effected; and will also deliver to said party of the second part, its successors or assigns, or its or their authorized agent, all premium or renewal certificates received for the payment of the premium upon such policy or policies of insurance, as soon as and whenever such certificates shall be issued; and in default of so doing, the said party of the second part, its successors or assigns, at its own or their option, may effect such insurance in its or their name or names or otherwise, and the premium money paid therefor shall be a charge upon said premises, and shall be secured by this instrument in the same manner as the said principal sum of money above mentioned is secured, and such premium money shall be paid by said parties of the first part, their heirs and legal representatives, to said party of the second part, its successors or assigns, on demand, and may be collected at any and all times after the same shall have been paid, with interest thereon at the rate of 10 per centum per annum from the time the same shall be advanced; and the said party of the second part, its successors or assigns, shall hold each and all such policies of insurance so received, by assignment or otherwise, as collateral and additional security for said principal sum of money and interest, and shall have the right to collect and receive any and all money and sums of money that may at any time become collectible or receivable upon each, all, and every of such policies of insurance, and apply the same, when received, in the same manner, as far as possible, as is hereinafter provided for in case of a sale of said above described premises under the power of sale hereinafter contained. But nothing herein contained shall be construed as requiring the said party of the second part, its successors or assigns, to incur any expense, or make any effort, to collect any money that may become due on any of such policies of insurance; but if it or they shall elect not to collect the same, they shall make such election within a reasonable time after such money shall become collectible, and on demand of said parties of the first part or their legal representatives shall thereupon forthwith, after making such election not to collect, reassign and deliver such policy or policies of insurance to said parties of the first part, their executors, administrators or assigns."

In the fall of 1867, by an arrangement between Scammon and his daughters, the south one third part of the lot was conveyed to his appointee by them, in fee, as representing his existing interest in fee in the lot, and the north two thirds part of the lot was conveyed by him to them as tenants in common, in fee, as representing their existing interest in fee in the lot, subject, as to such north two thirds part, to the life estate of the father therein. Thereupon, the father and daughters paid or caused to be paid to the mortgagee $10,000, as a reduction of the principal of the mortgage; and it released, by deed, from the lien of the mortgage, such south one third of the lot. [638]

With the money lent on the mortgage, Scammon erected a building on the north two thirds of the lot, and thereafter collected for his own use the rents from it, and paid the interest on the mortgage, and the taxes and the fire insurance premiums. Insurance against fire, covering the building, for $15,000, was effected by Scammon, by a policy issued by the Liverpool and London and Globe Insurance Company in his name, with a clause making the loss payable to the mortgagee. The building was destroyed by fire in October, 1871, and the loss being adjusted at a sum greater than $15,000, a draft for $15,000 was drawn at Chicago, by the agents of the fire insurance company there, on that company, at New York, payable to the order of the mortgagee. The draft was handed to Scammon and, at his request, the agent of the mortgagee at Chicago sent it to the mortgagee, at Hartford, with an application from Scammon to have the $15,000 paid to him, to enable him to rebuild the building. Thereupon the following instrument was executed in duplicate by the mortgagee and Scammon, a copy being retained by each:

"Memorandum of agreement made and entered into this 5th day of January, A. D. 1872, between the Connecticut Mutual Life Insurance Company, a corporation subsisting by the laws of the State of Connecticut, and located and doing business in the City of Hartford, in the State of Connecticut, of the one part, and J. Young Scammon, of the City of Chicago, in the County of Cook, and State of Illinois, of the other part, witnesseth: *that whereas*, the said party of the second part did, on the 10th day of September, A. D. 1866, make, execute and deliver to the said party of the first part a certain indenture of mortgage, bearing date on that day, on the following described premises, situate and being in the City of Chicago, aforesaid, to wit, lot number five (5), in block number eleven (11), in Fort Dearborn Addition to Chicago, for the purpose of securing the payment of the certain bond or obligation of the said party of the second part, bearing even date with said mortgage, in the penal sum of $60,000, conditioned for the payment to said party of the first part of the sum of $30,000 on the 10th day of September, A. D. 1871, with interest as therein stated, on which said mortgage has been paid $10,000 of principal; *and whereas*, the building on said premises, known as No. 90 Michigan Avenue, in said City of Chicago, was insured in the following company and in the following amount, to wit: the Liverpool and London and Globe, in the sum of $15,000; which said policy of insurance was held by said party of the first part as collateral security for the payment of said loan, any loss on said policy to be paid to said party of the first part; *and whereas*, said building has been destroyed by fire and the insurance moneys to be received on said policy or policies are subject to be paid to said party of the first part, in accordance with the conditions of said mortgage; *and* [639]

[illegible] said party of the second part desires [illegible] to permit and suffer [illegible] money to be used in and upon [illegible] in the reconstruction [illegible] or buildings thereon, and said [illegible] insurance money [illegible] conditions here[illegible] in the collection [illegible] party from [illegible] company or companies for [illegible] therefore, mutually [illegible] the parties hereto. [illegible] waives, except [illegible] its right to apply on the [illegible] that may be re[illegible] of insurance, [illegible] sum or sums of money [illegible] from said fire insur[illegible] by either of the [illegible] shall be deposited in [illegible] shall be selected by the [illegible] and assented to by the [illegible] at the risk of [illegible] to be used in the [illegible] building or buildings on said [illegible]

[illegible] shall be paid out and ex[illegible] of said building or build[illegible] the drafts or checks [illegible] part, countersigned [illegible] part, or its duly [illegible] until said insur[illegible] as herein pro[illegible] That said [illegible] countersigned upon [illegible] to said party of the [illegible] agent or attorney, [illegible] a competent and [illegible] the amount of said [illegible] with all previous [illegible] paid out on said ac[illegible] expended in and upon [illegible] in the permanent im[illegible] that the work and ma[illegible] so expended have [illegible] such sum.

[illegible] buildings are being con[illegible] supervision of an archi[illegible] party of the second [illegible] the option of said first [illegible] said architect's cer[illegible] understood and [illegible] building or build[illegible] to be insured said [illegible] part shall cause the same [illegible] good and responsible in[illegible] the fair insurable value [illegible] the same to said [illegible] part, and, as soon as said [illegible] insurable, all the pro[illegible] above described mort[illegible] insurance, and said con[illegible] a part of this agree[illegible]

[illegible] understood that any re[illegible] given by said party of [illegible] or jointly with others, [illegible] company or companies, [illegible] of facilitating the [illegible] party of any insurance [illegible] back on said mort[illegible] shall not be con[illegible] of said money by said first party under the conditions of said mortgage, wherein and whereby it is provided that said first party may collect and apply such insurance money upon the indebtedness secured to be paid thereby, but merely as enabling said second party to collect said insurance moneys. Said moneys are not to be so applied, and said mortgage shall remain a lien on said mortgaged premises for the full amount of the principal money mentioned in said bond, with the interest thereon, as if said moneys had never been collected.

It is also further expressly understood and agreed, that said insurance money shall be expended on said mortgaged premises as above provided, with all reasonable and proper dispatch; and that, in the event that from any cause, whether the death or absence of any party or parties to this agreement, or any other cause, said money shall not have been so expended within six months from the date hereof, then this agreement of waiver shall thereupon become thenceforth null and of no effect, and the right of said second party to use and expend said moneys shall thereupon cease, and said first party shall have the right to draw from the said bank or banks, upon its own check or checks or that of its authorized agent, said insurance moneys or so much thereof as shall not then have been actually expended as provided in this agreement, and apply the same in payment *pro tanto* of the indebtedness secured by said mortgage; and such check or checks of said first party or its agent as aforesaid, drawn at any time after the expiration of six months from the date hereof, shall be a full discharge and acquittance to said bank or banks for any moneys paid thereon.

It is expressly agreed, that time shall be of the essence of this agreement in all its parts, and that said agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the respective parties."

On the execution of this agreement the mortgagee indorsed the draft, making it payable to Scammon or his order, and sent it to its agent at Chicago. Scammon signed on the agreement a written designation by him of "the Marine Company of Chicago," a banking institution of which he was then president, as the banking office in which to deposit the $15,000; and the draft was then delivered by the agent to Scammon, and collected, and its proceeds were deposited to his credit in the Marine Company. The transaction between Scammon and the agent took place at the banking company's office, and the agent exhibited the copy of the agreement to Scammon, as president of the bank. No checks against the money were ever countersigned by or on behalf of the mortgagee, nor was any of it used in putting up any new building on the lot, nor was any such new building put up. Scammon's daughters had no knowledge or information as to any part of the transaction between their father and the mortgagee in regard to the $15,000.

Under that state of facts, the mortgagee, in June, 1876, filed a bill in equity, in the Circuit Court of the United States for the Northern District of Illinois, for the foreclosure of the mortgage, making as defendants Scammon and the two daughters, and Reed, the husband of one of them, and other persons. The bill credits

the payment of the $10,000, in November, 1876, as one by Scammon and his daughters, in reduction of the principal of the mortgage, and sets forth the release of the south one third of the lot from the lien of the mortgage, but ignores any credit of the $15,000, and claims as due $20,000, with interest at 8 per cent per annum from September 10, 1873, and moneys paid by the mortgagee for taxes and assessments.

Mrs. Reed and her sister answered the bill. The answer sets forth the transaction in regard to the $15,000, and avers that it took place without the knowledge, authority or consent of the daughters, and that the mortgagee, in consenting to the use of the $15,000 in any other way than in payment of the mortgage indebtedness, relied on the credit of Scammon and released the property of the daughters to that extent. It claims that Scammon's life estate in the north two thirds part of the lot should be first sold, and the proceeds be applied first in payment of the remaining $5,000 and interest, and the property of the daughters be thereupon released from all further liability.

After issue, the court referred the cause to a master, to take proofs and report them, with the amount due to the plaintiff. He reported the testimony, and that there was due $20,000 of principal, and interest from September 10, 1873, and certain sums paid by the plaintiff for taxes and assessments, with interest thereon. [643] Mrs. Reed and her sister excepted to the report, and the case was heard on the exceptions. The court rendered a decision (4 Fed. Rep. 263), in which it was ruled: 1, that authority in Scammon, as representing his daughters, to make the special agreement in regard to the $15,000, could not be implied from the general power he exercised over the property, in managing it, and procuring insurance and paying taxes, the daughters having themselves executed the mortgage; 2, that the insurance was obtained in pursuance of the requirements of the mortgage, and must be presumed to have covered the interests of all the mortgagors as an entirety; 3, that the mortgagee in fact dealt with the $15,000, not as Scammon's money but as representing a further security furnished under the mortgage, and as something which concerned the rights of all the mortgagors, because the agreement it made with Scammon recognized its obligation either to credit the $15,000 on the mortgage or to see that it went to restore the building; 4, that the provision of the policy, that the loss should be payable to the mortgagee, placed it in the same position towards all the mortgagors as if the policy had been taken out in the names of all, and assigned to the mortgagee, and it was bound to apply the $15,000, in accordance with the provisions of the mortgage, for the benefit of all the mortgagors, unless all consented to a different disposition of the money; 5, that in any view, if the agreement with Scammon was valid as against the daughters, the mortgagee was bound to see that the money was used to restore the building or else credit it on the mortgage.

Under these views, the court referred the case back to the master, with directions to restate the account according to the principles thus laid down. He did so, and, the case being heard on his report, the court, on the second of October, 1882, rendered a decree, which, after setting forth the material facts above stated, contains the following clauses:

"The court further finds that when the complainant originally took the said mortgage, it, by its agent, knew the state of the title of the mortgaged premises; that, in the erection of the building on said premises, and causing it to be insured, and in collecting rents and paying the [644] insurance premiums and taxes, the defendant J. Y. Scammon held the property as if it was his own; that the entire business connected with the loan from the complainant, from the time of its original negotiations down to the time of the before mentioned agreement in relation to the insurance, was transacted by J. Y. Scammon, who kept an account of the property in his bank ledger, in which rents by him received were credited, and the moneys paid out were also entered; that the defendants Florence A. D. Reed and Arianna E. Scammon knew nothing, at the time, of the insurance obtained upon the property, nor anything in relation to the agreement between their father and the complainant made in 1872; that the complainant entered into the agreement for the payment of the insurance money to Scammon, to be by him used in rebuilding, in good faith; and that said Scammon received it in good faith for that purpose, and the officers of the bank where it was deposited understood that the money was deposited there as a special deposit, subject to said agreement.

The court further finds that Florence A. D. Reed and Arianna E. Scammon did not know that this insurance had been effected on the property, or of the payment of premiums thereon, and were never consulted about the disposition of the insurance money, and had no knowledge of and gave no consent to its payment to their father and its deposit in the bank, and have never asserted any rights in relation thereto until the commencement of this suit.

The court further finds that the acts of Florence A. D. Reed and Arianna E. Scammon were limited to the execution of the bond and mortgage and the making of the agreement for partition; that said insurance was furnished under the covenants of the mortgage, and pursuant to the requirements thereof, and was an additional security held by the complainant for the payment of the principal sum and interest secured by said mortgage, and that the covenants in the mortgage for insurance operated [645] as an assignment of the insurance fund, when collected, to the mortgagee; that the acts of the complainant, its receipt of the draft for said insurance money, and its indorsement thereof to the defendant J. Y. Scammon, by ordinary commercial indorsement, and its assumed control over the ultimate destiny and use of the proceeds thereof, were equivalent to a collection of the insurance by the complainant; that the receipt by the complainant of said insurance money operated as a satisfaction *pro tanto* of said mortgage, so far as the estate and interests of the defendants Florence A. D. Reed and Arianna E. Scammon are involved, but that, so far as the life estate of J. Young Scammon is concerned, said mortgage remains an equitable lien and encumbrance for the full amount thereof."

The decree then goes on to declare that there

is due, at its date, from Scammon to the plaintiff, on the bond and mortgage, $20,000 of principal, and $13,093.32 of interest, as reported, and $1,404.44 for interest since the date of the report; and $3,275.42 for moneys paid for taxes and to redeem from tax sales, and $490.73 for interest thereon, as reported, and $287.51 for interest since the date of the report; being, in all, $38,551.42; that that sum is a valid and first lien on the estate of Scammon, for his life, in the north two thirds of the lot (excepting therefrom a strip from off its north side, hereafter mentioned); that, of the $38,551.42, Mrs. Reed and her sister are personally liable for $5,000 of principal, and $3,273.33 interest thereon, as reported, and $351.11 interest on the $5,000 since the date of the report, and for the above named sums of $3,275.42, $490.73, and $287.51, being in all $12,678.10, which is a valid and first lien on the estate in remainder of them and each of them, after the expiration of the life estate of Scammon, in the north two thirds of the lot (excepting therefrom the strip above referred to); and that the $12,678.10 is a valid and first lien on said strip. The decree then provides for the sale at public auction of such estate in remainder, excepting the strip, and of such life estate excepting the strip, and of the strip, each separately; and directs that the proceeds of the life estate be applied first to the satisfaction of the amount for the payment of which the life estate is decreed to be the sole security, and that no portion of the amount realized from the sale of the life estate shall be applied to pay the costs of the suit, or any [646] moneys found due for taxes, or on account of that part of the principal or interest of the bond for which there is other security, until the sum for which the life estate is the sole security shall have been fully paid. From this decree the plaintiff appealed to this court.

The plaintiff assigns for error that the circuit court erred in giving the daughters credit for the $15,000. But we are of opinion that the views of that court in its decision, as above set forth, and as embodied in the decree, were correct.

The policy of insurance was a collateral security for the joint debt of the mortgagors, furnished in compliance with the provisions of the mortgage, and the mortgagee was bound to apply the insurance money to the payment of the joint debt, according to the terms of the mortgage. In the agreement with Scammon, of January 5, 1872, the mortgagee declares that it held the policy "as collateral security for the payment" of the loan secured by the mortgage, and that the $15,000 is subject to be paid to it "in accordance with the conditions" of the mortgage. Although the policy was taken out in the name of Scammon, it was, under the mortgage, a part of the security covenanted for therein; and must be treated as having been furnished by and for the benefit of all the mortgagors. The insurance was on the building as a whole and not on any particular interest in it; and was accepted and treated by the mortgagee as an insurance complying with the terms of the mortgage, and covering all the interests which the mortgage covered.

The mortgagee could not, without the consent of the daughters, surrender the proceeds of the collateral security to Scammon, or divert them from the purpose to which the mortgage devoted them. And, in any event, the mortgagee, if at liberty to use the money toward restoring the building, was bound to see that it was so applied, and took the risk of the diversion. The money not having been so applied, it must be credited in favor of the daughters. Their intention, declared by the mortgage, that the money should be credited on the mortgage, was never varied by them.

Three persons named Andrews, and the wives of two of them, were defendants to the bill. [6 It alleged that they had interests in the mortgaged lot subordinate to the lien of the mortgage. They answered the bill, setting up a prior lien in favor of the three, because they had erected a party wall on and along the north line of the lot, under a party wall agreement made prior to the mortgage, and of which the mortgagee at all times had notice; and alleging that if the mortgage was superior in lien, then the residue of the lot, not covered by the party wall, should be first sold to satisfy the mortgage. Issue was joined on the answer. In the taking of proofs, the plaintiff put in evidence a party wall agreement made June 4, 1866, between Scammon and one Smith, by which it appears that Smith owned lot 4, next north of lot 5, and gave permission to Scammon to build one half of the north wall of a building he was to erect on lot 5, to the northward of the dividing line between the two lots, and that Smith, on paying to Scammon one half of the value of the wall, was to be entitled to use the north half of it as a party wall. On the 25th of February, 1867, Scammon and his daughters and Smith executed a supplemental paper, stating that the contemplated wall had been erected, and agreeing that such wall was to be considered as built on the dividing line between lots 4 and 5, and that the center of such wall was such dividing line. There is not, in the record, any other testimony about any party wall or the strip of land, and none to support the Andrews answer, and there is no mention of the strip in either of the reports of the master. The decree, however, finds that the three Andrews defendants own in fee, subject to the lien of the mortgage, by title derived from Scammon and his two daughters, the strip of land before referred to, describing it as a strip from off the north side of lot 5, 6¾ inches wide in front, and 9¼ inches in the rear, and the depth of the lot. It also excepts that strip in declaring that the mortgage is a first lien on the life estate of Scammon in the north two thirds of the lot, and in declaring that it is a first lien on the estate in remainder of the daughters therein, and declares that the $12,678.10 is a valid and first lien on that strip, and excepts the strip from the estate in remainder, and from the life estate, [6 in describing the premises to be sold, and directs it to be sold by itself, after those estates are sold.

The appellant objects to the adjudication in regard to the strip, on the ground that there is not in the record either pleading or evidence to support it. This is true.

The decree must therefore be reversed in that respect. It is accordingly affirmed, except as to the strip, and reversed as to that, and the case is remanded to the Circuit Court, with a direction to strike out of the decree everything relating to

the strip. The costs of the appeal are awarded to the daughters.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

W HALLETT PHILLIPS AND CLAVIUS PHILLIPS, Exrs. of PHILIP PHILLIPS, Deceased, *Plffs. in Err.*,

v.

JAMES S. NEGLEY.

(See S. C. Reporter's ed. 665-679.)

Supreme Court of District of Columbia—power of, over its judgments—authority of Maryland decisions.

1. The Supreme Court of the District of Columbia has not, at a special term, the same discretionary power over its judgments, rendered at a previous term, without any motion or other proceeding to that end made or taken at that term, to set them aside and grant new trials, which it has over judgments when such proceedings are taken during the term at which they were rendered.
2. After the term at which judgments were rendered the power of the court over the parties and over the record remains only in certain excepted cases, when, on motion, it may be purged of clerical errors, or the judgment reversed by proceedings for errors in fact, in analogy to the practice in cases of writs of error *coram vobis*, unless it be invoked by bill in equity.
3. The decisions of the Maryland courts founded on general principles, made since the organization of the District of Columbia, are not binding upon the court of the District as authorities.

[No. 199.]

Argued Mar. 25, 26, 1886. Decided Apr. 12, 1886.

IN ERROR to the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. **John Selden** and **W. Hallett Phillips**, for plaintiffs in error.

Messrs. **Job Barnard** and *James S. Edwards*, for defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

The facts material to a determination of the questions arising in this cause are as follows:

Philip Phillips sued the defendant Negley, in the Supreme Court of the District of Columbia, on August 29, 1874, to recover $4,368, alleged to be due upon a certain order in writing, signed by Simon Witkowski and by the defendant, as attorney for Mrs. Witkowski, addressed to Charles F. Peck and Charles E. Hovey, and by them accepted, payable out of money received by them from the United States, arising from a judgment in the Court of Claims in favor of Witkowski. A copy of the order was attached to the declaration.

Process was served personally on the defendant on the same day.

On October 26, 1874, Negley filed an affidavit of defense, denying his liability, on the ground that the order was signed by him only as the agent and on behalf of Mrs. Witkowski; alleging that the plaintiff was not in fact holder of the same for value; and denying notice of nonpayment, and any indebtedness whatever.

On May 3, 1877, the plaintiff joined issue on these pleas; and on April 3, 1879, the defendant not appearing, a jury was called, who found a verdict for the plaintiff for the sum demanded with interest, and judgment was rendered thereon.

On September 4, 1882, the defendant filed his motion "to vacate the judgment and set aside the verdict entered herein *ex parte* on the third day of April, 1879, because of irregularity, surprise, fraud and deceit in the procurement of said verdict and judgment, and the negligence of defendant's attorney, the particulars of which appear in the affidavit of the defendant filed herewith and in the record and papers on file in this case." [667]

In support of this motion the affidavits of the defendant Negley and of Richard Harrington were filed. In that of the defendant he denies his personal liability on the order, and says that when served with process in the cause he was temporarily in Washington, being at the time and always since a resident of Pittsburgh; that he employed Harrington as his attorney and filed his affidavit of defense, and received no further notice or information in reference to the suit from the fall of 1874 until about July 26, 1882, when he was served with process in a suit brought on the judgment in Allegheny County, Pennsylvania; that after he filed his affidavit of defense in the original suit, that is, from October 26, 1874, the plaintiff "seemed to have abandoned the case, and thereby to mislead affiant's attorney;" that the plaintiff took no notice of the plea until May 3, 1877, when he joined issue but gave no notice of trial; that in the meantime, without defendant's knowledge, Harrington had removed from the City of Washington, as was well known to the plaintiff and his counsel, leaving the defendant without any attorney; that on April 3, 1879, without any notice to the defendant, the case was called for trial; and in his absence the plaintiff, with knowledge that the defendant was ignorant of the proceedings, called for a jury, and without other proof than the production of the order sued on, procured the verdict and obtained the judgment thereon; and that by reason of the premises the said proceedings and judgment are a fraud upon him.

Harrington states in his affidavit that he understood that the plaintiff had abandoned his suit, and that he believes he so informed his client, the defendant, and that he, Harrington, removed from the District of Columbia in March, 1875, and has not since resided or practiced law therein; and that on such removal he undertook to notify all his clients, but having considered this cause at an end by reason of the plaintiff's failure to join issue or take action on the plea therein, as required by the rules of the court, he did not notify the defendant; and that the plaintiff and his attorney well knew when said cause was set down for trial that the affiant had removed to Dover, Delaware. [668]

Notice of this motion was served upon the plaintiff in the judgment, who appeared and filed counter affidavits of himself and of his attorney, William F. Mattingly. The latter states that he mailed notices of the trial of the issues in the action for the May Term, 1877, in due time, to what he understood to be the postoffice address both of Harrington and of the defendant, and that the cause stood for trial from thence

[illegible] a judgment [illegible] upon the merits [illegible] a final judgment, [illegible] writ of error. [illegible] the order in question [illegible] which the court had [illegible] when it was made, [illegible] that no ap- [illegible] to question its [illegible] to make it and it [illegible] the discretion of [illegible] other cases of orders [illegible] at the same term at [illegible] and granting new [illegible] left for the juris- [illegible] to act upon. The [illegible] and granting a new [illegible] acknowledged juris- [illegible] in force to be [illegible] the other hand, the order [illegible] without jurisdiction on the part [illegible] it is a proceeding [illegible] subject of review by an [illegible] The question of the jurisdic- [illegible] the present writ [illegible] necessarily involves the [illegible] Supreme Court of the Dis- [illegible] general term, and the [illegible] the order brought into re- [illegible] of our jurisdiction is [illegible] the question of the valid- [illegible] itself.

[illegible] involved in the judgment [illegible] to maintain it is that [illegible] of this District at special [illegible] discretionary power over its [illegible] a previous term of the [illegible] or other proceeding [illegible] at that term, to set [illegible] new trials of the actions [illegible] rendered, which it has over [illegible] proceedings are taken [illegible] which they were rendered; [illegible] the proceeding and [illegible] in the exercise of this [illegible] discretion, cannot be reviewed [illegible] writ of error.

[illegible] it is argued, may be deduced [illegible] and implied powers of all [illegible] according to the course of the [illegible] and if that fails, is supplied by [illegible] as to the Supreme Court [illegible] of Columbia, adopted by the [illegible] of 27th February, 1801. 2 [illegible]

[illegible] branch of this proposition is con- [illegible] for this court in regard to [illegible] of the courts of the United States [illegible] v. *Schulten*, 104 U. S. [illegible] L. ed. 797], which is an author- [illegible] upon the point. It was there said [illegible] Miller, speaking for the court: [illegible] all courts have terms and [illegible] The time of the commencement of [illegible] if there be half a dozen a year, is [illegible] by statute, and the end of it by the final [illegible] of the court for that term. This [illegible] case with regard to all the courts of the United States, and if there be exceptions in the state courts they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the con-

trol of the court which pronounces them, during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that court. But it is a rule equally well established that, after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceeding, by a writ of error or appeal, as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court."

The opinion then notices an exception to this rule founded upon the common-law writ of error *coram vobis*, by which errors of fact might be corrected, limited generally to the facts that one of the parties to the judgment had died before it was rendered; or was an infant and no guardian had appeared or been appointed; or was a *feme covert*, and the like, or error in the process through the fault of the clerk; for which writ, as was said in *Pickett's Heirs* v. *Legerwood*, 7 Pet. 144 [32 U. S. bk. 8, L. ed. 638], in practice, a motion is now substituted, heard in a summary manner upon affidavits. And it is then added that this remedy by motion has been extended in some States so as to embrace some of the cases where equitable relief had been administered by courts of chancery. "This practice," it was said, "has been founded in the courts of many of the States on statutes which conferred a prescribed and limited control over the judgment of a court after the expiration of the term at which it was rendered. In other cases the summary remedy by motion has been granted as founded in the inherent power of the court over its own judgments and to avoid the expense and delay of a formal suit in chancery." But it is added: "The question relates to the *power* of the courts, and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a State or the practice of its courts." Although the opinion also shows that, upon the facts of that case, the action of the circuit court in vacating its judgment after the term could not be justified upon any rule authorizing such relief, whether by motion or by bill in equity, nevertheless the decision of the case rests upon the emphatic denial of the power of the court to set aside a judgment upon motion made after the term and grant a new trial, except in the limited class of cases enumerated as reached by the previous practice under writs of error *coram vobis*, or for the purpose of correcting the record according to the fact, where mistakes have occurred from the misprision of the clerk. We content ourselves with repeating the doctrine of this recent decision, without recapitulating previous cases in this court, in which the point has been noticed, for the purpose of showing their harmony. It has been the uniform doctrine of this court. "No principle is better settled," it was said in *Sibbald* v. *U. S.* 12 Pet. 488, 492 [37 U. S. bk. 9, L. ed. 1167, 1169], "or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes, *Cameron* v. *McRoberts*, 3 Wheat. 591 [16 U. S. bk. 4, L. ed. 467]; *Bank of Ky.* v. *Wistar*, 3 Pet. 431 [28 U. S. bk. 7, L. ed. 731], or to reinstate a cause dismissed by mistake, *The Palmyra*, 12 Wheat. 1 [25 U. S. bk. 6, L. ed. 531]; from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing. Bills of review, in cases in equity, and writs of error *coram vobis* at law, are exceptions which cannot affect the present motion." And see *Bank U. S.* v. *Moss*, 6 How. 31, 38 [47 U. S. bk. 12, L. ed. 331, 334]; *Schell* v. *Dodge*, 107 U. S. 629 [Bk. 27, L. ed. 601].

It is equally well established by the decisions of this court that the appropriate remedy for relief against judgments at law wrongfully obtained is by a bill in equity, and the cases in which that remedy is applicable have been clearly defined. That rule was formulated by *Chief Justice* Marshall in a case arising in this district, of *Marine Ins. Co. of Alexandria* v. *Hodgson*, 7 Cranch, 332 [11 U. S. bk. 3, L. ed. 362], and more tersely stated by *Mr. Justice* Curtis in *Hendrickson* v. *Hinckley*, 17 How. 443 [58 U. S. bk. 15, L. ed. 123], as follows: "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents." This rule was supported by *Creath* v. *Sims*, 5 How. 192 [46 U. S. bk. 12, L. ed. 111], and *Walker* v. *Robbins*, 14 How. 584 [55 U. S. bk. 14, L. ed. 552], and was followed in *Crim* v. *Handley*, 94 U. S. 652 [Bk. 24, L. ed. 216]; in *Brown* v. *County of Buena Vista*, 95 U. S. 157 [Bk. 24, L. ed. 422], and in *Embry* v. *Palmer*, 107 U. S. 3 [Bk. 27, L. ed. 346], where it was considered and applied in a case in which the Supreme Court of Errors of Connecticut, having enjoined proceedings in that State upon a judgment of the Supreme Court of this District for causes not sufficient in law to have authorized the latter to set it aside, the judgment of the Connecticut Court was reversed, although no question was made of the right of that court to entertain the jurisdiction to enjoin proceedings upon the judgment in question, equally with that of the court by which it was rendered. This independent jurisdiction in equity over judgments at law, by implication, negatives the remedy at law in the same courts where they are rendered for the same causes, because that equitable jurisdiction is resorted to only because there was no adequate remedy at law, the jurisdiction of the courts of law over the cause and the parties having been exhausted when the judgment became final.

[675]

But it is argued that the power exercised in

the present instance is vested in the Supreme Court of this District by virtue of the laws of Maryland in force February 27, 1801, adopted by the Act of Congress of that date.

The Statute of Maryland supposed to confer [676] this power is an Act of 1787, chap. 9, 2 Kilty, Laws, Thomp. Dig. 173, relating to continuances, the sixth section of which is as follows:

"In any case where a judgment shall be set aside for fraud, deceit, surprise, or irregularity in obtaining the same, the said courts respectively may direct the continuances to be entered from the court where such judgment was obtained until such judgment shall be set aside, and may also continue such cause for so long a time as they shall judge necessary for the trial of the merits between the parties, not exceeding two courts after such cause has been reinstated, unless," etc.

This statutory provision, it will be observed, is entirely silent as to the mode according to which a judgment may be set aside at a subsequent term, whether by a writ of error *coram vobis* or *coram nobis*, bill in equity, or other procedure, and does not, either in express terms or by any necessary implication, provide that it may be done by a motion and summary proceedings thereon; and also, that it seems to proceed upon the idea that continuances should regularly be entered to show that the proceeding, if at law, to set a judgment aside, in theory at least, ought to originate at the same term at which the judgment was rendered.

The remedy by writ of error *coram nobis* continued in force and in use in Maryland. *Hawkins* v. *Bowie*, 9 G. & J. 437; *Bridendolph* v. *Zeller's Exrs.* 3 Md. 325. And in the first of these cases it was held that a reversal of a judgment upon such a writ was a final judgment from which an appeal would lie. The court said: "Now, if reversing the original judgment and awarding costs to the plaintiff in error, in this proceeding in error *coram nobis*, was not so far final as to fall within that class of judicial acts from which an appeal will lie to this court, we cannot see the reason, nor can we well conceive of any remedy the parties would have if the county courts were to undertake to vacate and annul all the judgments in their records." This remark equally applies whether the result is reached by this writ or by the more summary mode of a motion. It was so decided in *Graff* v. *Merchants & Miners Trans. Co.* 18 Md. 364, and *Craig* v. *Wroth*, 47 Md. 281. In the last named case, it was said by the court: [677] "The power to set aside judgments upon motion for fraud, deceit, surprise, or irregularity in obtaing them, is a common-law power *incident* to courts of record in this State, and was not *conferred* upon them by the Act of 1789, chap. 9, § 6, which is partially but not fully embodied in section 38, article 75 of the Code. This legislation *assumes* that the power resides in the courts, and provides for the entering of continuances when it is put in force. In deciding such motions made after the term is past, the court acts in the exercise of its quasi equitable powers and will, therefore, properly consider all the facts and circumstances of the case, and require that the party making the application shall appear to have acted in good faith and with ordinary diligence; relief will not be granted when he has knowingly acquiesced in the judgment complained of, or has been guilty of *laches* and unreasonable delay in seeking his remedy." This seems to be the settled doctrine of the Maryland Courts, as shown by a series of decisions, all of which, however, have been made since the cession of the present territory within the District of Columbia. *Kemp* v. *Cook*, 18 Md. 130; *Montgomery* v. *Murphy*, 19 Md. 576. In *Kemp* v. *Cook*, the court said: "The power of setting aside judgments upon motion is a common-law power incident to courts of record, and usually exercised under restraints imposed by their own rules and rarely after the term in which the judgment was rendered. * * * The judgment records of the State are the highest evidences of debt known to the law; they are presumed to have been made up after the most careful deliberation, upon trial or hearing of both parties. To permit them to be altered or amended without the most solemn forms of proceeding would be contrary to law and good policy."

It appears also from the case of *Kearney* v *Sascer*, 37 Md. 264, that the jurisdiction of the court of chancery, upon a bill in equity, to grant relief against a judgment on equitable grounds, constitutes part of the remedial system in that State, notwithstanding the practice to set aside judgments on motion made after the term; and in that case the court quoted and adopted the rule regulating the measure of relief, and the circumstances justifying the court in granting it, as declared by *Chief Justice* Marshall in *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 336 [11 U. S. bk. 3, L. ed. 363].

It thus appears that in Maryland, prior to 1801, the only statute in existence referring to the subject, while it assumes the existence of a power in the courts to set aside their judgments after the term in which they were rendered for certain causes, does not specify the modes in which that relief may be administered, and does not enumerate a summary proceeding by motion as one of them; that the cases in which that relief has been administered in that way have all arisen and been decided since the date of the cession to the United States of the territory constituting the District of Columbia; that these decisions are based, not upon the staute as creating or conferring such power, but upon an interpretation of the common law by which all courts of record are assumed to be possessed of it, as inherent in and incident to their constitution as courts of justice; that, in whatever form, the proceedings are regarded not as interlocutory steps in the original cause, but as independent applications to a legal discretion governed by fixed rules, and, therefore, terminating in final judgments, subject as in other cases to review or error in a court of appeal; and that the jurisdiction of chancery by a plenary suit in equity is not excluded, but is maintained and exercised in conformity with the general principles of equity jurisprudence.

It follows from this statement that these decisions of the Maryland courts, being founded upon general principles, and made since the organization of the District of Columbia, are not binding upon the courts of the District as authorities, though entitled to all the respect due to the opinions of the highest court of the State, a rule acted upon in this court in *Ould* v. *Washington Hospital*, 95 U. S. 303 [Bk 24, L.

ed. 450], and approved in *Russell* v. *Allen*, 107 U. S. 163, 171 [Bk. 27, L. ed. 397, 399]. We feel at liberty, therefore, to follow our own convictions as to the power of the courts of the District over their judgments; and are of opinion, and so decide, that, after the term at which they were rendered, the power of the court over the parties and over its record remains only in the excepted cases already noticed, when, on motion, it may be purged of clerical errors, or the judgment reversed by proceedings for errors in fact, in analogy to the practice in cases of writs of error *coram vobis*, unless it is invoked by a formal bill in equity upon grounds recognized as furnishing a title to relief.

We are, therefore, of opinion that the Supreme Court of the District, both at special and general term, in entertaining and granting the motion to set aside the judgment in the present case committed error, *and the proceedings and judgment thereon are reversed, and the cause remanded, with directions to dismiss the motion of the defendant, but without prejudice to his right to file a bill in equity.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

EDWARD J. CANTRELL AND HENRY B. PETTY, Trading as CANTRELL & PETTY, *Appts.*,

v.

WASHINGTON WALLICK.

(See S. C. Reporter's ed. 689-696.)

Patent law—patent for improvement on patented device—identity of mechanical devices—burden of proof.

1. Two patents may both be valid when the invention secured by the second is an improvement on that secured by the first, but if the second includes the first, neither patentee can use the invention of the other without his consent; and a stranger who is an infringer of both cannot set up the first patent as an excuse for infringing the other.

2. Two mechanical devices are identical in the sense of the patent law when they perform substantially the same function in substantially the same way to obtain the same result.

3. Where want of novelty is set up as a defense to a suit for infringement of a patent the burden of proof is upon the defendant and he must establish the defense set up beyond a reasonable doubt.

[No. 201.]

Argued Mar. 30, 31, 1886. Decided Apr. 12, 1886.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is stated by the court.

Mr. **John Walker Shortlidge**, for appellants.

Mr. **Charles Howson**, for appellee.

Mr. Justice **Woods** delivered the opinion of the court:

This was a bill in equity filed by Wallick, the appellee to restrain the infringement by Cantrell and Petty, the appellants, of letters patent granted to Wallick, dated May 25, 1875, for an "improvement in apparatus for enameling moldings," on an application filed October 16, 1874.

The specification stated the object of the invention to be "a rapid and economical production of enameled moldings." It appears from the record that the moldings referred to are those which, after being enameled, are gilded and used for picture and mirror frames and other like purposes. In order to prepare the molding to receive and retain the gilding it is necessary to enamel the surface to be gilded with a composition made of glue and whiting. Long before the date of the plaintiff's application the method of doing this was by passing the molding through a vessel containing the enameling material, the vessel having at its opposite sides and in the same line apertures of the shape of a section of the molding and large enough to permit the molding to pass through and leave a proper quantity of the enamel to pass out with and adhere to it. As early as October, 1851, a patent had been granted to Robert Marcher for an improvement in machinery for enameling moldings. In Marcher's contrivance the bottom of the box or hopper which contained the enameling composition was left open. The opposite sides of the box were made with apertures of suitable size and shape for receiving the end of the molding; and when the end of the molding was thrust through both the apertures the molding formed the bottom of the box. The result was that on passing a molding through the box its face was enameled, but its back, which did not come in contact with the composition in the box, was not. [691]

The means used to drive the moldings through the box were not covered by this patent; but this was done sometimes by hand and sometimes by passing them between revolving feed rollers. The latter became the more common method. In order to give a good enamel it was necessary to pass the molding through the box several times.

According to the contention of the plaintiff, this was the state of the art when he invented the device covered by his patent.

The specification of the plaintiff's patent stated that in enameling certain forms of molding, for instance, the moldings shown in figures 2 and 3 of the drawings, feed rollers could not be used for passing the moldings through the Marcher box without disturbing the coats of enamel on which the upper feed roller must bear. It then proceeded thus:

"The main aim of my invention has been to so construct an enameling box and so form the strips of wood that feed rollers may be employed to pass the strips through the reservoir containing the enameling composition.

"For enameled moldings like figures 1 and 2, for instance, I prepare a strip of wood, figure 5, with a groove, *x*, above for receiving the upper feed roller, and a groove, *y*, below for receiving the lower feed roller, and then pass the strip through an enameling box of peculiar construction, so that the rounded edges only are coated; and when these edges have received the proper number of coats I sever the strip, so as to produce either of the moldings, figures 1 and 2.

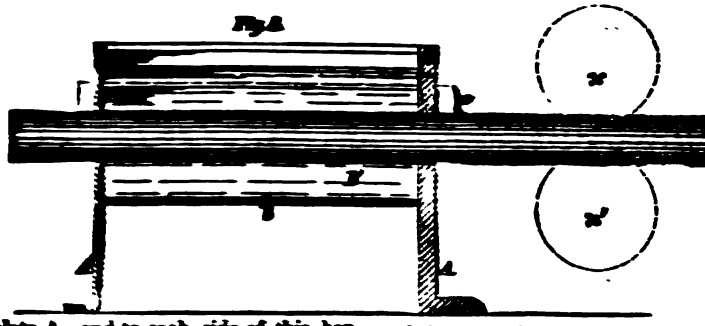
"For making moldings like figure 3 I prepare a strip of the form shown by figure 6, so that upper and lower feed rollers may be used to force the strip through the enameling box. [692]

"After the edges of the strip have been

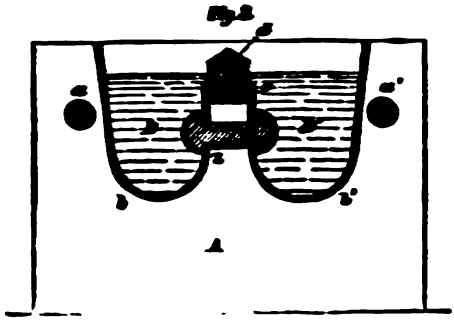
[illegible] enameled I sever it in the middle, thereby producing two moldings, like figure 3.

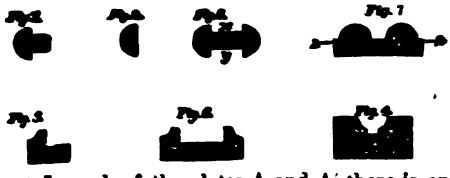
The box by which the enamel is applied to these strips is illustrated in the vertical section, figure 4, and transverse vertical section, figure 9 of the accompanying drawing, the box being, in the present instance, arranged for enameling the strip, figure 5.

"A and A' are two plates, which are confined by suitable bolts *a a*, two bent plates *b b'*, forming, under the circumstances explained hereafter, two reservoirs, B B', for containing the fluid or semi-fluid enameling composition. The distance between the turned up portion, *e*, of one plate, *b*, and that of the other plate is equal to the width of the groove *y* of the strip, figure 5. A permanent longitudinal bar, *d*, extends from the plate



A to the plate A, and to each side of this bar is secured a plate, *e*, of metal, the distance across the bar and its two plates being equal to the width of the groove *x* of the strip, figure 5, against the edges of which groove the said plates bear.





"In each of the plates A and A' there is an opening, conforming in shape and dimensions to that of the strip, figure 5, and these openings bear such relations to the turned up edges of the plates *b b'* and to the bar *d* that the strip, when introduced into the box, will be in the position shown in figure 9, so that no parts of the strip, excepting the rounded edges, are exposed to the enameling composition. After thus passing the end of the strip of molding through the openings in the plates A A' the composition may be introduced into the reservoirs B B', for all avenues for the escape of the fluids are cut off by the strip itself.

"Feed rollers XX (shown in dotted lines) may be used for forcing strip after strip through the enameling box, the said rollers in no way interfering with the different coatings of enamel, because they are never in contact with the enameled surfaces.

"In other words, the enameling box is separated into two reservoirs, partly by a permanent partition and partly by the strip, which is passed through the box so that the edges only of the strip are exposed to the enameling composition, one edge to the composition in one compartment and the other edge to that in the other compartment."

The claim was as follows:

"An enameling box divided into two compartments by a slotted partition, and having openings at the ends in a line with the slot in the partition, all substantially as and for the purpose set forth."

The defenses relied on were that the specification was too broad, and embraced and appropriated the Marcher box, noninfringement, and prior use by Frederick W. Werner and T. C. Ladd & Co., of Brooklyn.

The first defense is based on the theory that a a patent cannot be valid unless it is new in all its elements as well as in the combination, if it is for a combination. But this theory cannot be maintained. If it were sound no patent for an improvement on a known contrivance or process could be valid. And yet the great majority of patents are for improvements in old and well known devices, or on patented inventions. Changes in the construction of an old machine which increase its usefulness are patentable. *Seymour* v. *Osborne*, 11 Wall. 516 [78 U. S. bk. 20, L. ed. 33]. So a new combination of known devices, whereby the effectiveness of a machine is increased, may be the subject of a patent. *Loom Co.* v. *Higgins*, 105 U. S. 580 [Bk. 26, L. ed. 1177]; *Hailes* v. *Van Wormer*, 20 Wall. 353 [87 U. S. bk. 22, L. ed. 241]. Two patents may both be valid when the second is an improvement on the first, in which event, if the second includes the first, neither of the two patentees can lawfully use the invention of the other without the other's consent. *Star Salt Caster Co.* v. *Crossman*, 4 Cliff. 568.

Therefore, letters patent for an improvement on a patented invention cannot be declared void

because they include such patented invention. Much less does it lie in the mouth of a party who is infringing both the improvement and the original invention to set up the existence of the first patent as an excuse for infringing the improvement: It is only the patentee of the original invention who has the right to complain of the use made of his invention. We are, therefore, of opinion that the first defense to the suit must fail.

On the question of infringement, a comparison of the model of the plaintiff's patent with the model of the device shown to be in use by the defendants, makes it clear that the defendants have adopted substantially the invention of the plaintiff. It would baffle the ingenuity of the most skilled expert to show a substantial difference between the invention claimed by the plaintiff and that which it is conceded that the defendants use. It may be true, as contended by the defendants, that the device used by them is in some respects better than that of the plaintiff, but this cannot relieve them from the charge of infringement, if the devices are substantially alike. The rule was well stated by *Mr. Justice* Clifford, in delivering judgment in the case of *Machine Company* v. *Murphy*, 97 U. S. 120 [Bk. 24, L. ed. 935], when he said that "In determining the question of infringement, the court or jury are not to judge about similarities or differences by the names of things; but are to look at the machines or their several devices or elements in the light of what they do or what office or function they perform; and to find that one thing is substantially the same as another if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce substantially a different result."

Tested by this rule the charge of infringement made against the defendants is clearly made out.

It remains to inquire whether prior use and want of novelty have been shown. The prior use and consequent want of novelty alleged by the defendant was the making in 1866, and the using from that date until 1871, by Frederick W. Werner, of a box for enameling moldings in which the invention described in the patent of the plaintiff was embodied. Werner testified to this making and use, and to the further fact that, in 1874, he sold the box to Ladd, who some time afterwards began using it.

The burden of proof is upon the defendants to establish this defense. For the grant of letters patent is *prima facie* evidence that the patentee is the first inventor of the device described in the letters patent and of its novelty. *Smith* v. *Goodyear Dental Vulcanite Co.* 93 U. S. 486 [Bk. 23, L. ed. 952]; *Lehnbeuter* v. *Holthaus*, 105 U. S. 94 [Bk. 26, L. ed. 939]. Not only is the burden of proof to make good this defense upon the party setting it up, but it has been held that "every reasonable doubt should be resolved against him." *Coffin* v. *Ogden*, 18 Wall. 120, 124 [85 U. S. bk. 21, L. ed. 821, 823]; *Washburn* v. *Gould*, 2 Story, 122, 142.

The proof of prior use in this case depends on the testimony of Werner and T. C. Ladd. The contrivance to which the testimony of these witnesses refers is not produced nor any model of it. It is merely represented in a drawing made by Werner six years after he had sold the box to Ladd.

These two witnesses are contradicted by four others who were engaged in the factory where the box was used, and who had frequently seen the box referred to when in use and the moldings enameled by its use. Their testimony shows that the distinctive element in Wallick's contrivance was not used in the box, but that it was substantially the old Marcher box. The defendants have, therefore, failed to show by preponderance of proof, much less beyond reasonable doubt, the prior use on which they rely. On the contrary the weight of the evidence is against this defense.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

HENRY ZEIGLER, *Plf. in Err.*, [683]

v.

THERON R. HOPKINS.

(See S. C. Reporter's ed. 683-689.)

Ejectment—tax sale under California Statute—evidence—motion by third party to dismiss.

1. In an action of ejectment brought to recover the possession of land sold for nonpayment of taxes levied generally to defray the expenses of opening Montgomery Avenue in San Francisco, under the Act of the Legislature of California, of April 1, 1872, the landowner may show that the petition for the opening presented to the Mayor, although acted upon by him, the board of public works and the county court, was not signed by the owners of the requisite amount of frontage.

2. This court refuses to dismiss on motion of a third party based upon a charge that the suit is collusive, and upon affidavits to the effect that the amount involved is less than $5,000, the court below having found as a fact that the premises in question exceed in value the sum of $6,000.

[No. 1240.]

Submitted January 4, 1886. Leave granted A. S. Rosenbaum to file motion to dismiss, January 4, 1886. Motion to dismiss submitted, March 1, 1886. Case and motion decided, April 12, 1886.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is stated by the court.

Messrs. S. Shellabarger, J. M. Wilson, Daniel Rogers and *E. F. Preston*, for plaintiff in error.

Messrs. Philip G. Galpin and *Wm. F. Gibson*, for defendant in error.

Messrs. D. M. Delmas and *A. H. Garland*, in support of Rosenbaum's motion to dismiss.

Mr. Chief Justice **Waite** delivered the opinion of the court: [684]

This was an action of ejectment brought by Henry Zeigler for a lot in the City and County of San Francisco, and his right to recover depends on the validity of a sale of the property for nonpayment of a tax levied and assessed under "an Act to open and establish a public street in the City and County of San Francisco, to be called 'Montgomery Avenue,' and to take private lands therefor," approved April 1, 1872.

[illegible] 911. By that Act a strip of [illegible] described was taken for Mont- [illegible] and the cost and expenses [illegible] taking and opening of said [illegible] be assessed on certain "lots, [illegible] of land," particularly [illegible] to the benefits accru- [illegible] several lots, subdivisions [illegible] respectively, which said [illegible] to be benefited by the [illegible] By section 5 it was [illegible] the owners of a ma- [illegible] the property declared to be [illegible] owners are or shall be named [illegible] annual assessment roll for [illegible] taxes," should "peti- [illegible] city and county in writ- [illegible] of Montgomery Avenue," [illegible] works," to be composed "of [illegible] collector and the city and [illegible] the City and County of San [illegible] to organize by the [illegible] This board was to ascer- [illegible] a written report * * * the [illegible] value of the several [illegible] land included in the [illegible] Montgomery Avenue, and [illegible] will be occasioned [illegible] the line and within the [illegible] The same board was [illegible]

San Francisco was not, in any event whatever, to be liable for the payment of these bonds, and any person purchasing them, or otherwise becoming the owner thereof, was to take them "upon that express stipulation and understanding." It was, however, provided that "There shall be levied, assessed and collected, annually, at the same time and in the same manner as other taxes are levied, assessed, and collected in said city and county, a tax upon the lands" which had been declared to be benefited by the opening of the avenue, "sufficient to pay the interest upon said bonds" as it matured, and also "a tax of 1 per cent upon each $100 valuation, which shall constitute a sinking fund for the redemption of said bonds." The money arising from these taxes was to be paid to the treasurer of the city and county and by him used for the purposes intended. These taxes were to be assessed upon the "values of the respective parcels of land as fixed in the said * * * report of said board."

The case was tried in the court below without a jury, and comes here on a finding of facts, which shows that a petition, regular in form, for the opening of the avenue, was presented to the mayor of the city and county in the month of April, 1872, but which was not in fact subscribed by the owners of a majority in frontage of the land declared to be benefited "as said owners" were "named in the last preceding annual assessment roll for the state, city, and county taxes," although it purported on its face to have been so signed. After the filing of this petition, the persons at that time filling the offices respectively of mayor of the city and county, tax collector and surveyor, annexed thereto their several certificates that the petition had been subscribed by the owners of the requisite amount of frontage. This being done, the board of public works, consisting of the mayor, tax collector and surveyor, organized, opened the avenue and assessed the benefits conferred on the property declared to be benefited, for the purposes of taxation. Their report, after being left at their office for thirty days, and the requisite notice thereof given, was filed with and confirmed by the county court. The lot now in question was among those declared by the law to be benefited, and was assessed by the board for the purposes of taxation. A tax levied for the year 1878–9 upon this assessed value, to meet the annual obligations under the law, was not paid by the owner, and for this default the sale was made under which Zeigler now claims title. Upon these facts the court below gave judgment against him, and to reverse that judgment this writ of error was brought.

There is in reality but a single question presented for our consideration in this case, and that is whether, in an action of ejectment brought to recover the possession of lands sold for the non-payment of taxes levied to defray the expenses of opening Montgomery Avenue generally, and not in obedience to an order of a court of competent jurisdiction to meet some particular liability which had been judicially established, the [illegible] owner is estopped from showing, by [illegible] that the petition for the opening presented to the mayor was not signed by the owners of the requisite amount of frontage; and this depends on whether the owner is con- [illegible] by the acceptance of the petition by

the mayor and his certificate as to its sufficiency and the action of the board of public works thereunder; or 2, by the judgment of the county court confirming the report of the board of public works.

This precise question was most elaborately considered by the Supreme Court of California in *Mulligan* v. *Smith*, 59 Cal. 206, and decided in the negative, after full argument. With this conclusion we are entirely satisfied. It is supported by both reason and authority. The opinions of *Justices* M'Kee, Sharpstein and Ross, which are found in the report of the case, leave nothing further to be said on the subject. "A petition from the owners of a majority in frontage of the property to be charged with the cost of the improvement was necessary to set the machinery of the statute in motion," and "no step could be taken under the provisions of the statute until the requisite petition had been presented." Neither the mayor nor the county court was "authorized to enter into any investigation of the frontage as represented by the petition, or to adjudicate its sufficiency, or to make any record in reference to it." "The only powers which the county court, as a court of limited jurisdiction, was authorized to exercise," were such as related to the matters contained in the report of the board of public works, and this did not include the petition.

The case has been argued here as though it was between the taxpayers and *bona fide* holders of negotiable securities issued by them or for their account, but nothing of that kind is presented by the record. It does not appear affirmatively that a bond was ever issued. But if we are to presume from the finding that after the presentation of the petition the "mayor, tax collector, and surveyor proceeded to perform the duties imposed upon the board of public works," bonds of some kind were put out, it does not appear either that they were in such a form as to make them valid in the hands of *bona fide* holders if they were in fact issued without authority, or that there are any such holders. No other questions are now to be considered than such as would arise if it appeared affirmatively on the face of the record that the tax was levied simply to raise the means to pay the members of the board their own salaries as specially provided for in the Act. All we are now called on to decide is whether the presentation to the mayor of a petition, signed by the owners of less than a majority in frontage of the property to be assessed, as they were named in the last preceding annual assessment-roll, was sufficient to authorize the levy of the tax for which the lots in controversy were sold, and we have no hesitation in saying it was not. It will be time enough to consider the rights of *bona fide* holders of "Montgomery Avenue bonds," if there be any, when a case arises which involves such questions.

It remains only to dispose of a motion which has been made by or on behalf of Albert S. Rosenbaum, who claims to be a holder of Montgomery Avenue bonds, to dismiss the case; 1, because the value of the matter in dispute does not exceed $5,000; and 2, because the suit is colorable only, and got up by collusion so as to preclude a decision favorable to the holders of Montgomery Avenue bonds. Without deciding how far it is allowable for persons not parties to a suit to intervene with a motion of this kind, it is sufficient to say that we see no evidence of any improper collusion in this case. We are entirely satisfied that the suit was instituted in good faith by real parties for the determination of a substantial right, and that it fairly presents the questions involved. The court below found as a fact that the value of the premises in dispute exceeds $6,000, and this appears on the face of the record. While the affidavits as to value presented by Rosenbaum, taken by themselves, show that possibly the property may be worth less than $5,000, they are not enough to overcome the finding of the court below that it was actually worth more than that sum. *Affirmed.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

STATE OF NEW JERSEY, ROBERT GIVEN ET AL., Prosecutors, *Plffs. in Err.*, [648]
v.
HENRY WRIGHT, Collector of Taxes.

(See S. C. "*Given* v. *Wright*," Reporter's ed. 648-657.)

Exemption from taxation—loss of franchise by acquiescence in assessment of taxes—jurisdiction of supreme court.

1. Exemption from taxation being a special privilege granted by the government to an individual, either in gross or as appurtenant to his freehold, is a franchise; and acquiescence by the land owner, for a long period of time (in this case sixty years), under the imposition of taxes, raises a presumption that such franchise has been surrendered.
2. Where it is charged that the obligation of a contract has been impaired by a state law, and the state courts justify such impairment, by the application of some general rule of law to the facts of the case, this court has jurisdiction to review that decision.

[No. 143.]

Argued Mar. 5, 1886. Decided Apr. 12, 1886.

IN ERROR to the Supreme Court of the State of New Jersey.

The history and facts of the case appear in the opinion of the court.

Mr. **P. L. Voorhees**, for plaintiffs in error:

The Act of the Legislature of August 12, 1758 (2 Neville, Laws N. J. p. 212; Patterson, Laws N. J. p. 220), was a contract made by the State with the Indians, that the land purchased for the Indians should be free from taxation.

A covenant made at the time of the conveyance of the land, relating to the land, runs with the land and inures to the benefit of any subsequent purchasers.

Brewer v. *Marshall*, 18 N. J. Eq. 337; *State* v. *Com. R. R. Taxation*, 37 N. J. L. 251; 4 Kent, Com. 472; *New Jersey* v. *Wilson*, 7 Cranch, 164 (11 U. S. bk. 3, L. ed. 303).

A statute cannot be repealed by nonuser. Nothing short of a statute can repeal a statute.

Sedg. Stat. & Const. 127, ed. 1857; Smith, Stat. & Const. 908, par. 790; Potter's Dwarr. Stat. pp. 122, 153, 154; 1 Kent, Com. (467) 527, 10th ed.; *White* v. *Boot*, 2 T. R. 275; *Leigh* v. *Kent*, 3 T. R. 362; *The India*, Browning & Lush. 221; 4 Fisher's Dig. 8223; 6 Mew's Fisher, Dig. 2038.

The cases referred to in the opinion of the Supreme Court of New Jersey in deciding this case will be found to depend upon the proof of title by custom or usage ripening into prescriptive rights under the laws of England; and in all the cases where it was shown that such rights existed, or a grant had been made before the time of legal memory, the limitation under the laws of England, the grants were sustained and enforced. Such cases can be of but little authority in this country, where there are no such prescriptive rights. This country was not discovered or settled until after the time "whereof the memory of man runneth not to the contrary," the limitation of prescriptive rights in England.

In New Jersey it has been decided by its supreme court that there can be no title by prescription.

Ackerman v. *Shelp*, 7 N. J. L. 125.

The effect of such citations is stated in 1 Dillon, Mun. Corp. 324; Cooley, Const. Lim. p. 197; *Com.* v. *Stodder*, 2 Cush. 565.

Messrs. **John P. Stockton,** *Atty-Gen. of New Jersey*, and **Charles E. Hendrickson,** for defendant in error:

There can be no intendment to enlarge the operation of a claim restraining the exercise of a sovereign attribute of a State.

Prov. Bank v. *Billings*, 4 Pet. 561 (29 U. S. bk. 7, L. ed. 955); *Del. R. R. Tax*, 18 Wall. 206 (Bk. 21, L. ed. 888); *Morgan* v. *La.* 93 U. S. 222 (Bk. 23, L. ed. 860); *Ches. & Ohio R. Co.* v. *Miller*, 114 U. S. 176 (Bk. 29, L. ed. 121).

If the holders took from the Indians, they had no title, because the Indians had no power of alienation. If they did not take from the Indians, they took no title but that which remained in the trustees for the purpose of sale, and not for the Indians and their successors forever; and such title did not convey the exemption.

Laws 1801, p. 132.

The trust estate held for the Indians had terminated at the request of the Indians. The property reverted to the State during five years when it was held by trustees to sell for the *cestui que trust*. And as such, in the hands of the trustees, no such condition was attached to the power of alienation.

If the exemption remained, the prohibition of alienation must also have remained, and the title is therefore bad.

With the discovery of the Act in question (that of 1796), it became impossible for the owners to set up the exemption without clouding their title to the land; which is manifestly the reason why the exemption was surrendered.

If lapse of time makes their title good, it must also raise the presumption of a release from the exemption.

The continuous payment of taxes for sixty-six years raises the presumption of a release, waiver or acquiescence It is an estoppel *in pais*.

Bigelow, Estop. 477, 528; *Welland Canal Co.* v. *Hathaway*, 8 Wend. 480; Cooley, Tax. p. 578.

In order that the assignee may sue on a covenant running with the land he must be *in*, of the same estate in the land which the party had, with whom the covenant was made.

Bingham and Colvin, Rents, Covenants and Cond. p. 222; *Spencer's Case*, 1 Smith, L. Cas. 22.

It requires express words to make a covenant which is collateral run with the land.

The law will not annex the covenant to a thing which has no being.

Conover v. *Smith*, 17 N. J. Eq. 51.

It is a personal covenant. No privity between the State and the grantee of the trust.

Spencer's Case, 5 Coke, 39; 1 Smith, L. Cas 22; 6 Cow. 302; 8 Cow. 266; 4 N. Y. 132.

Mr. Justice **Bradley** delivered the opinion of the court:

This is a writ of error directed to the Supreme Court of New Jersey, to review a judgment rendered by the Court of Errors and Appeals of that State, affirming a judgment of the supreme court, and remitted thereto. The case arose upon a *certiorari* issued in the name of the State, on the relation of certain taxpayers of the Township of Shamong, in the County of Burlington, directed to Henry Wright, Collector of said township, for the purpose of examining the legality of a certain assessment of taxes, for the year 1876. The taxes complained of were laid upon lands of the prosecutors lying within the bounds of a tract known as the Indian Reservation. According to the New Jersey practice, reasons were filed for setting aside the assessment, and evidence was taken before a commissioner of the court. The reasons assigned were:

1. That the lands were not liable to be assessed for taxes under the Constitution and laws of New Jersey.

2. That, by virtue of a contract with the State of New Jersey, contained in the Act of the Legislature, entitled "An Act to Empower Certain Persons to Purchase the Claims of the Indians to Land in This Colony," the lands are expressly exempted from taxation.

The lands on which the assessment was laid are the same lands which were held to be exempt from taxation by this court in the case of *N. J.* v. *Wilson*, reported in 7 Cranch, 164 [11 U. S. bk. 3, L. ed. 303], where a succinct history of the transactions out of which the claimed exemption grew is given. That decision was made in February Term, 1812. Since that time, for about sixty years before the assessment in question was laid, taxes have been regularly assessed on the lands, and paid without objection. The Supreme Court of New Jersey sustained the assessment, holding that the uninterrupted acquiescence in the imposition of taxes for so long a time raises a conclusive presumption that, by some convention with the State, the right to exemption was surrendered. The court of errors and appeals affirmed this decision, and the case is now brought here for review, on the allegation of the plaintiffs in error that the obligation of the contract of exemption has been impaired by the laws of New Jersey under which the tax was imposed.

The alleged contract is contained in a law of the New Jersey Colonial Legislature passed August 12, 1758. There remained at that time within the Colony a remnant of the Delaware Indians, who claimed certain lands in different parts of the Colony, which they alleged had never been sold by them. In consequence of a convention had with them, the Legislature passed the law in question, entitled "An Act to Empower Certain Persons to Purchase the Claims of the Indians to Land in This Colony."

The Act appointed five commissioners, with authority to lay out any sum, not exceeding £1,600 proclamation money, to purchase the right and claims of the Indians. The second section of the Act was as follows:

"*And whereas*, The Indians south of Raritan River have represented their inclination to have part of the sum allowed them laid out in land whereon they may settle and raise their necessary subsistence; in order that they may be gratified in that particular, and that they may have always in their view a lasting monument of the justice and tenderness of this Colony toward them; *Be it enacted by the authority aforesaid*, That the commissioners aforesaid, or any three of them, with the approbation and consent of His Excellency, the Governor, or the Governor or Commander-in-Chief for the time being, shall purchase some convenient tract or tracts of land for their settlement, and shall take a deed or deeds in the name of His said Excellency or Commander-in-Chief of this Colony for the time being, and of the commissioners, and their heirs, in trust for the use of the said Indian natives, who have or do reside in this Colony, south of Raritan, and their successors, forever; *Provided, nevertheless*, That it shall not be in the power of the said Indians or their successors or any of them, to lease or sell to any person or persons, any part thereof. And if any person or persons, Indians excepted, shall attempt to settle on the said tract or tracts, it shall and may be lawful for any justice of the peace to issue his warrant to remove any such person or persons from such land. And if any person or persons, Indians excepted, shall fall, cut up, or cart off, any cedar, pine, or oak trees, such person or persons shall forfeit and pay, for each tree so fell, cut up, or carted off, the sum of forty shillings," etc.

The seventh section was as follows:

"7. *And be it further enacted by the authority aforesaid*, That the lands to be purchased for the Indians, as aforesaid, shall not hereafter be subject to any tax, any law, usage, or custom to the contrary thereof in any wise notwithstanding."

In pursuance of this law a tract of about 3,000 acres of land, situate in the Township of Evesham, in Burlington County (now in the Township of Shamong aforesaid), was purchased by the commissioners for the sum of £740, and conveyed to "His said Excellency, Francis Bernard, Esquire, Governor and Commander-in-Chief of the Province of New Jersey, and to them the said Andrew Johnston, Richard Salter, Charles Read, John Stevins, William Foster and Jacob Spicer, Esquires, and their heirs forever; in trust, nevertheless, that they shall permit such Indian natives as have resided or do reside in this Colony south of Raritan, and their successors forever, to cultivate and inhabit the same to and for such uses as are declared in an Act of General Assembly of the Colony of New Jersey, entitled 'An Act to Empower Certain Persons to Purchase the Claims of the Indians to Lands in This Colony.'"

The tract purchased included a cedar swamp and sawmill, and was surrounded by wild lands which furnished good hunting ground, and they were sufficiently near the coast for fishing.

The Indian beneficiaries of this trust, who were but a small band (about sixty in all, as stated by the historian Smith), removed to the settlement purchased (which received the name of Brotherton), and remained there until the latter part of the century, when they desired a change in the mode of managing their lands. The old commissioners having died, they desired new ones appointed to take charge of the lands and mill, and to let or lease the same for their use and benefit.

Accordingly, on their petition, an Act was passed on the 17th of March, 1796, which appointed three commissioners to take charge of the lands "and lease out the same, from time to time, on such terms and in such manner as should most conduce to the advantage of said Indians." The commissioners were directed to apply the moneys arising from the lands unto the Indians, or the value thereof in necessaries, such as provisions and clothing, or to such of them as should stand most in need. They were to account annually to the Court of Common Pleas of Burlington County, which court was invested with power to remove them for misconduct, and in case of a vacancy to appoint new commissioners. It was expressly provided, however, that nothing in the Act should prevent the Indians from residing on the lands, or cutting wood or timber for their own use.

It was not long after this before the Indians desired to have their lands sold, and to join their brethren at New Stockbridge in the State of New York. The Legislature complied with their wishes, and on the third of December, 1801, passed an Act appointing commissioners [652] to sell the lands, and to appropriate the money thence arising for the benefit of the Indians. The Act directed the tract to be divided up into lots not exceeding a hundred acres in each, and to give notice of the time and place of sale; all of which was done. The lands were sold and deeds of conveyance in fee simple were given to the purchasers; but neither in the law nor in the deeds was anything said about exemption from taxes.

After the sale the assessors of the township in which the lands lay proceeded to assess the same for taxes, but on a *certiorari* from the Supreme Court of New Jersey, the assessment was set aside in September, 1804. On the first of December, 1804, the Legislature repealed the seventh section of the Act of 1758, which contained the exemption from taxes. Another assessment was then made, and the matter was brought before the supreme court a second time in the case of *N. J.* v. *Wilson*, reported in 1 Pennington, 300. The assessment was now sustained. *Judges* Rossell and Pennington delivered quite elaborate opinions, arguing that, by the Act of 1758, and the purchase under the same, the lands were intended as a permanent possession of the Indians as a home, protected against their natural improvidence by being made inalienable by sale or lease, or by the imposition of taxes; that the exemption from taxes was one of the incidents of the Indian tenure, and had no congruity with absolute ownership of citizens; and that when, at the request of the Indians, the land was sold to other parties in fee simple absolute, the abnormal qualities of the Indian tenure were extinguished, and all the conditions which rendered exemption

from taxes requisite and proper ceased to exist. *Judge* Pennington added that the fee was not in the Indians; that the purchasers could not claim title from or under them; that the commissioners were not authorized to sell the interests or rights of the Indians, but to sell the land, the fee of which was in trustees who were agents of the State; and that the State in selling the land was under no obligation to continue the exemption from taxes, and did not do so. On writ of error from this court, however, this judgment was reversed, the Act of 1758 was [653] held to be a contract, and the Act of 1804, repealing the exemption, was held to impair the obligation of that contract, and was, therefore, void. *N. J.* v. *Wilson*, 7 Cranch, 164. [11 U. S. bk. 3, L. ed. 308]. It appears from the record of that case, preserved in our files, that the Act of 1796, authorizing the lands to be leased out, was not brought to the attention of this court. Whether, [655] if it had been, it would have affected the judgment of this court is uncertain. It probably would not have done so; and we must assume it to be *res judicata*, that in 1805 (when the case of *N. J.* v. *Wilson* arose) the lands remained exempt from taxation in the hands of the purchasers.

We do not feel disposed to question the decision in *N. J.* v. *Wilson*. It has been referred to and relied on in so many cases from the day of its rendition down to the present time, that it would cause a shock to our constitutional jurisprudence to disturb it now. If the question were a new one we might regard the reasoning of the New Jersey judges as entitled to a great deal of weight, especially since the emphatic declarations made by this court in *Providence Bank* v. *Billings*, and other cases, as to the necessity of having the clearest legislative expression in order to impair the taxing power of the State. See the cases collected in *Vicksburg R. R. Co.* v. *Dennis* [*ante*, 770].

The question, then, will be whether the long acquiescence of the land owners, under the imposition of taxes, raises a presumption that the exemption which once existed has been surrendered.

This question, by itself, would be a mere [656] question of state municipal law, and would not involve any appeal to the Constitution or laws of the United States. But where it is charged that the obligation of a contract has been impaired by a state law, as in this case by the general tax law of New Jersey as administered by the state authorities, and the state courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the the party is entitled to the benefit of the constitutional protection. *Murdock* v. *Memphis*, 20 Wall. 590, 636, prop. 6 [87 U. S. bk. 22, L. ed. 429, 444].

We have carefully read the evidence in this case, and are satisfied that the lands were regularly assessed for taxes, and that the taxes were paid without objection from 1814, or about that time, down to 1876, the time of the assessment complained of, a period of sixty years. If an exemption from taxation can be lost in any case by long acquiescence under the imposition of taxes, it would seem that an acquiescence of sixty years, and indeed a much shorter period, would be amply sufficient for this purpose, by raising a conclusive presumption of a surrender of the privilege. An easement may be lost by nonuser in twenty years, and even in a less time, if it is affected by positive acts of invasion. A franchise may be lost in the same way, nonuser being one of the common grounds assigned as a cause of forfeiture. 3 Bl. Com. 262. Exemption from taxation being a special privilege granted by the government to an individual, either in gross, or as appurtenant to his freehold, is a franchise. Nonuser for sixty, or even thirty years, may well be regarded as presumptive proof of its abandonment or surrender. The present case is a strong one. The nonuser consists of acquiescence in actual taxation, or an actual invasion of the franchise, year by year, for a period of years reaching almost beyond the memory of man. It is not merely a case of nonuser, but one of disaffirmance of the privilege for this long period.

If the franchise were one which affected adversely the rights of other individuals, they might not be able to question its validity in a collateral proceeding. But it is set up against the government itself, while exercising one of its most important prerogatives. We see no reason why, in such a case, the government may not claim the benefit of lapse of time as a ground of presumption of the surrender of the franchise, though the same period of nonuser would be a ground of forfeiture in a direct proceeding on the part of the State to revoke the franchise. We think the reasoning of the Supreme Court of New Jersey in this case is entirely satisfactory.

The judgment is affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

JOSEPH JACKSON ET AL., *Appts.*,
v.
FREDERICK H. LAWRENCE ET AL.

(See S. C. Reporter's ed. 679-683.)

Deed absolute in terms—parol contract accompanying—rights of purchasers under power of sale.

Where a debtor executed a deed, absolute in terms, to his creditor (with the verbal agreement that it was to secure a note and that if the note was not paid when due the creditor should be authorized to sell the land), a *bona fide* purchaser of the land on sale by the creditor after default, who paid just the amount of the debt, takes it free from all rights of creditors of the first grantors who levied an attachment prior to the sale. Such attaching creditors have no right of redemption.

[No. 205.]

Submitted April 1, 1886. Decided April 12, 1886.

APPEAL from the Circuit Court of the United States, for the Western District of Missouri.

The case is stated by the court.

Messrs. T. J. Johnston, H. M. Jackson, and *A. S. Everest*, for appellants:

The relation between Lancaster and Wells created by the deed executed September 15, 1875, by Lancaster to said Wells, conveying the real estate involved, was that of mortgagor and mortgagee.

O'Neill v. *Capelle*, 62 Mo. 202; *Brant* v. *Robertson*, 16 Mo. 129; *Wilson* v. *Drumrite*, 21 Mo. 325; *Worley* v. *Dryden*, 57 Mo. 226; *Miller* v. *Thomas*, 14 Ill. 428; *Russell* v. *Southard*, 12 How. 139 (53 U. S. bk. 13, L. ed. 927); *Babcock* v. *Wyman*, 19 How. 289 (60 U. S. bk. 15, L. ed. 647); *Villa* v. *Rodriguez*, 12 Wall. 323 (79 U. S. bk. 20, L. ed. 406); *Peugh* v. *Davis*, 96 U. S. 332 (Bk. 24, L. ed. 775); *Pierce* v. *Robinson*, 13 Cal. 116.

The deed from Lancaster to Wells being a mortgage, it was subject to all the incidents and attributes of a mortgage, just as much so as if the defeasance had been written in it; and no contemporaneous, or other or subsequent agreement would change its character as such, unless such agreement had been reduced to or proved by some writing signed by Lancaster, or some one thereunto by him lawfully authorized, and such agreement be based upon and supported by a sufficient consideration. If not in writing such agreement would be invalid, under the Statute of Frauds, and without a consideration to support it, a *nudum pactum*.

Wilson v. *Drumrite*, 21 Mo. 325; *Henry* v. *Davis*, 7 Johns. Ch. 40; *Peugh* v. *Davis*, *supra*; *Batty* v. *Snook*, 5 Mich. 231; 1 Hill. Mort. 3d ed. pp. 67, 78; Jones, Mort. § 7, 340; *Youle* v. *Richards*, 1 N. J. Eq. 534; *Richard* v. *Eaton*, 38 Conn. 434; 3 Wheat. 449 (16 U. S. bk. 4, L. ed. 432); *Oliver* v. *Piatt*, 3 How. 333 (44 U. S. bk. 11, L. ed. 623).

Mr. B. F. Lucas, for appellees.

Mr. Justice **Woods** delivered the opinion of the court:

The appellants filed a bill in the circuit court. The following facts are shown by the record: one Alvin N. Lancaster being the owner in fee simple of certain lands in Worth, Nodaway and Atchison Counties, in the State of Missouri, conveyed them on September 15, 1875, to Edward L. Wells, by deed absolute on its face. At the time the deed was executed Lancaster made and delivered to Wells his promissory note for $1,300, payable in ninety days. There was at the time a verbal understanding between them that the deed was made as security for the payment of the note and that if the note was not paid at maturity Wells should have the right to sell the land to whom he pleased. The note was not paid at maturity. Wells pressed Lancaster for payment, and on his failure to pay, about January 5, 1876, contracted to sell the lands to George C. Tallman, and executed to him a quitclaim deed of that date therefor, which, however, was not delivered until January 20, 1876.

On January 15, 1876, the plaintiffs in this suit began, by attachment, in the Circuit Court of Worth County, Missouri, an action against Lancaster, in which the lands in controversy were seized; and on October 24, 1876, they recovered judgment against him for $895. On February 21, 1878, executions were issued on the judgment to the sheriffs of the counties where the lands lay, and the lands were sold by virtue thereof, and purchased by the plaintiffs, to whom deeds therefor were made. George C. Tallman, the vendee of Wells, died on May 5, 1880, and the defendants in the present suit were his devisees of the lands above mentioned. Afterwards, on January 31, 1882, the plaintiffs filed the bill in this case, in which they alleged that the deed of Lancaster to Wells was in effect a mortgage executed to secure the note made by the former to the latter. They tendered to the defendants the amount due on the note, with all the taxes paid by the latter on the lands, and prayed for a decree permitting them, as [681] purchasers of Lancaster's equity of redemption, to redeem the lands, and for general relief.

The defendants answered that at the time George C. Tallman purchased the lands, and at the time of the delivery of said deed, which they averred to be on January 5, 1876, he had no notice of any claim of the plaintiffs against Lancaster, or that the title of Wells to the lands in controversy was other or different from the absolute title which the deed from Lancaster to him purported to convey, and that Tallman intended to purchase, and did purchase, the absolute title thereto, for which he paid a full and valuable consideration.

On final hearing the circuit court dismissed the bill, and the plaintiffs appealed.

There is no conflict in the testimony, or disagreement between the parties touching the terms on which Lancaster conveyed the lands in controversy to Wells. Lancaster, Wells and one Jordan, who acted as agent for Wells in the transaction, all give the same account. The deed was executed to secure the payment of the note made by Lancaster to Wells for $1,300, due in ninety days, with the distinct agreement that if the note was not paid when due, Wells should be authorized to sell the land. No other account is given of this transaction by any witnesses.

The deed from Lancaster to Wells was, therefore, in effect a mortgage, for it is settled that an absolute deed intended by the parties as a security for a debt is in equity a mortgage. *Hughes* v. *Edwards*, 9 Wheat. 489 [22 U. S. bk. 6, L. ed. 142]; *Sprigg* v. *Bank of Mount Pleasant*, 14 Pet. 201 [39 U. S. bk. 10, L. ed. 419]; *Morris* v. *Nixon*, 1 How. 118 [42 U. S. bk. 11, L. ed. 69]; *Peugh* v. *Davis*, 96 U. S. 332 [Bk. 24. L. ed. 775]; *Teal* v. *Walker*, 111 U. S. 242 [Bk. 28, L. ed. 415]; *Brant* v. *Robertson*, 16 Mo. 129; *Worley* v. *Dryden*, 57 Mo. 226; *O'Neill* v. *Capelle*, 62 Mo. 202. It is also settled that evidence written or oral may be admitted to show the real character of the transaction. *Russell* v. *Southard*, 12 How. 139 [53 U. S. bk. 13, L. ed. 927]; *Babcock* v. *Wyman*, 19 How. 289 [60 U. S. bk. 15, L. ed. 644]; *Peugh* v. *Davis*, *ubi supra*; *Brick* v. *Brick*, 98 U. S. 514 [Bk. 25, L. ed. 256].

There being no dispute, therefore, in relation to the terms of the agreement between Lancaster and Wells, on which the deed of the former [682] to the latter was executed and delivered, it is to be read in equity precisely as if the agreement were set out therein, and is to be considered a mortgage to secure the payment of the note made by Lancaster to Wells according to its tenor, with power to Wells in default of payment to sell the mortgaged premises.

This condition must be taken as a whole; no part of it can be rejected. The authority to Wells to sell the premises, in default of payment of the note, was just as much an element in the condition as the right of Lancaster to a reconveyance upon payment of the note. The right of Wells to sell the premises in default of

payment was a right of property which he had bought and paid for, which could not be impaired by an attachment levied on the property by Lancaster's creditors. Their attachment was as much subject to the right of Wells to sell in default of payment of the note as it would have been to his right to foreclose a mortgage made in the usual form. After the attachment was levied Wells exercised the right to sell. He sold, as the record abundantly shows, with the knowledge and concurrence of Lancaster. The property brought enough to pay the debt, and no more. It is not disputed that the sale was fair and *bona fide*. It therefore cut up by the roots all title of Lancaster, and all claim of the plaintiffs acquired by their attachment upon the lands in question, and left neither in them nor Lancaster any right to redeem. The vendee of Wells stands upon the same ground as if he had bought the premises at a foreclosure sale; and his title is indefeasible.

This conclusion does not depend upon the fact whether or not Tallman purchased with or without notice of the verbal condition under which the deed from Lancaster to Wells was executed. The rights of Lancaster and those claiming under him are not strengthened by the fact that the condition was a verbal one. They are in no better position than if the condition had been incorporated in the deed and put upon the public records, thereby giving constructive notice to all the world. In the latter case it is clear that Wells, having power to sell, could sell to whomsoever he chose. Therefore, [683] whether the vendee had notice of the condition would be immaterial. But the proof in the record that Tallman had no knowledge or notice of the condition, and that when he bought he supposed the deed was what it purported to be, an absolute conveyance, is clear and positive.

The case, therefore, in all its elements, falls within the rule laid down by the Supreme Court of Missouri in *Wilson* v. *Drumrite*, 21 Mo. 325. In that case a deed absolute on its face was executed by Wilson to Drumrite, but was in fact given as a security for a debt. There was a verbal agreement between Wilson and Drumrite that the latter should reconvey if the debt was paid when due; in case of default Drumrite was authorized to sell the land to enforce payment of his debt. Wilson failed to pay the debt when due, and Drumrite sold part of the land to a purchaser without notice. The court, laying stress upon the fact that the vendee had no notice of the condition, held that the sale was valid, but that Drumrite must account to Wilson for the land sold, and must reconvey the residue.

In the present case, even under the rule laid down by the Supreme Court of Missouri, there is no right of redemption.

Upon the whole record, therefore, the decree of the Circuit Court dismissing the bill was right.

Decree affirmed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

COUNTY OF DAVIESS, *Plf. in Err.*, *v.* J. M. DICKINSON,

(See S. C. Reporter's ed. 657-665.)

Municipal bonds—excessive issue by county court—Statute of Kentucky—estoppel—payment of interest, whether a ratification.

1. Under the Act of the Legislature of Kentucky, of February 27, 1867, the County Court of the County of Daviess acquired no authority to issue bonds for stock of the Owensboro and Russellville Railroad Company for a greater amount than $250,000; and all bonds issued in excess of that amount are invalid, even in the hands of a purchaser for value, before maturity, and without notice of the excessive issue.

2. The County is not estopped to deny the validity of a particular bond by a certificate on the back thereof by the county judge, to the effect that it was duly authorized.

3. The payment of interest on all of the bonds does not amount to a ratification of those issued beyond the lawful limit.

4. It *seems* that the bonds first delivered, up to the amount authorized, without regard to classification, are valid.

[No. 186.]

Argued March 22, 1886. Decided April 12, 1886.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

Statement by *Mr. Justice* **Gray**:

This was an action brought April 8, 1879, in the Circuit Court of the United States for the District of Kentucky, by Dickinson against the County of Daviess, on bonds and coupons alleged to have been issued under the Statute of Kentucky of February 27, 1867, chap. 1505, incorporating the Owensboro and Russellville Railroad Company, the material provisions of which were as follows:

By section 1 five persons named in Daviess County, and certain other persons named in each of four other counties, are "appointed commissioners, under the direction of whom, or any three of whom, in each of said counties, subscription may be received to the capital stock of the Owensboro and Russellville Railroad Company hereby incorporated."

By section 2, "The capital stock of said Owensboro and Russellville Railroad Company shall be $1,000,000, in shares of $25 each."

By section 19, "The county courts of Daviess," and those four other counties, "shall have power and are hereby authorized to subscribe to the capital stock of said company in such number of shares as may be determined by said county courts respectively, and to levy upon the taxpayers of such counties, respectively, such

NOTE.—*Municipal bonds; recitals; estoppel.* See Mercer Co. v. Hackett, 68 U. S., bk. 17, 548, note.

Overissue of bonds.

"In a suit brought by a *bona fide* holder for value, to recover the amount of certain coupons of township bonds, it cannot be shown, as a defense to a recovery, that, at the time of voting and issuing the series of bonds, the value of the taxable property of the township was not in amount sufficient to authorise the voting and issuing of the whole series, according to the State Act which authorised their issue, where there is a recital in the bonds that the requirements of such Act have been complied with." Head note to Marcy v. Oswego, 92 U. S., bk. 23, 748. See also Humboldt v. Long, 92 U. S., bk. 23, 752, and dissenting opinion, p. 764. See Burroughs, Pub. Securities, p. 230 *et seq.*, for discussion of this general subject.

taxes as may be necessary to pay the stock so by them respectively subscribed; and said county courts may if they shall deem it prudent, issue the bonds of said counties respectively for the amount of stock subscribed, or any part thereof; said bonds to be in such sums, and payable at such times, as said county courts may determine upon. But before such stock shall be subscribed by said county courts, the said county courts shall submit to the voters of said counties the proposition to subscribe stock and the amount thereof (to be suggested and fixed by the commissioners named herein in each of said counties), at an election to be held on the third Monday in April, 1867, in each of the counties aforesaid, due notice of which shall be given by the sheriffs in each of said counties, by written advertisements posted in each of the voting precincts thereof for at least thirty days before said day of election; and said stock shall not be subscribed unless a majority of all the votes cast at such election be in favor of such proposition; and said county courts shall have power to appoint suitable and necessary officers to conduct such election, and to provide for the collection of the tax aforesaid, if a majority of the votes cast at such election is in favor of the proposition aforesaid."

At the trial the following facts were admitted:

At March Term, 1867, of the Daviess County Court, upon the suggestion of the five commissioners named in the charter of the railroad company, that court ordered to be submitted to the voters of the County, on the third Monday in April, 1867, this proposition: "Shall or shall not the County Court of Daviess County subscribe ten thousand shares, being the sum of $250,000, to the capital stock of said Owensboro and Russellville Railroad Company?"

At April Term, 1868, George W. Triplett, presiding judge, and a majority of the justices of the peace of the County being present, the county court, upon motion of Edward C. Berry, one of those justices, adopted the following order: "In obedience to the will of the majority of the voters and taxpayers of this County, as expressed and recorded in the poll book at the election held on the 15th day of April, 1867, it is now ordered that this court do subscribe $250,000 to the capital stock of the Owensboro and Russellville Railroad Company; and George W. Triplett, presiding judge of this court, is ordered and directed to make said subscription of said stock in manner and form as prescribed by the charter incorporating said company."

At July Term, 1868, of the county court "It is ordered that George W. Triplett, presiding Judge of Daviess County Court, William B. Tyler (who was the treasurer of the railroad company) and E. C. Berry be and are hereby appointed a committee on behalf of the County Court of Daviess County, to have bonds executed and prepared of a sufficient amount to satisfy and pay off the subscription on the part of the County of Daviess to the Owensboro and Russellville Railrord Company; that said bonds be executed and made payable as as follows, viz.:

"Fifty thousand dollars, five years from date.

"Fifty thousand dollars, ten years from date.

"Seventy-five thousand dollars, fifteen years from date.

"Seventy-five thousand dollars, twenty years from date. [660]

"The county reserving the right to pay at any time after five years; the interest on the same, at the rate of 6 per cent per annum, to be due and payable semi-annually at such place or places as the committee may determine upon; and that such bonds shall be of such denominations as said committee shall deem best, with interest coupons attached, and said bonds shall be signed by the presiding judge of Daviess County and the clerk of the County Court of Daviess County, and have the seal of the County impressed on each; and said committee or a majority of the same may sell and dispose of said bonds either to the Owensboro and Russellville Railroad Company, or to individuals or other corporations, on such terms as said committee may deem best and most advisable to the interests of the County of Daviess in paying the subscription of said County to the said Owensboro and Russellville Railroad Company; and they are hereby authorized to raise funds from said bonds, either by sale to individuals or corporations, or by contract with said railroad company, so as to pay off and meet all calls made by the Owensboro and Russellville Railroad Company by reason of the subscription of stock on behalf of the County of Daviess to said railroad company.

"It is further ordered that whenever any bond shall be sold or otherwise disposed of by said committee for the purposes aforesaid, that a list of said bonds shall be made, giving the amount, number and denomination of same, with the amount of coupons attached to each at the time of their disposal; and said list so furnished shall be entered upon the records of the County Court of Daviess by the clerk of same."

George W. Triplett, the presiding judge, and Thomas C. Jones, the clerk of the county court, claiming to act under the authority of this order, signed as such judge and clerk bonds of the county, and under the seal of the county court, as follows:

Bonds payable in five years, to the amount of	$51,250
Bonds payable in ten years, to the amount of	65,200
Bonds payable in fifteen years, to the amount of	76,500
Bonds payable in twenty years, to the amount of	127,500
	$320,450

The bonds of each class had distinct letters [661] and were numbered in a series; and each bond, omitting the letter and number, the sum and the time of payment, and the coupons annexed, was as follows:

"United States of America,

"County of Daviess, State of Kentucky:

"On account of stock subscribed in the Owensboro and Russellville Railroad Company ——— years after date the County of Daviess in the State of Kentucky promise to pay to bearer the sum of ——— dollars, with interest thereon at the rate of 6 per cent per annum, payable semi-annually, upon presentation of the

proper coupons hereto attached, the principal and interest being payable at the Deposit Bank, Owensboro, and to secure the payment of which the property and credit of the county are pledged.

In testimony whereof, the judge of the County Court of Daviess County has hereunto set his hand and affixed the seal of the said court, and caused the same to be countersigned by the clerk of the said court, who has also signed the coupons hereto attached, this — day of ———, 18—.

[Seal.] George W. Triplett,
"T. C. Jones, Judge of County Court."
County Clerk."

Each bond had the following certificate, plainly printed on the back thereof: "This bond is issued as authorized by an Act of the Kentucky Legislature, approved February 27, 1867, entitled 'An Act to Charter the Owensboro and Russellville Railroad Company,' and by an ordinance of the County Court of Daviess in pursuance thereof;" and signed "George W. Triplett, Judge of the County Court of Daviess."

All the bonds so issued (except bonds to the amount of $800, payable in five years, and of $200, payable in ten years, which were sold and delivered to individuals by Triplett, Tyler and Berry, committee as aforesaid, in September, 1879) were delivered by Triplett to the railroad [662] company in various amounts on different days from June 5, 1869, to March 22, 1870. The last two deliveries were as follows: on February 17, 1870, were delivered bonds payable in ten years, to the amount of $12,500, like bonds to the amount of $53,700 having been delivered previously; on March 22, 1870, were delivered bonds payable in twenty years, to the amount of $92,500, the amount of like bonds previously delivered being $35,000, and the amount of all bonds previously delivered being $227,950. Of the bonds delivered to the railroad company before February 17, 1870, there were afterwards returned by the company, and canceled and destroyed by the County, bonds payable in five years to the amount of $100, and bonds payable in fifteen years to the amount of $3,000, leaving the excess issued $67,350.

Among the records of the county court was a register, open to public inspection, in which were registered all the bonds as they were delivered.

The coupons on all the bonds were paid by the County up to and including January 1, 1877. The County also paid, before July 1, 1877, all or nearly all the bonds payable in five years, as well as five bonds of $100 each payable in ten years. The other bonds have not been paid.

The court, against the defendant's objection, admitted testimony of the plaintiff that at various dates from February 1, 1870, to July 9, 1875, he purchased, before maturity and for value, the bonds and coupons sued on. These consisted mostly of bonds payable in ten years to the amount of $9,000, being some of those delivered to the railroad company on February 17, 1870, and the unpaid coupons annexed; and of coupons for $1,880, detached from some of the bonds payable in twenty years, which had been delivered to the railroad company on March 22, 1870. Payment of the bonds and coupons held by the plaintiff was demanded by him on January 1, 1879, and refused by the County.

Upon a bill filed May 12, 1875, by taxpayers of the County against the county court, the railroad company, and various bondholders by name (not including the present plaintiff), the circuit court of the County, on January 24, 1876, adjudged that the issue of bonds beyond [663] $250,000 was unlawful and void, and that the county court be restrained by injunction from levying any tax to pay the excess of $67,350, or interest thereon; and on March 30, 1876, the decree was affirmed by the court of appeals. *Daviess Co. Court* v. *Howard*, 13 Bush, 101.

The defendant moved the court to instruct the jury to find for the defendant. But the court overruled the motion; and, at the plaintiff's request, instructed the jury that if they believed that the plaintiff purchased the bonds and coupons sued on, before their maturity and for value, and without notice that more than $250,000 of bonds had been issued by the defendant, the law was for the plaintiff; and that the plaintiff, before purchasing the bonds, was not bound to examine the records of the county court, and cannot be presumed to have known what the records contained when he made the purchase. The defendant excepted to these rulings and instructions and, after verdict for the plaintiff, sued out this writ of error.

Messrs. **J. D. Atchison** and *Geo. W. Jolly*, for plaintiff in error:

The county judge was not authorized by the Act to determine the amount of stock, or submit the question to the voters, or decide whether the vote had resulted in favor of a subscription, or to determine the amount of bonds to be issued, or to issue the bonds; and he has no general authority to do any of these things.

The bonds, on the face, do not profess to be issued under any Act of the Legislature or other authority; the Act is not referred to in any way.

The county judge has no power, from any source whatever, to determine whether the bonds were issued "as authorized" by the Act.

The certificate is not countersigned by the county clerk, nor is the seal of the county court attached to it; and of course it is not the certificate of the committee.

As a separate and independent instrument it is entitled to no consideration, for the reason that it was made without authority.

See *Kenicott* v. *Supervisors*, 16 Wall. 452 (83 U. S. bk. 21, L. ed. 319); *Knox County* v. *Aspinwall*, 21 How. 529 (62 U. S. bk. 16, L. ed. 208).

It is only where the bonds on their face recite the circumstances which bring them within the power, that the corporation is estopped to deny the truth of the recital.

County of Moultrie v. *Rockingham Savings Bank*, *Marcy* v. *Oswego*, *Town of Coloma* v. *Eaves* and *Humboldt Township* v. *Long*, 92 U. S. 636, 638, 484, 642 (Bk. 23, L. ed. 634, 748, 579 and 752); *Orleans* v. *Pratt*, 99 U.S. 676 (Bk. 25, L. ed. 404), *Dixon Co.* v. *Field*, 111 U. S. 94 (Bk. 28, L. ed. 360); *Buchanan* v. *Litchfield*, 102 U. S. 292 (Bk. 26, L. ed. 138); *Hayes* v. *Holly Springs*, *ante*, 81.

To the extent the county court paid out of the taxes, any interest on, or principal of, the

overissue, it was without authority and in violation of the law, and did not amount to a ratification.

See *Marsh* v. *Fulton Co.* 10 Wall. 684 (Bk. 19, L. ed. 1040); *Hayes* v. *Holly Springs, supra;* *McCracken* v. *San Francisco*, 16 Cal. 624.

Messrs. **J. Hubley Ashton**, *P. B. Muir* and *James Speed*, for defendant in error:

The bonds in question are all payable to bearer, and were all signed by the county judge and countersigned by the clerk. The signatures are admitted to be genuine; and the bonds were all sold for value by the county judge within three months after their date. Being in possession of defendant in error, the presumption of law is that he acquired them "*bona fide*, for full value, in the usual course of business, before maturity, and without notice of any circumstances impeaching their validity, and that he is the owner thereof."

1 Dan. Neg. Inst. § 812 and cases there cited.

Such instruments are commercial paper, and governed by the rules of the law merchant concerning such paper; and as respects a holder for value, before due, without notice of facts constituting a defense thereto, the only defense which is available is that there was no power in the defendant corporation to issue the bonds or instruments in question.

Dill. Law of Mun. Bonds, § 7; *St. Joseph's Township* v. *Rogers*, 16 Wall. 644 (83 U. S. bk. 21, L. ed. 328).

Irregularities in the exercise of the power, as against a holder for value, without notice of such irregularities, constitute no defense.

Dill. Law of Mun. Bonds, § 7; *Knox Co.* v. *Aspinwall*, 21 How. 539 (62 U. S. bk. 16, L. ed. 208); *Marsh* v. *Fulton Co.* 10 Wall. 676 (77 U. S. bk. 19, L. ed. 1040), and many later cases in this court.

It may well be contended that the express power to create this debt carried with it the implied power to issue bonds to an amount sufficient, at their market value, to pay the debt. The Supreme Court of Ohio so held in the case of *Bank of Chillicothe* v. *Chillicothe*, 7 Ohio, pt. 2, 31.

The doctrine in Iowa and Wisconsin is the same.

Hull v. *County of Marshall*, 12 Iowa, 142; *Mills* v. *Gleason*, 11 Wis. 470; *State* v. *Madison*, 7 Wis. 688.

Such seems to have been the ruling of this court in *Lynde* v. *Winnebago Co.* 16 Wall. 12 (83 U. S. bk. 21, L. ed. 272).

As there was authority for the issue of the subscription bonds which is indorsed on the bonds by reference to the law from which it is derived, the purchaser before maturity was not bound to look further.

County of Moultrie v. *Fairfield*, 105 U. S. 374 (Bk. 26, L. ed. 945); *Knox* v. *Aspinwall*, 21 How. 539 (62 U. S. bk. 16, L. ed. 208); *Town of Coloma* v. *Eaves*, *Humboldt Township* v. *Long* and *Marcy* v. *Township of Oswego*, 92 U. S. 484, 642, 687 (Bk. 23, L. ed. 579, 752 and 748).

There was no want of power to issue more bonds of any class than the order prescribed for that class; and at most the issuing of such bonds was a mere irregularity which cannot avail the County as a defense to the bonds in the hands of a *bona fide* purchaser for value.

The irregularity, if it was one, was committed by the agents of the County; and the County is precluded from taking advantage of it, upon the plainest principles of justice

This would be true if there had been no representation or warranty or certificate, on the part of the county court, upon the bonds, that everything necessary by law had been done, and every fact necessary by law to have existed did exist, to make the bonds lawful and binding. But there *is* such a certificate on the back of each bond, which declared to the purchaser that "This bond is issued as authorized by an Act of the Kentucky Legislature, approved February 27, 1867, entitled, 'An Act to Charter the Owensboro and Russellville Railroad Company,' and by an ordinance of the County Court of Daviess in pursuance thereof."

This certificate was a part of the bond, as prepared, executed and issued under the order of the county court, by authority of the statute.

See *Marshall Co. Supervisors* v. *Schenck*, 5 Wall. 772 (72 U. S. bk. 18, L. ed. 556); *Pendleton Co.* v. *Amy*, 13 Wall. 297 (80 U. S. bk. 20, L. ed. 597); *County of Clay* v. *Society for Savings*, 104 U. S. 591 (Bk. 26, L. ed. 856); *Anderson Co. Commissioners* v. *Beal*, 113 U. S. 240 (Bk. 28, L. ed. 966); *Moran* v. *Miami Co.* 2 Black, 722 (67 U. S. bk. 17, L. ed. 342); *Zabriskie* v. *Cleveland, C. & C. R. R. Co.* 23 How. 381 (64 U. S. bk. 16, L. ed. 488); *Grand Chute* v. *Winegar*, 15 Wall. 355, 373 (82 U. S. bk. 21, L. ed. 170, 174); *Knox Co.* v. *Aspinwall*, 21 How. 539 (62 U. S. bk. 16, L. ed. 208); *Mercer Co.* v. *Hackett* and *Myer* v. *City of Muscatine*, 1 Wall. 83, 384 (68 U. S. bk. 17, L. ed. 548, 564).

Mr. Justice **Gray**, after stating the case as above reported, delivered the opinion of the court: [663]

The county court had no power to subscribe for stock in the railroad corporation, or to issue bonds therefor, except as authorized by statute. The statute authorized the county court to subscribe for such an amount of stock only, as should be fixed and proposed by the commissioners named in the statute, and be approved by the vote of a majority of the voters of the County; and the authority of the county court, either to levy taxes, or to issue bonds, was limited to the amount so proposed and voted. That amount was $250,000. The county court therefore had no authority to issue bonds for a greater amount, and any bonds issued in excess of that amount were unlawful and void.

By the statute the bonds were to be in such sums and payable at such times as the county court should determine. The county court ordered that the bonds should be executed and made payable, $50,000 in five years; $50,000 in ten years; $75,000 in fifteen years; and $75,000 in twenty years; and that the bonds should be signed by the judge and the clerk of the county court, and have the seal of the County impressed on each. Notwithstanding this, bonds so signed and sealed were issued of each class to a larger amount, amounting in all to $320,450, showing, after deducting bonds returned and canceled, an excess of $67,350. To the ex- [664]

tent of this excess, the bonds were invalid, and the county is liable upon bonds to the amount of $250,000 only. It does not deny its liability to that amount.

Then comes the question, Which of the bonds are valid and which invalid? We can have no doubt that the test is: Which were first delivered—if that can be ascertained, and without regard to the classification of bonds according to times of payment in the order of the county court; for, as the county court was authorized to determine at what time the bonds should be payable, anyone, taking a bond signed by the presiding judge and the clerk and bearing the seal of the County, had the right to presume that it was valid, provided the county court had not already issued bonds to the amount limited by the statute and by the vote.

The certificate of the judge of the county court upon the back of each bond, that it was issued as authorized by the statute and by an order of the county court in pursuance thereof, cannot estop the County to deny that the particular bond is void because the county court, at the time of issuing it, had exhausted the power conferred by the Act of the Legislature and the vote of the people. The certificate is not a recital in the bond. It is not the act of the county court, is not under its seal, nor signed by its clerk; but is simply the certificate of the person holding the office of judge of that court. Neither the statute, nor the vote of the people, nor the order of the county court, empowered him to make such a certificate, or to determine the question whether the county court had exceeded the power conferred upon it. An officer's certificate of a fact which he has no authority to determine is of no legal effect. *Dixon Co.* v. *Field*, 111 U. S. 83 [Bk. 28, L. ed. 360].

Nor can the payment of interest on all the bonds have the effect of ratifying bonds issued beyond the lawful limit; for a ratification can have no greater force than a previous authority, and the county cannot ratify what it could not have authorized. *Marsh* v. *Fulton Co.* 10 Wall. 676 [77 U. S. bk. 19, L. ed. 1040].

The necessary consequence is that the court below erred in instructing the jury that the plaintiff was entitled to recover on all the bonds and coupons sued on, if he purchased them before their maturity and for value, and without notice that more than $250,000 of bonds had been issued by the defendant. *Merchants Bank* v. *Bergen Co.* 115 U. S. 384 [Bk. 29, L. ed. 430].

The judgment must therefore be reversed, and the case remanded, with directions to set aside the verdict and order a new trial. What part of his bonds and coupons the plaintiff may enforce against the County may depend upon further evidence of the exact dates of the delivery and the purchase of the several bonds, that may be introduced upon another trial of this case, or perhaps in some other suit to which all the bondholders may be made parties, and therefore no opinion is expressed upon that question.

Judgment reversed.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

CXVII UNITED STATES.

117 U. S. 1-34, 29 L. 791, EXPRESS CASES.

Railroads are not legally bound to carry all express companies as such, p. 26.

Cited in 62 Am. St. Rep. 519, note.

Railroads, in absence of law or usage, need not carry express carrier in order to do express business, p. 26.

Approved in Chicago, etc., Ry. v. Pullman Car Co., 139 U. S. 89, 35 L. 101, 11 S. Ct. 494, upholding contract for furnishing of sleeping-cars; Pacific Exp. Co. v. Seibert, 44 Fed. 318, upholding State tax receipts of express company; Chicago, etc., Ry. v. Osborne, 52 Fed. 915, 10 U. S. App. 430, holding joint tariff rates, the standard for determining whether act forbidding greater compensation for a shorter haul was violated; Ilwaco, etc., Nav. Co. v. Oregon, etc., Ry., 57 Fed. 676, 15 U. S. App. 173, holding company not required to permit boats of a competitor to land; Union Pac. Ry. v. United States, 59 Fed. 827, 19 U. S. App. 531, holding railroad could contract with telegraph company for joint maintenance of a line of poles; Oregon, etc., Ry. v. Northern Pac. R. Co., 61 Fed. 160, 15 U. S. App. 479, provision of interstate commerce law for protection of traffic cannot be invoked by carrier against connecting carrier; St. Louis Drayage Co. v. Louisville, etc., R. R., 65 Fed. 41, upholding contract of connecting carriers for exclusive privileges; Voight v. Baltimore, etc., Ry., 79 Fed. 564, holding void, contract exempting railroad for injury to express messenger; Pfister v. Central Pac. R. R., 70 Cal. 182, 59 Am. Rep. 414, 11 Pac. 692, holding railroad not bound to carry gold of county treasurer as luggage; Louisville, etc., Ry. v. Keefer, 146 Ind. 26, 35, 58 Am. St. Rep. 351, 357, 44 N. E. 798, 800, 38 L. R. A. 94, 96, and Pittsburgh, etc., Ry. v. Mahoney, 146 Ind. 200, 62 Am. St. Rep. 507, 46 N. E. 918, 40 L. R. A. 103, holding that common carriers may contract as private carriers; Bates v. Old Colony R. R., 147 Mass. 266, 17 N. E. 635, holding express messenger could not recover for injuries; Wiggins Ferry Co. v. Chicago, etc., Ry., 128 Mo. 246, 27 S. W. 571, any contract which prevents a railroad from performing its duties to the public is invalid; State v. Sioux City, etc., R. Co., 46 Neb. 700, 65 N. W. 771, 31 L. R. A. 54, holding invalid, statute regulating freight rates; Atlantic Exp. Co. v. Wilmington, etc., R. R., 111 N. C. 477, 479, 481,

32 Am. St. Rep. 810, 811, 813, 16 S. E. 395, 396, 18 L. R. A. 397, 398, and n., holding railroad is not compelled to furnish facilities to an express company; Post v. Southern Ry., 103 Tenn. 202, 52 S. W. 306, holding that initial carrier cannot be compelled to make a through shipment to a point beyond its line. See 11 Am. St. Rep. 653, 61 Am. St. Rep. 361, and 62 Am. St. Rep. 513, 514, 515, 516, notes.

Distinguished in Central Trust Co. v. Wabash, etc., Ry., 29 Fed. 557, 560, enforcing contracts between railroads as to use of right of way; United States v. Delaware, etc., Ry., 40 Fed. 104, State v. Delaware, etc., Telephone Co., 47 Fed. 639, 640, and Delaware, etc., Telephone Co. v. Delaware, 50 Fed. 680, 3 U. S. App. 30, holding telephone company bound to furnish equal facilities to all; United States v. Addyston, etc., Steel Co., 85 Fed. 287, 54 U. S. App. 755, holding contracts restraining soliciting of orders are in restraint of trade; Covington, etc., Bridge Co. v. South, etc., Ry., 93 Ky. 141, 19 S. W. 404, 15 L. R. A. 829, holding bridge company could not remove rails for street cars.

Courts cannot make arrangement for business intercourse, in absence of usage, contract or law, p. 29.

Reaffirmed in Paxton, etc., Irr. Co. v. Farmers, etc., Irr. Co., 45 Neb. 901, 50 Am. St. Rep. 596, 64 N. W. 348, 29 L. R. A. 858, State v. Sioux City, etc., R. Co., 46 Neb. 699, 703, 65 N. W. 771, 772, 31 L. R. A. 54, 55, Delaware, etc., R. R. v. Central Stock, etc., Co., 43 N. J. Eq. 81, 10 Atl. 605, and Delaware, etc., R. R. v. Central Stock, etc., Co., 45 N. J. Eq. 55, 17 Atl. 148, 6 L. R. A. 858, and n. Approved in Joy v. St. Louis, 138 U. S. 50, 34 L. 859, 11 S. Ct. 258, enjoining railroad from refusing to permit other company to use its way; Union Pac. Ry. v. Chicago, etc., Ry., 163 U. S. 602, 41 L. 279, 16 S. Ct. 188, specifically enforcing contracts between railroads as to running arrangements; Interstate Commerce Commission v. Cincinnati, etc., Ry., 167 U. S. 500, 42 L. 253, 17 S. Ct. 900, holding interstate commerce commission could not determine future rates; Little Rock, etc., R. Co. v. St. Louis, etc., Ry., 41 Fed. 568, holding equity could not compel railroad to enter into contract for joint through rate; Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co., 47 Fed. 779, holding there was no unlawful discrimination; Little Rock, etc., R. Co. v. St. Louis, etc., Ry., 59 Fed. 400, holding railroad not required to furnish equal facilities to connecting lines; Schmidt v. Louisville, etc., R. R., 101 Ky. 483, 41 S. W. 1027, 38 L. R. A. 822, holding that equity should enforce contract specifically; Atlantic Exp. Co. v. Wilmington, etc., R. R., 111 N. C. 482, 32 Am. St. Rep. 814, 16 S. E. 397, 18 L. R. A. 398, and n., holding railroad is not compelled to furnish facilities to an express company.

Miscellaneous.— Cited generally in Fargo, etc., Exp. Co. v. Southeastern Ry. Co., 28 Fed. 906.

117 U. S. 34-51, 29 L. 785, PICKARD v. PULLMAN, ETC., CAR CO.

Commerce.— Tennessee act, 1877, taxing leased sleeping-cars, is void as to interstate transportation, p. 51.

Reaffirmed in Tennessee v. Pullman, etc., Car Co., 117 U. S. 52, 29 L. 791, 6 S. Ct. 643. Approved in Wabash, etc., Ry. v. Illinois, 118 U. S. 564, 575, 30 L. 246, 250, 7 S. Ct. 6, 12, holding invalid, State statute regulating freight rates; Targo v. Michigan, 121 U. S. 245, 30 L. 894, 7 S. Ct. 863, holding void, State tax upon gross receipts of railroads; Philadelphia S. S. Co. v. Pennsylvania, 122 U. S. 346, 30 L. 1205, 7 S. Ct. 1125, holding invalid, State tax upon gross receipts of steamship company from transportation between different States; Bowman v. Chicago, etc., Ry., 125 U. S. 508, 31 L. 715, 8 S. Ct. 1066, holding invalid, Iowa statute forbidding common carriers to bring intoxicating liquors into the State; Leloup v. Port of Mobile, 127 U. S. 648, 32 L. 314, 8 S. Ct. 1384, holding invalid, general license tax on telegraph company; McCall v. California, 136 U. S. 110, 34 L. 393, 10 S. Ct. 883, holding invalid, license tax upon agency of foreign railroad; Allen v. Pullman, etc., Car Co., 139 U. S. 662, 35 L. 305, 11 S. Ct. 683, purely injunction bills cannot be sustained to restrain the collection of unconstitutional taxes; Crutcher v. Kentucky, 141 U. S. 58, 35 L. 652, 11 S. Ct. 854, holding invalid, act requiring agent of foreign express company to procure a license, etc.; Hooper v. California, 155 U. S. 653, 39 L. 300, 15 S. Ct. 209, upholding provision of California code, forbidding anyone to procure insurance for a resident from foreign company not having filed bond; Mobile, etc., R. Co. v. Sessions, 28 Fed. 594, holding State cannot regulate interstate commerce; Pullman's, etc., Car Co. v. Twombly, 29 Fed. 668, holding property used for interstate commerce is not exempt from equal taxation; United States v. Hopkins, 82 Fed. 538, stock shipped to a point, there to be sold or reshipped, does not cease to be a subject of interstate commerce, by being unloaded; Colt Co. v. Sutton, 102 Mich. 327, 60 N. W. 691, 25 L. R. A. 820, holding franchise fee did not apply to foreign corporations selling through itinerant agents; Postal, etc., Cable Co. v. Adams, 71 Miss. 560, 562, 42 Am. St. Rep. 477, 479, 14 So. 37, 38, upholding privilege tax of $1 per mile, on telegraph company; State v. Stephens, 146 Mo. 682, 69 Am. St. Rep. 637, 48 S. W. 934, holding cars in transits not taxable; Lumberville Bridge Co. v. Assessors, 55 N. J. L. 535, 26 Atl. 713, 25 L. R. A. 137, upholding yearly license fee upon corporations; People v. Pennsylvania R. R., 138 N. Y. 6, 33 N. E. 721, 19 L. R. A. 696, holding corporation engaged in interstate commerce was not taxable; Bain v. Richmond, etc., R. R., 105 N. C. 367, 18 Am. St. Rep. 916, 11 S. E. 312, 8 L. R. A. 301, and n., holding State could not tax rolling-stock of non-resident railroad; State v. Rankin, 11 S. Dak. 149, 76 N. W. 301, invalidating license fee on solicitors for mercantile orders; Gulf, etc., Ry. v. Dwyer, 75 Tex. 579, 16 Am. St.

Rep. 828, 12 S. W. 1002, 7 L. R. A. 479, holding State cannot regulate rate of freight for goods shipped between States; Wœssner v. Cottam Co., 19 Tex. Civ. App. 615, 47 S. W. 680, holding invalid, law denying right to sue to foreign corporation not paying franchise tax; dissenting opinions in Maine v. Grand Trunk Ry., 142 U. S. 234, 35 L. 997, 12 S. Ct. 163, majority upholding State tax on franchises according to gross receipts; O'Neill v. Vermont, 144 U. S. 346, 36 L. 461, 12 S. Ct. 702, majority holding that no Federal question was involved; Pollock v. Farmers, etc., Trust Co., 158 U. S. 691, 39 L. 1144, 15 S. Ct. 941, majority holding income tax invalid; Adams Exp. Co. v. Ohio, 165 U. S. 234, 41 L. 700, 17 S. Ct. 314, majority holding invalid, statute of Ohio for taxation of express companies; Central Trust Co. v. Pullman Car Co., 139 U. S. 51, 35 L. 65, 11 S. Ct. 485, arguendo. See 27 Am. St. Rep. 563, note.

Distinguished in Pullman's Car Co. v. Pennsylvania, 141 U. S. 25, 35 L. 617, 11 S. Ct. 879, upholding State statute imposing tax on capital stock of railroads in proportion to miles of road in State; Hall v. Refrigerator, etc., Co., 24 Colo. 299, 65 Am. St. Rep. 226, 51 Pac. 424, upholding State tax on refrigerator-cars; Osborne v. State, 33 Fla. 178, 186, 191, 39 Am. St. Rep. 109, 114, 118, 14 So. 593, 595, 597, 25 L. R. A. 126, 128, 130, upholding license tax on express companies; Transit Co. v. Lynch, 18 Utah, 390, 55 Pac. 642, where tax was according to value of cars.

Commerce power of Congress, interstate, is exclusive, p. 49.

Approved in Robbins v. Shelby Taxing Dist., 120 U. S. 498, 30 L. 696, 7 S. Ct. 594, holding State cannot tax interstate commerce; Rhea v. Newport, etc., R. Co., 50 Fed. 22, upholding erection of bridge by State across navigable river. See 59 Am. Rep. 269, and 27 Am. St. Rep. 550, notes.

117 U. S. 51-52, 29 L. 791, TENNESSEE v. PULLMAN, ETC., CAR CO.

Commerce.— Tennessee privilege sleeping-car tax of 1881, is void as to interstate transportation, p. 52.

Cited in 27 Am. St. Rep. 563, note.

117 U. S. 52-71, 29 L. 805, HAGOOD v. SOUTHERN.

Taxation.— Holder of State scrip receivable for taxes may not sue thereon until tendered for taxes and refused, p. 64.

Approved in President, etc. v. Sanger, 62 Fed. 182, enjoining State treasurer from threatened diversion of income under unconstitutional statute.

States.— Where relief is actually sought against State, though nominally its officer, suit is not maintainable, p. 67.

Reaffirmed in In re Ayers, 123 U. S. 490, 491, 502, 31 L. 224, 225, 228, 8 S. Ct. 175, 181, Ferguson v. Ross, 38 Fed. 163, 3 L. R. A. 324,

and n., and Mills Pub. Co. v. Larrabee, 78 Iowa, 100, 42 N. W. 594. Approved in Christian v. Atlantic, etc., R. R., 133 U. S. 243, 33 L. 593, 10 S. Ct. 263, dismissing suit, since State was an indispensable party; Hans v. Louisiana, 134 U. S. 10, 33 L. 845, 10 S. Ct. 505, holding State cannot be sued without its consent; North Carolina v. Temple, 134 U. S. 30, 33 L. 852, 10 S. Ct. 511, and New York Guaranty Co. v. Steele, 134 U. S. 232, 33 L. 892, 10 S. Ct. 512, holding suit to compel auditor to raise a tax was against State; Pennoyer v. McConnaughy, 140 U. S. 10, 35 L. 365, 11 S. Ct. 701, reviewing cases; Reagan v. Farmers, etc., Trust Co., 154 U. S. 389, 38 L. 1020, 14 S. Ct. 1051, upholding suit against railroad commissioners; Belknap v. Schild, 161 U. S. 18, 40 L. 602, 16 S. Ct. 446, dismissing injunction against officers of United States; Tindal v. Wesley, 167 U. S. 220, 42 L. 142, 17 S. Ct. 776, holding suit against secretary of State, in possession in his official capacity, was really against the State; McConnaughy v. Pennoyer, 14 Sawy. 588, 43 Fed. 199, enjoining sale by commissioners; Chicago, etc., Ry. v. Dey, 35 Fed. 870, 1 L. R. A. 747, and n., restraining railroad commissioners from putting in force a schedule of rates; Mills v. Greene, 67 Fed. 824, enjoining supervisor of registration; Western Union Tel. Co. v. Henderson, 68 Fed. 597, restraining auditor from certifying valuations of property for taxation under statute claimed to be unconstitutional; Green v. Mills, 69 Fed. 863, 25 U. S. App. 383, 30 L. R. A. 97, holding supervisor of registration could not be enjoined on ground that laws were unconstitutional; Smith v. Rackliffe, 87 Fed. 966, 59 U. S. App. 430, holding action against treasurer to recover taxes was against State; Wesley v. Eells, 90 Fed. 156, 162, holding that scrip constituted bills of credit, and was void; In re Comingore, 96 Fed. 562, holding State has no authority to permit collector of internal revenue to certify copies of reports on file in his office; Hickman v. Missouri, etc., Ry., 151 Mo. 656, 52 S. W. 354, holding action by railroad commissioners was really by the State; Lowry v. Thompson, 25 S. C. 420, 1 S. E. 144 (see dissenting opinion in 25 S. C. 431, 432, 1 S. E. 152, 153), holding case was really against State; Water-Power Co. v. Electric Co., 43 S. C. 167, 168, 20 S. E. 1007, dismissing equitable issue of injunction, it being against the State; Miller v. State Board of Agriculture, 46 W. Va. 194, 32 S. E. 1008, denying mandamus, to compel officer to execute contract of State; dissenting opinion in Butler v. Ellerbe, 44 S. C. 261, 22 S. E. 429, majority holding to restrain payment of warrants not a suit against State.

Distinguished in McConnaughy v. Pennoyer, 14 Sawy. 597, 43 Fed. 340, holding that suit was not against the State; Railroad Commrs. v. Pensacola, etc., R. R., 24 Fla. 461, 462, 463, 12 Am. St. Rep. 223, 224, 225, 5 So. 131, 132, 2 L. R. A. 506, 507, holding bill filed against railroad commissioners was not an action against State.

States.—Distinction is between suits to enforce State's political obligations, and to protect personal rights, p. 70.

Approved in Pennoyer v. McConnaughy, 140 U. S. 16, 17, 35 L. 367, 11 S. Ct. 704, reviewing [illegible] Tschman v. Welch, 42 Fed. 552, and M. Chandler Rottling [illegible] v. Welch, 42 Fed. 563, both restraining county attorney from instituting proceedings for contempt; President, etc., of Tab[illegible] v. Sanger, 62 Fed. 182, enjoining State treasurer from [illegible] diversion of income under an unconstitutional [illegible] Union Tel. Co. v. Henderson, 68 Fed. 59[illegible] [illegible] restrain auditor from certifying valuations for [illegible] claimed to be unconstitutional; [illegible] 82 Fed. 710, enjoining State officer from [illegible] Lowry v. Thompson, 25 S. C. 422, 1 S. E. [illegible] [illegible] really against State.

[illegible] WRIGHT v. KENTUCKY, ETC., RY.

[illegible] contract of Kentucky and Great Eastern [illegible] and held to create no lien, p. 93.

[illegible] contract, made with knowledge of vendor's [illegible] no lien superior thereto, p. 94.

[illegible] directors cannot so place themselves that personal con[illegible] corporate interests, p. 94.

[illegible] in Thomas v. Peoria, etc., Ry., 36 Fed. 816, holding [illegible] to mortgagor by car company dominated by same per[illegible] be made the basis of an accounting; Central Trust Co. [illegible] 37 Fed. 767, 16 U. S. App. 115, holding contract made by [illegible] stockholder for his own benefit cannot be questioned by [illegible] persons not injured thereby.

Railroad mortgage covers only mortgagor's interest, and bondholders acquire no rights superior to prior vendor's lien, p. 94.

117 U. S. 96-122, 29 L. 811, LEATHER MANUFACTURERS' BANK v. MORGAN.

Bank and its depositor sustain relation of debtor and creditor, p. 106.

Reaffirmed in McKeen v. Boatmen's Bank, 74 Mo. App. 288.

Bank depositor must examine his book promptly and report errors, or will be estopped thereby, p. 106.

Reaffirmed in First Nat. Bank v. Allen, 100 Ala. 482, 46 Am. St. Rep. 83, 14 So. 336, 27 L. R. A. 430, and n., and Weinstein v. National Bank, 69 Tex. 43, 5 Am. St. Rep. 27, 6 S. W. 174. Approved in Porter v. Price, 80 Fed. 657, 49 U. S. App. 300, acquiescence in account rendered concludes party; Charlotte, etc., Fertilizer Co. v. Hartog, 85 Fed. 155, 42 U. S. App. 716, holding silence did not estop

party from showing fraud, etc., in account; Turnbull v. Home Fire Ins. Co., 83 Md. 324, 34 Atl. 877, holding failure of agent of assured to disclose that gasolene was used on the premises, avoided policy; Gladstone Bank v. Keating, 94 Mich. 431, 53 N. W. 1111 (see dissenting opinion in 94 Mich. 434, 435, 53 N. W. 1112), holding bank could recover against the partnership; McKeen v. Boatmen's Bank, 74 Mo. App. 289, 290, 291, holding that bank-book is an account stated; Shipman v. Bank of New York, 126 N. Y. 328, 330, 22 Am. St. Rep. 828, 829, 27 N. E. 373, 374, 12 L. R. A. 796, 797, and n., holding that depositor is not presumed to know signature of payee; United Security, etc., Co. v. Bank, 185 Pa. St. 601, 40 Atl. 99, holding depositor is not required to examine indorsements of paid checks; National Bank v. National Bank, 92 Tex. 439, 440, 49 S. W. 368, 369, mere silence, in absence of proof that bank was prejudiced, will not estop depositor.

Estoppel does not necessarily imply intent to mislead; negligence is sufficient, p. 108.

Approved in Edison, etc., Light Co. v. Buckeye Electric Co., 59 Fed. 700, holding party estopped by acts done under a mistaken idea of the law; Davis, etc., Mfg. Co. v. Dix, 64 Fed. 410, holding parties could not set up an unauthorized alteration.

Bank officer overlooking forgery, for want of proper care, depositor can recover, though not examining returned checks, p. 112.

Reaffirmed in Janin v. London, etc., Bank, 92 Cal. 23, 27 Am. St. Rep. 84, 27 Pac. 1100, 14 L. R. A. 322, and Brixen v. National Bank, 5 Utah, 512, 18 Pac. 45. Approved in First Nat. Bank v. South Nat. Bank, 56 Fed. 971, 16 U. S. App. 1, charging bank with notice of letters duly mailed to it; Rice v. Citizens' Nat. Bank, — Ky. —, 51 S. W. 455, holding bank liable for payment of forged check; Todd v. Meding, 56 N. J. Eq. 101, 38 Atl. 355, holding receiver not excused from liability of payment.

Estoppel arises against depositor if his negligence prevented bank promptly getting redress from forger, p. 115.

Approved in Robb v. Vos, 155 U. S. 39, 39 L. 62, 15 S. Ct. 13, holding party estopped to deny authority of attorney to appear for him; Manhattan Beach Co. v. Harned, 23 Blatchf. 500, 27 Fed. 489, holding purchaser had right to rely upon diligence of corporation; Janin v. London, etc., Bank, 92 Cal. 26, 27 Am. St. Rep. 87, 27 Pac. 1101, 14 L. R. A. 328 (see dissenting opinion in 92 Cal. 29, 27 Pac. 1108, 14 L. R. A. 324), holding bank not prejudiced by the erroneous instruction; Lynch v. Smyth, 25 Colo. 112, 54 Pac. 637, it is sufficient that conduct of surety prevented obligee from trying to procure other security; Kuriger v. Jœst, 22 Ind. App. 639, 52 N. E. 767, holding surety estopped from claiming his signature to be a forgery; Welsen, etc., Mach. Co. v. Southern Exp. Co., 42 La. Ann. 599, 7

So. 712, holding an estoppel arises where one induces another to omit some act which otherwise he would have done and prevented loss; Andrews v. Clark, 72 Md. 436, 437, 20 Atl. 433, holding party not estopped by his delay; Turnbull v. Home Fire Ins. Co., 83 Md. 323, 34 Atl. 876, holding assured should have read policy; Wind v. Fifth Nat. Bank, 39 Mo. App. 86, holding depositor loses recourse against bank, if he might have discovered forgeries; McKeen v. Boatmen's Bank, 74 Mo. App. 290, reasonableness of time in which customer of bank should make objection is a question of law; Devine v. Bank of Baldwin, 91 Wis. 75, 64 N. W. 592, holding defendant, to establish an estoppel, must show it had been or might be prejudiced; Shepard, etc., Lumber Co. v. Eldridge, 171 Mass. 533, 68 Am. St. Rep. 463, 51 N. E. 16, 41 L. R. A. 624, and First Nat. Bank v. Fourth Nat. Bank, 56 Fed. 971, 16 U. S. App. 1, arguendo.

Banks.— Where depositor's agent for examining returned checks is forger, depositor is liable unless diligent, p. 116.

Reaffirmed in Myers v. Southwestern Nat. Bank, 192 Pa. St. 12, 44 Atl. 281. Approved in John Shillito Co. v. M'Clung, 45 Fed. 779, to point that matters of estoppel may be set up in actions at law; First Nat. Bank v. Fourth Nat. Bank, 56 Fed. 969, 16 U. S. App. 1, holding bank mailing certificate of deposit to debtor, negligent; Armstrong v. Chemical Nat. Bank, 83 Fed. 573, 574, 54 U. S. App. 494, 496, passing of monthly statement was notice to directors of second bank of loan; Wilson, etc., Mach. Co. v. Southern Exp. Co., 42 La. Ann. 598, 7 So. 711, holding an estoppel arises where one induces another to omit some act which otherwise he would have done, and prevented loss; Wind v. Fifth Nat. Bank, 39 Mo. App. 79, holding depositor loses recourse against bank if he might have discovered forgeries; People's Bank v. Franklin Bank, 88 Tenn. 308, 17 Am. St. Rep. 889, 12 S. W. 718, 6 L. R. A. 726, bank negligently cashing forged check drawn upon another bank, is liable to drawee for money received; Spargo v. Nelson, 10 Utah, 279, 37 Pac. 496, estopping company from asserting its priority of lien; Marrow v. Brinkley, 85 Va. 62, 6 S. E. 609, estopping parties to deny authority of attorneys to represent them; Two Rivers Mfg. Co. v. Day, 102 Wis. 332, 78 N. W. 442, holding disclaimer estopped from asserting his title.

Distinguished in Atlantic Nat. Bank v. Burke, 81 Ga. 601, 7 S. E. 740, 2 L. R. A. 99, and n., holding depositor had a right to presume indorsement was genuine.

Banks.— Questions of estoppel and diligence, arising from loss by raised checks, are for jury, p. 122.

Reaffirmed in Beatty v. Mutual, etc., Life Assn., 75 Fed. 68, 44 U. S. App. 527. Approved in Southern Pac. Co. v. Burke, 60 Fed. 715, 23 U. S. App. 1, holding question of negligence was properly submitted to jury; McKeen v. Boatmen's Bank, 74 Mo. App. 292, hold-

ing that facts warranted an action at law; Devine v. Bank of Baldwin, 91 Wis. 74, 64 N. W. 591, holding defendant, as a matter of law, was guilty of such negligence as to estop him. See 27 Am. St. Rep. 89, note.

Distinguished in Charlotte, etc., Fertilizer Co. v. Hartog, 85 Fed. 157, 42 U. S. App. 716, holding case was properly withheld from jury; Anderson v. Walker, — Tex. Civ. App. —, 49 S. W. 951, generally.

Miscellaneous.— Cited generally in Leather Manufacturers' Bank v. Cooper, 120 U. S. 781, 30 L. 818, 7 S. Ct. 778.

117 U. S. 123-129, 29 L. 837, CHICAGO, ETC., RY. v. OHLE.

Domicile.— State citizenship is lost or gained only where residence is, in good faith, changed, p. 128.

Approved in Alabama, etc., R. Co. v. Carroll, 84 Fed. 780, 52 U. S. App. 458, taking case from jury and dismissing same, where evidence showed no intention to permanently change domicile. See 48 Am. St. Rep. 715, note.

Appellate court cannot decide jury's verdict wrong, though charge correct, where some evidence supports it, p. 129.

Reaffirmed in Clark v. Carlisle, etc., Min. Co., 5 N. Mex. 325, 21 Pac. 356. Approved in New York, etc., Ry. v. Estill, 147 U. S. 617, 37 L. 305, 13 S. Ct. 454, holding court could not review verdict as to weight of evidence.

Evidence.— Party's affidavit as to residence held admissible against it on another issue, p. 129.

Approved in Cleveland v. Cleveland, etc., Ry., 98 Fed. 129, holding allegation was not an admission that defendant's possession was adverse.

Miscellaneous.— Cited in Wetmore v. Rymer, 169 U. S. 121, 42 L. 684, 18 S. Ct. 295, generally.

117 U. S. 129-139, 29 L. 830, TENNESSEE v. WHITWORTH.

Taxation.— Corporations have four separate taxable elements: Franchises, property, shares in its own, and individual hands, p. 136.

Approved in New Orleans v. Houston, 119 U. S. 277, 30 L. 415, 7 S. Ct. 205, holding assessment upon shares was substantially a tax upon the corporation; Gibbons v. Mahon, 136 U. S. 557, 34 L. 527, 10 S. Ct. 1058, holding stock dividend was an accretion to capital; Bank of Commerce v. Tennessee, 161 U. S. 147, 40 L. 649, 16 S. Ct. 461, holding both capital stock and shares may be taxed; Owensboro Nat. Bank v. Owensboro, 173 U. S. 682, 19 S. Ct. 542, holding tax on franchise of corporation was illegal under the statute; Tennessee v. Bank of Commerce, 53 Fed. 747, holding charter exemption exempted shares of stock; Memphis v. Home Ins. Co., 91 Tenn.

561, 19 S. W. 1043, holding exemption did not extend to shares of stock; Memphis v. Memphis City Bank, 91 Tenn. 578, 19 S. W. 1046, holding that capital stock and shares of stock are separate properties; Memphis v. U. & P. Bank, 91 Tenn. 553, 19 S. W. 760, State v. Bank of Commerce, 95 Tenn. 227, 31 S. W. 995, and Commonwealth v. Charlottesville, etc., Loan Co., 90 Va. 792, 44 Am. St. Rep. 951, 20 S. E. 365, holding that capital stock and shares of capital stock may both be taxed; dissenting opinion in Hancock v. Singer Mfg. Co., 62 N. J. L. 348, 41 Atl. 854, 42 L. R. A. 862, majority holding exemption of shares from taxation also exempts capital stock.

Taxation.— Every presumption is against surrender of taxing power, p. 136.

Reaffirmed in Memphis v. U. & P. Bank, 91 Tenn. 550, 19 S. W. 759, Memphis v. Memphis City Bank, 91 Tenn. 580, 19 S. W. 1046, Turnpike Cases, 92 Tenn. 373, 22 S. W. 76, and Railroad v. Harris, 99 Tenn. 693, 43 S. W. 117. Approved in Shelby County v. Union, etc., Bank, 161 U. S. 160, 40 L. 655, 16 S. Ct. 562, holding provision for annual tax in lieu of all other taxes, does not exempt capital stock; Memphis v. Home Ins. Co., 91 Tenn. 562, 19 S. W. 1043, holding exemption did not extend to shares of stock.

Taxation.— Double taxation is never presumed, p. 137.

Approved in Western Union Tel. Co. v. Harris, — Tenn. —, 52 S. W. 752, holding telegraph company having paid one privilege tax, was not exempt from another.

Statutory contracts are to receive meaning intended at time of enactment, p. 137.

Taxation.— Exemption of "capital stock" exempts individual shares, p. 139.

Reaffirmed in Central R. R. v. Wright, 164 U. S. 335, 41 L. 457, 17 S. Ct. 83. Approved in State v. Hernando, etc., Ins. Co., 97 Tenn. 92, 36 S. W. 722, holding capital stock not exempt by charter provision for annual tax in lieu of all other taxes; Foster v. Stevens, 63 Vt. 182, 22 Atl. 79, 13 L. R. A. 168, and n., holding shares of stock of Canadian bank, which pays a direct tax in Canada, are exempt from taxation as against residents.

Distinguished in Street R. R. v. Morrow, 87 Tenn. 422, 11 S. W. 351, 2 L. R. A. 858, tax against corporation and also its shares is not double; Memphis v. Home Ins. Co., 91 Tenn. 563, 19 S. W. 1043, holding that exemption did not extend to shares of stock.

Miscellaneous.— Cited in Tennessee v. Union, etc., Bank, 152 U. S. 460, 38 L. 514, 14 S. Ct. 656, and Arkansas v. Kansas, etc., Coal Co., 96 Fed. 355, to point that case is removable if record shows either party claims a right under the Constitution and laws of United States.

117 U. S. 139-150, 29 L. 833, TENNESSEE v. WHITWORTH.

Taxing power of State is never presumed relinquished, p. 145.

Reaffirmed in Memphis v. Memphis City Bank, 91 Tenn. 580, 19 S. W. 1046. Approved in Memphis v. Home Ins. Co., 91 Tenn. 562, 19 S. W. 1043, holding exemption did not extend to shares of stock; Dow v. Northern R. R., 67 N. H. 49, 36 Atl. 535, arguendo.

Taxation.— Grant of another corporation's rights, etc., carries a tax exemption, notwithstanding Tennessee Constitution, p. 146.

Reaffirmed in State Board of Assessors v. Morris, etc., R. R., 49 N. J. L. 207, 7 Atl. 832. Approved in Phœnix Ins. Co. v. Tennessee, 161 U. S. 179, 181, 40 L. 662, 663, 16 S. Ct. 473, 474, confining exemption to line defined in charter of first corporation; Citizens' Bank v. Board of Assessors, 54 Fed. 76, holding that exemption from taxation followed extension of charter; United States v. Stanford, 70 Fed. 359, 363, 44 U. S. App. 68, holding there was a waiver of individual liability of stockholders; Buchanan v. Knoxville, etc., R. Co., 71 Fed. 338, 37 U. S. App. 499, arguendo.

Distinguished in Keokuk, etc., R. R. v. Missouri, 152 U. S. 311, 38 L. 455, 14 S. Ct. 596, holding a new company was formed from date of consolidation, and exemption did not pass; Adams v. Yazoo, etc., R. Co., — Miss. —, 24 So. 209, 210, 211, and S. C., — Miss. —, 24 So. 318, where there was a mere merger; Memphis v. Phœnix, etc., Ins. Co., 91 Tenn. 572, 19 S. W. 1045, holding grant of "rights and privileges" did not carry exemption from taxation.

Corporation, consolidated, presumably has powers, privileges, restrictions and liabilities of predecessors, p. 147.

Reaffirmed in Natchez, etc., R. R. v. Lambert, 70 Miss. 790, 13 So. 35. Approved in Africa v. Board of Mayor, etc., 70 Fed. 789, holding consent of city not terminated by extinguishment of companies; Langhorne v. Richmond R. Co., 91 Va. 374, 22 S. E. 161, holding consolidated corporation may be sued for liabilities of old.

Distinguished in Keokuk, etc., R. R. v. Missouri, 152 U. S. 307, 38 L. 454, 14 S. Ct. 594, holding a new company was formed from date of consolidation, and exemption did not pass.

Corporations.— Grant of privileges to railroad "for its government," means for regulation, not as limitation, p. 149.

Miscellaneous.— Tennessee v. Union, etc., Bank, 152 U. S. 460, 38 L. 514, 14 S. Ct. 656, on removal question.

117 U. S. 151-180, 29 L. 845, VAN BROCKLIN v. STATE OF TENNESSEE.

United States may take for public use under eminent domain, paying just compensation, p. 154.

Reaffirmed in Ryan v. United States, 136 U. S. 81, 34 L. 452, 10 S. Ct. 918. Approved in Cherokee Nation v. Kansas Ry., 135 U. S.

656, 34 L. 302, 10 S. Ct. 970, holding railroad could take private property for right of way; Luxton v. North River Bridge Co., 153 U. S. 530, 38 L. 810, 14 S. Ct. 892, holding United States could take private land to build bridge across navigable stream; United States v. Certain Tract of Land, 67 Fed. 871, holding United States could not take land for national cemetery at Gettysburg; Abbott v. New York, etc., R. R., 145 Mass. 453, holding right of eminent domain granted to domestic corporation might pass to foreign corporation, its successor.

States.— Ordinance of 1787 had no force in any State after its admission, any more than other acts of Congress, p. 159.

Reaffirmed in Sands v. Manistee, etc., Imp. Co., 123 U. S. 296, 31 L. 152, 8 S. Ct. 117, and People v. Thompson, 155 Ill. 473, 40 N. E. 313. Approved in Illinois v. Illinois, etc., R. Co., 33 Fed. 754, 755, holding State could fix line beyond which docks could not be built.

Public lands.— Disposition of, lies wholly with Congress, p. 168.

Approved in Wiseman v. Eastman, 21 Wash. 175, 57 Pac. 401, holding decision of United States land department could not be reviewed.

Taxation.— State taxing laws do not include State or municipal property, although not in terms exempt, p. 173.

Approved in Springville v. Johnson, 10 Utah, 355, 37 Pac. 577, holding lands of municipality were exempt.

United States property is exempt from State taxation, p. 178.

Reaffirmed in Wisconsin R. R. v. Price County, 133 U. S. 504, 33 L. 692, 10 S. Ct. 344, and Bannon v. Burnes, 39 Fed. 898, 899. Approved in United States v. Nashville, etc., Ry., 118 U. S. 126, 30 L. 83, 6 S. Ct. 1009, holding statute of limitations did not run against bonds held by United States in trust for Indians; Pollock v. Farmers, etc., Trust Co., 157 U. S. 584, 39 L. 819, 15 S. Ct. 691, holding invalid, tax on interest on municipal bonds; Central, etc., R. R. v. California, 162 U. S. 125, 40 L. 915, 16 S. Ct. 779, holding State may tax property of corporation, an agent of United States; Southern Pac. R. Co. v. Stanley, 49 Fed. 265, it would be inequitable to regard one as owner for purposes of taxation, and not for purpose of enforcing his rights; United States v. Devereux, 90 Fed. 186, 61 U. S. App. 557, property claimed by United States as cestui que trust, is not subject to statute of limitations; United States v. Bell Telephone Co., 167 U. S. 265, 42 L. 163, 17 S. Ct. 820, United States v. Bee, 54 Fed. 114, 7 U. S. App. 459, and United States v. Willamette, etc., Road Co., 54 Fed. 810, all holding defense of laches is not applicable to United States; Nichols v. Council, 51 Ark. 33, 14 Am St. Rep. 22, 9 S. W. 306, holding statute of limitations will not run in favor of enterer's grantee, while title remains in the

government; Ex parte Gaines, 56 Ark. 280, 19 S. W. 602, holding lessee of land of United States subject to State taxation; State v. Burk, 68 Ark. 58, 37 S. W. 407, holding statute of limitations was no defense to action by State to foreclose mortgage security for school funds; Davis v. Magoun, — Iowa, —, 80 N. W. 429, holding land was taxable from time of reinstatement of cancelled entry; State v. Central Pac. R. R., 21 Nev. 269, 30 Pac. 692, holding unsurveyed lands not taxable; Howard Sav. Inst. v. Newark, 63 N. J. L. 549, 44 Atl. 655, holding United States securities not taxable; Jackson v. La Moure County, 1 N. Dak. 238, 46 N. W. 449, holding indemnity lands were not taxable until selected; Tyler v. Cass County, 1 N. Dak. 382, 48 N. W. 233, holding lands upon which United States had lien for survey fee, were not taxable; Duncan v. Newcomer, 9 S. Dak. 377, 69 N. W. 581, until new proof of homestead entry was made, land was not taxable; dissenting opinion in Pollock v. Farmers, etc., Trust Co., 158 U. S. 666, 693, 39 L. 1135, 1145, 15 S. Ct. 931, 942, majority holding income tax invalid; Frost v. Spitley, 121 U. S. 556, 30 L. 1012, 7 S. Ct. 1131, arguendo.

United States, acquiring land at tax sale, may not be taxed by State, as respects it, p. 179.

Approved in United States v. Insley, 130 U. S. 265, 32 L. 969, 9 S. Ct. 485, holding United States holds right of redemption for public purposes; Graff v. Ackerman, 38 Neb. 723, 57 N. W. 513, holding land purchased from government not taxable, before issuance of patent.

117 U. S. 180-197, 29 L. 839, GRAFFAM v. BURGESS.

Execution.— Party misled, and lulled into security, so as to prevent her from redeeming, may have extra time, p. 190.

Reaffirmed in Power v. Larabee, 3 N. Dak. 509, 44 Am. St. Rep. 581, 57 N. W. 791. Approved in Schroeder v. Young, 161 U. S. 345, 40 L. 727, 16 S. Ct. 516, allowing relief, notwithstanding statutory period for redemption had expired; Young v. Schroeder, 10 Utah, 172, 37 Pac. 256, setting aside execution sale.

Judicial sale will not be set aside for inadequacy, unless so great as to shock conscience, p. 192.

Reaffirmed in Fidelity Trust, etc., Co. v. Mobile, etc., Ry., 54 Fed. 28, Fidelity Ins., etc., Co. v. Roanoke Iron Co., 84 Fed. 755, Magan v. Segal, 92 Fed. 256, 257, 258, 259, 262. Hudgins v. Morrow, 47 Ark. 518, 2 S. W. 105, Carden v. Lange, 48 Ark. 219, 3 Am. St. Rep. 229, 2 S. W. 710, and Phillips v. Pullen, 45 N. J. Eq. 836, 18 Atl. 851. Approved in Pewabic Mining Co. v. Mason, 145 U. S. 367, 36 L. 738, 12 S. Ct. 892, refusing to set aside sale; Schroeder v. Young, 161 U. S. 340, 40 L. 725, 16 S. Ct. 514, setting aside sale; Colonial, etc., Mortgage Co. v. Sweet, 65 Ark. 154, 67 Am. St. Rep. 912, 45 S. W.

60, holding mortgagee could not have sale set aside upon offer of a larger bid.

Distinguished in Central Trust Co. v. Street Ry., 96 Iowa, 651, 65 N. W. 984, holding bidder at foreclosure sale could not object to resale, because of inadequacy of price.

Judicial sale will be set aside for gross inadequacy, shocking the conscience, unfairness practiced, or surprise, p. 192.

Reaffirmed in Schrœder v. Young, 161 U. S. 338, 40 L. 724, 16 S. Ct. 514. Approved in Detwiler v. Schultheis, 122 Ind. 166, 23 N. E. 712, upholding sufficiency of cross-complaint to quiet title; Power v. Larabee, 3 N. Dak. 508, 44 Am. St. Rep. 580, 57 N. W. 790, setting aside sale, where right of redemption was injuriously interfered with; Horse Springs Cattle Co. v. Schofield, 9 N. Mex. 142, 49 Pac. 956, setting aside receiver's sale, where purchaser enjoyed an unconscionable advantage through mistake; Young v. Schrœder, 10 Utah, 167, 37 Pac. 254, setting aside execution sale; Davenport v. Moore, 74 Fed. 953, arguendo.

Judicial sales.— Gross inadequacy requires very slight additional circumstances of unfairness, to constitute fraud, p. 192.

Reaffirmed in Branch v. Foust, 130 Ind. 544, 30 N. E. 633. Approved in Fletcher v. McGill, 110 Ind. 402, 10 N. E. 654, and Wright v. Dick, 116 Ind. 545, 19 N. E. 309, setting aside sheriff's sale; Detwiler v. Schultheis, 122 Ind. 165, 23 N. E. 712, upholding sufficiency of cross-complaint, to quiet title; Russell v. Pew, 12 Mont. 516, 31 Pac. 76, refusing to set sale aside; Warren v. Stinson, 6 N. Dak. 303, 305, 70 N. W. 282, 283, ignorance of facts, and inadequate price suffices to justify annulment of sale; Young v. Schrœder, 10 Utah, 168, 37 Pac. 254, setting aside execution sale; Parry v. Parry, 80 Wis. 131, 48 N. W. 657, setting aside sale.

Equity.— Prayer of bill may sometimes be amended at hearing, to conform to proof, p. 195.

Approved in Mackintosh v. Flint, etc., R. Co., 34 Fed. 614, allowing supplemental bill to stand; Bass v. Feigenspan, 82 Fed. 261, refusing amendment to prayer after replication; Tennant v. Dunlop, 97 Va. 239, 33 S. E. 621, upholding change in prayer for relief; Detwiler v. Schultheis, 122 Ind. 166, 23 N. E. 712, arguendo.

Miscellaneous.— Cited generally in Burgess v. Doble, 149 Mass. 258, 21 N. E. 438.

117 U. S. 197–198, 29 L. 888, AKERS v. AKERS.

Removal of suit cannot be had, unless diverse citizenship existed at its commencement, p. 198.

Reaffirmed in Stevens v. Nichols, 130 U. S. 232, 32 L. 915, 9 S. Ct. 519, Hone v. Dillon, 29 Fed. 466, Seddon v. Virginia, etc., Iron Co., 36 Fed. 8, 1 L. R. A. 109, Graswell v. Belanger, 56 Fed. 560, 15 U. S.

App. 104, Foster v. Paragould, etc., R. Co., 74 Fed. 273, Amy v. Manning, 144 Mass. 154, 10 N. E. 740, and Herndon v. Lancashire Ins. Co., 107 N. C. 193, 12 S. E. 241, 10 L. R. A. 54. Approved in Moore v. Edgerfield, 32 Fed. 500. excluding interest accumulated pending suit, in estimating amount in dispute; La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 647, holding filing of counterclaim in State, by non-resident defendant, does not preclude his right of removal; Burnham v. First Nat. Bank, 53 Fed. 165, 10 U. S. App. 485, holding case not removable, where substituted parties were citizens of separate States.

117 U. S. 199, 29 L. 888, JOHNSON v. KEITH.

Appeal and error.— Judgment of reversal and new trial is not a final appealable judgment, p. 199.

Reaffirmed in Brown v. Baxter, 146 U. S. 620, 36 L. 1107, 13 S. Ct. 261, and Union, etc., Life Ins. Co. v. Kirchoff, 160 U. S. 378, 40 L. 463, 16 S. Ct. 320. Approved in MacLeod v. Graven, 79 Fed. 84, 47 U. S. App. 573, holding writ of error does not lie to review judgment of Circuit Court of Appeals, which is not final.

117 U. S. 200-201, 29 L. 887, HARWOOD v. DICKERHOFF.

Appeal and error.— Increase in amount of appeal bond for death of one of appellants, refused, p. 201.

Not cited.

117 U. S. 201-210, 29 L. 855, TUA v. CARRIERE.

Insolvency of attached debtor, in Louisiana, dissolves attachment not matured into judgment, p. 204.

Reaffirmed in Shwartz v. H. B. Claflin Co., 60 Fed. 685 13 C. C. App. 707.

Insolvency.— Cession of all property by surviving partners, though illegal as to deceased, yet when accepted and acted on by court, cannot be collaterally attacked by creditor, p. 206.

Reaffirmed in Geilinger v. Philippi, 133 U. S. 255, 33 L. 617, 10 S. Ct. 268.

Courts.— Property being administered by one court, cannot be seized under process from another, p. 208.

Reaffirmed in Geilinger v. Philippi, 133 U. S. 257, 33 L. 617, 10 S. Ct. 269. Approved in Milliken v. Barrow, 55 Fed. 148, after surrender of property by insolvent, executory process cannot be issued by a Federal court.

Insolvency law of a State, in force when national bankrupt law passed, revives on latter's repeal, p. 210.

Approved in In re Gutwilling, 90 Fed. 476, holding voluntary assignments for creditors, voidable within four months; In re Bruss-Ritter Co., 90 Fed. 652, holding bankrupt act suspends State insolvency laws.

117 U. S. 210-227, 29 L. 860, PATCH v. WHITE.

Wills.— Latent ambiguity in will may be removed by extrinsic evidence, p. 217.

Reaffirmed in Decker v. Decker, 121 Ill. 350, 12 N. E. 754, and Webster v. Morris, 66 Wis. 380, 28 N. W. 357. Approved in Post v. Jackson, 70 Conn. 286, 39 Atl. 152, rejecting extrinsic evidence, where language of testator was not ambiguous; Seebrock v. Fedawa, 33 Neb. 417, 29 Am. St. Rep. 491, 50 N. W. 271, holding error in description will not avoid will; dissenting opinion in Eckford v. Eckford, 91 Iowa, 65, 74, 58 N. W. 1096, 1099, 26 L. R. A. 374, 377, majority admitting extrinsic identification. See 50 Am. St. Rep. 285, 287, and 65 Am. St. Rep. 521, notes.

Wills.— Latent ambiguity may arise where two persons or things answer the given description, or there is misdescription, p. 217.

Reaffirmed in Gilmer v. Stone, 120 U. S. 590, 30 L. 736, 7 S. Ct. 690. Approved in Whitcomb v. Rodman, 156 Ill. 122, 47 Am. St. Rep. 183, 40 N. E. 554, 28 L. R. A. 151, holding that devise carried adjoining forties; Daugherty v. Rogers, 119 Ind. 259, 20 N. E. 781, 13 L. R. A. 851, and n., admitting extrinsic evidence; Stewart v. Stewart, 96 Iowa, 625, 65 N. W. 977, holding devise of land described as northeast quarter, passed southeast quarter; Oldham v. York, 99 Tenn. 77, 41 S. W. 335, holding metes and bounds control estimated acreage; dissenting opinion in Eckford v. Eckford, 91 Iowa, 64, 58 N. W. 1096, 26 L. R. A. 374, majority admitting extrinsic proof to show what quarter decedent owned. See 50 Am. St. Rep. 290, note.

Wills.— If latent ambiguity consist in misdescription, court may strike it out, if remainder sufficient, p. 217.

Reaffirmed in Decker v. Decker, 121 Ill. 352, 12 N. E. 755, and Huffman v. Young, 170 Ill. 296, 49 N. E. 572. Cited in 50 Am. St. Rep. 284, note.

Evidence.— Well-known map, to which all recorded conveyances refer, may be judicially noticed, p. 220.

Approved in Morris v. United States, 174 U. S. 269, 19 S. Ct. 678, holding that Dermott map was the one intended to be annexed to act of 1797.

Wills.— Devise of lot 6, which testator did not own, held valid devise of lot 3, which he did own, p. 220.

Reaffirmed in Eckford v. Eckford, 91 Iowa, 58, 58 N. W. 1094, 26 L. R. A. 372 (see dissenting opinion in 91 Iowa, 69, 71, 58 N. W. 1097,

26 L. R. A. 375, 376), and Hawkins v. Young, 52 N. J. Eq. 510, 28 Atl. 511. Approved in Estate of Callaghan, 119 Cal. 575, 576, 51 Pac. 861, 862, 39 L. R. A. 690, 691, holding parol evidence is inadmissible where there is no question of misdescription or identity. See 50 Am. St. Rep. 298, note.

Distinguished in Ehrman v. Hoskins, 67 Miss. 194, 19 Am. St. Rep. 298, 6 So. 777, holding parol evidence inadmissible to show wrong lot was described; Wildberger v. Cheek, 94 Va. 527, 27 S. E. 445, holding children omitted from the class specifically enumerated, did not take.

117 U. S. 228-232, 29 L. 858, BARNEY v. WINONA, ETC., R. R.

Courts.— Opinion on matters obiter the issue, may be reconsidered on second appeal, p. 231.

Reaffirmed in Donnelly v. United States Cordage Co., 66 Fed. 615, Northern Pac. R. Co. v. Sanders, 46 Fed. 244, and Northern Pac. R. Co. v. Sanders, 47 Fed. 605. Approved in Thatcher v. Gottlieb, 59 Fed. 873, 19 U. S. App. 469, where facts are substantially the same, court is bound by former decision; Clark v. Hershy, 52 Ark. 480, 12 S. W. 1078, holding questions not presented on first appeal may be reviewed; dissenting opinion in Wright v. Carson Water Co., 23 Nev. 50, 42 Pac. 200, majority holding, where facts are not changed, court is bound by former decision.

Public lands.— "Granted lands" and "indemnity lands," in railroad grant, defined and explained, p. 232.

Approved in Wisconsin R. R. v. Price County, 133 U. S. 513, 33 L. 695, 10 S. Ct. 347, United States v. Missouri, etc., Ry., 141 U. S. 375, 35 L. 771, 12 S. Ct. 19, and New Orleans, etc., Ry. v. Parker, 143 U. S. 58, 36 L. 70, 12 S. Ct. 369, all holding title to indemnity lands does not pass until their selection is approved by secretary of interior; Wisconsin, etc., R. Co. v. Forsythe, 43 Fed. 888, until indemnity lands are selected, title remains in United States; Northern Pac. R. Co. v. Amacker, 58 Fed. 54, holding party was entitled to perfect his title; United States v. Winona, etc., R. Co., 67 Fed. 952, 967, 32 U. S. App. 272, holding lands pre-empted at time map of location is filed are exempted from grant; St. Paul, etc., Ry. v. Sage, 71 Fed. 46, 50, 36 U. S. App. 340, holding act, in absence of filing of map, did not withdraw lands; Southern Pac. R. R. v. Wood, 124 Cal. 488, 57 Pac. 398, holding filing of map did not perfect title to indemnity lands; Jackson v. La Moure County, 1 N. Dak. 239, 240, 46 N. W. 450, indemnity lands are not taxable until their selection is approved by secretary of interior; Northern Pac. R. R. v. Barnes, 2 N. Dak. 365, 51 N. W. 406, arguendo.

Public lands.— Act of 1865, granting lands to Minnesota, reserved the "granted" not the "indemnity" lands, p. 232.

Reaffirmed in St. Paul, etc., Ry. v. Greenalgh, 139 U. S. 21, 35 L. 73, 11 S. Ct. 396.

117 U. S. 233-235, 29 L. 890, COFFEY v. UNITED STATES.

Courts.— Practice in suits in rem, in Federal courts, was not changed by process act of 1872, p. 235.

Approved in United States v. Molloy, 31 Fed. 23, holding defendant, under Federal statutes, was not entitled to a new trial; United States v. Fifty Boxes, 92 Fed. 602, holding R. S., § 914, does not require Federal court to follow State statute as to manner of taking depositions in proceedings in rem.

117 U. S. 236-241, 29 L. 888, PHELPS v. OAKS.

Courts.— R. S., § 914, establishing State practice in Federal courts, does not require them to renounce a jurisdiction lawfully attaching under act of Congress, p. 239.

Reaffirmed in O'Connell v. Reed, 56 Fed. 534. Approved in Southern Pac. Co. v. Denton, 146 U. S. 209, 36 L. 945, 13 S. Ct. 47, and Mexican Central Ry. v. Pinkney, 149 U. S. 206, 37 L. 704, 13 S. Ct. 864, both holding Texas statute giving to special appearance the effect of a general appearance, is not binding on Federal courts; Campbell v. Haverhill, 155 U. S. 615, 39 L. 282, 15 S. Ct. 219, holding statutes of limitation of several States apply to actions at law for infringement of patent; In re Rugheimer, 36 Fed. 373, holding institution of condemnation proceedings by petition of agent of United States, was proper; Nat. Cash-Register Co. v. Leland, 77 Fed. 243, holding act of 1892 merely provided an additional mode of taking depositions; Chappell v. United States, 81 Fed. 767, holding question of damages was properly submitted to jury.

Courts.— Admission of landlord as defendant in ejectment against tenant was proper under Missouri practice, but this need not divest Circuit Court's jurisdiction from diverse citizenship of original defendants, p. 241.

Reaffirmed in Hardenbergh v. Ray, 151 U. S. 118, 38 L. 95, 14 S. Ct. 306. Approved in Baltimore, etc., Loan Assn. v. Alderson, 90 Fed. 147, 61 U. S. App. 645, upholding appointment of receiver for property outside of jurisdiction; Rock Island Nat. Bank v. Thompson, 173 Ill. 600, 64 Am. St. Rep. 141, 50 N. E. 1091, holding lien of Federal judgment is co-extensive with its territorial jurisdiction; Bland v. Fluman, 29 Fed. 673, holding parties could intervene regardless of citizenship; Jarboe v. Temple, 38 Fed. 217, holding subsequent transfer of cause of action will not divest jurisdiction; Burnham v. First Nat. Bank, 53 Fed. 166, holding citizenship of substituted parties cannot give right of removal; Minneapolis v. Reum, 56 Fed. 581, State statute giving elective franchise does not affect status of alien; Wetherby v. Stinson, 62 Fed. 176, holding defendant, by disclaiming, was not dismissed from case; Wheeling Bridge, etc., Ry. v. Cochran, 68 Fed. 144, holding Federal courts should follow State practice; Society of Shakers v. Watson, 68 Fed. 736, holding subsequent

intervention of executrix did not oust jurisdiction; Sioux City, etc., Warehouse Co. v. Trust Co., 82 Fed. 128, 49 U. S. App. 533, holding subsequent introduction of parties will not oust jurisdiction; Mitchell v. Smale, 140 U. S. 409, 35 L. 443, 11 S. Ct. 820 (see dissenting opinion, 140 U. S. 416, 35 L. 446, 11 S. Ct. 840), arguendo.

Parties.— Court may allow stranger to intervene pro interesse suo, p. 241.

Approved in Osborne v. Barge, 30 Fed. 806, holding party could intervene in equitable action, though he would have had a remedy at law; Compton v. Jesup, 68 Fed. 279, 31 U. S. App. 486, holding court could compel any person claiming an interest to come in.

117 U. S. 241-254, 29 L. 868, EX PARTE ROYALL.

Courts.— Circuit Court may release on habeas corpus State prisoner, held contrary to Federal Constitution, p. 250.

Reaffirmed in In re Ah Jow, 12 Sawy. 91, 29 Fed. 183, and Ex parte Jervey, 66 Fed. 959. Approved in In re Loney, 134 U. S. 377, 33 L. 951, 10 S. Ct. 586, discharging person arrested for perjury in testifying upon a contested election of congressman; In re Mills, 135 U. S. 269, 34 L. 110, 10 S. Ct. 764, granting writ where sentence was unconstitutional; In re Chapman, 156 U. S. 215, 39 L. 402, 15 S. Ct. 332, refusing writ; In re Neagle, 14 Sawy. 245, 39 Fed. 842, 5 L. R. A. 83, discharging United States marshal arrested under State process; In re Reinitz, 39 Fed. 205, 4 L. R. A. 237, releasing extradited person arrested under State process, before he could return; In re Beine, 42 Fed. 546, releasing agent imprisoned for selling liquor; In re White, 43 Fed. 914, 11 L. R. A. 285, releasing agent citizen of another State, soliciting without a license; Ex parte Conway, 48 Fed. 77, releasing person imprisoned for act done under Federal authority; In re Waite, 81 Fed. 362, releasing officer of United States charged with crime in State court; dissenting opinion in Mahon v. Justice, 127 U. S. 718, 32 L. 289, 8 S. Ct. 1214, majority refusing to discharge on habeas corpus person abducted to another State and arrested; In re Ladd, 74 Fed. 34, and United States v. Rauscher, 119 U. S. 431, 30 L. 433, 7 S. Ct. 246, arguendo. See 10 Am. St. Rep. 210, note.

Courts.— But such release is discretionary, to be subordinated to special circumstances requiring immediate action, p. 253.

Reaffirmed in Ex parte Mirzan, 119 U. S. 586, 30 L. 513, 6 S. Ct. 342, Ex parte Hanson, 11 Sawy. 661, 28 Fed. 130, United States v. Ronan, 33 Fed. 119, 120, In re Christensen, 43 Fed. 243, 244, In re Van Vliet, 43 Fed. 768, 10 L. R. A. 454, In re King, 51 Fed. 436, United States v. Chapel, 54 Fed. 140, In re Huse, 79 Fed. 306, 308, 48 U. S. App. 321, 324, In re Grice, 79 Fed. 633, In re Alexander, 84 Fed. 633, Nesbit v. Hert, 91 Fed. 125, and Eaton v. West Virginia,

91 Fed. 766, 61 U. S. App. 676. Approved in Ex parte Royall, 117 U. S. 255, 29 L. 872, 6 S. Ct. 742, refusing to discharge prisoner in advance of trial; Ex parte Fonda, 117 U. S. 518, 29 L. 994, 6 S. Ct. 848, denying petition; In re Terry, 128 U. S. 302, 32 L. 408, 9 S. Ct. 78, reprinted in 13 Sawy. 461, holding Supreme Court not required to exercise power to inquire into restraint of any person; In re Neagle, 135 U. S. 74, 34 L. 75, 10 S. Ct. 672, 14 Sawy. 315, discharging United States marshal from State custody; In re Duncan, 139 U. S. 454, 35 L. 222, 11 S. Ct. 575, refusing to interfere pending appeal; In re Wood, 140 U. S. 289, 35 L. 509, 11 S. Ct. 742, holding that question should have been raised and determined by trial court; Cook v. Hart, 146 U. S. 194, 195, 36 L. 940, 13 S. Ct. 43, 44, and In re Frederich, 149 U. S. 75, 77, 37 L. 656, 657, 13 S. Ct. 795, 796, in absence of special circumstances, person should be compelled to seek review by writ of error; New York v. Eno, 155 U. S. 92, 39 L. 82, 15 S. Ct. 31, declining writ, where it did not appear that case was urgent; In re Chapman, 156 U. S. 216, 217, 39 L. 402, 403, 15 S. Ct. 332, 333, courts are reluctant to interfere with proceedings not finally determined; Washington v. Coovert, 164 U. S. 702, 41 L. 1182, 17 S. Ct. 1000, discharging writ; Iasigi v. Van De Carr, 166 U. S. 394, 41 L. 1049, 17 S. Ct. 596, upholding order of District Court dismissing writ; Whitten v. Tomlinson, 160 U. S. 240, 241, 242, 40 L. 411, 412, 16 S. Ct. 301, 302, Baker v. Grice, 169 U. S. 290, 42 L. 750, 18 S. Ct. 325, and Tinsley v. Anderson, 171 U. S. 105, 18 S. Ct. 807, dismissing writ issued before trial; Fitts v. McGhee, 172 U. S. 532, 533, 19 S. Ct. 275, 276; dissolving injunction of Circuit Court restraining prosecution of indictments in State court; Ohio v. Thomas, 173 U. S. 284, 285, 19 S. Ct. 456, releasing Federal officers arrested by State; Markuson v. Boucher, 175 U. S. 186, 20 S. Ct. 77, holding State judgments in criminal cases should not be reviewed on habeas corpus; Ex parte Yung Jon, 12 Sawy. 78, 28 Fed. 309, denying writ; In re Neagle, 14 Sawy. 249, 39 Fed. 845, 5 L. R. A. 85, discharging United States marshal arrested by State court; Ex parte Coy, 32 Fed. 916, holding relator could claim exemption from trial for any offense other than that in extradition papers; In re Reinitz, 39 Fed. 209, 4 L. R. A. 239, releasing extradited person arrested under State process before he could return; In re Converse, 42 Fed. 218, refusing to discharge prisoner; Ex parte Kieffer, 40 Fed. 400, issuing habeas corpus, right of appeal being an inadequate protection; United States v. Fiscus, 42 Fed. 397, refusing to discharge prisoner in advance of trial; In re Johnson, 46 Fed. 480, where prisoner confined under sentence of Federal court is released by State court, he may be rearrested; In re Fox, 51 Fed. 433, person under bail in Federal court has no right to be released from arrest by State court; In re Flinn, 57 Fed. 499, leaving constitutionality of act to State courts; In re Maldonado, 63 Fed. 827, holding that the error of State court could not be corrected by habeas corpus; In re Hacker, 73 Fed. 468, holding

prisoner will not be discharged on habeas corpus for insufficiency of indictment; In re Krug, 79 Fed. 310, refusing to issue writ where it would interfere with execution of State laws; Campbell v. Waite, 88 Fed. 107, 59 U. S. App. 744, releasing Federal officer arrested while discharging his duty; United States v. M'Alcese, 93 Fed. 658, refusing relief where prisoner had exhausted his remedy in State court; In re Anderson, 94 Fed. 492, refusing to discharge United States marshal executing process outside of his district; In re Bradley, 96 Fed. 970, 971, refusing to discharge prisoner on ground that offense was committed at soldiers' home; King v. M'Lean Asylum, 64 Fed. 357, 21 U. S. App. 407, 26 L. R. A. 798, and In re Rowe, 77 Fed. 167, 40 U. S. App. 516, arguendo.

Courts.— Even after conviction, prisoner may be so discharged, in discretion of Circuit Court, p. 253.

117 U. S. 254-255, 29 L. 872, EX PARTE ROYALL.

Courts.— Federal court should not release, on habeas corpus, one unlawfully in State custody, in advance of trial, p. 255.

Reaffirmed in Ex parte Mirzan, 119 U. S. 586, 30 L. 513, 6 S. Ct. 342. Approved in New York v. Eno, 155 U. S. 95, 96, 39 L. 88, 15 S. Ct. 32, declining writ, where it did not appear that case was urgent; In re Chapman, 156 U. S. 217, 39 L. 403, 15 S. Ct. 333, courts are reluctant to interfere with proceedings not finally determined; United States v. Fiscus, 42 Fed. 397, refusing to discharge prisoner in advance of trial.

117 U. S. 255-271, 29 L. 892, APPLEGATE v. LEXINGTON, ETC., MIN. CO.

Ejectment.— Deed genuine in appearance, of antiquity, and free from suspicion, is admissible in evidence, p. 260.

Evidence.— Record of former suit is admissible to prove collateral fact of antiquity of deeds and custody, p. 261.

Evidence.— Recorder's apparently genuine certificate is competent evidence that deed recorded, p. 262.

Evidence.— Deed is admissible, if thirty years' old, in proper custody, and possession had thereunder, p. 263.

Reaffirmed in M'Claskey v. Barr, 47 Fed. 169, Templeton v. Luckett, 75 Fed. 258, 41 U. S. App. 392, Reuter v. Stuckart, 181 Ill. 538, 54 N. E. 1017, and Woods v. Bonner, 89 Tenn. 419, 18 S. W. 69. Approved in Fulkerson v. Holmes, 117 U. S. 397, 29 L. 918, 6 S. Ct. 784, admitting deed as an ancient document; Van Gunden v. Virginia, etc., Iron Co., 52 Fed. 845, 8 U. S. App. 229, admitting copy of unrecorded and lost deed.

Courts.— It is presumed that court of general jurisdiction had parties duly served by publication, where its order is on file, p. 271.

Approved in Guaranty Trust Co. v. Green Cove R. R., 139 U. S. 148, 35 L. 120, 11 S. Ct. 516, holding publication for four lunar months was insufficient; Foster v. Givens, 67 Fed. 691, 31 U. S. App. 626, holding recital in judgment, of service by publication, was sufficient; Boyd v. Roane, 49 Ark. 413, 414, 5 S. W. 708, holding presumption of service raised by record to be conclusive; Gregory v. Bartlett, 55 Ark. 36, 17 S. W. 345, where statute requires a warning order to appear of record, no presumption in favor of record will be indulged in its absence; McConnell v. Day, 61 Ark. 475, 33 S. W. 734, presuming judgment of domestic court of general jurisdiction in collateral inquiry, to be within jurisdiction; Porter v. Dooley, 66 Ark. 7, 49 S. W. 1085, refusing to set aside decree, because affidavit contained no certificate of magistracy; Seculovich v. Morton, 101 Cal. 677, 40 Am. St. Rep. 107, 36 Pac. 387, plaintiff, in spite of defendant's absence from State, could have had a commissioner appointed to convey the land; State v. Eddy, 10 Mont. 318, 25 Pac. 1034, holding taking of personal judgment, without embodying directions for sale, did not destroy lien of attachment; Amy v. Amy, 12 Utah, 314, 323, 326, 42 Pac. 1126, 1129, where judgment recites service by publication, presumption of court's jurisdiction is not overcome by defendant's non-residence. See 94 Am. Dec. 769, note. Smythe v. Henry, 41 Fed. 710, arguendo.

Miscellaneous.— Cited generally in Clarke v. Seay, — Ky. —, 51 S. W. 589.

117 U. S. 271-272, 29 L. 898, BOARDMAN v. TOFFEY.

Appeal.— General finding by court, without jury, precludes inquiry into special facts, p. 272.

Approved in Bowden v. Burnham, 59 Fed. 754, 19 U. S. App. 448, and Fourth Nat. Bank v. Belleville, 83 Fed. 675, 58 U. S. App. 629, an assignment of error upon a general finding by court, without a jury, raises no question for review; Burrows v. Niblack, 84 Fed. 112, 53 U. S. App. 715, holding, under Illinois statute, motion in arrest of judgment in assumpsit, rendered after waiver of jury, will not lie, where finding is general.

Miscellaneous.— Miscited in Boyd v. Roane, 49 Ark. 414, 5 S. W. 708.

117 U. S. 272-275, 29 L. 897, JEFFERSON v. DRIVER.

Removal for local prejudice is only obtainable where all defendants of different citizenship from plaintiffs, p. 274.

Reaffirmed in Rosenthal v. Coates, 148 U. S. 146, 37 L. 400, 13 S. Ct. 577, Thouron v. East Tennessee, etc., Ry., 38 Fed. 676, and Adelbert College v. Toledo, etc., Ry., 47 Fed. 845. Approved in Lawson v. Richmond, etc., R. R., 112 N. C. 397, 17 S. E. 172, where prerequisites for removal do not exist, State court may decline to

permit it; Baird v. Richmond, etc., R. R., 113 N. C. 608, 18 S. E. 699, Circuit Court, on being satisfied of its jurisdiction, can order removal of suit.

Distinguished in Whelan v. New York, etc., R. Co., 35 Fed. 857, 1 L. R. A. 71, and n., holding act of 1887 repeals subd. 3, § 639, R. S.; Bonner v. Meikle, 77 Fed. 489, under act of 1887-1888, it is not necessary, where all plaintiffs are citizens of State where suit is brought, that all defendants be citizens of different States.

Removal of separable controversy, provided in R. S., § 639, does not apply to removal for local prejudice, p. 274.

Reaffirmed in Cambria Iron Co. v. Ashburn, 118 U. S. 57, 30 L. 61, 6 S. Ct. 930. Cited in Young v. Parker, 132 U. S. 270, 33 L. 353, 10 S. Ct. 77, arguendo.

Removal.— Purchaser pendente lite, made party, is subject to disabilities of other parties, as respects removal, p. 274.

Approved in Farmers, etc., Nat. Bank v. Schuster, 86 Fed. 165, 52 U. S. App. 620, one intervening, after mistrial in State court, cannot have cause removed.

117 U. S. 275-279, 29 L. 899, SLOANE v. ANDERSON.

Removal.— Joint action in tort is not rendered separable by separate answers and defenses, p. 279.

Reaffirmed in Fidelity Ins. Co. v. Huntington, 117 U. S. 281, 29 L. 899, 6 S. Ct. 734, Plymouth Min. Co. v. Amadore Canal Co., 118 U. S. 270, 30 L. 234, 6 S. Ct. 1037, Little v. Giles, 118 U. S. 601, 30 L. 271, 7 S. Ct. 35, Thorn, etc., Hedge Co. v. Fuller, 122 U. S. 543, 30 L. 1237, 7 S. Ct. 1267, Graves v. Corbin, 132 U. S. 588, 33 L. 468, 10 S. Ct. 202, Louisville, etc., R. R. v. Wangelin, 132 U. S. 601, 33 L. 476, 10 S. Ct. 204, Torrence v. Shedd, 144 U. S. 531, 36 L. 531, 12 S. Ct. 727, Powers v. Chesapeake, etc., Ry., 169 U. S. 97, 42 L. 675, 18 S. Ct. 266, Rumsey v. Call, 28 Fed. 771, Southworth v. Reid, 36 Fed. 452, Stanbrough v. Cook, 38 Fed. 373, 3 L. R. A. 402, Ames v. Chicago, etc., Ry., 39 Fed. 683, State v. Columbus, etc., Ry., 48 Fed. 628, and O'Harrow v. Henderson, 52 Fed. 769. Approved in Core v. Vinal, 117 U. S. 348, 29 L. 913, 6 S. Ct. 767, holding separable controversy cannot arise when defendants in trespass plead jointly; Brooks v. Clark, 119 U. S. 511, 30 L. 485, 7 S. Ct. 303, holding that controversy was not a separable one; Winnemans v. Edgington, 27 Fed. 326, holding cause not separable when all defendants are interested adversely to defendant; Western Union Tel. Co. v. Brown, 32 Fed. 338, holding no separable controversy for purpose of removal exists in action against principal and surety on bond; Seddon v. Virginia, etc., Iron Co., 36 Fed. 9, 1 L. R. A. 110, holding defendants sued jointly must be regarded as real parties in interest; Sexton v. Seelye, 39 Fed. 705, holding neither joint defendant may

remove, on ground that he might have been sued separately; Burnham v. First Nat. Bank, 53 Fed. 166, 10 U. S. App. 485, holding non-resident defendant in replevin, substituted for sheriff, cannot remove; Thompson v. Chicago, etc., Ry., 60 Fed. 774, holding failure of defendants to join in petition, fatal to removal, cause not being separable; In re The Jarnecke Ditch, 69 Fed. 170, holding cause not made separable by filing of conflicting separate defenses; Warax v. Cincinnati, etc., Ry., 72 Fed. 640, holding joinder of resident defendant, to prevent removal, must be affirmatively shown; Creagh v. Equitable Life Ins. Co., 88 Fed. 3, holding one of several joint defendants cannot remove, on ground of separable controversy as to lien; Zeller v. Martin, 84 Wis. 6, 54 N. W. 331, holding defendant cannot insist upon change of venue, not desired by joint and several co-defendants; Wetherby v. Stinson, 62 Fed. 176, 18 U. S. App. 714, dismissing suit, although defendant co-citizen of complainant, filed disclaimer; Woodrum v. Clay, 33 Fed. 899, and Kaitel v. Wylie, 38 Fed. 867, when plaintiff elects to sue jointly, defendants cannot make action several; Dow v. Bradstreet Co., 46 Fed. 826, holding allegations of complaint true, in determining whether cause is separable; Brown v. Coxe, 75 Fed. 690, and Moore v. Los Angeles, etc., Steel Co., 89 Fed. 78, both holding on plaintiff's election to sue jointly, neither defendant can treat action as several, for removal purposes; Deere v. Chicago, etc., Ry., 85 Fed. 881, holding plaintiff may sue jointly, although motive is to prevent removal; Weller v. J. B. Pace T. Co., 32 Fed. 862, arguendo.

Distinguished in Fergason v. Chicago, etc., Ry., 63 Fed. 178, holding cause of action against railroad and employees, for negligence, separable.

117 U. S. 280-282, 29 L. 898, FIDELITY INS. CO. v. HUNTINGTON.

Removal cannot be had for separable controversies, on creditor's bill to subject incumbered property to lienholders, p. 281.

Reaffirmed in Young v. Parker, 132 U. S. 270, 33 L. 353, 10 S. Ct. 76, Rosenthal v. Coates, 148 U. S. 147, 37 L. 400, 13 S. Ct. 577, and Turnbull Wagon Co. v. Linthicum Carriage Co., 80 Fed. 5. Approved in Little v. Giles, 118 U. S. 601, 30 L. 271, 7 S. Ct. 35, Graves v. Corbin, 132 U. S. 588, 33 L. 468, 10 S. Ct. 201, Torrence v. Shedd, 144 U. S. 530, 532, 36 L. 531, 12 S. Ct. 727, 728, Rumsey v. Call, 28 Fed. 771, Hax v. Caspar, 31 Fed. 500, Stanbrough v. Cook, 38 Fed. 873, 3 L. R. A. 402, Ames v. Chicago, etc., Ry., 39 Fed. 883, 884, In re San Antonia, etc., Ry., 44 Fed. 145, State v. Columbus, etc., R. Co., 48 Fed. 628, and Thurber v. Miller, 67 Fed. 375, 32 U. S. App. 209, all holding filing of separate answers by defendants jointly sued, does not create separate controversies; Brooks v. Clark, 119 U. S. 511, 30 L. 485, 7 S. Ct. 303, holding that controversy was not a separable one; Bellaire v. Baltimore, etc., R. R., 146 U. S.

112, 36 L. 341, 13 S. Ct. 17, petition of city against lessor and lessee, to condemn land, is not a separable controversy between lessee and plaintiff; Thompson v. Dixon, 28 Fed. 6, remanding cause to State court; Western Union Tel. Co. v. Brown, 32 Fed. 339, holding no separable controversy for purposes of removal exists, in action against principal and surety on bond; Anderson v. Appleton, 32 Fed. 859, holding action to establish a will was a single controversy; Woodrum v. Clay, 33 Fed. 899, when plaintiff elects to sue jointly, defendants cannot make action several; Bissell v. Canada, etc., Ry., 39 Fed. 226, holding petition failed to show a separable controversy between mortgagee and lien claimants; Welder v. Virginia, etc., Iron Co., 46 Fed. 681, holding incidental averments of indebtedness did not constitute a separable controversy; Adelbert College v. Toledo, etc., Ry., 47 Fed. 846, in suit to assert lien of certain railroad equipment bonds, trustees under mortgage cannot remove cause; Shaver v. Hardin, 30 Fed. 802, and Marsh v. Atlanta, etc., R. Co., 53 Fed. 168, holding there was no separable controversy; Sweeney v. Grand Island, etc., R. Co., 61 Fed. 6, suit to enforce mechanic's lien on railroad, was not a separable controversy between plaintiff and railroad; Garner v. Second Nat. Bank, 66 Fed. 871, where defendants are citizens of different State from plaintiff, any one of them may remove cause; In re The Jarnecke Ditch, 69 Fed. 169, 170, 171, holding cause not made separable by filing of conflicting defenses; Davis v. County Court, 88 Fed. 706, holding suit for injunctions was not separable; Alkire Grocery Co. v. Richesin, 91 Fed. 84, holding that amount claimed by judgment creditor determined jurisdiction of court; Springer v. Sheets, 115 N. C. 379, 20 S. E. 470, where complete relief cannot be had without the presence of all defendants, there is no separable controversy; State v. Adams, 9 Ohio C. C. 24, holding that there was a single cause of action; Merchants, etc., Press Co. v. Insurance Co., 151 U. S. 382, 38 L. 208, 14 S. Ct. 371, and Insurance Cos. v. Carrier Cos., 91 Tenn. 542, 19 S. W. 756, in action against carrier, there is no separable controversy as to his insurers; Weller v. J. B. Pace Tobacco Co., 32 Fed. 862, arguendo.

Distinguished in Foster v. Chesapeake, etc., Ry., 47 Fed. 378, 379, removing controversy as to priority of liens; Ferguson v. Chicago, etc., Ry., 63 Fed. 178, holding cause of action against railroad and employees, for negligence, separable.

117 U. S. 282-288, 29 L. 905, KLEINSCHMIDT v. McANDREWS.

Exception to ruling sustaining non-suit is an exception within Montana code, p. 286.

Reaffirmed in Emerson v. Eldorado Ditch Co., 18 Mont. 254, 44 Pac. 971, and McKay v. Montana Union Ry., 13 Mont. 20, 31 Pac. 1001. Approved in Lalande v. McDonald, 2 Idaho, 287, 13 Pac. 348, holding appeal will lie from judgment of non-suit.

Exceptions, bill of, may include matters previous to final judgment; e. g., testimony on which non-suit based, p. 286.

Appeal.— Montana law, limiting time for appeals, does not apply to ruling sustaining non-suit, p. 287.

Reaffirmed in Gilliam v. Black, 16 Mont. 219, 40 Pac. 304.

Fraudulent conveyances.— Bill of sale, at 9 o'clock, p. m., followed by possession, 4 a. m., is "immediate delivery," p. 288.

Cited in 97 Am. Dec. 346, note.

117 U. S. 288–312, 29 L. 880, THE CHEROKEE TRUST FUNDS.

Indians.— United States has, by treaties, recognized Cherokees as one tribe or nation, p. 295.

Approved in Mehlin v. Ice, 56 Fed. 16, 19, 12 U. S. App. 305, holding judgments of courts of Cherokee Nation entitled to same respect as those of territorial courts.

Indians.— Cherokees, in North Carolina, left their nation by refusal to remove, and are State citizens, p. 309.

Approved in United States v. Boyd, 68 Fed. 578, 580, 582, 584, entertaining suit by United States, as guardian of North Carolina Cherokees, to protect their interests; State v. Newell, 84 Me. 466, 24 Atl. 943, holding Indians, resident within State, are not "Indian Tribes;" In re Narragansett Indians, 20 R. I. 781, 40 Atl. 372, where tribe of Indians has ceased to exercise the functions of government, State may terminate its tribal existence.

Indians.— North Carolina Cherokees were entitled to no share in Cherokee annuity fund, p. 312.

117 U. S. 312–327, 29 L. 873, PHŒNIX TRUST CO. v. ERIE, ETC., TRANSPORTATION CO.

Insurance.— At common law, carrier's right of subrogation could only be asserted in insured's name, p. 321.

Approved in United States v. American Tobacco Co., 166 U. S. 474, 41 L. 1083, 17 S. Ct. 621, holding that action was properly brought in name of insured; Southern, etc., Telegraph Co. v. Watts, 66 Fed. 464, 25 U. S. App. 214, where loss has been paid, action is properly brought in name of assured.

Carrier is liable for value of goods at destination, in absence of stipulation contra, p. 322.

Approved in East Tennessee, etc., R. R. v. Kelly, 91 Tenn. 707, 30 Am. St. Rep. 906, 20 S. W. 314, 17 L. R. A. 696, and n., holding measure of damages was value of goods at place where stored.

Carriers.— Exemption from liability for negligence is void, as against public policy, p. 322.

Reaffirmed in Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 442, 32 L. 792, 9 S. Ct. 472, Woodburn v. Cincinnati, etc., Ry., 40 Fed. 734, Thomas v. Lancaster Mills, 71 Fed. 485, 34 U. S. App. 404, Trenton, etc., Ry. v. Guarantors' Liability Co., 60 N. J. L. 252, 37 Atl. 611, 44 L. R. A. 215, and Davis v. Chicago, etc., R. Co., 93 Wis. 481, 57 Am. St. Rep. 939, 67 N. W. 19, 33 L. R. A. 658. Approved in The G. R. Booth, 171 U. S. 460, 19 S. Ct. 12, holding carrier for injury from water, due to explosion; The Brantford City, 29 Fed. 396, holding that stipulations as to negligence were invalid; Voight v. Baltimore, etc., Ry., 79 Fed. 563, holding void, contract of express company exempting railroad from liability.

Insurance on ship or cargo covers loss by perils of sea, though occasioned by crew's negligence, p. 323.

Reaffirmed in California Ins. Co. v. Union Compress Co., 133 U. S. 414, 33 L. 737, 10 S. Ct. 371, Hartford Ins. Co. v. Chicago, etc., Ry., 175 U. S. 99, 20 S. Ct. 36, and The Barnstable, 84 Fed. 901. Approved in Constable v. Nat. Steamship Co., 154 U. S. 62, 38 L. 910, 14 S. Ct. 1067 (see dissenting opinion in 154 U. S. 101, 38 L. 923, 14 S. Ct. 1081), upholding stipulation that company should not be liable for fire happening after unloading; State v. Baltimore, etc., R. Co., 36 Fed. 656, upholding release by widow of her claim; The Ontario, 37 Fed. 224, holding insured could not recover for expenses in rescuing vessel from peril, brought about by negligence in navigation; Pelzer Mfg. Co. v. St. Paul, etc., Ins. Co., 41 Fed. 274, holding failure to mention fact of release of railroad, would not invalidate policy; Earnmoor, etc., Co. v. Union Ins. Co., 44 Fed. 376, holding ordinary negligence of shipmaster no defense; Liverpool, etc., Ins. Co. v. M'Neill, 89 Fed. 138, 59 U. S. App. 511, holding stipulation did not exempt from loss due to carrier's negligence; South Carolina, etc., R. Co. v. Carolina, etc., R. Co., 93 Fed. 560, construing contract for exemption from liability for negligence; Louisville Ins. Co. v. Monarch, 99 Ky. 593, 36 S. W. 566, negligence of owners and officers of boat is no defense by insurance company; Casualty Ins. Co.'s Cases, 82 Md. 576, 577, 34 Atl. 786, 38 L. R. A. 117, and n., holding carrier could insure against loss due to his own negligence; Minneapolis, etc., Ry. v. Home Ins. Co., 64 Minn. 69, 66 N. W. 135, and Kansas City, etc., R. Co. v. Southern, etc., News Co., 151 Mo. 385, 387, 74 Am. St. Rep. 552, 553, 52 S. W. 207, 208, 45 L. R. A. 384, 385, holding carrier could insure against loss due to negligence of his servants. See 36 Am. St. Rep. 852, note; Savannah, etc., Ins. Co. v. Pelzer Mfg. Co., 60 Fed. 43, note.

Insurance.— Carrier's stipulation for benefit of insurance obtained by shipper, limits insurer's rights, p. 325.

Reaffirmed in Orient Ins. Co. v. Adams, 123 U. S. 73, 31 L. 66, 8 S. Ct. 71, Wager v. Providence Ins. Co., 150 U. S. 108, 37 L. 1017, 14 S. Ct. 58, Leavitt v. Canadian Pac. Ry., 90 Me. 162, 37 Atl. 889, 38

L. R. A. 154. Approved in Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 462, 32 L. 799, 9 S. Ct. 489, holding steamship, connecting carrier, had not right to insurance; North American Ins. Co. v. Hibernia Ins. Co., 140 U. S. 573, 35 L. 521, 11 S. Ct. 911, upholding contract of reinsurance for full amount; Pennsylvania R. Co. v. Manheim Ins. Co., 56 Fed. 303, holding insurance company, and not carriers, liable; Ginn v. Ogdensburg Transit Co., 85 Fed. 986, 57 U. S. App. 406, upholding limitation in bill of lading, as to time within which action must be brought; Stephens v. Southern Pac. Co., 109 Cal. 95, 50 Am. St. Rep. 23, 41 Pac. 786, 29 L. R. A. 755, upholding covenant that lessor shall not be liable for damage by fire; Sun Ins. Office v. Merz, 63 N. J. L. 370, 43 Atl. 695, holding that contract of reinsurance was lawful; Fayerweather v. Phenix Ins. Co., 118 N. Y. 328, 23 N. E. 193, 6 L. R. A. 806, holding provision in bill cut off insurer's right of subrogation; Insurance Co. v. Easton, 73 Tex. 173, 11 S. W. 181, 3 L. R. A. 427, and n., upholding stipulation that carrier shall have benefit of insurance; Kidd v. Greenwich Ins. Co., 35 Fed. 352, and The Iniziativa, 50 Fed. 231, arguendo.

Distinguished in The Roanoke, 59 Fed. 165, 18 U. S. App. 407, holding exceptions in bill of lading did not exempt owner of vessel from a general average claim; Willock v. Pennsylvania R. R., 166 Pa. St. 191, 192, 45 Am. St. Rep. 678, 679, 30 Atl. 949, 950, 27 L. R. A. 230, 231, holding shipper could recover, though not insuring.

Insurer paying total loss, is subrogated only to assured's rights of action against third persons, p. 326.

Reaffirmed in Chicago, etc., R. R. v. Pullman Car Co., 139 U. S. 88, 35 L. 101, 11 S. Ct. 493, St. Louis, etc., Ry. v. Commercial Ins. Co., 139 U. S. 235, 35 L. 158, 11 S. Ct. 557, Leavitt v. Canadian Pac. Ry., 90 Me. 161, 165, 37 Atl. 888, 890, 38 L. R. A. 154, 155, Platt v. Richmond, etc., R. R., 108 N. Y. 364, 15 N. E. 395, and Home Mutual Ins. Co. v. O. R. & N. Co., 20 Or. 573, 23 Am. St. Rep. 154, 26 Pac. 859. Approved in The Bristol, 29 Fed. 870, restricting insurer to what owner could recover; The Young America, 30 Fed. 800, allowing insurers and libellants to share ratably in residue; Phenix Ins. Co. v. Chadbourne, 31 Fed. 301, holding receipt of insurance, taken as security, extinguished debt; Force v. Providence, etc., Ins. Co., 35 Fed. 775, holding that collection of freight did not discharge insurance pro tanto; Savannah, etc., Ins. Co. v. Pelzer Mfg. Co., 60 Fed. 42, holding covenant that railroad should not be liable to warehouseman for fire, was binding on insurer; The Burlington, 73 Fed. 261, where there is total loss, property passes to insurer without a formal abandonment; Pacific Coast, etc., Co. v. Bancroft, etc., Co., 94 Fed. 192, holding insurance company not prevented by dissolution of partnership from maintaining suit in its name against carrier; Louisville, etc., Ry. v. Nicholai, 4 Ind. App. 125, 51 Am. St. Rep. 211, 30 N. E. 426, allowing party full amount of loss sustained; Lumbermen's, etc., Ins. Co. v. Kansas, etc., R. R., 149 Mo. 180, 50

S. W. 286, holding insurance company subrogated to rights of owner; American, etc., Ins. Co. v. Chicago, etc., Ry., 74 Mo. App. 106, sub-lessee, receiving benefits of parol lease, is estopped to deny its validity; Hartford Ins. Co. v. Chicago, etc., Ry., 175 U. S. 96, 20 S. Ct. 35, and Wachusett Nat. Bank v. Sioux City Stove Works, 62 Fed. 370, arguendo.

117 U. S. 327-336, 29 L. 901, GLASGOW v. LIPSE.

Payment in Confederate money, to Virginia executor, in 1862, in good faith, was valid, p. 334.

Approved in Washington v. Opie, 145 U. S. 221, 36 L. 684, 12 S. Ct. 824, upholding payment of mortgage bonds, made in Confederate notes, and acquiesced in by heirs; Hendry v. Benlisa, 37 Fla. 622, 20 So. 802, 34 L. R. A. 285, regarding payment during Civil War in Confederate money as full settlement.

Distinguished in Opie v. Castleman, 32 Fed. 514, 515, holding acceptance of payment in Confederate money, and investing same in Confederate bonds, was illegal.

Executors or administrators could not invest in Confederate securities, p. 334.

Cited in 12 Am. St. Rep. 315, note.

117 U. S. 336-340, 29 L. 904, NEW PROVIDENCE v. HALSEY.

Courts.— Circuit Court has no jurisdiction of suit on bonds, assigned to give Federal jurisdiction, p. 338.

Reaffirmed in Bernards Twp. v. Morrison, 133 U. S. 527, 33 L. 729, 10 S. Ct. 335.

Courts.— Transferee of negotiable bonds may sue in Federal court, though transferrer could not, p. 338.

Reaffirmed in Cross v. Allen, 141 U. S. 533, 35 L. 847, 12 S. Ct. 69. Cited in 51 Am. St. Rep. 857, note.

Municipal corporations.— Bond purchaser is entitled to rely on commissioners' decision as to amount issued, p. 338.

Approved in Fulton v. Riverton, 42 Minn. 397, 44 N. W. 258, holding recital by officers conclusive upon municipality.

Costs.— To stop costs, offer to allow judgment should be in open court, after notice, p. 339.

117 U. S. 340-345, 29 L. 907, RAND v. WALKER.

Parties.— In suit for assignment of dower, in lots jointly held, though legal title in one, both are necessary, p. 344.

Approved in Weller v. J. B. Pace Tobacco Co., 32 Fed. 862, holding cause being inseparable, not removable; Watkins v. Bryant, 91

Cal. 504, 27 Pac. 777, holding decree annulling deed of trust, not void as to creditors not made parties.

Distinguished in Thompson v. Dixon, 28 Fed. 6, remanding cause.

Removal of separable controversy is confined to parties "actually interested in such controversy," p. 345.

Approved in Merchants, etc., Press Co. v. North America Ins. Co., 151 U. S. 387, 38 L. 205, 14 S. Ct. 373, holding there was no right of removal on part of plaintiffs.

Courts.— Bill alleging Federal judgment ineffective as to one not party, raises no Federal question, p. 345.

117 U. S. 346-347, 29 L. 912, DUNPHY v. SULLIVAN.

Adverse possession for three years gave title in Montana, before 1877, p. 346.

Not cited.

117 U. S. 347-348, 29 L. 912, CORE v. VINAL.

Removable case, because of separable controversy, cannot arise on general issue, pleaded by defendants in tort action, p. 348.

Reaffirmed in Little v. Giles, 118 U. S. 601, 30 L. 271, 7 S. Ct. 35. Approved in Brooks v. Clark, 119 U. S. 511, 30 L. 485, 7 S. Ct. 303, holding that controversy was not a separable one; Weller v. J. B. Pace Tobacco Co., 32 Fed. 862, arguendo.

117 U. S. 348-355, 29 L. 909, MACKIN v. UNITED STATES.

Indictment.— Crime punishable in penitentiary is infamous, requiring presentment by grand jury, p. 354.

Reaffirmed in United States v. De Walt, 128 U. S. 393, 32 L. 486, 9 S. Ct. 111, In re Claasen, 140 U. S. 204, 35 L. 411, 11 S. Ct. 737, United States v. Johannesen, 35 Fed. 412, Ex parte M'Clusky, 40 Fed. 72, 73, 74, and United States v. Smith, 40 Fed. 757, 758, 759, 760. Approved in Ex parte Bain, 121 U. S. 13, 30 L. 853, 7 S. Ct. 787, holding falsifying of reports by bank cashier, an infamous crime; Parkinson v. United States, 121 U. S. 282, 30 L. 960, 7 S. Ct. 896, holding offenders against §§ 5511 and 5512, R. S., must be prosecuted by indictment; Medley, Petitioner, 134 U. S. 169, 33 L. 839, 10 S. Ct. 387, holding statute adding to punishment of death, solitary confinement until execution, is ex post facto; In re Mills, 135 U. S. 267, 34 L. 109, 10 S. Ct. 763, holding "punishable by imprisonment at hard labor," in act of 1889, embraces offenses which may, in the discretion of court, be punishable by imprisonment in a penitentiary; In re Bonner, 151 U. S. 257, 38 L. 152, 14 S. Ct. 326, after person is convicted and sentenced in Federal court, judge cannot adjudge that imprisonment be in State penitentiary; Bannon v. United States, 156 U. S. 466, 467, 39 L. 495, 496, 15 S. Ct. 468, 469,

holding conspiracy to commit an offense against United States is not a felony; Wong Wing v. United States, 163 U. S. 234, 41 L. 142, 16 S. Ct. 979, act subjecting aliens coming to this country in spite of exclusion act to infamous punishment, must provide for a judicial trial; United States v. Harmon, 34 Fed. 873, holding bad, indictment for mailing of obscene matter; Ex parte Brown, 40 Fed. 83, an assault with an intent to kill is an infamous offense; United States v. Cobb, 43 Fed. 571, 573, one sentenced for less than a year, cannot be imprisoned in State prison; United States v. Sutton, 47 Fed. 130, declaring adultery to be an infamous crime; Ex parte Van Vranken, 47 Fed. 889, holding punishment "at hard labor" could only be inflicted by naval court-martial in cases punishable with death; United States v. Wong Dep Ken, 57 Fed. 211, holding imprisonment at hard labor renders crime "infamous;" United States v. Cadwallader, 59 Fed. 679, holding that statute defines three separate crimes; Bright v. Patton, 5 Mack. 534, 60 Am. Rep. 399, 400, officer may not arrest without warrant for misdemeanor after offense; Stokes v. United States, 60 Fed. 598, 23 U. S. App. 289, holding conviction for using mails to defraud, reviewable in Supreme Court; Gardes v. United States, 87 Fed. 185, holding, where statute provides imprisonment, "at hard labor" should not be added to sentence; Crum v. State, 148 Ind. 409, 47 N. E. 836, declaring larceny to be an infamous crime; Butler v. Wentworth, 84 Me. 32, 24 Atl. 458, 17 L. R. A. 766, and n., rendering imperative, a sentence of imprisonment, makes crime infamous; In re Kirby, 84 Fed. 607, disbarring attorney for offense for which Congress has provided infamous punishment, though not a felony; Harris v. Terry, 98 N. C. 134, 3 S. E. 746, charging postmaster with breaking mail is actionable as slander; dissenting opinion in Rosen v. United States, 161 U. S. 45, 40 L. 611, 16 S. Ct. 481, majority upholding indictment for mailing obscene matter; United States v. Van Leuven, 62 Fed. 68, arguendo.

117 U. S. 355–363, 29 L. 920, UNION PAC. RY. v. UNITED STATES.

Post-office.— Court of Claims finding as to amount due Union Pacific railway for mails, held sufficient, p. 360.

Railroads.— Omaha bridge is part of Union Pacific railway, for purpose of computing government transportation rates, p. 362.

Approved in Union Pac. Ry. v. Chicago, etc., Ry., 51 Fed. 323, 10 U. S. App. 98, upholding contract to let another company into the joint use of a bridge.

Railroad service in carrying local passenger, is not same as through passenger between same points, p. 363.

Reaffirmed in Texas Pac. Ry. v. Interstate Commerce Commission, 162 U. S. 231, 40 L. 951, 16 S. Ct. 680, and Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 632, 2 L. R. A. 326.

Approved in Ex parte Kœhler, 31 Fed. 320, carrier may reduce rate on long haul, under interstate commerce act; Ex parte Kœhler, 12 Sawy. 453, 454, 31 Fed. 319, 320, that there is competition to or from a particular place, justifies a carrier to charge less for a long than a short haul; Interstate Commerce Commission v. Baltimore, etc., R. Co., 43 Fed. 50, giving of party-rate tickets is not an unjust discrimination; Cleveland, etc., Ry. v. Closser, 126 Ind. 353, 22 Am. St. Rep. 597, 26 N. E. 161, 9 L. R. A. 757, and n., holding contract giving special rate to shipper, and providing for drawback, is not in itself illegal.

117 U. S. 363-365, 29 L. 920, STURGES v. UNITED STATES.

Taxation.— Repeal of legacy tax exempts legacy to which right had not accrued, p. 365.

Not cited.

117 U. S. 365-367, 29 L. 924, PHŒNIX LIFE INS. CO. v. WALRATH.

Removal.— Right to, lost by failure to act at first trial term, is not restored by amendment of pleadings, p. 366.

Approved in Stix Co. v. Keith, 90 Ala. 125, 7 So. 424, holding right of removal attaches on filing of a sufficient petition.

117 U. S. 367-370, 29 L. 923, EX PARTE PHŒNIX INS. CO.

Appeal.— Decrees, distinct as to parties, causes of action, or liabilities, cannot be joined to give appellate amount, p. 369.

Approved in Gibson v. Shufeldt, 122 U. S. 38, 30 L. 1087, 7 S. Ct. 1071, and Wheeler v. Cloyd, 134 U. S. 547, 33 L. 1012, 10 S. Ct. 604, in suit on distinct demands, defendant can appeal to Supreme Court only on those in which more than $5,000 is decreed; Walter v. Northeastern R. R., 147 U. S. 374, 37 L. 208, 13 S. Ct. 350, holding Circuit Court without jurisdiction of bill to enjoin collection of taxes upon distinct assessments, each less than $2,000; Hosford v. Germania Fire Ins. Co., 127 U. S. 402, 32 L. 197, 8 S. Ct. 1201, arguendo.

117 U. S. 370-373, 29 L. 913, VAN RISWICK v. SPALDING.

Fraudulent conveyances.— Action of mortgagee, taking security in satisfaction, and conveying to debtor's children, upheld, p. 373.

Not cited.

117 U. S. 373-378, 29 L. 950, YALE LOCK CO. v. SARGENT.

Patents.— Where essential feature of lock not used, or equivalent, held no infringement, p. 378.

Approved in Dryfoos v. Wiese, 124 U. S. 37, 31 L. 364, 8 S. Ct. 357, holding patent must be limited to mechanism described and

claimed; Forncrook v. Root, 127 U. S. 181, 32 L. 99, 8 S. Ct. 1249, holding Forncrook patent for "improvement in sectional honey-frames" invalid for want of novelty; Smith v. Putnam, 45 Fed. 203, holding closet with two jets not infringed by closet with one jet; Reece, etc., Mach. Co. v. Globe, etc., Mach. Co., 61 Fed. 963, 21 U. S. App. 244, holding Reece patent for improvements in button-hole machines not infringed; Eagle, etc., Cremation Co. v. Elwood, 73 Fed. 485, to be equivalents there must be an identity of functions; Campbell, etc., Mfg. Co. v. Duplex, etc., Press Co., 86 Fed. 334, holding specifications cannot be referred to, to expand claim.

Distinguished generally in Everest v. Buffalo, etc., Oil Co., 31 Fed. 746.

117 U. S. 379-387, 29 L. 924, KERR v. SOUTH PARK COMMISSIONERS.

Appeal.— After term when decree entered, Circuit Court may permit evidence and charge to jury to be put in record, p. 383.

Approved in Wilson v. Riddle, 123 U. S. 615, 31 L. 283, 8 S. Ct. 259, what issues should be submitted to jury is within discretion of court.

Equity decree, reciting that verdict on law side had been set aside and second rendered, affirms such action, p. 384.

Eminent domain.— On park condemnation proceedings, evidence of adjoining sale thereafter, not evidence of prior value, p. 385.

Approved in Shoemaker v. United States, 147 U. S. 297, 305, 37 L. 184, 187, 13 S. Ct. 390, 393, in determining value of land, appraisers should exercise their own judgment; San Diego Land, etc., Co. v. Neale, 78 Cal. 75, 20 Pac. 378, enhancement of value of adjoining lands could not be considered.

117 U. S. 388-389, 29 L. 927, KERR v. SOUTH PARK COMMISSIONERS.

Adjudged in conformity with preceding case, q. v.

117 U. S. 389-401, 29 L. 915, FULKERSON v. HOLMES.

Evidence.— Deed sixty years old, produced by grantee's heirs, was properly admitted, p. 397.

Evidence.— Witness as to pedigree must be shown a relation of family by independent proof, p. 397.

Approved in Flora v. Anderson, 75 Fed. 234, holding rule is limited to declarations by relatives.

Evidence.— Declaration by grantor in ancient deed, that he was only heir, etc., is admissible, p. 399.

Approved in De Leon v. McMurray, 5 Tex. Civ. App. 283, 23 S. W. 1069, admitting declarations as to pedigree; Harman v. Stearns, 95

Va. 63, 27 S. E. 603, accepting recital in deed that grantor was a widow.

117 U. S. 401–405, 29 L. 914, HOYT v. RUSSELL.

Evidence.— Court will judicially notice the extent of its jurisdiction, p. 404.

Reaffirmed in Jones v. United States, 137 U. S. 214, 34 L. 696, 11 S. Ct. 84. Approved in Mills v. Green, 159 U. S. 658, 40 L. 295, 16 S. Ct. 135, judicially noticing a State constitutional convention; The James G. Swan, 50 Fed. 111, condemning vessel killing fur seals in Alaska waters; Kansas City, etc., R. R. v. Burge, 40 Kan. 737, 21 Pac. 589, judicially noticing county boundaries. See 89 Am. Dec. 679, 696, note.

Evidence.— Court should judicially notice whether certain act is in force at certain time, not require proof, p. 405.

Approved in United States v. Williams, 6 Mont. 391, 12 Pac. 856, taking judicial notice of regulations of secretary of interior as to cutting of timber. See 89 Am. Dec. 665, note.

Mines.— Query, whether after act of 1872, territory could add to requirements of notice of location, p. 405.

Approved in O'Donnell v. Glenn, 8 Mont. 255, 19 Pac. 305, upholding statute requiring declaratory statement to mining claim to be sworn to.

117 U. S. 406–410, 29 L. 928, SIOUX CITY R. R. v. CHICAGO RY.

Public lands.— Title to railroad grant relates back to date of act, but superior title might arise in lieu lands, p. 410.

Reaffirmed in Donahue v. Lake Superior Canal, etc., Co., 155 U. S. 387, 39 L. 195, 15 S. Ct. 116, and Sioux City, etc., R. R. v. United States, 159 U. S. 365, 367, 40 L. 182, 183, 16 S. Ct. 23, 24. Approved in Wisconsin R. R. v. Price County, 133 U. S. 513, 33 L. 695, 10 S. Ct. 347, until secretary of interior approves selection of indemnity lands, no title passes; Chicago, etc., Ry. v. United States, 159 U. S. 374, 375, 40 L. 185, 186, 16 S. Ct. 27, holding company estopped by decree in cited case; United States v. Southern Pac. R. R., 146 U. S. 595, 36 L. 1097, 13 S. Ct. 156, and Southern Pac. R. R. v. United States, 168 U. S. 42, 42 L. 374, 18 S. Ct. 25, upon acceptance of maps, rights of company in lands attached as of date of act; United States v. Southern Pac. R. Co., 14 Sawy. 68, 71, 39 Fed. 138, 140, holding company not having complied with conditions of grant, had no right to indemnity lands; United States v. Sioux City, etc., R. Co., 43 Fed. 619, 621, holding road was only entitled to such part of grant as was proportioned to part of road built; Wisconsin, etc., R. Co. v. Forsythe, 43 Fed. 888, holding no title had been acquired to indemnity lands, since they had never been selected; United States

v. Sioux City, etc., Ry., 46 Fed. 503, 504, where railroad failed to earn right to overlapping land, it reverted to United States; Southern Pac. R. Co. v. Stanley, 49 Fed. 264, holding full title passed at time of filing map of definite location; United States v. Winona, etc., R. Co., 67 Fed. 967, 968, 32 U. S. App. 272, considering exceptions from lands granted in indemnity limits; St. Paul, etc., Ry. v. Sage, 71 Fed. 46, 36 U. S. App. 340, holding lands within indemnity limits are not reserved until selected or withdrawn; McCarver v. Herzberg, 120 Ala. 531, 25 So. 4, holding grant was of equal undivided shares for benefit of each railroad, regardless of priority of location; Western Land Co. v. Hamblin, 79 Iowa, 546, 44 N. W. 808, holding first location, having failed to meet requirements of Congress, was not conclusive; Bowne v. Bilsland, 83 Iowa, 167, 49 N. W. 162, road not having been completed, lands reverted to United States; Sioux City, etc., Ry. v. Countryman, 83 Iowa, 180, 183, 49 N. W. 75, holding plaintiff could not claim land on uncompleted part of road as indemnity lands; United States v. Missouri, etc., Ry., 141 U. S. 375, 35 L. 771, 12 S. Ct. 19, State v. Sage, 75 Minn. 454, 78 N. W. 16, and Jackson v. La Moure County, 1 N. Dak. 240, 46 N. W. 450, holding title to Northern Pacific indemnity lands did not pass until selection by company, with approval of secretary of interior; Northern Pac. R. R. v. Barnes, 2 N. Dak. 365, 51 N. W. 403, considering legislative power of taxation.

117 U. S. 411-415, 29 L. 960, KNAPP v. HOMEOPATHIC, ETC., LIFE INS. CO.

Insurance.— Failure to elect upon courses prescribed upon default in premium, held to cancel life policy, p. 414.

Approved in Cravens v. New York, etc., Ins. Co., 148 Mo. 611, 71 Am. St. Rep. 646, 50 S. W. 526, it was a condition precedent to holder's right of a paid-up policy, that demand be made within six months; Schneider v. United States Life Ins. Co., 128 N. Y. 114, 20 Am. St. Rep. 729, 25 N. E. 322, holding failure to pay premium rendered policy void.

117 U. S. 415-419, 29 L. 919, MARSHALL v. HUBBARD.

Fraud.— False representations, to be actionable, must be intentional, and have caused injury, p. 418.

Approved in First Nat. Bank v. Marshall, etc., Bank, 83 Fed. 735, 54 U. S. App. 527, holding bank not estopped by representation of its officer; Thorp v. Smith, 18 Wash. 279, 51 Pac. 381, party reciting false consideration, bill thereby enabling agent to deceive principal, is not liable to latter.

Trial.— Instruction for plaintiff is proper, if evidence contra, with all inferences, is insufficient, p. 419.

Reaffirmed in Robertson v. Edelhoff, 132 U. S. 626, 33 L. 451, 10 S. Ct. 190, Au v. New York, etc., R. Co., 29 Fed. 83, Dwyer v. St. Louis, etc., R. Co., 52 Fed. 88, Colorado, etc., Min. Co. v. Turck, 54 Fed. 266, 12 U. S. App. 85, Sullivan v. Colby, 71 Fed. 466, 34 U. S. App. 432, Travelers' Ins. Co. v. Randolph, 78 Fed. 760, 47 U. S. App. 260, and Knapp v. Sioux Falls Nat. Bank, 5 Dak. 396, 40 N. W. 590. Approved in Smith v. United States, 151 U. S. 55, 38 L. 70, 14 S. Ct. 235, holding testimony offered by government had no legitimate tendency to prove murdered man was not an Indian; Sparf v. United States, 156 U. S. 100, 101, 39 L. 360, 361, 15 S. Ct. 292, 293, holding court could not peremptorily order jury to find defendant guilty of offense charged; Rosen v. United States, 161 U. S. 43, 40 L. 610, 16 S. Ct. 439, instructing jury as to principles applicable to the case made by the evidence; Southern Pac. Co. v. Johnson, 69 Fed. 566, 44 U. S. App. 1, holding evidence insufficient to establish negligence; United States v. Kuhl, 85 Fed. 627, refusing to submit case to jury where, upon a finding of guilty, a new trial would be granted; Marshall v. Harney Peak, etc., Mfg. Co., 1 S. Dak. 357, 47 N. W. 292, on application to take case from jury, evidence of opposite party is assumed to be true.

117 U. S. 419–430, 29 L. 930, LITTLEFIELD v. IMPROVEMENT FUND TRUSTEES.

States.— Ownership of certain Florida improvement bonds awarded to the trustees, pp. 420–430.

Cited in Union Trust Co. v. Southern Nav. Co., 130 U. S. 567, 32 L. 1043, 9 S. Ct. 607, arguendo.

117 U. S. 430–433, 29 L. 962, STONE v. SOUTH CAROLINA.

Removal.— State court is not bound to surrender jurisdiction until case for removal is made out, p. 432.

Reaffirmed in Burlington, etc., Ry. v. Dunn, 122 U. S. 516, 30 L. 1160, 7 S. Ct. 1264, Springer v. Howes, 69 Fed. 850, Southern Ry. v. Hudgins, 107 Ga. 337, 33 S. E. 443, Duncan v. St. Louis, etc., R. R., 49 La. Ann. 1702, 22 So. 924, Craven v. Turner, 82 Me. 336, 19 Atl. 865, and Baird v. Richmond, etc., R. R., 113 N. C. 608, 18 S. E. 700. Approved in Carson v. Hyatt, 118 U. S. 287, 30 L. 169, 6 S. Ct. 1054, holding question was one of fact to be determined by Circuit Court; Crehore v. Ohio, etc., Ry., 131 U. S. 243, 244, 33 L. 145, 9 S. Ct. 693, holding fatal defect in allegation of diverse citizenship cannot be corrected in Circuit Court; Winnemans v. Edington, 27 Fed. 326, if State court does not grant or refuse an order for removal of cause, no amendments to petition will be allowed; Smith v. Chicago, etc., Ry., 30 Fed. 723, denying motion to remand; Shedd v. Fuller, 36 Fed. 609, remanding cause where petition and bond was filed with clerk; Freeman v. Butler, 39 Fed. 3, holding Federal

court did not obtain jurisdiction; Brown v. Murray, etc., Co., 43 Fed. 615, omission to ask State court to act on petition is no ground for remanding; Williams v. Massachusetts Ben. Assn., 47 Fed. 534, petitioning judge in vacation will not effect removal; Tod v. Cleveland, etc., Ry., 65 Fed. 148, 22 U. S. App. 707, holding petition for removal on account of local prejudice must show that more than $2,000 is involved; Monroe v. Williamson, 81 Fed. 984, 985, 986, 987, where petition showed a cause removable, jurisdiction of State court ceased; Dexter v. Sayward, 84 Fed. 299, holding Circuit Court cannot declare judgment of Circuit Court of Appeals void in a collateral action, though record fails to show facts necessary to warrant removal; Knott v. McGilvray, 124 Cal. 131, 56 Pac. 790, holding petition must disclose the right to remove the suit; Chambers v. Illinois, etc., R. R., 104 Iowa, 239, 73 N. W. 598, State court cannot dismiss cause, after filing of proper petition for removal; Roberts v. Chicago, etc., Ry., 48 Minn. 529, 531, 51 N. W. 479, 480, defendant filing petition for removal should direct attention of court to same; Stuart v. Bank of Staplehurst, 57 Neb. 576, 78 N. W. 299, State court should suspend action pending motion to remand in Circuit Court; Hickman v. Missouri, etc., Ry., 151 Mo. 653, 52 S. W. 353, where motion to remove is overruled, defendant cannot delay by protesting against jurisdiction; Winslow v. Collins, 110 N. C. 121, 14 S. E. 513, upon filing of bond and petition, jurisdiction of State court ceases; Larson v. Cox, 39 Kan. 632, 18 Pac. 893, Lawson v. Richmond, etc., R. R., 112 N. C. 400, 17 S. E. 173, and Howard v. Southern Ry., 122 N. C. 952, 29 S. E. 780, holding filing of petition does not, ipso facto, dissolve State court's jurisdiction; State v. Barnes, 5 N. Dak. 357, 65 N. W. 691, State court's jurisdiction not divested by petition filed too late; Miller v. Sunde, 1 N. Dak. 3, 44 N. W. 302, under omnibus bill, filing of request in open court destroys State court's jurisdiction; Koshland v. National Ins. Co., 31 Or. 208, 49 Pac. 846, holding State court can decide on sufficiency of petition; Marshall v. Holmes, 141 U. S. 595, 35 L. 872, 12 S. Ct. 63, Wills v. Baltimore, etc., R. Co., 65 Fed. 532, Mecke v. Valley Town Mineral Co., 89 Fed. 211, Stix v. Keith, 90 Ala. 124, 7 So. 424, and North America, etc., Trust Co. v. Colonial, etc., Mtge. Co., 3 S. Dak. 594, 54 N. W. 661 (see dissenting opinion in 3 S. Dak. 606, 607, 54 N. W. 666), holding filing of petition and bond arrests jurisdiction of State court; Railway Cos. v. Hendricks, 88 Tenn. 714, 13 S. W. 697, mere filing of proper petition does not deprive State court of its jurisdiction; Texas, etc., Ry. v. Bloon, 85 Tex. 284, 20 S. W. 135, holding that petition for removal should be presented to State court; Guarantee Co. v. National Bank, 95 Va. 486, 28 S. E. 911, holding insufficient petition stating that petitioner is an alien corporation and its co-defendant a citizen of another State; Pullman's, etc., Car Co. v. Washburn, 66 Fed. 795, and Lake Street, etc., R. Co. v. Farmers, etc., Trust Co., 77 Fed. 773, 46 U. S. App. 630, arguendo.

Removal.— Issues of fact on removal petition are for Circuit Court; sufficiency of record to effect removal decided adversely by State court is reviewable by Supreme Court, p. 432.

Reaffirmed in Burlington, etc., Ry. v. Dunn, 122 U. S. 515, 30 L. 1160, 7 S. Ct. 1263, Missouri, etc., Ry. v. Fitzgerald, 160 U. S. 582, 40 L. 542, 16 S. Ct. 396, Steiner v. Mathewson Co., 77 Ga. 659, State v. Barnes, 5 N. Dak. 357, 65 N. W. 691, Western Union Tel. Co. v. Griffith, 104 Ga. 57, 30 S. E. 420, and Craven v. Turner, 82 Me. 387, 19 Atl. 865. Approved in Carson v. Hyatt, 118 U. S. 287, 30 L. 169, 6 S. Ct. 1054, holding question was one of fact to be determined by Circuit Court; Walker v. Oneil, 38 Fed. 375, holding decision of State court as right to removal is not conclusive; Amy v. Manning, 144 Mass. 154, 10 N. E. 739, holding that petition was filed too late, Howard v. Southern Ry., 122 N. C. 954, 29 S. E. 781, holding filing of petition does not, ipso facto, dissolve State court's jurisdiction; Talbott v. Planter Oil Co., 12 Tex. Civ. App. 50, 33 S. W. 746, refusal to order removal will not be reviewed where Federal court remanded case; Northern Pac. R. Co. v. McMullen, 86 Wis. 507, 56 N. W. 631, decision of Circuit Court that case is removable is conclusive; dissenting opinion in North America, etc., Trust Co. v. Colonial, etc., Mtge. Co., 3 S. Dak. 604, 54 N. W. 665, majority holding filing of petition and bond arrests jurisdiction of State court.

Removal.— Suit between a State and citizens is not removable on ground of citizenship, p. 433.

Reaffirmed in Postal, etc., Cable Co. v. Alabama, 155 U. S. 487, 39 L. 233, 15 S. Ct. 194, Grinnell v. Johnson, 28 Fed. 4, Ferguson v. Ross, 38 Fed. 162, 3 L. R. A. 323, and n., Texas v. Day, etc., Cattle Co., 49 Fed. 597, Indiana v. Tolleston Club, 53 Fed. 19, Indiana v. Alleghany Oil Co., 85 Fed. 872, Arkansas v. Kansas, etc., Coal Co., 96 Fed. 355, Hickman v. Missouri, etc., Ry., 151 Mo. 656, 52 S. W. 354, State v. Adams, 9 Ohio C. C. 24, and State v. Port Royal, etc., Ry., 45 S. C. 434, 23 S. E. 366. Approved in Carson v. Dunham, 121 U. S. 426, 30 L. 993, 7 S. Ct. 1032, holding petition may be amended in Circuit Court; Mathis v. Southern Ry., 53 S. C. 258, 31 S. E. 244, arguendo.

Distinguished in South Carolina v. Port Royal, etc., Ry., 56 Fed. 334, where case involved a Federal question.

Removal cannot be had of suit for money received by partners, unless all defendants can unite in petition, p. 433.

117 U. S. 434–481, 29 L. 963, UNION TRUST CO. v. ILLINOIS MIDLAND CO.

Railroad receiver's certificates, issued for necessary repairs, have priority over bonded debt, p. 454.

Reaffirmed in McIlhenny v. Binz, 80 Tex. 15, 26 Am. St. Rep. 721, 13 S. W. 661. Approved in Union Trust Co. v. Morrison, 125 U. S.

612, 31 L. 831, 8 S. Ct. 1010, holding claimant could pursue earnings which had been appropriated to the purchase of property; Kneeland v. Luce, 141 U. S. 509, 35 L. 836, 12 S. Ct. 38, holding issue of certificates to pay sub-contractors was proper; Fidelity, etc., Safe-Deposit Co. v. Roanoke Iron Co., 68 Fed. 624, holding equity can make receiver's certificates a paramount lien only if they are for necessaries; Jones v. Central Trust Co., 73 Fed. 573, 48 U. S. App. 224, discharging out of the property obligations incurred by third persons to preserve it; California, etc., Trust Co. v. Yakima Inv. Co., 82 Fed. 544, treating claims for services in constructing canal as cost of original construction; New York, etc., Indemnity Co. v. Tacoma, etc., Motor Co., 83 Fed. 367, 48 U. S. App. 673, giving claim for cable priority; Vilas v. Page, 106 N. Y. 452, 13 N. E. 746, upholding order authorising the creation of debts for rolling-stock; Fidelity, etc., Deposit Co. v. Shenandoah R. R., 33 W. Va. 788, 11 S. E. 68, arguendo. See 54 Am. St. Rep. 403, 422, note.

Distinguished in Farmers, etc., Trust Co. v. Grape Creek Coal Co., 50 Fed. 482, 16 L. R. A. 604, and n., holding receiver could not issue certificates in order to operate coal mine; Felton v. Cincinnati, 95 Fed. 342, holding court not authorized to charge to lessor bridge built by receiver.

Railroads.— Court's power to order necessary repairs by receiver is not dependent on consent or notice, p. 455.

Reaffirmed in Karn v. Rorer Iron Co., 86 Va. 759, 11 S. E. 433. Approved in McIlhenny v. Binz, 80 Tex. 18, 26 Am. St. Rep. 726, 13 S. W. 663, holding court time limit could not preclude court from adjusting priority of claims.

Railroads.— Purchasers of receiver's certificates, issued without prior notice, take subject to court's final action, which is equivalent to prior notice, p. 456.

Approved in Virginia, etc., Coal Co. v. Central R. R., 170 U. S. 365, 42 L. 1072, 18 S. Ct. 661, holding party furnishing necessary supplies entitled to a priority; Mercantile Trust Co. v. Kanawha, etc., Ry., 50 Fed. 876, 877, lien of receiver's certificates is not affected by fact that he misappropriates the funds; Mercantile Trust Co. v. Kanawha, etc., Ry., 58 Fed. 17, 16 U. S. App. 37, holding validity of security of certificates may be prejudicially affected; Gordon v. Newman, 62 Fed. 689, 23 U. S. App. 660, holding enforcement of decree could not be restrained by holders of receiver's certificates claiming priority; Laughlin v. United States, etc., Stock Co., 64 Fed. 26, holders of receiver's certificates, issued to creditors for ordinary debts, were entitled to no priority; Raht v. Attrill, 106 N. Y. 434, 60 Am. Rep. 460, 13 N. E. 284, holding debts created for money used in improvements do not displace lien of mortgagees. See 71 Am. St. Rep. 380, note.

Distinguished in Third Street, etc., Ry. v. Lewis, 79 Fed. 198, 48 U. S. App. 278, holding lien of mortgage was not subordinated to lien of receiver's certificates.

Railroads.— Bill by general creditor and majority stockholders, praying receiver, etc., enables equity to administer, p. 459.

Approved in Sage v. Memphis, etc., R. R., 125 U. S. 375, 31 L. 698, 8 S. Ct. 891, holding bill sufficient to justify equity in appointing a receiver; Brown v. Lake Superior Iron Co., 134 U. S. 534, 33 L. 1024, 10 S. Ct. 605, refusing relief because of laches; Joy v. St. Louis, 138 U. S. 47, 34 L. 858, 11 S. Ct. 257, rights of public in respect to railroads should be fostered by courts; Ames v. Union Pac. Ry., 74 Fed. 345, charging operating expenses anterior to appointment of receiver upon the property; Moore v. Southern, etc., Timber Co., 83 Fed. 400, holding bill gave court jurisdiction.

Railroad receiver's certificates to pay tax liens are entitled to priority, p. 461.

Approved in Central Trust Co. v. New York, etc., R. R., 110 N. Y. 258, 18 N. E. 96, 1 L. R. A. 264, holding claim of State for payment of tax a paramount one; Wise v. Wise Co., 153 N. Y. 510, 47 N. E. 769, holding attachment cannot be displaced by subsequent claim for taxes. See 54 Am. St. Rep. 421, note.

Railroads.— Purchasers of certificates from receiver are not bound to see to application of proceeds, p. 461.

Railroads.— Holders of receiver's certificates, buying at allowed discount, are entitled to face value, p. 462.

Railroads.— Receiver's certificates, going to replace income spent for betterments, have no priority, p. 462.

Reaffirmed in Virginia, etc., Coal Co. v. Central R. R., 170 U. S. 370, 42 L. 1073, 18 S. Ct. 663. Cited in 54 Am. St. Rep. 418, note.

Railroads.— Want of trustees' consent through negligence, held not to prevent prior lien of receiver's certificates, p. 463.

Distinguished in Central Transp. Co. v. Pullman's Car Co., 139 U. S. 56, 35 L. 67, 11 S. Ct. 487, where contract was unlawful.

Railroads.— Operating expenses, payable primarily out of income, may be chargeable against corpus, after notice, p. 465.

Reaffirmed in Mercantile Trust Co. v. Kanawha, etc., Ry., 58 Fed. 15, 16 U. S. App. 37, and Thornton v. Highland, etc., R. R., 94 Ala. 357, 10 So. 443. Approved in St. Louis, etc., R. R. v. Cleveland, etc., Ry., 125 U. S. 673, 31 L. 837, 8 S. Ct. 1017, holding claimant had no equitable right to priority of payment; Morgan's Co. v. Texas, etc., Ry., 137 U. S. 198, 34 L. 634, 11 S. Ct. 69, mere fact that money was loaned to keep railroad going, does not give priority; Quincy, etc., R. R. v. Humphreys, 145 U. S. 103, 36 L. 639, 12 S. Ct. 794,

holding no equities existed which called upon court to divert proceeds of sale; Farmers, etc., Trust Co. v. Vicksburg, etc., R. Co., 33 Fed. 783, charging current expenses on income, in preference to mortgage; Thomas v. Peoria, etc., Ry., 36 Fed. 818, where current receipts are expended for improvements, a claim of rent may be charged on corpus; Farmers, etc., Trust Co. v. Kansas City, etc., R. Co., 53 Fed. 189, authority to give priority is not limited to cases where there has been a diversion of income; Bosworth v. Terminal R. Assn., 80 Fed. 971, 53 U. S. App. 305, holding receiver had no right to appeal from decree awarding preference to claim for supplies; New York, etc., Indemnity Co. v. Tacoma, etc., Motor Co., 83 Fed. 369, 48 U. S. App. 677, giving claim for cable priority; Anderson v. Condict, 93 Fed. 353, charging claim for personal injuries on corpus; International Trust Co. v. Townsend, etc., Contr. Co., 95 Fed. 861, holding court could not displace lien on corpus in favor of supply creditors; Bosworth v. Terminal, etc., Assn., 174 U. S. 185, 19 S. Ct. 626, arguendo. See 54 Am. St. Rep. 431, note.

Railroads.— Wages six months prior to receivership, held entitled to priority, p. 464.

Reaffirmed in Drennen v. Mercantile Trust, etc., Co., 115 Ala. 606, 67 Am. St. Rep. 77, 23 So. 166, 39 L. R. A. 625, Rutherford v. Pennsylvania, etc., R. R., 178 Pa. St. 43, 35 Atl. 927, and Litzenberger v. Jarvis Co., 8 Utah, 19, 28 Pac. 872. Approved in Seventh Nat. Bank v. Shenandoah Iron Co., 35 Fed. 438, holding liens of laborers of iron manufacturing company not entitled to priority; Thomas v. Peoria, etc., Ry., 36 Fed. 819, 820, refusing to charge claims accruing more than six months before receivership; American, etc., Trust Co. v. East, etc., R. Co., 46 Fed. 108, holding claim for original construction not entitled to priority; Finance Co. v. Charleston, etc., R. Co., 62 Fed. 208, 8 U. S. App. 547, paying running expenses out of corpus; St. Louis Trust Co. v. Riley, 70 Fed. 35, 37, 36 U. S. App. 100, 30 L. R. A. 458, 459, refusing to allow claim for personal injuries suffered prior to appointment of receiver; Wood v. New York, etc., R. Co., 70 Fed. 743, paying claim for coupling links procured prior to appointment of receiver; Ames v. Union Pac. Ry., 74 Fed. 345, charging operating expenses, anterior to appointment of receiver, on property; Cleveland, etc., Ry. v. Knickerbocker Trust Co., 86 Fed. 77, allowing claim, though more than six months had elapsed between doing of work and appointment of receiver; Raht v. Attrill, 106 N. Y. 436, 60 Am. Rep. 462, 13 N. E. 286, that company was owing debts for labor created no equity for their payment. See 54 Am. St. Rep. 409, note.

Railroads.— Order appointing receiver, held not to exclude priority of labor claims, p. 465.

Cited in 54 Am. St. Rep. 404, note.

Railroads.— Decree apportioning receivership indebtedness of three roads in proportion to length, upheld, p. 468.

Approved in Compton v. Jesup, 68 Fed. 327, 31 U. S. App. 486, it is public policy to treat a railroad as an entirety; Farmers' Loan Co. v. Oregon Pac. R. R., 31 Or. 246, 65 Am. St. Rep. 824, 48 Pac. 707, 38 L. R. A. 426, holding railroad mortgagee not liable for debts incurred by receiver. See 54 Am. St. Rep. 404, note.

Estoppel.— Executed sale of insolvent road to another cannot be questioned by its bondholders long acquiescing in administration under one receiver, p. 468.

Approved in Brown v. Lake Superior Iron Co., 134 U. S. 536, 33 L. 1025, 10 S. Ct. 606, good faith and early assertion of rights are essential on part of defendant in equity; Central Trans. Co. v. Pullman's Car Co., 139 U. S. 56, 35 L. 67, 11 S. Ct. 487, where contract was unlawful; Pullman's Car Co. v. Central Transp. Co., 139 U. S. 63, 35 L. 69, 11 S. Ct. 489, and St. Louis R. R. v. Terre Haute R. R., 145 U. S. 409, 36 L. 754, 12 S. Ct. 958, both refusing to set aside ultra vires lease acquiesced in many years; Central Trust Co. v. Marietta, etc., R. R., 75 Fed. 216, 41 U. S. App. 369 (see dissenting opinion in S. C., 75 Fed. 202, 41 U. S. App. 339), holding company was bound by the order; Farmers, etc., Trust Co. v. Centralia, etc., R. Co., 96 Fed. 643, holding stockholders could attack certificates. See 70 Am. St. Rep. 166, note.

Distinguished in Denison, etc., Ry. v. Ranney, etc., Mercantile Co., — Ind. Ter. —, 53 S. W. 509.

Railroad bonds surrendered in exchange for others, held cancelled and not on footing with unsurrendered ones, p. 474.

Approved in First Nat. Bank v. Radford Trust Co., 80 Fed. 578, 47 U. S. App. 692, holding there was an election to accept new bonds, and they were not entitled to security of old bonds.

Distinguished in Mowry v. Farmers, etc., Trust Co., 76 Fed. 45, 46 U. S. App. 164, holding bonds deposited under the agreement were not extinguished.

Railroad foreclosure decree providing sale separately then en masse, held valid, p. 474.

Affirmed in Low v. Blackford, 87 Fed. 402, ordering property to be sold as an entirety.

Railroads.— Claims for rent of track, stores supplied, and labor, are entitled to priority, p. 476.

Railroads.— Large amounts borrowed by receiver, without court order, are not prior claims, p. 477.

Approved in Chicago, etc., Vault Co. v. McNulta, 153 U. S. 562, 38 L. 822, 14 S. Ct. 918, holding receiver had no authority to make a lease, for a term, of general offices.

Railroads.— Claims for rent; extraordinary depreciation of rolling-stock and right of way are not prior, p. 480.

Approved in Farmers, etc., Trust Co. v. Chicago, etc., Ry., 42 Fed. 11, holding petitioner not entitled to payment of rental out of corpus of estate; New York, etc., R. Co. v. New York, etc., R. Co., 58 Fed. 281, rentals accruing prior to receivership are entitled to no priority.

Railroads.— There should be no priority between receiver's certificates for necessaries, etc., except those for taxes, p. 481.

Costs in this case were not allowed for or against either party, p. 481.

Approved in Trinidad, etc., Paving Co. v. Robinson, 52 Fed. 349, in actions at law, Federal courts must tax costs against losing party, except in special cases.

Miscellaneous.— Cited generally in St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., 33 Fed. 447.

117 U. S. 482-490, 29 L. 979, FERGUSON v. ARTHUR.

Customs duties.— Henry's calcined magnesia was dutiable as proprietary medicine, not a commodity, p. 488.

Approved in In re Eisner, 54 Fed. 672, 673, holding Johann Hoff malt extract dutiable as a proprietary medicine.

Distinguished in United States v. Eisner, etc., Co., 59 Fed. 355, 20 U. S. App. 243, holding fluid compound sold as "malt extract," dutiable as such.

117 U. S. 490-504, 29 L. 984, DINGLEY v. OLER.

Contract to return ice the next year authorizes return at any time therein, p. 501.

Contract to return ice any time during season, gives no right of action upon refusal of specific demand, p. 502.

Contracts.— Query, whether refusal of performance not yet due, is actionable as present breach, p. 503.

Cited in Clark v. National, etc., Casualty Co., 67 Fed. 225, holding that there was no breach of entire contract; Horst v. Rœhm, 84 Fed. 569, Marks v. Van Eeghen, 85 Fed. 854, 57 U. S. App. 151, and Rœhm v. Horst, 91 Fed. 348, 62 U. S. App. 526, where notice of refusal to perform is given, party may sue at once; Pierce v. Tennessee, etc., R. R., 173 U. S. 12, 19 S. Ct. 339, arguendo.

Contracts.— Refusal of performance, to justify suit, must be unequivocal, and so treated, p. 503.

Reaffirmed in Sullivan v. McMillan, 26 Fla. 580, 8 So. 457, and Kilgore v. Baptist Education Assn., 90 Tex. 142, 143, 37 S. W. 600, 601. Approved in Cleveland Rolling-Mill v. Rhodes, 121 U. S. 264, 30 L. 923, 7 S. Ct. 886, holding buyer might have refused to accept iron shipped; Foss, etc., Brewing Co. v. Bullock, 59 Fed. 88, 16 U.

S. App. 311, where seller refuses to acquiesce in cancellation of sale, his right of action accrues at time of delivery; Edward Hines Lumber Co. v. Alley, 73 Fed. 607, 43 U. S. App. 169, holding defendants' refusal to take lumber was a breach of contract; Jeffrey Mfg. Co. v. Central, etc., Iron Co., 93 Fed. 412, party accepting goods, after delay, waived stipulation as to time; Lake Shore, etc., Ry. v. Richards, 152 Ill. 95, 38 N. E. 782, 30 L. R. A. 57, and n., it is sufficient if a clear intention to be no longer bound is evinced; Wilkinson v. Blount Mfg. Co., 169 Mass. 380, 47 N. E. 1022, holding that a waiver was not shown; Vittum v. Estey, 67 Vt. 161, 31 Atl. 145, holding refusal was not absolute; Lee v. Mutual, etc., Life Assn., 97 Va. 163, 33 S. E. 557, notice that policy will be declared forfeited if assessment is not paid, is not an absolute repudiation; Stanford v. McGill, 6 N. Dak. 564, 72 N. W. 949, 38 L. R. A. 770, arguendo.

117 U. S. 504–508, 29 L. 988, TURPIN v. BURGESS.

Internal revenue.— Act taxing tobacco intended for export, was constitutional, p. 505.

Cited in 27 Am. St. Rep. 564, note.

Internal revenue.— Tax on goods still in factory, though intended for export, is not export tax, p. 507.

Approved in Myers v. Baltimore County, 83 Md. 392, 55 Am. St. Rep. 354, 35 Atl. 146, 34 L. R. A. 312, holding property bought for exportation liable to taxation. See 62 Am. St. Rep. 474, and 27 Am. St. Rep. 552, notes.

117 U. S. 508–514, 29 L. 982, MAHOMET v. QUACKENBUSH.

Statute with but one general object germane to the title, satisfies constitutional requirement, p. 511.

Reaffirmed in Carter County v. Sinton, 120 U. S. 523, 30 L. 702, 7 S. Ct. 653, Illinois v. Illinois, etc., R. Co., 33 Fed. 766, Hotchkiss v. Marion, 12 Mont. 226, 29 Pac. 824, and Bosang v. Building Assn., 96 Va. 123, 30 S. E. 441. Approved in Baltimore, etc., R. Co. v. Jefferson County, 29 Fed. 307, upholding act authorizing railroad to extend its road, and empowering county to subscribe to stock; State v. Becker, 3 S. Dak. 43, 51 N. W. 1023, a law may include the employment of many measures for its enforcement. See 64 Am. St. Rep. 104, note.

117 U. S. 514–516, 29 L. 990, BRUCE v. MANCHESTER, ETC., R. R.

Appeals.— Matter in dispute means that directly involved in cause, not collateral effect in others, p. 515.

Reaffirmed in New England Mtge. Co. v. Gay, 145 U. S. 131, 36

L. 649, 12 S. Ct. 817. Approved in Gibson v. Shufeldt, 122 U. S. 29, 30 L. 1084, 7 S. Ct. 1067, Vicksburg, etc., R. R. v. Smith, 135 U. S. 200, 34 L. 96, 10 S. Ct. 730, and The Sydney, 139 U. S. 336, 35 L. 178, 11 S. Ct. 621, holding court with jurisdiction; Ex parte Sweeney, 126 Ind. 589, 27 N. E. 129, cross-complaint making real controversy can supply jurisdictional amount.

117 U. S. 516-518, 29 L. 994, EX PARTE FONDA.

Courts.— Federal court will not release on habeas corpus in advance of final action in State court, p. 518.

Reaffirmed in Pepke v. Cronan, 155 U. S. 101, 39 L. 85, 15 S. Ct. 34, In re Huse, 79 Fed. 307, 48 U. S. App. 322, In re Alexander, 84 Fed. 633, and Nesbit v. Hert, 91 Fed. 125. Approved in In re Duncan, 139 U. S. 454, 35 L. 222, 11 S. Ct. 575, refusing to interfere pending appeal; Cook v. Hart, 146 U. S. 194, 36 L. 940, 13 S. Ct. 43, in absence of special circumstances, prisoner should be compelled to seek review by writ of error; New York v. Eno, 155 U. S. 95, 39 L. 83, 15 S. Ct. 32, declining writ where it did not appear that case was urgent; Whitten v. Tomlinson, 160 U. S. 242, 40 L. 412, 16 S. Ct. 302, and Tinsley v. Anderson, 171 U. S. 105, 18 S. Ct. 807, dismissing writ issued before trial; Markuson v. Boucher, 175 U. S. 186, 20 S. Ct. 77, holding State judgments in criminal cases should not be reviewed on habeas corpus; Ex parte Kieffer, 40 Fed. 400, issuing habeas corpus, writ of appeal being an inadequate protection; In re Welch, 57 Fed. 578, holding question whether acts charged constituted the statutory crime, could not be raised on habeas corpus; United States v. M'Aleese, 93 Fed. 658, refusing relief where prisoner had not exhausted his remedy in State court; In re Bradley, 96 Fed. 970, refusing to discharge prisoner on ground that offense was committed at soldiers' home; dissenting opinion in Brown v. Walker, 161 U. S. 626, 40 L. 831, 16 S. Ct. 662, arguendo.

117 U. S. 519-536, 29 L. 934, NEW YORK, ETC., INS. CO. v. FLETCHER.

Corporations.— New York insurance company, doing business in Missouri, is subject to its laws, p. 519.

Reaffirmed in Wall v. Equitable Life Ins. Co., 32 Fed. 276. Approved in Mutual, etc., Ins. Co. v. Robison, 54 Fed. 585, holding law of State where application is made, and policy is delivered and premium paid. See 77 Am. Dec. 724, and 99 Am. Dec. 671, notes.

Insurance contract, where both parties are deceived by false answers written by agent, should be cancelled, p. 529.

Reaffirmed in McKay v. New York Life Ins. Co., 124 Cal. 273, 56 Pac. 1113. Approved in McDonald v. Metropolitan, etc., Co., 63 N. H. 6, 73 Am. St. Rep. 550, 38 Atl. 501, allowing assured to recover

payments, on cancellation; Maier v. Fidelity, etc., L. Assn., 78 Fed. 571, 47 U. S. App. 322, holding company not estopped to deny validity of policy; United States Life Ins. Co. v. Smith, 92 Fed. 509, insurance company need not tender back premiums to enable it to defend, because of misrepresentation in application; McCarty v. New York Life Ins. Co., 74 Minn. 534, 77 N. W. 427, holding fraudulent representations constituted a ground for rescission; Sladden v. New York Life Ins. Co., 86 Fed. 106, and Mailhoit v. Metropolitan, etc., Ins. Co., 87 Me. 382, 47 Am. St. Rep. 341, 32 Atl. 992, arguendo. See 77 Am. Dec. 728, and 9 Am. St. Rep. 229, 233, notes.

Distinguished in Shelby v. Mutual Life Ins. Co., 67 Fed. 492, holding insurer could not defeat recovery, unless he had rescinded and tendered premium; State Ins. Co. v. Gray, 44 Kan. 735, 25 Pac. 199, where applicant was old and feeble.

Insurer can limit its agents' authority; and insured must read application and limitations there stated, p. 530.

Reaffirmed in Mensing v. American Ins. Co., 36 Mo. App. 607. Approved in Mutual, etc., Life Ins. Co. v. Robison, 58 Fed. 730, 19 U. S. App. 266, 22 L. R. A. 331, estopping insurer to dispute truth of answer, which agent construed; Maier v. Fidelity, etc., Life Assn., 78 Fed. 571, 47 U. S. App. 322, holding company not estopped to deny validity of policy; Hubbard v. Mutual, etc., Life Assn., 80 Fed. 685, parol evidence is not admissible to dispute agreement as to agency; Glover v. National Fire Ins. Co., 85 Fed. 131, 42 U. S. App. 728, holding company estopped to rely on misdescription of property, application being prepared by its agent; Brown v. United States Casualty Co., 88 Fed. 41, holding company bound only by stipulations in its own substituted policy; United States Life Ins. Co. v. Smith, 92 Fed. 507, 508, that local agent of company advised the answer, did not bind company; Wheaton v. North British, etc., Ins. Co., 76 Cal. 418, 9 Am. St. Rep. 217, 18 Pac. 760, where agent prepares statement, any misrepresentation not known to assured will not avoid policy; Sun Fire Office v. Wich, 6 Colo. App. 113, 39 Pac. 591, assured is not relieved from consequences of a false statement, because he was ignorant of contents of application; Globe, etc., Ins. Co. v. Duffy, 76 Md. 301, 25 Atl. 228, if assured had means of discovering falsehood of agent, he cannot recover; Baker v. Ohio, etc., Ins. Co., 70 Mich. 206, 207, 14 Am. St. Rep. 489, 490, 38 N. W. 219, 220, holding application signed by agent, without knowledge of assured, is not binding on her; Robinson v. Jarvis, 25 Mo. App. 425, 427, holding party is presumed to have read written instrument, and is bound by its terms; Frœhly v. North, etc., Ins. Co., 32 Mo. App. 311, holding policy was void in its inception; Greenwood v. New York Life Ins. Co., 27 Mo. App. 412, and Wolf v. Dwelling-House Ins. Co., 75 Mo. App. 339, 340, holding knowledge of agent was not a waiver, his authority being limited; Johnson v. Dakota, etc., Ins. Co., 1 N. Dak. 181, 45 N. W. 804, holding that

policy never attached; Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 270, 15 S. E. 583, holding that local agent may waive limitations; Fitzmaurice v. Mutual Life Ins. Co., 84 Tex. 65, 19 S. W. 302, holding binding effect of statements in application not avoided by fact that insured was unacquainted with them; King v. Cox, 63 Ark. 211, 37 S. W. 879, and Mutual Fire Ins. Co. v. Ward, 95 Va. 239, 28 S. E. 211, holding company estopped by agent's knowledge of other insurance; Georgia, etc., Ins. Co. v. Goode, 95 Va. 758, 30 S. E. 369, holding forfeiture imposed on account of incumbrance was waived; Mutual Life Ins. Co. v. Baker, 10 Tex. Civ. App. 520, 31 S. W. 1073, arguendo. See 9 Am. St. Rep. 229, note.

Distinguished in Continental Ins. Co. v. Chamberlain, 132 U. S. 309, 33 L. 343, 10 S. Ct. 88, holding provision on back of policy that agent could waive none of its terms, did not relieve company; Sawyer v. Equitable, etc., Ins. Co., 42 Fed. 33, 34, holding company, where agent inserted false statement as to income; Mutual, etc., Ins. Co. v. Robison, 54 Fed. 594, 595, holding insurance company estopped to avoid the policy; Standard, etc., Ins. Co. v. Fraser, 76 Fed. 707, 44 U. S. App. 694, statement in policy that agent could not waive its provisions did not protect company; Phœnix Ins. Co. v. Warttemberg, 79 Fed. 247, 248, 249, 48 U. S. App. 347, 349, 351, holding company, though agent inserted statement that there was no incumbrance; Royal Neighbors of America v. Boman, 177 Ill. 31, 69 Am. St. Rep. 203, 52 N. E. 265, holding false answers inserted by agent do not avoid the policy; Marston v. Kennebec, etc., Ins. Co., 89 Me. 277, 278, 56 Am. St. Rep. 420, 421, 36 Atl. 392, 393, estopping company from controverting statements written by its agent; Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 346, 16 Am. St. Rep. 899, 12 S. W. 623, 7 L. R. A. 221, and n., holding warranty did not warrant that the examiner should correctly reduce the answers; New York Life Ins. Co. v. Russell, 77 Fed. 102, 108, 40 U. S. App. 530, arguendo.

Insurance.— Retention of policy, with annexed copy of application, is approval of statements therein, p. 534.

Approved in Assurance Society v. Reutlinger, 58 Ark. 544, 25 S. W. 840, holder could not keep policy without approving action of the agent. See 9 Am. St. Rep. 229, note.

117 U. S. 536-554, 29 L. 954, YALE, ETC., MFG. CO. v. SARGENT.

Patents.— Sargent patent for improvement in locks, contained patentable novelty, p. 547.

Approved in Nat., etc., Register Co. v. American, etc., Register Co., 53 Fed. 372, 3 U. S. App. 340, and S. F. Heath Cycle Co. v. Hay, 67 Fed. 249, so long as a new and useful result is produced, it does not matter whether action of elements is simultaneous or successive; Pomace Co. v. Ferguson, 119 U. S. 338, 30 L. 408, 7 S. Ct. 234, arguendo.

Patents.—The lock, Cole No. 2, infringes Sargent patent, p. 548.

Patentee may recover from infringer, loss, through reduction in price, from infringer's competition, p. 552.

Reaffirmed in Creamer v. Bowers, 35 Fed. 208. Approved in Busch v. Graff, 133 U. S. 705, 33 L. 791, 10 S. Ct. 381, holding plaintiff must furnish data as to what extent reduction in price was due to defendant's act; Towle v. Park, 48 Fed. 793, apply rule in computing damages for sale of patent medicine; Tatum v. Gregory, 51 Fed. 447, calculating damages on basis of entire machine; Holmes v. Truman, 67 Fed. 545, 29 U. S. App. 572, allowing for entire loss.

Patentee alone can sue infringer, though he have a partner in the manufacture of the invention, p. 552.

Patents.—On suit for infringement of reissue, costs were equally divided, where judgment only on one claim thereof, p. 554.

Approved in Kittle v. Hall, 30 Fed. 240, allowing patentee to recover on valid claims, though he filed no disclaimer.

117 U. S. 554-559, 29 L. 952, YALE, ETC., MFG. CO. v. GREENLEAF.

Patent must be limited to claim, and cannot be enlarged by other parts of specifications, p. 559.

Approved in Johnson Co. v. Pacific, etc., Mills Co., 47 Fed. 589, and H. W. Johns Mfg. Co. v. Robertson, 60 Fed. 906, limiting improvement by reference to specifications; Westinghouse v. Edison, etc., Light Co., 63 Fed. 592, 28 U. S. App. 1, matters incidentally referred to cannot be read into the specifications.

Patent.—Idea of changing mechanical device, obvious to unskilled mechanic, is not patentable, p. 559.

Reaffirmed in Gardner v. Herz, 118 U. S. 192, 30 L. 163, 6 S. Ct. 1063. Approved in Pomace Holder Co. v. Ferguson, 119 U. S. 338, 30 L. 408, 7 S. Ct. 384, holding void, patent for improvement in cheese-formers for cider presses; Hendy v. Miners' Iron Works, 127 U. S. 375, 32 L. 209, 8 S. Ct. 1278, holding there was no patentable combination; Hill v. Wooster, 132 U. S. 701, 33 L. 506, 10 S. Ct. 231, dismissing bill, because claims were not patentable; United States, etc., Mfg. Co. v. Independent, etc., Brushing Co., 24 Blatchf. 410, 31 Fed. 79, holding patent for improvement in bungs, wanting in patentable novelty; Cluett v. Claflin, 24 Blatchf. 416, 30 Fed. 924, holding void, patent for improved shirt-bosoms; Consolidated, etc., Jar Co. v. Bellaire Stamping Co., 28 Fed. 94, holding void, patent for improved mode of preventing corrosion of metallic caps; Root v. Sontag, 47 Fed. 313, holding bill demurrable for want of novelty in invention; Chuse v. Ide, 89 Fed. 498, 60 U. S. App. 646, holding void, improvement in lubricating devices.

Patents.— First claim of Rosner improvement in permutation locks, was void for anticipation, p. 559.

117 U. S. 559-566, 29 L. 994, DIMOCK v. REVERE COPPER CO.

Courts.— State court's decision that bankruptcy discharge barred an action, is reviewable in Supreme Court, p. 564.

Judgment.— Defense, neglected by defendant at trial, cannot be set up against judgment, p. 566.

Reaffirmed in Nat. Bank v. Wallis, 59 N. J. L. 48, 34 Atl. 984, and Mather v. Cincinnati, etc., Tunnel Co., 8 Ohio C. C. 289. Approved in Scott v. Ellery, 142 U. S. 384, 35 L. 1051, 7 S. Ct. 982, after discharge in bankruptcy, right to take deficiency decree was lost; United States v. Wallace, 46 Fed. 571, holding party, by appearing, waived irregularities as to his arrest; Compton v. Jesup, 68 Fed. 286, 296, 31 U. S. App. 486, holding trustees could not object to a separate redemption of the Ohio division; Board of Commissioners v. Platt, 79 Fed. 572, 49 U. S. App. 223, holding judgment is an estoppel as to every matter which might have been offered; Holt County v. Nat. Life Ins. Co., 80 Fed. 689, 49 U. S. App. 382, issuing mandamus to levy tax, is conclusive on question as to whether levy was in excess of statutory power; Turner v. Hamilton, 88 Fed. 468, defendant neglecting to plead usury, cannot set it up in action on judgment; Sullivan v. Rabb, 86 Ala. 440, 5 So. 749, holding bankruptcy proceedings affect dissolution of attachment; Tuttle v. Scott, 119 Cal. 589, 51 Pac. 850, vacating judgment by default, to let in defense of discharge in insolvency; Lackey v. Steere, 121 Ill. 603, 605, 2 Am. St. Rep. 138, 139, 13 N. E. 520, 521, setting aside satisfaction of judgment had no effect on surety not a party; Whyte v. McGovern, 51 N. J. L. 357, 359, 17 Atl. 958, holding debtor filing petition in bankruptcy, may allow suit to proceed to judgment, without forfeiting his right; McDonald v. Davis, 105 N. Y. 513, 12 N. E. 41, that defendant failed to avail himself of a stay of proceedings, does not merge the debt in the judgment; Shaw v. Broadbent, 129 N. Y. 122, 29 N. E. 240, holding effect of judgment could not be nullified by posthumous production of record, which might have defeated claim if presented on trial; Zumbro v. Stump, 38 W. Va. 332, 18 S. E. 446, holding discharge in bankruptcy may be set up in State court to stay proceedings; dissenting opinion in St. Louis, etc., Ry. v. Jackson, 95 Fed. 571, maintaining that question of existence of lien could not be considered. See 2 Am. St. Rep. 140, and 23 Am. St. Rep. 112, notes.

Distinguished in Boynton v. Ball, 121 U. S. 463, 30 L. 985, 7 S. Ct. 982, holding discharge in bankruptcy may be set up in State court to stay execution, although defendant, before judgment, did not ask for a stay of proceedings; Second Nat. Bank v. Townsend, 114 Ind. 535, 17 N. E. 116, where question was as to right of creditor to share in distribution of trust fund in hands of assignee.

117 U. S. 567-582, 29 L. 940, HOBBS v. McLEAN.

Partners advancing all money, and doing all work, are entitled to be repaid before third partner's creditors, p. 573.

United States.— Agreement to pay into partnership expected government claim, does not violate R. S., §§ 3477, 3737, p. 574.

Approved in Freedman's Saving Co. v. Shepherd, 127 U. S. 505, 32 L. 168, 8 S. Ct. 1256, upholding transfer of lease of real estate from government; Burck v. Taylor, 152 U. S. 646, 649, 38 L. 583, 584, 14 S. Ct. 701 (see dissenting opinion in 152 U. S. 669, 38 L. 591, 14 S. Ct. 709), holding party could not, without consent of State, transfer his contract; Ball v. Halsell, 161 U. S. 79, 40 L. 624, 16 S. Ct. 556, holding contract would not support an action by attorney for fee, where Congress had made no appropriation; Milliken v. Barrow, 65 Fed. 894, upholding assignment of contingent profits which party hopes to make.

United States.— Claim against United States is the right to demand money, p. 575.

Approved in Milliken v. Barrow, 65 Fed. 894, upholding assignment of contingent profits which party hopes to make; United States v. Ferguson, 78 Fed. 105, 45 U. S. App. 457, holding order by prisoner to inspector, to pay it to a third person, was not an assignment of a claim against United States; Dulaney v. Scudder, 94 Fed. 10, holding there was no claim against the United States; Manning v. Leighton, 65 Vt. 94, 26 Atl. 260, 24 L. R. A. 690, and n., holding that they were claims against the United States.

United States.— R. S., §§ 3477, 3737, prohibiting assignment of government claims, were for its protection, p. 576.

Reaffirmed in Price v. Forrest, 54 N. J. Eq. 687, 35 Atl. 1082. Approved in Price v. Forrest, 173 U. S. 423, 19 S. Ct. 438, holding case was not within the prohibition of the statute; Dulaney v. Scudder, 94 Fed. 9, the government may elect to recognize the assignment; Jernegan v. Osborn, 155 Mass. 210, 211, 29 N. E. 521, 522, query, whether claim for loss sustained in rescuing seamen is a claim against the United States; Forrest v. Price, 52 N. J. Eq. 28, 29 Atl. 220, upholding assignment of claim, established in obedience to an order of chancery; York v. Conde, 147 N. Y. 492, 42 N. E. 195, after United States has paid claimant, assignee may enforce his right.

Contract, if open to lawful and unlawful construction, former must be adopted, p. 576.

Reaffirmed in United States v. Central Pac. R. R., 118 U. S. 241, 30 L. 175, 6 S. Ct. 1041, Wiggins Ferry Co. v. Chicago, etc., Ry., 128 Mo. 245, 27 S. W. 571, and Watters v. McGuigan, 72 Wis. 157, 39 N. W. 383. Approved in Seamans v. Knapp, etc., Co.,

89 Wis. 182, 46 Am. St. Rep. 829, 61 N. W. 760, 27 L. R. A. 365, and dissenting opinion in Jones v. Williams, 139 Mo. 85, 40 S. W. 367, 37 L. R. A. 705, construing different contracts; Gaines v. Molen, 30 Fed. 29, holding there was no illegality of consideration.

United States.— Partner's promise to pay, out of receipts from government claim, does not bar promisee's rights to enforce payment after collection, p. 577.

Limitations, statute of, does not run against agreement to pay out of proceeds of recovery in suit, until recovery had, p. 578.

Witnesses.— R. S., § 858, prohibiting party testifying in action against estate, does not mean against deceased's assignee, p. 579.

Approved in Farmers' Bank v. Gould, 42 W. Va. 136, 24 S. E. 548, in suit by creditor, to set aside deed for fraud, grantee may testify, though grantor be dead.

Statutes.— Courts have no power to supply omitted words in statute, p. 579.

Reaffirmed in Grace v. Collector of Customs, 79 Fed. 318, 48 U. S. App. 231, and State v. Simon, 20 Or. 373, 26 Pac. 173.

Estoppel.— Partner denying his interest in recovery, except as creditor, is not estopped from asserting subsequent title, p. 580.

Distinguished in Foote v. Godwin, 42 La. Ann. 521, 7 So. 845, holding plaintiff's testimony alone would not sustain claim, where he had previously testified that he had no interest.

Trusts.— Unsuccessful litigant for trust fund is not entitled to expenses out of fund, p. 582.

Approved in Boston, etc., Trust Co. v. Adrian, etc., Water Works, 47 Fed. 10, refusing further allowance to trustee for services; Jacksonville, etc., Ry. v. American Const. Co., 57 Fed. 70, 13 U. S. App. 377, permitting appeal from decree allowing attorney's fees; Bound v. South Carolina Ry., 59 Fed. 512, charging counsel fees upon the proceeds to be appropriated to the payment of the respective mortgages; Central Trust Co. v. Condon, 67 Fed. 111, 31 U. S. App. 387, allowing plaintiffs, in creditor's bill, for counsel fees; Barrow v. Milliken, 74 Fed. 615, 41 U. S. App. 332, holding sugar-planter could pledge the bounty to become payable, before his claims have been allowed; Burden, etc., Refining Co. v. Ferris, etc., Mfg. Co., 87 Fed. 812, allowing solicitors out of general fund for work done previous to appointment of receiver; Fidelity, etc., Deposit Co. v. Roanoke Iron Co., 91 Fed. 21, holding brokers not entitled to deduct any sum for expenses in defending their title; Davis v. Bay State League, 158 Mass. 434, 33 N. E. 591, allowing reimbursement to one bringing suit for benefit of all with a common interest.

117 U. S. 582-591, 29 L. 991, BURNES v. SCOTT.

Evidence to show promissory note, not such, but a mere memorandum, is inadmissible, p. 585.

Reaffirmed in Wilson v. Wilson, 26 Or. 261, 38 Pac. 189. Approved in Michels v. Olmstead, 157 U. S. 201, 39 L. 672, 15 S. Ct. 581, holding plaintiff estopped to object that evidence was admissible at law only; Seymour v. Malcolm M'Donald Lumber Co., 58 Fed. 961, 16 U. S. App. 245, rejecting evidence of fraud in procuring an acceptance; Union Nat. Bank v. German Ins. Co., 71 Fed. 476, 34 U. S. App. 397, parol negotiations, leading up to a contract of insurance, are merged; Leonard v. Miner, 120 Cal. 406, 52 Pac 656, rejecting parol evidence of limitation of liability; Godkin v Monahan, 83 Fed. 119, 53 U. S. App. 613, and Champion, etc., Min Co. v. Bird, 7 Colo. App. 526, 44 Pac. 765, rejecting evidence introduced to vary terms of note; McIntosh, etc., Co. v. Rice, — Colo. App. —, 58 Pac. 363, rejecting parol testimony as to history of written agreement; King v. Kilbridge, 58 Conn. 117, 19 Atl. 520, holding there could be no implication contrary to the writing; White, etc., Mach. Co. v. Feeley, 72 Conn. 185, 44 Atl. 37, admitting evidence relating to condition upon which contract was signed; Phelps v. Abbott, — Mich. —, 72 N. W. 4, rejecting parol evidence of agreement of reduction to be made if animal for which note was given should prove barren; Catlin v. Harris, 7 Wash. 546, 35 Pac. 386, parol evidence is inadmissible to show note does not represent the amount due; Pearce v. Strickler, 9 N. Mex. 477, 54 Pac. 751, rejecting ex parte statement, made before execution of note; dissenting opinion in Harman v. Harman, 70 Fed. 936, 18 U. S. App. 723, majority admitting parol evidence to show entire contract.

Distinguished in Burke v. Dulaney, 153 U. S. 232, 233, 38 L. 700, 14 S. Ct. 817, admitting parol evidence of agreement as to when note should become operative.

Equity.— Evidence of equitable defense to note, e. g., partnership settlement, inadmissible on plea at law, p. 587.

Reaffirmed in Wilson v. Wilson, 26 Or. 260, 38 Pac. 188. Approved in Union Bank v. Crine, 33 Fed. 811, and Seymour v. Malcolm M'Donald Lumber Co., 58 Fed. 962, 16 U. S. App. 245, holding court of law could not take cognizance of equitable defense.

Champertous contract cannot be set up in bar of cause of action to which it relates, p. 589.

Reaffirmed in Missouri, etc., Ry. v. Smith, 60 Ark. 237, 29 S. W. 753, Wehmhoff, etc. v. Rutherford, 98 Ky. 97, 32 S. W. 290, Euneau v. Rieger, 105 Mo. 682, 16 S. W. 860, Woods v. Walsh, 7 N. Dak. 385, 75 N. W. 770, and Croco v. Oregon, etc., R. Co., 18 Utah, 324, 54 Pac. 988, 44 L. R. A. 289. Approved in Peck v. Heurich, 167 U. S. 632, 42 L. 305, 17 S. Ct. 930, holding deed would not sustain an action by grantees to recover part of lands from third persons;

Byrne v. Kansas City, etc., R. Co., 55 Fed. 47, champertous agreement between attorney suing as administrator, may be pleaded as a defense; Ross v. Ft. Wayne, 64 Fed. 1007, 24 U. S. App. 506, one who, having an interest in subject-matter, buys up interest of plaintiff, is not guilty of champerty; The Clara A. McIntyre, 94 Fed. 557, holding there could be no recovery on claim founded on champertous contract.

Distinguished in Keiper v. Miller, 68 Fed. 630, dismissing bill founded on champertous agreement.

117 U. S. 591-600, 29 L. 997. NEW YORK, ETC., INS. CO. v. ARMSTRONG.

Insurance, payable to legal representatives, if assured died before its maturity, is assignable, except for speculation, p. 597.

Reaffirmed in Croswell v. Conn. Indemnity Assn., 51 S. C. 108, 28 S. E. 202, Fitzpatrick v. Hartford, etc., Ins. Co., 56 Conn. 133, 7 Am. St. Rep. 295, 13 Atl. 677. Approved in Amick v. Butler, 111 Ind. 582, 60 Am. Rep. 725, 12 N. E. 520, holding creditor has insurable interest in life of debtor; Carpenter v. Knapp, 101 Iowa, 728, 70 N. W. 767, 38 L. R. A. 133, holding beneficiary has no assignable interest while assured is living; Hays v. Lapeyre, 48 La. Ann. 755, 19 So. 824, 35 L. R. A. 652, and n. (see dissenting opinion in 48 La. Ann. 757, 19 So. 825, 35 L. R. A. 653, and n.), holding policy was assignable; Robinson v. Hurst, 78 Md. 71, 44 Am. St. Rep. 272, 26 Atl. 959, 20 L. R. A. 764, holding life insurance could be assigned to creditor; Ewing v. Shannahan, 113 Mo. 194, 20 S. W. 1067, construing "legal representatives" to mean heirs of donor; Roller v. Moore, 86 Va. 517, 10 S. E. 243, 6 L. R. A. 139, and n., holding that assignment stood as security for advances made; Heusner v. Mut. Life Ins. Co., 47 Mo. App. 343, holding invalid, assignment of policy for speculative purposes.

Distinguished in Union, etc., Ins. Co. v. Woods, 11 Ind. App. 343, 37 N. E. 182, holding wife had contingent interest during life of husband.

Insurance.— Evidence is admissible that assignee of policy feloniously caused assured's death, p. 598.

Approved in Ritter v. Mutual L. Ins. Co., 169 U. S. 156, 42 L. 699, 18 S. Ct. 306, affirming 70 Fed. 958, 28 U. S. App. 612, 42 L. R. A. 586, holding representatives of person killing himself, could not recover the insurance; Holdom v. Ancient Order, 159 Ill. 622, 50 Am. St. Rep. 183, 43 N. E. 773, 31 L. R. A. 69, killing of insured by insane beneficiary, does not defeat right of recovery; Murphy v. Red, 64 Miss. 619, 1 So. 763, allowing assignee, having no insurable interest in assured, to recover on policy; State v. Hope, 100 Mo. 359, 13 S. W. 493, 8 L. R. A. 613, and n., upholding statute permitting verdict of jury in criminal cause to be received in voluntary

absence of accused; Shellenberger v. Ransom, 31 Neb. 72, 28 Am. St. Rep. 507, 47 N. W. 703, 10 L. R. A. 813, holding heir, murdering decedent, did not take estate; Shellenberger v. Ransom, 41 Neb. 637, 639, 645, 646, 59 N. W. 937, 939, 940, 25 L. R. A. 571, 574, 576, and n., holding heir murdering decedent inherited estate; Riggs v. Palmer, 115 N. Y. 512, 12 Am. St. Rep. 823, 22 N. E. 190, 5 L. R. A. 847, and n., depriving beneficiary, murdering testator, of his rights under the will; Carpenter's Estate v. Carpenter's Appeal, 170 Pa. St. 211, 50 Am. St. Rep. 769, 32 Atl. 638, 29 L. R. A. 149, holding parricide has right to inherit his father's estate; Roller v. Moore, 86 Va. 519, 10 S. E. 243, 6 L. R. A. 140, and n., holding that assignment stood as security for advances made. See 58 Am. Rep. 856, note.

Insurance.— It may be shown that assignee, at same time, fraudulently procured other insurance on deceased, p. 600.

Reaffirmed in Whitmore v. Supreme Lodge, 100 Mo. 48, 13 S. W. 497. Approved in Fifth Nat. Bank v. New York, etc., Ry., 24 Blatchf. 91, 28 Fed. 232, admitting evidence of damage accruing after commencement of action; Penn. Mut., etc., Ins. Co. v. Merchants, etc., Trust Co., 72 Fed. 423, 37 U. S. App. 692, 38 L. R. A. 59, and n., admitting evidence of false statements made in other applications; Gardner v. Meeker, 169 Ill. 44, 48 N. E. 308, admitting evidence of similar acts for three months after the transaction; Cox Shoe Co. v. Adams, 105 Iowa, 413, 75 N. W. 319, knowledge of dealer that false ratings were given him by commercial agencies was admissible to show fraudulent intent; Wilkinson v. Dodd, 42 N. J. Eq. 248, 7 Atl. 334, holding charges showing unlawful management of institution prior to time of act, were pertinent; Continental Ins. Co. v. Pennsylvania Ins. Co., 51 Fed. 888, 1 U. S. App. 201, Mudsill Min. Co. v. Watrous, 61 Fed. 180, 22 U. S. App. 12, Harrison v. Hawley, 7 Tex. Civ. App. 312, 26 S. W. 766, and Piedmont Bank v. Hatcher, 94 Va. 231, 26 S. E. 506, admitting evidence of other like frauds; New York Life Ins. Co. v. Davis, 96 Va. 739, 741, 32 S. E. 475, 476, 44 L. R. A. 306, limiting assignee's recovery to amount advanced; dissenting opinions in United States v. Budd, 144 U. S. 170, 36 L. 389, 12 S. Ct. 580, majority upholding transfer of timber lands; Hannig v. Muller, 82 Wis. 242, 52 N. W. 100, arguendo.

117 U. S. 601-602, 29 L. 805, EXPRESS CASES.

Appeal.— Supreme Court's decree, modified in accordance with counsel's stipulations, p. 602.

Not cited.

117 U. S. 602-611, 29 L. 1000, ALABAMA v. MONTAGUE.

Railroad mortgage of enumerated and "all other property" held, ejusdem generis, not to include certain town lots, p. 611.

Approved in Tishomingo Inst. v. Allen, 76 Miss. 132, 23 So. 959, holding intent was to assign all property of every kind; Wilson v. Beckwith, 117 Mo. 78, 22 S. W. 643, holding lien did not include railroad lands, since they were not appurtenant to road. See 66 Am. St. Rep. 60, note.

117 U. S. 611-612, 29 L. 1003, ALABAMA v. MONTAGUE.

Adjudged on authority of Alabama v. Montague, supra, q. v.

117 U. S. 612-615, 29 L. 1006, STEWART v. VIRGINIA.

Removal.— Virginia, proceeding to establish State coupons as tender, is not suit arising under Federal law, p. 614.

Approved in Rosenbaum v. Board of Supervisors, 11 Sawy. 623, 28 Fed. 225, holding suit for mandamus not removable; McCullough v. Virginia, 172 U. S. 106, 19 S. Ct. 135, arguendo.

117 U. S. 615-617, 29 L. 1007, CAMPBELL v. DISTRICT OF COLUMBIA.

Contracts.— One taking place of contractor performing work, and accepting allowance for extras, is bound thereby, p. 617.

Not cited.

117 U. S. 617-621, 29 L. 1004, LONG v. BULLARD.

Bankruptcy.— Setting aside of homestead does not discharge liens thereon, before bankruptcy, p. 621.

Courts.— State court's decision, as to lien on homestead, is not reviewable in Supreme Court, p. 621.

Bankruptcy of debtor does not affect lien of secured creditor who does not prove debt, p. 621.

Approved in Broach v. Powell, 79 Ga. 82, 3 S. E. 765, that mortgage is subject to be administered in bankruptcy will not defeat right of foreclosure.

117 U. S. 621-633, 29 L. 946, DISTRICT OF COLUMBIA v. McELLIGOTT.

District of Columbia.— Query, whether it is liable for injury from road supervisor's negligence, p. 628.

See note under next syllabus.

Master and servant.— Query, whether county road supervisor and laborer are co-servants, p. 628.

Approved in District of Columbia v. Woodbury, 136 U. S. 457, 34 L. 475, 10 S. Ct. 993, holding District of Columbia liable for injuries due to defective streets; Sullivan v. City, 10 Mont. 144, 25 Pac. 96, following territorial decisions as to municipal liability.

Negligence.— After instruction that supervisor's negligence was risk laborer assumed, it is error to instruct what would relieve supervisor of imputation of negligence, p. 630.

Approved in Herman v. Campbell, 56 Fed. 1014, 12 U. S. App. 530, holding subsequent submission of case to jury was reversible error.

Master and servant.— Laborer threatened by cave-in, must use due care, irrespective of warning to overseer, p. 633.

Approved in Kane v. Northern, etc., Ry., 128 U. S. 94, 95, 32 L. 341, 9 S. Ct. 17, negligence of brakeman, after notice of defective step, is for jury; Delaware, etc., R. R. v. Converse, 139 U. S. 475, 35 L. 216, 11 S. Ct. 572, holding that question of contributory negligence was properly submitted to jury; New Jersey, etc., R. Co. v. Young, 49 Fed. 725, 1 U. S. App. 96, remaining in employ after knowledge of defect, is not conclusive of negligence; Haas v. Balch, 56 Fed. 987, 12 U. S. App. 534, holding evidence of contributory negligence was not sufficient to warrant court in directing a verdict for defendant; Detroit, etc., Oil Co. v. Grable, 94 Fed. 79, holding engineer assumed risk of bolts breaking pipe; Victor Coal Co. v. Muir, 20 Colo. 332, 46 Am. St. Rep. 302, 38 Pac. 382, 26 L. R. A. 439, holding master not liable if servant knew of defects; Davis v. Graham, 2 Colo. App. 215, 29 Pac. 1009, Atchison, etc., R. Co. v. Midgett, 1 Kan. App. 142, 40 Pac. 996, and Illinois Steel Co. v. Mann, 170 Ill. 206, 62 Am. St. Rep. 372, 48 N. E. 418, 40 L. R. A. 789, and n., if, after lapse of reasonable time, master does not supply defects, servant assumes risk; Watson v. Kansas, etc., Coal Co., 52 Mo. App. 372, holding servant does not assume risk unless he has knowledge of the conditions; Rogers v. Leyden, 127 Ind. 57, 26 N. E. 212, holding servant continuing in employ, after increase of danger, assumes the risk; Roux v. Blodgett, etc., Lumber Co., 85 Mich. 526, 24 Am St. Rep. 108, 48 N. W. 1094, 13 L. R. A. 731, and n., where assurances are made, servant, by continuing in employment, does not assume risk; Cerrillos, etc., R. Co. v. Deserant, 9 N. Mex. 59, 49 Pac. 810, holding company not chargeable with negligence in not providing a safer place to work; Lutz v. Atlantic, etc., R. Co., 6 N. Mex. 505, 30 Pac. 915, 16 L. R. A. 826, and n. (see dissenting opinion in 6 N. Mex. 520, 30 Pac. 926, 16 L. R. A. 831, and n.), holding failure to furnish proper caboose did not cause injury; Allen v. Logan, 10 Utah, 287, 37 Pac. 498, holding employer not liable, for caving bank; McKelvey v. Chesapeake, etc., Ry., 35 W. Va. 513, 14 S. E. 266, holding instruction bad because it contained no element of a promise to repair; Knight v. Cooper, 36 W. Va. 234, 14 S. E. 1000, holding servant, with knowledge of danger, must use diligence in protecting himself; Woodell v. West Virginia Imp. Co., 38 W. Va. 45, 17 S. E. 394, discussing cases involving doctrine of risk of employment.

Distinguished in Gerity v. Haley, 29 W. Va. 107, 11 S. E. 904, arguendo.

117 U. S. 634-648, 29 L. 1007, CONNECTICUT, ETC., INS. CO. v. SCAMMON.

Mortgagee receiving insurance policy as collateral for mortgagor's joint debt, must apply proceeds thereto, p. 646.

Mortgagee must either apply proceeds of insurance on property, to restoring property after fire, or to debt, p. 646.

Not cited.

117 U. S. 648-657, 29 L. 1021, GIVEN v. WRIGHT.

Taxation.— Long acquiescence in taxation, raises presumption of surrender of exemption, p. 655.

Approved in McCullough v. Virginia, 172 U. S. 119, 19 S. Ct. 140, holding owner of coupons had right to tender same for taxes; Stevens County v. St. Paul, etc., Ry., 36 Minn. 471, 31 N. W. 944, holding exemption from taxation passed with lands to which it was appendant; Wau-pe-man-qua v. Aldrich, 28 Fed. 499, and Board of Commissioners v. Simons, 129 Ind. 197, 28 N. E. 421, 13 L. R. A. 514, and n., holding lands not liable to taxation; West Hartford v. Board of Water Commissioners, 68 Conn. 334, 36 Atl. 790, holding long-continued usage had defined duties of water board; Dow v. Northern R. R., 67 N. H. 49, 36 Atl. 535, arguendo.

Courts.— State decision, justifying impairment of contract, under general law, is reviewable by Supreme Court, p. 656.

Reaffirmed in McCullough v. Virginia, 172 U. S. 119, 19 S. Ct. 140. Cited in 15 Am. St. Rep. 216, note.

117 U. S. 657-665, 29 L. 1026, DAVIESS COUNTY v. DICKINSON.

Municipal bonds, issued by County Court, in excess of authorized amount recommended by commissioners, held void, p. 663.

Reaffirmed in Francis v. Howard Co., 50 Fed. 56. Approved in Brenham v. German, etc., Bank, 144 U. S. 188, 36 L. 396, 12 S. Ct. 565, denying recovery on negotiable bonds, issued without authority; Weber v. Spokane Nat. Bank, 64 Fed. 211, 29 U. S. App. 97 (reversing S. C., 50 Fed. 737), holding debt contracted by national bank, in violation of statute, is valid; Lake County v. Standley, 24 Colo. 10, 49 Pac. 26, holding issue of bonds upon an indivisible contract, void as to whole issue; Laporte v. Gamewell, etc., Tel. Co., 146 Ind. 476, 58 Am. St. Rep. 366, 45 N. E. 591, 35 L. R. A. 690, holding debt for current expenses cannot be made beyond the constitutional limit; Commissioners v. Call, 123 N. C. 326, 31 S. E. 487, 44 L. R. A. 253, holding legislation authorizing the creation of county indebtedness must conform to constitutional requirements; Municipal Security Co. v. Baker County, 33 Or. 353, 54 Pac. 178, holding payment of unlawful indebtedness, not an estoppel; dissenting opinion in Edin-

[illegible] S. Dak. 607, 48 N. W. 136, [illegible] were void.

[illegible] County, 150 U. S. 188, 37 L. [illegible] not surrender part, and [illegible]

[illegible] showing overissue and in- [illegible] judge thereon, p. 664.

[illegible] S. 150, 32 L. 82, 8 S. Ct. 1106, [illegible] give no further effect to valid- [illegible] v. Lyon County, 44 Fed. 343, [illegible] of agent; Mercer County v. [illegible] 632, 43 U. S. App. 21, holding [illegible] that road had not actually been [illegible] Co. v. White, — Ky. —, 49 S. W. [illegible] of service of summons upon corpora- [illegible] County, 1 S. Dak. 227, 46 N. W. 176, [illegible] unauthorized officers, do not bind county; [illegible] 202, 49 N. W. 12, that auditor has [illegible] is no ground for refusing mandamus; [illegible] S. Dak. 427, 57 N. W. 70, holding school- [illegible] impeached, because unauthorized. See 51 [illegible]

[illegible] v. Santa Cruz, 89 Fed. 633, holding city [illegible] in bonds.

[illegible] to authorized amount, were valid, and only [illegible] p. 664.

[illegible] Francis v. Howard County, 50 Fed. 62, 64, Catron [illegible] County, 106 Mo. 668, 17 S. W. 579, and Citizens' Bank [illegible] 460, 14 S. W. 1007. Approved in Hopper v. Cov- [illegible] 151, 30 L. 192, 6 S. Ct. 1026, holding declaration [illegible] what purpose bond was made, is demurrable; Mer- [illegible] 138 U. S. 682, 34 L. 1073, 11 S. Ct. 445, holding [illegible] stopped to set up lack of authority; Chicago v. Mc- [illegible] 415, 52 N. E. 985, enforcing divisible contract as to [illegible] in excess of limit; The School Town of Winamac v. [illegible] Ind. 239, 50 N. E. 84, holding bond of contractor not void [illegible] holding contract created a debt in excess of limit; Crogster [illegible] County, 99 Wis. 11, 74 N. W. 638, upholding bonds not [illegible] of constitutional limitation. See 44 Am. St. Rep. 243, and [illegible] Rep. 856, notes.

[illegible] guished in Hedges v. Dixon Co., 150 U. S. 188, 37 L. 1047, [illegible] 73, holders of bonds could not offer to surrender part and [illegible] residue; Hedges v. Dixon Co., 37 Fed. 306, where contract [illegible] divisible and void in toto.

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Judgment at law, erroneously obtained, is properly relievable in equity, p. 675.

Approved in Knox County v. Harshman, 133 U. S. 154, 33 L. 588, 10 S. Ct. 238, dismissing bill to restrain process of execution upon judgment; Young v. Sigler, 48 Fed. 184, granting relief against judgment obtained in State court by fraud; Pelzer Mfg. Co. v. Hamburg, etc., Ins. Co., 62 Fed. 4, holding mistake in verdict could only be corrected in equity; Hamburg, etc., Ins. Co. v. Pelzer Mfg. Co., 76 Fed. 481, 42 U. S. App. 123, correcting mistake in announcing verdict; Perry v. Johnston, 95 Fed. 325, and Handley v. Jackson, 31 Or. 555, 65 Am. St. Rep. 841, 50 Pac. 916, enjoining the execution of an unconscionable judgment; State v. Superior Court, 8 Wash. 593, 36 Pac. 443, refusing to vacate judgment on ground of fraud. See 54 Am. St. Rep. 220, note.

117 U. S. 679-683, 29 L. 1024, JACKSON v. LAWRENCE.

Mortgages.— Absolute deed to secure debt, held a mortgage, and purchaser under power of sale gets good title, p. 683

Cited in Martin v. Pond, 30 Fed. 17, arguendo.

117 U. S. 683-689, 29 L. 1019, ZEIGLER v. HOPKINS.

Municipalities.— Owner of lands sold for taxes for street opening, may show petition for street opening not signed by required number of owners, p. 687.

Reaffirmed in Ogden v. Armstrong, 168 U. S. 236, 42 L. 451, 18 S. Ct. 102. Approved in Bradley v. Fallbrook Irr. Dist., 68 Fed. 961, 964, holding invalid, statute of California providing for assessments for forming irrigation districts; Watkins v. Griffith, 59 Ark. 357, 27 S. W. 238, and Roswell v. Dominice, — N. Mex. —, 58 Pac. 343, holding that petition by owners was a prerequisite to special assessment; Harmon v. Omaha, 53 Neb. 168, 73 N. W. 673, holding that void special taxes cannot be enforced; Armstrong v. Ogden, 12 Utah, 492, 43 Pac. 120, decision of city council that objections by owners of a sufficient number of feet were not filed, may be attacked in action to enjoin assessment.

Distinguished in Scotten v. Detroit, 106 Mich. 570, 64 N. W. 581, estopping landowner, since there had been a judicial determination.

Appellate court, after finding below that value in dispute is $6,000, will disregard affidavits contra, p. 689.

Approved in Talkington v. Dumbleton, 123 U. S. 746, 31 L. 314, 8 S. Ct. 336, refusing to consider affidavits tending to contradict finding of court in respect to value; Red River Cattle Co. v. Needham, 137 U. S. 634, 635, 34 L. 800, 11 S. Ct. 209, refusing to allow affidavits as to value to be filed; Davie v. Heyward, 33 Fed. 94, holding question of jurisdictional amount must be left to Supreme Court.

Distinguished in Wilson v. Blair, 119 U. S. 388, 30 L. 442, 7 S. Ct. 230, where record below was silent as to value of matter in dispute.

117 U. S. 689-696, 29 L. 1017, CANTRELL v. WALLICK.

Patents may issue for invention and improvement, and can only be used together by consent; infringer of both cannot set up first as excuse for infringing second, p. 694.

Approved in Hardwick v. Masland, 71 Fed. 889, presumption of patentable difference does not arise from grant of subsequent patent.

Patents.— Devices are same if performing substantially same function in substantially the same way, p. 695.

Approved in Mann's, etc., Car Co. v. Monarch, etc., Car Co., 34 Fed. 134, holding patent for signal apparatus in sleeping-cars, void for want of novelty; Thompson v. American, etc., Note Co., 35 Fed. 204, holding machine for forming staple-seams infringed; Harmon v. Struthers, 43 Fed. 448, mere reduction in size of gear is not invention, though efficiency is increased; Pacific, etc., Ry. v. Butte City, etc., Ry., 52 Fed. 866, mere introduction of link into brake connection did not avoid infringement; Sayre v. Scott, 55 Fed. 973, 3 U. S. App. 643, holding device merely changing shape of cutting edge, an infringement; Westinghouse v. New York Air-Brake Co., 59 Fed. 598, merely subdividing elements will not avoid infringement; Beach v. American, etc., Mach. Co., 63 Fed. 606, that part of one machine accomplishes more than correspondent part of other, is immaterial; Western Electric Co. v. Home Tel. Co., 85 Fed. 658, holding switch-board patent infringed; King v. Anderson, 90 Fed. 504, holding substitution of materials was invention; Holloway v. Dow, 54 Fed. 514, and Travers v. American Cordage Co., 64 Fed. 774, arguendo.

Patents.— Burden is on infringer to establish prior use and want of novelty as defense, p. 695.

Reaffirmed in Anderson v. Monroe, 55 Fed. 397, Pacific, etc., Ry. v. Butte County, etc., Ry., 55 Fed. 764, Richardson v. Campbell, 72 Fed. 526, Dodge v. Post, 76 Fed. 809, Bowers v. Pacific, etc., Reclamation Co., 81 Fed. 571, and Bowers v. San Francisco Bridge Co., 91 Fed. 409. Approved in The Barbed-Wire Patent, 143 U. S. 285, 36 L. 159, 12 S. Ct. 447, holding proof sustaining an unpatented device, set up as a complete anticipation, must be beyond a reasonable doubt; Cary v. Lovell Mfg. Co., 31 Fed. 347, sustaining Cary patent for spiral springs; Hat, etc., Mfg. Co. v. Davis, etc., Mach. Co., 32 Fed. 404, holding that facts raised a presumption of validity; American Bell Tel. Co. v. American, etc., Tel. Co., 35 Fed. 739, 1 L. R. A. 62, treating experiment as having been abandoned; Putnam v. Keystone, etc., Stopper Co., 38 Fed. 236, granting pre-

[illegible] injunction; Harmon v. Strothers, [illegible] Fed. [illegible], overruling defense of prior use; United States, etc., Lighting Co. v. Edison Lamp Co., 51 Fed. 28, holding evidence of prior invention insufficient to overcome presumption; Francis v. Kirkpatrick Co., 52 Fed. 837, overruling defense of anticipation; Singer Mfg. Co. v. Brill, 54 Fed. [illegible], 7 U. S. App. 601, holding finding of infringement by jury not reviewable; Harper Co. v. Wilgus, 56 Fed. 588, 15 U. S. App. 148, refusing to consider objection to verdict, because evidence showed patent was anticipated; Barnes etc., Sprinkler Co. v. Walworth Mfg. Co., [illegible] Fed. 607, 18 U. S. App. 338, upholding defense that patented device was anticipated by a prior patent; Electric [illegible] v. Edison, etc., Light Co., [illegible] Fed. 837, 18 U. S. App. 637, [illegible] has been sustained, right [illegible] only by a new defense, [illegible] trial; Mast v. Iowa, [illegible] subsequently abandoned, [illegible] Bridge Co. v. Keat- [illegible] verdict of jury upon [illegible] Co. v. Peters Cartridge [illegible] on question of priority [illegible] evidence; American, etc., [illegible] Fed. 993, where claimant [illegible] foreign country prior to his [illegible] is on him; Morgan v. Dan- [illegible] Ct. 773, and Earl v. Southern [illegible] prior adjudication, sustaining [illegible] man, 79 Fed. 323, and Consoli- [illegible] Co., 79 Fed. 798, both con- [illegible]; Hobie v. Smith, 27 Fed. 659, [illegible] etc., Electrical Co., 54 Fed. 679, [illegible] and Hanifen v. E. H. Godshalk [illegible], all holding prior use not proved; [illegible], Kinnear & Co. v. Capital, etc., [illegible] Wilkins, etc., Fastener Co. v. Webb, [illegible] patent is prima facie evidence of its

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[illegible] are advisory merely, not obligatory; [illegible] Supreme Court, p. 702.

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Distinguished in Interstate Commerce Commission v. Brimson, 154 U. S. 483, 484, 38 L. 1059, 14 S. Ct. 1135, holding commission could not be invested with power to compel obedience to its orders by fine or imprisonment.

Courts.— Congress cannot enlarge Supreme Court's appellate powers, or authorize non-judicial opinion by it, p. 702.

Reaffirmed in In re Pacific Ry. Commrs., 12 Sawy. 587, 32 Fed. 259. Approved in United States v. Old Settlers, 148 U. S. 466, 37 L. 524, 13 S. Ct. 666, holding Congress had not authorized courts to go behind treaty of 1846, with Cherokee Nation; Styles v. Tyler, 64 Conn. 453, 30 Atl. 172, arguendo.

Courts.— Congress having omitted to transfer records of territorial court, Supreme Court will not bring up record and proceed to judgment, p. 704.

Reaffirmed in Pendleton v. Cowling, 11 Mont. 48, 27 Pac. 388.

Constitutionality of law is judicial question to be decided by the courts, p. 705.

Reaffirmed in State v. Cunningham, 83 Wis. 137, 35 Am. St. Rep. 45, 53 N. W. 53, 17 L. R. A. 166.

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APPENDIX.

Cases disposed of at October Term, 1885, in which no opinions were delivered.

No. 6. HEWITT v. MCOUAT. Dismissed, pursuant to 19th Rule.

7. SAVAGE v. BURNS. Dismissed, pursuant to 19th Rule.

10. EDWARDS v. FARRELL. Affirmed, per stipulation.

11. PAYNE, &c. v. MOORE, &c. Dismissed by appellants.

15. ASBILL v. WHITMORE. Dismissed per stipulation.

20. WISDOM v. SHELBY COUNTY. Dismissed per stipulation.

51. PUTNAM v. HUTCHINSON. Dismissed per stipulation.

54. PUTNAM v. HUTCHINSON. Dismissed per stipulation.

63 PAULSEN v. RAILWAY CO. Affirmed.

352. BACHMAN v. RAILWAY CO. Affirmed.

90. MCCLURE v. UNITED STATES. Dismissed by appellant.

137. MCKAY v. LEHMAN. Dismissed by stipulation.

139. CURTIN v. PEOPLE. Dismissed by plaintiff in error.

146. BLUE RIDGE v. HYDE. Dismissed by plaintiff in error.

153. NEELY v. CALDWELL. Dismissed by plaintiff in error.

171. MORELEY v. KIMBERLY. Dismissed, pursuant to 28th Rule.

181. THOMAS v. LANSING. Dismissed for want of jurisdiction.

191. BANK v. DUDLEY. Dismissed per stipulation.

289. RAILROAD COMPANY v. COMMISSIONERS, &c. Dismissed by plaintiff in error.

294. CAMPBELL v. OSWEGO TOWNSHIP. Dismissed by plaintiff in error.

537, 538. WILSON v. COMMISSIONERS, &c. Dismissed by plaintiff in error.

623. KIRKPATRICK v. BAKER. Dismissed per stipulation.

663. MINING COMPANY v. MINING COMPANY. Dismissed per stipulation.

682. ELDER v. ULMAN. Dismissed per stipulation.

898. PAUL v. CULLUM. Dismissed by appellant.

1055. UNITED STATES v. "THE PURRISIMA," &c. Dismissed by appellant.

1056. UNITED STATES v. MURGA. Dismissed by appellant.

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GENERAL INDEX

TO THE

FOUR VOLUMES CONTAINED IN THIS BOOK.

114, 115, 116, 117.

ACCORD AND SATISFACTION.

SEE CONTRACTS, 12.

Certain attorneys were employed by the State of Texas to recover certain bonds and coupons, or the proceeds thereof, their compensation to be a percentage of the amount recovered. Agents subsequently appointed for the same purpose are not liable upon a promise made to the attorneys to withhold the amount recovered until the attorneys should be paid, said attorneys having, before the money was paid over, entered into a compromise and released the State.

Morris v. Giddings, 403

ACTIONS.

SEE APPEAL AND ERROR, 72.
BONDS, 5, 7.
CONSTITUTIONAL LAW, 29, 66.
CONTRACTS, 10, 11.
DEBIT.
INTERNAL REVENUE, 2.
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NEGLIGENCE, 5.
PARTNERSHIP, 5, 6.
PENALTIES, 2.
REMOVAL OF CAUSES, *passim*.
REPLEVIN, 1.
SALES, 4.
SET-OFF, 2.

1. Detinue lies for personal property, distrained by the defendant for delinquent taxes, in payment of which the plaintiff had duly tendered coupons cut from bonds issued by the State of Virginia under the Funding Act of March 30, 1871.

Poindexter v. Greenhow, 135

2. Where, by an Act of Congress, the Secretary of the Treasury is required to pay a certain claim against the United States, and no discretion in the premises is vested in him, the claimant is entitled to payment, and no suit lies to recover back the amount when paid on the ground of mistake, unless Congress abrogates the law under which payment was made.

United States v. Price, 541

ADMIRALTY.

SEE JURISDICTION, 5-8.
PRACTICE, 10, 11.

1. Where, in cases of collision, it appears that signals were exchanged as required by Rule 2 of the Board of Supervising Inspectors of Steam Vessels, and the question of distance between the vessels at the time of such exchange of signals is not raised in the court below, it will be presumed to have been at the proper distance, as nothing appears to the contrary.

Steamboat Charles Morgan v. Kouns, 316

2. Under the operation of Admiralty Rule 24, the Circuit Court may, in its discretion, permit an amendment of the libel, so as to include a claim for damages growing out of the original cause of action and litigated in the court below, but rejected because not specified in the pleadings.

Idem, 316

3. The finding of the board of local inspectors, in proceedings instituted under sec. 4450, R. S., and the documents connected therewith, are inadmissible evidence.

Idem, 316

4. In a charter party, which describes the ship by name and as "of the burthen of 1,100 tons, or thereabouts, registered measurement," and by which the owner agrees to receive on board, and the charterer engages to provide, "a full and complete cargo, say about 11,500 quarters of wheat in bulk," the statement of her registered tonnage is not a warranty or condition precedent.

Watts v. Camors, 406

5. The clause in a charter party, by which the parties mutually bind themselves, the ship and freight, and the merchandise to be laden on board, "in the penal sum of estimated amount of freight," to the performance of their agreements, is not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of damage that either party may actually suffer from any breach of the contract; and is to be so treated in a court of admiralty of the United States.

Idem, 406

6. Under a charter party which allowed fifteen lay days for loading, the owner of the ship tendered her to the charterers, they immediately refused to accept her, and thirty-six days afterward he obtained another cargo; but negotiations were pending between the parties for half of that time, and the owner sustained substantial damage in a certain amount by the failure of the charterers to comply with their contract. The Circuit Court found these facts, and entered a decree against the charterers for that amount. Held, no error in law, for which the charterers could have the decree reversed in this court.

Idem, 406

AGENCY.

SEE PRINCIPAL AND AGENT.

ALIENS.

SEE JURISDICTION, 6, 8, 9.

APPEAL AND ERROR.

SEE ADMIRALTY, 6.
CONFEDERATE NOTES, 2.
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FOREIGN COINS, 3.
JUDGMENTS AND DECREES, 6.
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NEW TRIAL.
PRACTICE, 3.
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REMOVAL OF CAUSES, 33.

1. Affidavits presented to the master, or the court below, as grounds of application to reopen the proofs, cannot be considered by this court on appeal.

Thomson v. Wooster, 105

2. A judgment is final for purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, the court below having only to execute its judgment in case of affirmance.

Mower v. Fletcher, 117

3. Under the Utah Code of Criminal Procedure of 1878, a judgment upon a verdict of guilty of murder, the record of which states that the court charged the jury, and does not contain the charge in writing, nor show that with the defendant's consent it was given orally, is erroneous, and must be reversed on appeal.
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Richmond Mining Co. v. Ross, 273
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Idem, 144
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Idem, 144
14. An order of this court served upon the appellee, to appear and argue the cause if he sees fit, is itself the legal equivalent of a citation.
Idem, 144
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Lancaster v. Collins, 373
19. The question as to which party shall make the closing argument to the jury is one of practice, and is not the subject of a bill of exceptions or of a writ of error.
Idem, 373
20. No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the ruling was made.
Idem, 373
21. Where suit is brought against heirs to enforce their liability for the payment of a note on which their ancestor was bound, and they plead neither counterclaim nor set-off, and ask no affirmative relief, and separate judgments are rendered against each for his proportionate share, this court has jurisdiction in error only over those judgments which exceed $5,000.
Henderson v. Wadsworth, 377
22. Upon appeal from a decree against all of the defendants jointly, after the death of one of the appellants the appeal may proceed at the suit of the survivors.
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23. A motion to dismiss will be granted where it appears on the face of the opinion, when it forms a part of the record, that the decision by the su[illegible] court did not involve a federal question.
Jacks v. Helena, 3[illegible]
24. In the absence of any assignment of errors, [illegible] counsel for plaintiff in error having withdrawn [illegible] appearance, the judgment will be affirmed.
Boston Gold Mining Co. v. Eagle C. & S. Mining Co., 3[illegible]
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Waterville v. Van Slyke, 4[illegible]
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Idem, 44[illegible]
28. Under equity, Rule 93, the judge who allow[illegible] the appeal may give special notice that the injunc[illegible]tion is to continue in force pending the appeal.
Idem, 44[illegible]
29. The jurisdiction of this court in an action up[illegible] on a money demand, is governed by the value of the actual matter in dispute, as shown by the whole record, and not alone by the damages claimed in the prayer for judgment.
Bowman v. Chicago & N. R. Co., 50[illegible]
30. In a controversy between the trustee in a railroad mortgage and certain creditors claiming superior liens, it is held that the demand of each creditor is separate and distinct, and that the jurisdiction of this court does not extend to the creditors whose several decrees do not exceed $5,000.
Hassall v. Wilcox, 504
31. The trustee represents all of the bondholders; this appeal is therefore their appeal and is to be treated as such.
Idem, 504
32. Where it does not appear from the record that a federal question was actually presented or in any way relied on before final judgment below, this court is without jurisdiction.
Simmerman v. Nebraska, 535
33. This court acts on the case as made to the court below when the judgment was rendered, and cannot incorporate into the record new matter appearing on the petition for rehearing.
Idem, 535
34. A stipulation by the parties and the finding of the court thereon, will be construed, on appeal, with reference to existing laws affecting the subject matter.
Utah & N. R. Co v. Fisher, 542
35. A citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the term to which it is made returnable then the appeal becomes inoperative.
Hewitt v. Filbert, 581
36. An appeal from the Court of Claims brings up for review the decisions of that court upon questions of law arising in the course of the trial, or in the application of the law to the facts as finally found by it.
Union Pac. R. Co. v. United States, 584
37. An appeal under sec. 5261, R. S., is subject to the general rules regulating appeals from the Court of Claims.
Idem, 584
38. Certain special findings which were requested in the court below were properly refused, as they related to mere incidental facts amounting only to evidence which had performed its office when the facts were found.
Idem, 584
39. When it appears that there is no longer an existing cause of action between the parties to a writ of error, pending in this court, it will be dismissed.
San Mateo County v. Southern Pac. R. Co., 589
40. An objection to the service of a citation of a writ of error to a state court in another State by the marshal of a district therein, can only be taken advantage of by a motion to dismiss made promptly, on appearance limited to that specific purpose.
Renaud v. Abbott, 629
41. The substitution, by the state court, of the plaintiff in error upon the death of the plaintiff af-

ter judgment, was a question which that court had the exclusive right to determine.
Idem, 629
42. Upon a writ of error to the highest court of a State, this court takes judicial notice of the law of another State only where, by the local law, that court takes judicial notice of it.
Idem, 629
43. Where the record does not contain more, this court must take the findings of the trial court as adopted by the court below, and determine the case on their sufficiency, considered in connection with the pleadings to support the judgment.
O'Reilly v. Campbell, 669
44. It is a general rule that an objection to want of proof of a fact, which might be met at once, must be taken at the trial or it will be considered as waived, except as to matters going to the jurisdiction.
Idem, 669
45. Findings of fact are not construed with the strictness of special pleadings.
Idem, 669
46. Where it appears upon examination of affidavits and counter-affidavits, filed in this court, that the value of the property in dispute is less than $5,000 the writ of error will be dismissed.
Wells v. Wilkins, 671
47. Where it does not appear, either from the record or by affidavits, that the value of the matter in dispute exceeds $5,000 the writ of error will be dismissed.
Johnson v. Wilkins, 671
48. Where, upon a writ of error to a state court, a federal question is raised here, and it is possible that its decision was necessarily involved in the judgment below, a motion to dismiss will not be sustained, although it may not appear affirmatively on the face of the record that such question was raised below.
Eureka L. & Y. Can. Co. v. Superior Court, 671
49. Upon a second appeal from the Court of Claims the findings of fact at the first trial and the original petition, an amended petition having been substituted therefor, form no part of the record.
Union Pac. R. Co. v. United States, 677
50. Cases advanced under sec. 3, Rule 32, are to be submitted on printed briefs or arguments after service of notice and brief or argument.
Fletcher v. Hamlet, 679
51. Upon a writ of error to reverse a judgment of forfeiture for violation of the internal revenue laws, questions arising on certain demurrers and the question as to the jurisdiction of the Circuit Court, are subject to review, though no bill of exceptions appears in the record.
Coffey v. United States, 681
52. A general verdict upon an information under the revenue laws for forfeiture of goods only, will be upheld if but one of several counts is good.
Idem, 681
53. Upon a writ of error to reverse a judgment of forfeiture for a violation of the internal revenue laws, questions involving the sufficiency of the information and the regularity of the proceedings, which were not formally raised in the court below, and are not presented by bill of exceptions, cannot be considered by this court.
Coffey v. United States, 684
54. The claimant, having by answer denied the allegations of the first count of the information, cannot, on the record so presented, be heard to say that he did not know the charge made and could not defend against it.
Idem, 684
55. One good count in an information will uphold the judgment after a general verdict.
Idem, 684
56. Upon a writ of error to a state court if the record shows on its face that a federal question was not necessarily involved, and does not show that one was raised, this court will not go out of it to the opinion or elsewhere, to ascertain whether one was in fact decided.
Otis v. Oregon Steamship Co., 719
57. Upon a writ of error to review a judgment entered upon a special finding of facts, the trial in the court below having been without a jury, in the absence of a bill of exceptions this court can only consider such special finding, and will ignore a stipulation between the parties after the trial that certain other facts were shown by proof at the trial.
Chicago Tyre and S. W. Co. v. Spalding, 720
58. Cases in which the execution of the revenue laws of a State have been enjoined or stayed, will only be advanced on motion of the State or those claiming under it, and then it must appear that the operations of the government of the State will be embarrassed by delay.
Kentucky Central R. R. Co. v. Bourbon County, 725
59. Whatever has been decided by this court on one writ of error cannot be re-examined on a subsequent writ of error in the same case.
Chaffin v. Taylor, 727
60. Every question of law presented was covered by the former judgment of this court, 114 U. S. 309; and it was error for the state court in proceedings under the mandate to permit the filing of a rejoinder setting up matters of law which had been already finally adjudged by this court in the same case.
Idem, 727
61. Where a plea to the jurisdiction was filed by a defendant and overruled in the Circuit Court and no error was assigned and the point was not referred to on the argument in this court, leave is granted by the court, of its own motion, to counsel to file arguments on the question by a day named.
Pa. R. R. Co. v. St. Louis, etc., R. R. Co., 696
62. A trial by an impartial jury being all that a party can demand the allowance of a challenge for cause, even if the cause was insufficient, is no ground of complaint where a competent and unbiased jury was finally selected.
Northern Pac. R. R. Co. v. Herbert, 755
63. It is for the party asserting error to show it. Where a party was entitled to peremptory challenge it will not be assumed that a juror was rejected on a challenge for cause.
Idem, 755
64. When a case is brought here from a Circuit Court for review, in which the matter in controversy is less than $5,000, it will be dismissed, although accompanied by a certificate of division of opinion by the judges holding the court, unless that certificate presents a case proper for the consideration of this court and not a proposition of mixed law and fact.
Waterville v. Van Slyke, 772
65. While such a statement must accompany the certificate as to show that the question of law is applicable to the case, the point on which the judges differed must be a distinct question of law clearly stated.
Idem, 772
66. If more than one material question of distinct law occurs on which the judges sitting differ, these questions may be embraced in the certificate, but where it is apparent that the whole case is presented to this court for decision, with all its propositions of law and fact, it will not be entertained.
Idem, 772
67. There is nothing in sec. 763, R. S., which requires that appeals from the District Court in cases of *habeas corpus* shall be to the next term of the Circuit Court. On the contrary the subject is otherwise regulated by sec. 765, R. S.
Roberts v. Reilly, 544
68. An objection that the hearing of the appeal by the court below was at chambers and not in open court cannot be made here for the first time.
Idem, 544
69. An appeal will not be entertained from a decree of an inferior court in exact accordance with the mandate of this court upon a previous appeal.
Mackall v. Richards, 558
70. Where an appeal was taken for the sole purpose of correcting a certain error, it is proper to construe the mandate as in effect nothing more than an order for such correction, leaving the remainder of the decree to stand.
Idem, 558
71. Where, since the original decree, the rights of the parties have so changed as to make it improper to carry the decree into execution, relief can only be had through some form of original proceeding.
Idem, 558
72. The decree in this case, although rendered at general term, was still the decree of the Supreme Court of the District of Columbia.
Idem, 558
73. Under the rules regulating appeals from the Court of Claims the evidence cannot be brought up, and the special Act under which this case was brought does not take it out of the operation of the rules.
McClure v. United States, 572
74. A cause will not be remanded to the Court of Claims for further findings where the findings desired would simply bring before this court the com-

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43. Where the record does not contain more, this court must take the findings of the trial court as adopted by the court below, and determine the case on their sufficiency, considered in connection with the pleadings to support the judgment.
O'Reilly v. Campbell, 669

44. It is a general rule that an objection to want of proof of a fact, which might be met at once, must be taken at the trial or it will be considered as waived, except as to matters going to the jurisdiction.
Idem, 669

45. Findings of fact are not construed with the strictness of special pleadings.
Idem, 669

46. Where it appears upon examination of affidavits and counter-affidavits, filed in this court, that the value of the property in dispute is less than $5,000 the writ of error will be dismissed.
Wells v. Wilkins, 671

47. Where it does not appear, either from the record or by affidavits, that the value of the matter in dispute exceeds $5,000 the writ of error will be dismissed.
Johnson v. Wilkins, 671

48. Where, upon a writ of error to a state court, a federal question is raised here, and it is possible that its decision was necessarily involved in the judgment below, a motion to dismiss will not be sustained, although it may not appear affirmatively on the face of the record that such question was raised below.
Eureka L. & Y. Can. Co. v. Superior Court, 671

49. Upon a second appeal from the Court of Claims the findings of fact at the first trial and the original petition, an amended petition having been substituted therefor, form no part of the record.
Union Pac. R. Co. v. United States, 677

50. Cases advanced under sec. 3, Rule 32, are to be submitted on printed briefs or arguments after service of notice and brief or argument.
Fletcher v. Hamlet, 679

51. Upon a writ of error to reverse a judgment of forfeiture for violation of the internal revenue laws, questions arising on certain demurrers and the question as to the jurisdiction of the Circuit Court, are subject to review, though no bill of exceptions appears in the record.
Coffey v. United States, 681

52. A general verdict upon an information under the revenue laws for forfeiture of goods only, will be upheld if but one of several counts is good.
Idem, 681

53. Upon a writ of error to reverse a judgment of forfeiture for a violation of the internal revenue laws, questions involving the sufficiency of the information and the regularity of the proceedings, which were not formally raised in the court below, and are not presented by bill of exceptions, cannot be considered by this court.
Coffey v. United States, 684

54. The claimant, having by answer denied the allegations of the first count of the information, cannot, on the record so presented, be heard to say that he did not know the charge made and could not defend against it.
Idem, 684

55. One good count in an information will uphold the judgment after a general verdict.
Idem, 684

56. Upon a writ of error to a state court if the record shows on its face that a federal question was not necessarily involved, and does not show that one was raised, this court will not go out of it to the opinion or elsewhere, to ascertain whether one was in fact decided.
Otis v. Oregon Steamship Co., 719

57. Upon a writ of error to review a judgment entered upon a special finding of facts, the trial in the court below having been without a jury, in the absence of a bill of exceptions this court can only consider such special finding, and will ignore a stipulation between the parties after the trial that certain other facts were shown by proof at the trial.
Chicago Tyre and S. W. Co. v. Spalding, 720

58. Cases in which the execution of the revenue laws of a State have been enjoined or stayed, will only be advanced on motion of the State or those claiming under it, and then it must appear that the operations of the government of the State will be embarrassed by delay.
Kentucky Central R. R. Co. v. Bourbon County, 725

59. Whatever has been decided by this court on one writ of error cannot be re-examined on a subsequent writ of error in the same case.
Chaffin v. Taylor, 727

60. Every question of law presented was covered by the former judgment of this court, 114 U. S. 309; and it was error for the state court in proceedings under the mandate to permit the filing of a rejoinder setting up matters of law which had been already finally adjudged by this court in the same case.
Idem, 727

61. Where a plea to the jurisdiction was filed by a defendant and overruled in the Circuit Court and no error was assigned and the point was not referred to on the argument in this court, leave is granted by the court, of its own motion, to counsel to file arguments on the question by a day named.
Pa. R. R. Co. v. St. Louis, etc., R. R. Co., 696

62. A trial by an impartial jury being all that a party can demand the allowance of a challenge for cause, even if the cause was insufficient, is no ground of complaint where a competent and unbiased jury was finally selected.
Northern Pac. R. R. Co. v. Herbert, 755

63. It is for the party asserting error to show it. Where a party was entitled to peremptory challenge it will not be assumed that a juror was rejected on a challenge for cause.
Idem, 755

64. When a case is brought here from a Circuit Court for review, in which the matter in controversy is less than $5,000, it will be dismissed, although accompanied by a certificate of division of opinion by the judges holding the court, unless that certificate presents a case proper for the consideration of this court and not a proposition of mixed law and fact.
Waterville v. Van Slyke, 772

65. While such a statement must accompany the certificate as to show that the question of law is applicable to the case, the point on which the judges differed must be a distinct question of law clearly stated.
Idem, 772

66. If more than one material question of distinct law occurs on which the judges sitting differ, these questions may be embraced in the certificate, but where it is apparent that the whole case is presented to this court for decision, with all its propositions of law and fact, it will not be entertained.
Idem, 772

67. There is nothing in sec. 763, R. S., which requires that appeals from the District Court in cases of *habeas corpus* shall be to the next term of the Circuit Court. On the contrary the subject is otherwise regulated by sec. 765, R. S.
Roberts v. Reilly, 544

68. An objection that the hearing of the appeal by the court below was at chambers and not in open court cannot be made here for the first time.
Idem, 544

69. An appeal will not be entertained from a decree of an inferior court in exact accordance with the mandate of this court upon a previous appeal.
Mackall v. Richards, 558

70. Where an appeal was taken for the sole purpose of correcting a certain error, it is proper to construe the mandate as in effect nothing more than an order for such correction, leaving the remainder of the decree to stand.
Idem, 558

71. Where, since the original decree, the rights of the parties have so changed as to make it improper to carry the decree into execution, relief can only be had through some form of original proceeding.
Idem, 558

72. The decree in this case, although rendered at general term, was still the decree of the Supreme Court of the District of Columbia.
Idem, 558

73. Under the rules regulating appeals from the Court of Claims the evidence cannot be brought up, and the special Act under which this case was brought does not take it out of the operation of the rules.
McClure v. United States, 572

74. A cause will not be remanded to the Court of Claims for further findings where the findings desired would simply bring before this court the com-

parative weight as evidence of the facts found on both sides.
McClure v. United States, 572
75. It is not for this court to decide that the jury brought in a wrong verdict under a correct charge where there was some evidence to support the verdict.
Chicago & N. W. R. R. Co. v. Ohle, 837
76. The rule that what was decided on a first appeal is not open to reconsideration in the same case on a second appeal, upon similar facts, does not apply to expressions of opinion on matters the disposition of which was not necessary to the decision.
Barney v. Winona & St. P. R. R. Co., 858
77. A motion to increase *supersedeas* bond overruled.
Harwood v. Dickerhoff, 887
78. A judgment of reversal, accompanied by an order remanding the cause for a new trial, is not a final judgment for the purposes of a writ of error to this court.
Johnson v. Keith, 888
79. Where the trial below is by the court without a jury, a general finding prevents all inquiry by this court into the special facts and conclusions of law on which it rests.
Boardman v. Toffey, 898
80. An offer by the defendant in error, for the purpose of saving costs, made out of court cannot be considered. Such an offer should be made in open court upon due notice to the other side.
New Providence v. Halsey, 904
81. An exception to a ruling of the trial court sustaining a motion for a nonsuit is within sec. 279 of the Montana Code.
Kleinschmidt v. McAndrews, 905
82. The bill of exceptions presented is held not to be limited to the exception taken to the entry of the final judgment, but to embrace matters occurring previously, and the testimony and agreed statement of facts on which the motion for a nonsuit was based.
Idem, 905
83. Section 408, Montana Statutes, limiting the time within which appeals may be taken, does not apply to a decision granting a motion for a nonsuit.
Idem, 905
84. Upon the facts recited in the bill of exceptions the delivery of possession under the bill of sale is held to have been immediate within the meaning of sec. 15 of the statute of Montana relating to conveyances and contracts.
Idem, 905
85. Distinct decrees against distinct parties on distinct causes of action, or on a single cause of action in which there are distinct liabilities, cannot be joined to give this court jurisdiction on appeal.
Ex parte Phœnix Ins. Co. of London, 923
86. It was not improper for the court below to permit a certificate of the evidence adduced on the trial of an issue sent to the law side of the court, with the charge to the jury, to be filed and made part of the record at the succeeding term after that at which the decree was entered.
Kerr v. South Park Comrs., 924
87. This court refuses to disregard the verdict recited in the decree, although it is alleged that a prior verdict was not properly set aside, on the ground that the Chancellor, in framing the decree, confirmed the action of the circuit judge in setting aside the first verdict.
Idem, 924
88. In an action involving the title to certain bonds the Supreme Court on a complicated state of facts affirms the judgment of the Circuit Court.
Littlefield v. Bloxham, 930
89. The matter in dispute, on which the jurisdiction of this court depends, is the matter directly in dispute in the particular cause in which the judgment or decree sought to be reviewed was rendered, not including its collateral effect in a subsequent action between the same or other parties.
Bruce v. Manchester & K. R. R. Co., 990
90. Where a suit is brought to recover the interest on bonds only, the amount of the interest determines the jurisdiction irrespective of the value of the principal of the bonds.
Idem, 990
91. This court refuses to dismiss on a motion of a third party based on a charge that the suit is collusive, and affidavits to the effect that the amount involved is less than $5,000, the court below having found as a fact that the premises exceed $5,000 in value.
Zeigler v. Hopkins, 1019
92. Where it is charged that the obligation of a contract has been impaired by a state law, and the state courts justify such impairment by the application of some general rule of law to the facts of the case, the Supreme Court of the United States has jurisdiction to review that decision.
State ex rel. Green v. Wright, 1021

ARMY.

SEE HABEAS CORPUS, 19.
OFFICERS.

ASSIGNMENT.

SEE BANKRUPTCY, 1.
INSURANCE, 12-15.
JURISDICTION, 1, 32.

Though an assignment of a mere right to file a bill for fraud committed upon the assignor is void, a conveyance of property is not void because the grantee may have to bring suit to enforce his right to the property conveyed.
Traer v. Clews, 467

ATTACHMENT.

SEE BANKRUPTCY, 1.
CORPORATIONS, 4.
GARNISHMENT.
LANDS, 35.

1. Under the law of Louisiana the effect of a cession of property by an insolvent is to dissolve all attachments which have not matured into judgments.
Tua v. Carriere, 855
2. A cession by surviving partners carries their own undivided interests, and if it purports to carry the interest of a deceased partner and the court accepts the surrender, the validity of the cession cannot be attacked collaterally in attachment proceedings.
Idem, 855
3. Property in the possession of one court is not liable to seizure on process from another.
Idem, 855

BANKRUPTCY.

SEE JURISDICTION, 10, 12, 14, 19, 20, 34, 38.
MORTGAGES, 3.
PARTNERSHIP, 8.

1. Where a proceeding in bankruptcy was commenced prior to the levy of an attachment, issued by a state court of Michigan, on land of the debtor, the assignment made subsequently related back and vested title in the assignee.
Chapman v. Brewer, 83
2. The assignee in possession could maintain a suit in equity in the United States Circuit Court to remove the cloud on his title and under section 720, R. S., the court could enjoin a sale under the levy and a further levy.
Idem, 83
3. The District Court having had jurisdiction of the subject matter, the adjudication is conclusive of the fact decreed and cannot be attacked collaterally in a suit by the assignee against one claiming an adverse interest.
Idem, 83
4. The creditor of a bankrupt surrendered one of two securities claimed by the assignee as being unlawfully in his possession. A suit of the assignee to recover the other resulted in favor of the defendant. In a suit by the creditor to recover the proceeds of the security surrendered, it is held that the action is barred by the two years' limitation under sec. 2, Act of March 2, 1867, and sec. 5057, R. S.
Doe v. Hyde, 142
5. The term "fraud," in the clause defining the debts from which a bankrupt is not relieved by a discharge under the Bankrupt Act, means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, not implied fraud, which may exist without bad faith.
Strang v. Bradner, 248
6. A claim against a bankrupt for damages on account of fraud or deceit practiced by him, is not discharged by proceedings in bankruptcy; even where it was proved against his estate, and a dividend thereon received on account.
Idem, 248
7. One who has been adjudicated a bankrupt may purchase property surrendered by him prior to his actual discharge.
Traer v. Clews, 467

8. A lawful composition under sec. 17 of the Act of June 22, 1874, and its performance, has the same effect as a discharge in bankruptcy.
Liebke v. Thomas, 744
9. The holder and owner of an accommodation note is the party to be dealt with in composition proceedings. The accommodation maker is not entitled to notice of such proceedings involving the payee and indorser for the accommodation of whom the note was made.
Idem, 744
10. A state insolvent law is valid though enacted while a national Bankrupt Act is in force, and on the repeal of the latter it becomes operative.
Tua v. Carriere, 855
11. The insolvent law of Louisiana was enacted prior to the enactment of the Bankruptcy Act of 1867, by Congress.
Idem, 855
12. As, under the statute, a discharge releases the bankrupt only from debts which were or might have been proved, and debts secured by mortgage or pledge can only be proved for the balance remaining due after deducting the value of the security, unless all claim on the security is released, where a creditor neither proved his claim nor released his lien the security was preserved notwithstanding the bankruptcy of his debtor.
Long v. Bullard, 1004

BANKS.

SEE APPEAL AND ERROR, 5, 6.
DEBTOR AND CREDITOR, 2.
EVIDENCE, 2-5, 8, 9.
JURISDICTION, 10.

1. Where a depositor sends his pass-book to the bank to be written up, it is his duty upon its return, either in person or by duly authorized agent, within a reasonable time, to examine the account and vouchers returned and give to the bank timely notice of any objections thereto. If he fail so to do, he may be estopped from questioning the conclusiveness of the account.
Leather Manuf'rs Nat. Bk. v. Morgan, 811
2. If the examination is made by an agent, it must be done in good faith and with ordinary diligence, and where such agent himself commits forgeries which mislead the bank and injure the depositor, the latter is not protected in the absence of, at least, reasonable diligence in supervising the conduct of the agent.
Idem, 811
3. In the case presented it was error to direct a verdict for the plaintiffs, as the questions whether the depositor is estopped, whether the bank exercised due caution before paying the altered checks, and whether a certain check was indorsed in blank or for deposit, are for the jury.
Idem, 811

BIGAMY.

SEE POLYGAMY, *passim*.
UTAH, 7.

BILLS, NOTES AND CHECKS.

SEE APPEAL AND ERROR, 21.
BANKRUPTCY, 9.
BANKS, 3.
BONDS, *passim*.
EVIDENCE, 29.
JURISDICTION, 1.
MORTGAGES, 1, 5, 8.
PARTNERSHIP, 3.
TRUSTS AND TRUSTEES, 5.

A foreign bill of exchange dated March 4, payable in London 60 days after sight, accepted without date, "due 21st May," was protested on the 21st of May. In a suit against the drawer the date of acceptance was not shown. Held, that the bill was prematurely protested, it not appearing that days of grace were allowed.
Bell v. First Nat. Bk. of Chicago, 409

BONDS.

SEE ACTIONS.
APPEAL AND ERROR, 11, 20.
CONSTITUTIONAL LAW, 34.
INJUNCTIONS, 1, 2.
JURISDICTION, 11, 12, 32, 33.
LICENSE, *passim*.
RAILROADS, 6-8, 24.
STATE LAWS AND DECISIONS, 6.

1. Railroad bonds issued January 1, 1872, by the City of Holly Springs, Mississippi, held to be void for want of power to issue them, notwithstanding any recitals on their face, or any acts *in pais*, claimed to operate by way of estoppel.
Hayes v. Holly Springs, 81
2. The Act of the Legislature of Mississippi of March 16, 1872, relied on as a validating Act, held not to be sufficient for that purpose under the Constitution of the State.
Idem, 81
3. Upon the consolidation of four railroad companies, the consolidated company agreed to protect the various bonds of the old companies according to their true effect and meaning. Two years afterwards, the consolidated company, to secure its own bonds payable at a later date than the old ones, executed a mortgage of all its property to trustees, which recited that it had been deemed for the interest of the corporation as well as for the interest of all the various classes of existing bonds, that the whole of them should be consolidated into one mortgage debt upon equitable principles; and provided that a sufficient amount of the new bonds should be retained "to retire, in such manner and upon such terms as the directors may from time to time prescribe," an equal amount of the old bonds. Six years later, the consolidated company made another mortgage to secure other bonds, for nonpayment of which it was afterwards foreclosed by sale of the whole property. Held, that the company was not subject to any lien in favor of bonds of one of the old companies, issued after the passage of the statutes authorizing the consolidation, unsecured by any mortgage or lien before the consolidation, and the holders of which had not exchanged or offered to exchange them for bonds of the consolidated company before the proceedings for foreclosure.
Wabash, St. L. & P. R. Co. v. Ham, 235
4. Where the Constitution of a State provides that no city, etc., "shall be allowed to become indebted in any manner or for any purpose" beyond a certain per centum of its taxable property, the prohibition is as effectual against the implied as the express promise, and is as binding in equity as at law.
Litchfield v. Ballou, 132
5. The holders of bonds issued in excess of the constitutional limit and agents of the city are *particeps criminis* in the act of violating the constitutional prohibition, and equity will no more raise a resulting trust in favor of the holders than the law will raise an implied assumpsit for money had and received.
Idem, 132
6. The purchasers of bonds, issued in excess of the constitutional limit, have no lien upon public works upon which the purchase money is alleged to have been expended if other funds have also been expended upon such works.
Idem, 132
7. Where the complainant seeks to recover the money he let the municipality have, he must clearly identify it, or the fund, or other property which represents it.
Idem, 132
8. A decree which does not attempt to restore the specific money of the complainant, but which is for a sum equal in amount to the bonds and interest, being a decree to pay as on an implied contract, cannot be sustained.
Idem, 132
9. The statutory lien with which the State of Tennessee was invested, upon the issue of its bonds to railroad companies under its internal improvement laws, was created solely for the security of the State, and the holders of the bonds are not entitled to its benefit.
Stevens v. Memphis & C. R. R. Co., 281
10. Purchasers of securities of municipalities having only a special power to issue them for a particular purpose, must see that the conditions prescribed for the exercise of the power existed.
Merch. Exch. Nat. Bk. v. Bergen Co., 430
11. In the absence of recitals showing compliance with the provisions of the statutory authority, the obligor is not estopped from denying the fact of such compliance.
Idem, 430
12. Purchasers of municipal securities must take the risk of the genuineness of official signatures.
Idem, 430
13. In an original suit at law in this court by the State of Alabama against the controlling officers and stockholders of the Alabama and Chattanooga Railroad Company, certain bonds of which had been indorsed by the State, to recover losses alleged

to have resulted from the fraud of the defendants it is held that the liability of the defendants is statutory only; that they are not liable in this action for the alleged fraud in obtaining the indorsement of the State; that the other allegations of fraud fail to show that the losses of the State resulted from such fraud; and that the obligation of the company to use the bonds to build and equip its road was satisfied if the road was actually built, completed and equipped at a cost of more than the amount of the bonds.
Alabama v. Burr, 435

14. The Port of Mobile, which is composed of substantially the same community, includes within its limits substantially the same taxable property, holds substantially the same public property, and is organized for the same general purposes, as the City of Mobile, is the legal successor of said city, and liable for its debts.
Mobile v. Watson, 620

15. All Acts passed since the issue by the City of Mobile of the bonds in question, the purpose or effect of which is to take from said city or its successor, power to levy taxes and pay said bonds, are invalid, and *mandamus* lies to compel the proper officers of the Port of Mobile to levy the necessary taxes and pay the judgment of the plaintiff.
Idem, 620

16. Purchasers of certain bonds issued by a municipality of New Jersey under a statute of that State had the right to rely on the decision of the commissioners as conclusive as to the amount that could be issued under the statute.
New Providence v. Halsey, 904

17. Under the Act of the Legislature of Kentucky of February 27, 1867, the County Court of the County of Daviess acquired no authority to issue bonds for stock of the Owensboro & Russellville Railroad Company for a greater amount than $250,000, and all bonds issued in excess of that amount are invalid, even in the hands of a purchaser for value, before maturity and without notice of the excessive issue.
Daviess Co. v. Dickinson, 1026

18. The county is not estopped to deny the validity of a particular bond by a certificate on the back thereof by the county judge to the effect that it was duly authorized.
Idem, 1026

19. The payment of interest on all of the bonds does not amount to a ratification of those issued beyond the lawful limit.
Idem, 1026

20. It seems that the bonds first delivered, up to the amount authorized without regard to classification, are valid.
Idem, 1026

CARRIERS.

SEE INSURANCE, 4.
RAILROADS, *passim*.

1. In the absence of some special statute, there is no law, or usage having the force of law, which requires railroad companies to furnish express facilities to all express companies which may demand them.
Memphis & L. R. R. R. Co. v. Southern Exp. Co., 791

2. Though railroad companies are not common carriers of express carriers, it seems that it is their duty to furnish the general public with reasonable express facilities.
Idem, 791

3. It seems that the service rendered by a carrier in transporting a local passenger between two points is not in law identical with that rendered in transporting a through passenger between the same points.
Union Pac. R. Co. v. United States, 920

CHAMPERTY.

A champertous contract cannot be set up in bar of a recovery on the cause of action to which it relates.
Burnes v. Scott, 991

COMMERCE.

SEE CONSTITUTIONAL LAW, 3-12, 36-38.

COMMISSION MERCHANT.

Where the cancellation of contracts, made by a commission merchant on the Chicago Board of Trade for his principal, was shown, and uncontradicted evidence that the substitution of other contracts, as permitted by the rules of said board, if any, existed only in the mental operation of the commission merchant, it was proper to instruct the jury that no valid substitution had been shown.
Higgins v. McCrea, 764

CONFEDERATE NOTES.

1. Contracts made in the insurgent States, during the late civil war, between residents of those States, with reference to confederate notes as a standard of value, and not designed to aid the insurrectionary government, may be enforced in the national courts; and the value of the contracts is to be determined by the value of the confederate notes in lawful money of the United States at the time when and place where such contracts were made.
Effinger v. Kenney, 495

2. The Statute of Virginia of February 28, 1867, impairs the obligation of contracts. In a suit to enforce a lien for unpaid purchase money of real estate sold during the war, a decision under said statute that the plaintiff was entitled to recover the value of the land at the time of the sale instead of the value of the confederate notes with reference to which the sale was made, was erroneous.
Idem, 495

3. The question whether a bond was executed with reference to confederate notes is one of fact for the state court, and not a federal question of law for this court.
Kenney v. Effinger, 498

4. Payment in confederate currency, made to a coexecutor, in Virginia, in 1862, of a debt contracted there in 1860, such payment having been made and accepted in good faith, discharged the debt.
Glasgow v. López, 901

CONSTITUTIONAL LAW.

SEE APPEAL AND ERROR, 94.
BANKRUPTCY, 10.
BONDS, 2, 4-6, 15.
CONFEDERATE NOTES, 2.
CRIMINAL LAW, 2.
JUDGMENTS AND DECREES, 3, 4.
LICENSE, 2.
LIMITATIONS, 9.
RAILROADS, *passim*.
STATES.
STATUTES, 2-5.
TAXES, *passim*.
TERRITORIES, 3.

1. A crime punishable by imprisonment for a term of years at hard labor is an infamous crime within the provision of the Fifth Amendment of the Constitution.
Ex parte Wilson, 89

2. The provision of Rev. Stat. sec. 1022, authorizing certain offenses to be prosecuted either by indictment or by information, does not preclude the prosecution by information of such other offenses as may be so prosecuted consistently with the Constitution and laws of the United States.
Idem, 89

3. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities.
Gloucester Ferry Co. v. Pennsylvania, 158

4. The power to regulate interstate and foreign commerce, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions.
Idem, 158

5. With reference to the subjects of commerce which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control.
Idem, 158
Brown v. Houston, 257

6. When the subjects of commerce are national in character and require uniformity of regulation, affecting alike all of the States, the power of Congress is exclusive.
Idem, 158
Idem, 257

7. The commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a sub-

ject of national character, and requires uniformity of regulation. Congress alone can deal with such transportation, and its nonaction is a declaration that it shall remain free from burdens imposed by state legislation.

Gloucester Ferry Co. v. Pennsylvania, 158

8. Freedom of transportation implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property within the jurisdiction of the State.

Idem, 158

9. Receiving and landing passengers and freight is incident to their transportation. All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are invasions of the exclusive power of Congress.

Idem, 158

10. The only state interference with the landing and receiving of passengers and freight, which is permissible, is confined to such measures as will prevent confusion among the vessels, and collision between them, insure their safety and convenience and facilitate the discharge or receipt of their passengers and freight.

Idem, 158

11. A ferry is a means, and a necessary means, of commercial intercourse between States bordering on dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them.

Idem, 158

12. The capital stock of the Gloucester Ferry Company, a New Jersey corporation engaged in the transportation of persons and property between Gloucester in that State and Philadelphia in Pennsylvania, is not subject to taxation by the State of Pennsylvania.

Idem, 158

13. A state law authorizing a debtor to procure the obligations of his creditor and use them as a set-off for his own debt, is not liable to impeachment as devesting vested rights or impairing the obligation of contracts.

Amy v. Taxing Dist. of Shelby Co., 172

14. The Acts of March 23, 1868, of the Legislature of Tennessee, providing for the refunding of the indebtedness of the extinct municipality of Memphis in the bonds of the Taxing District of Shelby County, and the collection and application of back taxes, violated no right of the plaintiffs nor any contract of theirs.

Idem, 172

15. By the terms of the Virginia Funding Act of March 30, 1871, and the issue of bonds and coupons in virtue of the same, a contract was made between every coupon holder and the State, the right of the coupon holder, under which, was to have his coupons received for taxes when offered. Any Act of the State which forbids the receipt of these coupons for taxes is a violation of the contract, and void as against coupon holders.

Poindexter v. Greenhow, 185

16. A lawful tender of payment of taxes is equivalent to actual payment and deprives the collecting officer of all authority for further action, and makes every subsequent step illegal and void.

Idem, 185

17. The coupons in question are not "bills of credit," in the sense of the Constitution, which forbids the States to "emit bills of credit."

Idem, 185

18. An action brought by a taxpayer, who has duly tendered coupons which are a lawful tender in payment of his taxes, against the person who, under color of office as tax collector, and acting in the enforcement of a void law, having refused such tender, proceeds by seizure and sale of the property of the plaintiff to enforce the collection of such taxes is an action against him personally as a wrong doer, and not against the State, within the meaning of the Eleventh Amendment to the Constitution of the United States.

Idem, 185

19. As the State is a political corporate body, which can act only through agents and command only by laws, in order to complete his defense, the collector must produce a valid law of the State, which constitutes his commission as its agent, and a warrant for his act.

Idem, 185

20. The Act of the General Assembly of Virginia of January 23, 1882, forbidding the receipt of coupons issued under the Act of March 30, 1871, impairs the obligation of contracts, and is annulled by the Constitution of the United States.

Idem, 185

21. The Constitution of the United States and its own contract are the law of Virginia, and that law made it the duty of the defendant to receive the coupons tendered and declared every step thereafter taken to enforce the tax to be without warrant of law. This strips the defendant of his official character, and convicts him of a personal violation of the plaintiff's rights for which he must personally answer.

Idem, 185

22. A statute may be perfectly valid in its general and proper application; and yet be held to be void in particular applications of its provisions.

Idem, 185

23. In cases of detinue the action is purely defensive on the part of the plaintiff. Its object is merely to resist an attempted wrong and to restore the *status in quo* as it was when the right to be vindicated was invaded.

Idem, 185

24. The suit authorized by the General Assembly of Virginia of January 26, 1882, against the collector of taxes, for refusing to accept a tender of coupons, to recover back the amount paid under protest, is no remedy at all for the breach of the contract of the State.

Idem, 185

25. The revenue system of a State must yield to the contract which the State has lawfully made, and the obligation of which, by the Constitution, it is forbidden to impair.

Idem, 185

26. The right to pay in coupons cannot be treated as a mere right of set-off, which, when given by the general law, is part of the remedy merely, and therefore subject to modification or repeal, because the law which gave it is also a contract, and therefore cannot be changed without mutual consent.

Idem, 185

27. The Acts of the General Assembly of Virginia of January 26, 1882, and the Amendatory Act of March 13, 1884, are unconstitutional and void, because they impair the obligation of the contract of the State with the coupon holder under the Act of March 30, 1871, and that being the main object of the two Acts, the vice that invalidates them pervades them throughout, and in all their provisions.

Idem, 185

28. The statute of New Jersey of March 8, 1871, providing for the drainage of any tract of low or marshy land within the State, does not deprive owners of their property without due process of law, nor deny to them the equal protection of the laws, within the meaning of the Fourteenth Amendment of the Constitution of the United States.

Wurts v. Hoagland, 229

29. A statute giving the State a new remedy for an existing right to unpaid taxes is not retroactive under the Constitution of Ohio.

Sturges v. Carter, 240

30. What amounts to a substantial compliance with sec. 2782, R. S. of Ohio, requiring the auditor to notify the taxpayer of his intention to increase the amount of his property returned for taxation.

Idem, 240

31. The legislative power of Congress is exclusive over lands within a State purchased with her consent by the United States for a constitutional purpose.

Ft. Leavenworth R. Co. v. Lowe, 264

32. Where the United States acquires lands within a State in any other way than by purchase with her consent, forts, arsenals or other public buildings erected thereon for the use of the general government, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. But, when not used as such instrumentalities, the legislative power of the State over the places acquired remains.

Idem, 264

33. The cession of lands by a State to the United States may be upon conditions not inconsistent with their free and effective use for the purposes intended.

Idem, 264

34. After the admission of the State of Kansas, the United States retained only the rights of an ordinary proprietor in the Fort Leavenworth Military Reservation; except as an instrument for the execution of the powers of the general government, that part of the tract which was actually used as

a fort or military post, was beyond such control of the State, by taxation or otherwise, as would defeat its use for those purposes. The clause of the Act of the Legislature of Kansas of February 22, 1875, to cede jurisdiction over said Reservation to the United States, saving to the State "the right to tax railroad, bridge and other corporations, their franchises and property, on said Reservation," is valid.

Ft. Leavenworth R. Co. v. Lowe, 264

35. The Act of Congress purporting to cede to the United States exclusive jurisdiction over the Fort Leavenworth Military Reservation is a valid cession within the requirements of the Constitution.

C., R. I. & P. R. Co. v. McGlinn, 270

36. It is a general rule of public law, recognized and acted upon by the United States, that upon the transfer of political jurisdiction and legislative power over any territory, municipal laws continue in force until abrogated by the new government or sovereign. This principle applies to a cession to the United States by a State of legislative power over a particular tract for a special purpose of the general government.

Idem, 270

37. The term "imports" does not refer to articles carried from one State into another, but, only to articles imported from foreign countries into the United States.

Brown v. Houston, 257

38. A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least a direct tax or duty on goods which are intended for exportation.

Idem, 257

39. Coal, sent by the owners in Pennsylvania to their agents in New Orleans to be there sold for their account, becomes a part of the general mass of property of Louisiana upon its arrival, and is subject to taxation in common with all other property and in precisely the same manner. The fact that some of it is subsequently sold for exportation does not alter the case.

Idem, 257

40. "Due process of law" as applied to the levy and collection of taxes, does not imply or require the right to such notice and hearing as are considered essential to the validity of the proceedings and judgments of judicial tribunals.

Cincinnati, etc. R. R. Co. v. Kentucky, 414

41. The mode of valuing property for taxation under the Act of the Legislature of Kentucky of April 3, 1878, is due process of law.

Idem, 414

42. Whenever by the laws of a State, or by state authority, a tax assessment, servitude, or other burden is imposed upon property for the public use, and provision is made for confirming or contesting the charge thus imposed in the ordinary courts of justice, the judgment in such proceedings does not deprive the owner of his property without due process of law.

Idem, 414

43. Under the Constitution of Kentucky there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods.

Idem, 414

44. Railroad property, owing to its inherent nature, may form a separate class for purposes of valuation and taxation. If the mode of valuation is due process of law, its difference in some details from the mode of valuing other descriptions and classes of property does not operate as a denial of the equal protection of the laws.

Idem, 414

45. A statute of Missouri, which requires railroad corporations in the State to erect and maintain fences, and provides for the recovery of double the amount of all damages to stock occasioned by failure to construct or maintain such fences, does not deprive a company which is compelled to pay such damages, of property without due process of law; nor does it deny to the company the equal protection of the laws.

Missouri Pac. R. Co. v. Humes, 463

46. An action against a common carrier to recover damages for a refusal to transport beer into the State of Iowa, on the ground that such transportation is forbidden by a statute of that State, is not an action brought on account of a deprivation of a right, privilege or immunity secured by the Constitution within the meaning of sec. 699, R. S., which gives the court jurisdiction without regard to the sum or value in dispute.

Bowman v. Chicago & N. W. R. R. Co., 502

47. The legislative grant to the Louisville Gas Company, for the term of twenty years, of "the exclusive privilege of erecting and establishing gas works in the City of Louisville, and of vending coal gas lights and supplying the city and citizens with gas by means of public works," constituted a contract within the meaning of the National Constitution, and was not forbidden by the Bill of Rights of Kentucky, the services which the company undertook to perform being public services, affecting the interests and rights of the public generally.

Louisville Gas Co. v. Citizens Gas L. Co., 510

48. The Act passed by the Legislature of Kentucky in 1869, granting exclusive privileges to the Louisville Gas Company, "plainly expressed" within the meaning of the Act of 1856, an intent that the charter of the company should not be subject to amendment or repeal at the will of the Legislature without the concurrence of the city council and the company's directors.

Idem, 510

49. A company subsequently incorporated is not entitled to an injunction restraining the Louisville Gas Company from claiming and exercising the exclusive privileges granted by its charter.

Idem, 510

50. The New Orleans Gaslight Company, has, by its charter, the exclusive privilege of supplying gas to the city and people of New Orleans, by means of pipes, mains, and conduits laid at its own cost in the streets and other public ways of that city.

New Orleans Gas Light Co. v. Louisiana Light & Heat Producing and Mfg. Co., 516

51. Before the adoption of the present Constitution of that State the Legislature had authority to grant to a private corporation an exclusive privilege of that character, and such grant constitutes a contract, the obligation of which cannot be impaired by a State law.

Idem, 516

52. The manufacture and distribution of gas is not an ordinary business, in which everyone may engage as of common right, upon terms of equality; but is a franchise relating to matters of which the public may assume control, and, when not forbidden by the organic law of the State, may be granted by the Legislature, as a means of accomplishing public objects, to whomsoever, and upon what terms it pleases.

Idem, 516

53. The grant of the exclusive privilege in question is none the less a contract, because the manufacture and distribution of gas, when not subjected to proper supervision, may work injury to the public; for such a grant does not restrict the power of the State to establish and enforce regulations not inconsistent with the essential right given to the company by its charter.

Idem, 516

54. The constitutional prohibition upon state laws, impairing the obligation of contracts, does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts.

Idem, 516

55. The provision in the present Constitution of Louisiana, abrogating the monopoly features of existing corporations, is inoperative in respect to the charter of the New Orleans Gaslight Company.

Idem, 516

56. The charter of the New Orleans Waterworks Company, granting to that corporation the exclusive privilege of supplying New Orleans and its inhabitants with water from the Mississippi River, constitutes a contract within the meaning of the contract clause of the Constitution of the United States.

New Orleans Waterworks Co. v. Rivers, 525

57. The clause of the present Constitution of Louisiana abrogating the monopoly feature of existing corporations, is inoperative in respect of the charter of a company, granted before the adoption of that instrument.

Idem, 525

58. An ordinance of the city council of New Orleans authorizing the lessee of the St. Charles Hotel, in that city, to supply that hotel with water by means of pipes and mains laid in the streets, is a violation of the company's contract with the State, and, therefore, void.

Idem, 525

59. A provision of a State Constitution may be invalid as impairing the obligation of contracts.

Fisk v. Police Jury, 587

60. After services have been rendered to a mu-

nicipality under a law, resolution, or ordinance, which fixes the rate of compensation, there arises an implied contract to pay for the services at that rate, the obligation of which cannot be impaired by the State.
Idem, 587
61. The second amendment to the Constitution is a limitation only upon the power of Congress and the National Government, and not upon the States.
Presser v. Illinois, 615
62. Citizens of the United States have no right to associate together to drill or parade with arms, independent of any Act of Congress or State law, which is within the protection of the first section of the Fourteenth Amendment.
Idem, 615
63. The fifth and sixth sections of article XI of the Military Code of Illinois, which forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, are not in conflict with the Constitution of the United States.
Idem, 615
64. A state law which imposes a specific tax on persons engaged in the business of selling liquors at wholesale, or of soliciting or taking orders for such liquors to be shipped into the State from places out of the State, not having their principal place of business in the State, without imposing a like tax on persons engaged in the like business in reference to liquors manufactured in the State is unconstitutional and void.
Walling v. Michigan, 691
65. A law subsequently passed, imposing a greater tax upon all persons engaged in the business of manufacturing or selling liquors in the State, does not have the effect of divesting the first law of its objectionable character.
Idem, 691
66. The fifth section of the Act of June 22, 1874, authorizing a court of the United States in revenue cases, on motion of the government attorney to require the defendant or claimant to produce in court his private books, invoices and papers, is held to be unconstitutional as applied to suits for penalties, or to establish a forfeiture of the party's goods, as being repugnant to the Fourth and Fifth Amendments.
Boyd v. United States, 746
67. It does not require actual entry upon premises, and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the Fourth Amendment; a compulsory production of a party's books and papers, to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the Amendment.
Idem, 746
68. It is equivalent to a compulsory production of papers, to make the nonproduction of them a confession of the allegations which it is pretended they will prove.
Idem, 746
69. A proceeding to forfeit a person's goods for an offense against the laws, though civil in form, and whether *in rem* or *in personam*, is a "criminal case" within the meaning of that part of the Fifth Amendment which declares that no person "shall be compelled, in any criminal case, to be a witness against himself."
Idem, 746
70. The seizure or compulsory production of a man's private papers to be used in such a case is equivalent to compelling him to be a witness against himself.
Idem, 746
71. Both the Fourth and Fifth Constitutional Amendments relate to the personal security of the citizen. They nearly run into and mutually throw light upon each other. When the object of a search and seizure of his private papers is to compel a man to be a witness against himself within the meaning of the Fifth Amendment, it is an "unreasonable search and seizure" within the Fourth Amendment.
Idem, 746
72. Constitutional provisions for the security of person and property should be liberally construed.
Idem, 746
73. Section 6 of the Act passed by the Legislature of Tennessee, March 16, 1877, imposing a license or privilege tax on sleeping cars, is invalid in so far as it affects interstate commerce.
Pickard v. Pullman Southern Car Co., 785
Tennessee v. Same, 791
74. Where a State is not only the real party to the controversy, but the real party against which relief is sought, the nominal defendants being its officers and agents without any personal interest in the subject matter, the suit is substantially within the prohibition of the Eleventh Amendment.
Hagood v. Southern, 805
75. There is a clear distinction between actions to compel the officers of a State, by affirmative official action, to perform an obligation of the State, and actions against defendants, who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, which is unconstitutional and void.
Idem, 805
76. The property of the United States is not subject to state taxation.
Van Brocklin v. Anderson, 845
77. Lands situated in a State, which are acquired by the United States through sales for direct taxes, levied pursuant to Acts of Congress, are not subject to state taxation while so owned by the United States.
Idem, 845
78. Crimes punishable by imprisonment in a state prison, with or without hard labor, are infamous crimes for which persons cannot be held to answer in the Federal Courts otherwise than on presentment or indictment of a grand jury.
Mackin v. United States, 909
79. Art. 3, sec. 23, of the Illinois Constitution of 1848, providing that no private or local law shall embrace more than one subject, and that it shall be expressed in the title is satisfied if the law has but one general object, which is clearly expressed in the title, and the body of the Act is germane to the title.
Mahomet v. Quackenbush, 982
80. The exportation stamp required to be affixed to every package of tobacco intended for exportation, before its removal from the factory is constitutional and valid.
Turpin v. Burgess, 988
81. An excise laid on tobacco, before its removal from the factory, is not a duty on exports within the meaning of the prohibition of the Constitution, though the tobacco be intended for exportation.
Idem, 988

CONTRACTS.

SEE ACCORD AND SATISFACTION.
ADMIRALTY, 4, 5, 6.
APPEAL AND ERROR, 94.
CHAMPERTY.
CONFEDERATE NOTES, *passim*.
COMMISSION MERCHANT.
CONSTITUTIONAL LAW, 13-27, 47-60.
DEBTOR AND CREDITOR, 3.
EVIDENCE, 10.
EQUITY, 6, 9.
FRAUD.
GUARANTY.
INJUNCTIONS, ∞.
JURISDICTION, 11, 12.
RAILROADS, 11, 12, 14-17, 22-25, 28, 29, 31-33.
REPLEVIN, 2.
SALES, 1-3.
SPECIFIC PERFORMANCE.
STATUTES, 5.
STATUTE OF FRAUDS.
USURY, *passim*.

1. Under a contract made by A. with D. for the purchase of five cargoes of kainit of R., the money being advanced by G. for a commission paid by D., the kainit was consigned to G. or his assigns—the papers being sent to A. with invoices in the shape of bills showing that A. bought the cargoes of G.—and was entered at the custom house by the agent of A. as the property of G. Held, that G. was the owner of the cargoes, and sold and delivered them to A., to be paid for on delivery, free from any claim growing out of the contract of A. with D. or R., for any breach of that contract, as to the time of shipping the cargoes; and that A. was liable to G. for the price of the cargoes, with interest from their delivery.
Phosphate Co. v. Graffin, 221
2. Where a contract for the construction of a railroad provided that the company's engineer should, in all cases, determine questions relating to its execution, his action in the absence of fraud, or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, is conclusive upon the parties.
Martinsburg & P. R. R. Co. v. March, 255

3. To annul or modify a contract fairly made, requires the consent of both parties.
Wheeler v. New Bruns. & Canada R. Co., 341
4. In an action upon a contract for the sale of a large quantity of old rails by a railroad company; held, upon a review of the evidence, that a contract existed; that it had not been abandoned or set aside; that the company was not estopped from setting it up, and that it had the right to insist upon its construction and refer its performance to the courts if necessary.
Idem, 341
5. An agreement to accept from 200 to 300 tons is an agreement to accept any number of tons between those limits, the option being with the seller.
Idem, 341
6. An agreement between the members of a "syndicate" formed to purchase the controlling interest in the stock of a mining corporation, that one of them should "control the management of the mine," is necessarily subject to such rules and regulations as the stockholders or directors may adopt for the government of the officers of the company.
Grant v. Parker, 346
7. A bill in equity to restrain a member of the "syndicate" from acting as a stockholder and director in the company in enforcing such regulations, does not lie.
Idem, 346
8. A person, who, by a contract made with him by the quartermaster's department of the army agrees to furnish all the steamboat transportation required by the United States for officers and soldiers between certain places and to certain Indian posts and agencies, is not entitled to claim compensation for Indian supplies, never in the charge of the quartermaster's department for transportation, transported by another person under a contract between him and the Commissioner of Indian Affairs.
Hazlett v. United States, 382
9. Where a contract is made between two firms, dealers in ice, through an offer by the first firm to take from the second a cargo of ice and "return the same to you next year from our houses," which offer was accepted and acted upon, the first firm can comply therewith by a delivery of the ice called for by the contract at any time during the shipping season of the "next year." The first firm is not bound to deliver on demand at any time during such season.
Dingley v. Oler, 984
10. The refusal of a party to perform an executory contract, in order to authorize the other party to commence suit for nonfulfillment, must be distinct, absolute and unequivocal. Where one party has the right at any time during a certain season to deliver goods under a contract, a refusal to comply with a particular demand for an immediate delivery does not authorize the party making the demand to commence suit for breach of the contract.
Idem, 984
11. The refusal of one party to deliver goods under a contract, if not treated as final by the party making the demand, cannot afterwards be treated as a refusal authorizing the commencement of suit.
Idem, 984
12. The plaintiff in error having built a water main for the District of Columbia under authority of the contractors and with the permission of the chief engineer in charge, it is held that he is bound by the terms of the contract and his acceptance of an allowance made by the engineer in full settlement of his claims for extra work.
Campbell v. Dist. of Columbia, 1007

CONVEYANCE.

SEE ASSIGNMENT, *passim*.
DEED, *passim*.
HUSBAND AND WIFE, 2.
LANDS, *passim*.

CORPORATIONS.

SEE BONDS, 3.
CONTRACTS, 6, 7.
EVIDENCE, 2.
MORTGAGES, 2, 3.
PRACTICE, 9.
RAILROADS, *passim*.
REMOVAL OF CAUSES, 4, 6, 10, 11, 17.
TAXES, 2-4, 7.

1. The rights of a corporation are determined by the law in force when it came into being.
Chesapeake & O. R. Co. v. Miller, 121
2. There is nothing in the nature of a corporate franchise under the law of Louisiana which forbids its transfer with the other property of the corporation.
N. O. etc. R. R. Co. v. Delamore, 244
3. The National Steam Navigation Company, a corporation formed under an English statute, went into liquidation on August 15, 1867, selling its property to a new corporation organized to continue the same business. The new company is not chargeable with the payment of a judgment recovered against the former company, for damages for loss of life occasioned by a collision with one of the vessels subsequent to its transfer to the new company.
Gray v. Nat. Steamship Co., 389
4. A transfer, for a valuable consideration, of shares in a Massachusetts manufacturing corporation, not recorded as required by a statute of that State, is valid against a subsequent attachment by a creditor having knowledge or notice of the transfer.
Bridgewater Iron Co. v. Liesberger, 557

COSTS.

SEE APPEAL AND ERROR, 81.
FEES.
LANDS, 23.
PATENT-RIGHTS, 21.
RAILROADS, 35.

1. Upon the dismissal of a case for want of jurisdiction, on motion of the defendant, he is entitled to judgment for the costs of the motion.
Bradstreet Co. v. Higgins, 176
2. The right to decide a motion to dismiss for want of jurisdiction implies the right to decide as to costs incident to the motion.
Idem, 176
3. In an original proceeding in this court for a writ of *mandamus*, the docket fee and disbursements for printing objections in the nature of pleadings, are taxable as costs. Disbursements for printing briefs of counsel cannot be included.
Ex parte Hughes, 281
4. Where each party appeals to the Supreme Court, and each succeeds in reversing an important part of the judgment of the lower court, the costs in the Supreme Court will be divided.
Sioux City & St. P. R. R. Co. v. Chicago, M. & St. P. R. Co. 923
5. A court will not compel parties to pay for services rendered and expenses incurred in a proceeding adverse to their interest, and carried on for the benefit of others.
Hobbs v. McLean, 940
6. Where a bill alleged infringement of a reissued patent generally, and one claim of the reissue was invalid, but recovery was had for infringement of a valid claim of the reissue, and there had been no unreasonable delay in filing a disclaimer of the invalid claim the Supreme Court reverses the decree of the Circuit Court so far as it awarded costs to the complainant, and orders each party to bear his own costs in the Supreme Court and one half the expense of printing the record.
Yale Lock Mfg. Co. v. Sargent, 954

COURTS.

SEE APPEAL AND ERROR, *passim*.
ATTACHMENT, 3.
EVIDENCE, 1, 10, 11, 27, 28.
JURISDICTION, *passim*.
MANDAMUS, 1-3, 6.
PRACTICE, *passim*.
REMOVAL OF CAUSES, 38, 39.
STATE LAWS AND DECISIONS, 1, 2, 5-8.

COURTS MARTIAL.

SEE JURISDICTION, 17.
PROHIBITION, *passim*.

CRIMINAL LAW.

SEE APPEAL AND ERROR, 3.
CONSTITUTIONAL LAW, 1, 2, 69, 78.
HABEAS CORPUS, *passim*.
INDICTMENT.
INTERNAL REVENUE, 3-5.
POLYGAMY, *passim*.

1. The statute requiring the surrender of a fugitive from justice, found in one of the Territories, to the State in which he stands charged with treason, felony, or other crime, embraces every offense

known to the laws of the demanding State, including misdemeanors.
Ex parte Reggel, 250
2. Each State has the right to prescribe the forms of pleading and process to be observed in her courts, subject only to those provisions of the national Constitution designed for the protection of life, liberty, and property; consequently, in a case involving the surrender of a fugitive from justice, it may not be objected that the indictment is not framed according to the technical rules of criminal pleading, if it conforms substantially to the laws of the demanding State.
Idem, 250
3. Upon the executive of the State or Territory in which the accused is found, rests the responsibility of determining whether he is a fugitive from the justice of the demanding State. But the Act of Congress does not direct or authorise his surrender, unless it is made to appear that he is, in fact, a fugitive from justice.
Idem, 250
4. If the determination of that fact, upon proof before the executive of the State where the alleged fugitive is found, is subject to judicial review upon *habeas corpus*, the accused, being in custody under his warrant, which recites the requisition of the demanding State, accompanied by an authentic indictment charging him substantially, as required by her laws, with a specific crime committed within her jurisdiction, should not be discharged, because, in the judgment of the court, the proof showing that he was a fugitive from justice may not be as full as might properly have been required.
Idem, 250
5. The question of the lawfulness of an arrest of a person as a fugitive from justice from another State may be inquired into upon a writ of *habeas corpus* issued by either a federal or state court.
Roberts v. Reilly, 544
6. Upon demand to the governor of a State for an alleged fugitive from justice, it must appear that he is substantially charged with a crime against the laws of the demanding State, and that he is a fugitive from the justice of said State.
Idem, 544
7. The first question is one of law, which is open upon the face of the papers, to judicial inquiry. The second is one of fact, upon which the governor's decision against the person charged is sufficient to justify remove until the presumption in its favor is overthrown by contrary proof.
Idem, 544
8. The objection that it does not appear from the indictment that the corporation was capable in law of the ownership of the property, which was the subject of an alleged larceny, cannot be raised as a matter of law upon the face of the indictment.
Idem, 544
9. The objection that the circumstances set out show that the act of the accused constituted as crime in the State where he was arrested, as well as in the demanding State, does not affect the question, as the former State may waive its jurisdiction by his surrender.
Idem, 544
10. To be a fugitive from justice in the sense of the Act of Congress, it is not necessary that the party charged should have left the State after indictment found, or for the purpose of avoiding a prosecution anticipated or begun.
Idem, 544

DAMAGES.

SEE CONSTITUTIONAL LAW, 45.
JURISDICTION, 11.
PATENT-RIGHTS, 12, 17, 21.
UTAH, 6.

DEBTOR AND CREDITOR.

SEE SALES, 5.
1. A creditor having possession of the property of his debtor as agent, trustee or bailee, cannot, without legal process or the consent of the debtor, dispose of the property and apply the proceeds upon the debt.
Xenia Bk. v. Stewart, 101
2. A bank having in its possession shares of its own stock which belong to one who is indebted to it cannot sell such stock and apply the proceeds to the payment of the debt.
Idem, 101
3. Where a debtor purchased an interest in a stage company intending the purchase for the benefit of his creditor and himself, and so notified the creditor, and the owners, including the creditor, subsequently united in the execution of a paper defining their interests; held, that the contract was executed, that the Statute of Frauds did not apply, and that the creditor was entitled to have the debt applied on the purchase of his interest.
Huntley v. Huntley, 130

DECEIT.

An action to recover damages for a deceit cannot be sustained where it appears that the defendant, by false representations, induced the plaintiff to do something which he would have done anyhow, and by which he sustained no loss.
Ming v. Woolfolk, 740

DEED.

SEE EVIDENCE, 19-24.
LANDS, 1, 35.
1. Parol evidence of the existence of a debt and that an absolute conveyance was intended to secure it and to operate only as a mortgage, must be clear, or the presumption that the instrument is what it purports to be must prevail.
Coyle v. Davis, 583
2. The presumption in favor of the conveyance is strengthened when it appears that there is no considerable disproportion between the price paid and the value of the property.
Idem, 583

DEFINITION.

SEE CONSTITUTIONAL LAW, 37, 69.
MINES, 13, 14.
PENSIONS, 1.
STATUTES.
TAXES, 19.

DEPOSITIONS.

SEE APPEAL AND ERROR, 17.

DOMICIL.

SEE INFANTS, *passim*.
GUARDIAN AND WARD.
Upon the question whether the plaintiff at a certain time changed his residence from Iowa to Illinois, the jury were correctly told that he did not gain a citizenship in Illinois when he went there unless he did in good faith leave Iowa, and, giving up his residence there, go to Illinois, and actually and in good faith take up his permanent residence in that State at that time.
Chicago & N. W. R. R. Co. v. Ohle, 837

DOWER.

SEE PARTIES, 2.

DUTIES.

SEE JURISDICTION, 21, 22.
1. Under sec. 8 of the Act of June 30, 1864, chap. 171 (13 Stat., 210), an article of silk and cotton bought and sold as "spotted or dotted net," but which was a lace, in which silk was the component material of chief value, was a "silk lace," and subject to a duty of 60 per cent.
Drew v. Grinnell, 453
2. Under the finding of facts by the court below certain beet and cabbage seeds are held to be "garden seeds" and subject to a duty of 20 per cent *ad valorem*, while certain mangel-wurzel and turnip seeds are held to be free from duty.
Ferry v. Livingston, 489
3. Under secs. 2931 and 3011, R. S., the importer must show, in order to recover duties alleged to have been illegally exacted, that he has fully complied with the statutory conditions which attach to the statutory action provided for.
Arnson v. Murphy, 491
4. The conditions imposed by statute cannot, any of them, be regarded as matters a failure to comply with which must be pleaded by the defendant as a statute of limitations.
Idem, 491
5. It seems that the statute does not require any communication of the decisions on the appeals to the claimant; and that they may be introduced in

[illegible]

Brown v. Murphy, [illegible]

4. A certain article of manufacture, not in existence many and manufactured from wood, is held to be "wooden-ware," subject to a duty of 35 per centum ad valorem under act, 1864, § 2, and not within the free list under act, 1862, § 2.

Barnum v. Morris, [illegible]

5. Evidence in these [illegible] to show knowing the imported article and another article, is admissible to show the character of the article in question.

Idem, [illegible]

6. Under the Tariff Act of 1862, wire rope is within Schedule H hereof, act, 1862, § 2, and subject to a duty of 35 per centum ad valorem.

Morris v. Morris, 280

7. The interpretation of words of common speech is matter of law.

Idem, 280

8. The whole tariff revenue system must be regarded in the construction of each schedule, and in determining allowed of existing legislation which of greater application beyond the clear meaning of language.

Sarmiento Mills v. Russell, 354

9. Where the revenue of wool stopped from Europe showed the value to be more than twenty cents per pound, it is held to be subject under the statute to a duty of six cents per pound, and it per centum, although at the time of shipment the market value was less than twenty-cents per pound.

Idem, 354

10. Under the Act of March 2, 1863, repealing former provisions, boxes or coverings of any kind, not of a material or form designed to evade duties thereon, are dutiable and to be used in the form for transportation of the goods to the United States, are not subject to duty.

Barlow v. Robertson, 708

11. The exaction of duty on packing, whether packing goods in cartons or cartons in outer cases or using outer cases, is not warranted by law, such "charges" having been abolished by the Act of 1863.

Idem, 708

14. The addition to the valuation of imported goods of items for boxes, cartons, and for packing is no part of the appraisement, and the remedy of the importer is not to apply for a new appraisement but to protest and appeal.

Idem, 708

15. A protest held sufficient to cover the points relied on by the plaintiffs in error.

Idem, 708

16. Where it appears as a fact from a special finding that certain "steel tire blooms" have passed through an important stage in the process of manufacture, and are, therefore, articles of steel partly manufactured, they are subject to a duty of 45 per cent under Schedule E, sec. 2504, R. S.

Chicago Tire, etc. Co. v. Spalding, 720

17. The decisions of the Collector and the Secretary of the Treasury are conclusive until the contrary is shown in a suit.

Idem, 720

18. "Henry's Calcined Magnesia," being a medicinal preparation, imported in bottles, and recommended to the public as a proprietary medicine, is subject to a duty of 50 per cent ad valorem under sec. 2504, R. S., Schedule M.

Ferguson v. Arthur, 979

EJECTMENT.

See Evidence, 19.
Lands, 15.
Mortgages, 4.
Municipal Corporations.

1. Under the Mississippi Code of 1880, secs. 2608, 2612, a tenant in common who has been ousted by his cotenant may maintain ejectment against him, and recover rents and profits in the same action.

Clay v. Field, 375

2. Under the laws of Pennsylvania a judgment in ejectment is not a bar to a subsequent action.

Gibson v. Lyon, 440

3. A party cannot be permitted to claim under and against the same deed.

Idem, 440

4. If a judicial sale be void, the court having confirmed it upon terms not authorized by law, the purchaser is without title upon which to base an action of ejectment; if it be erroneous merely, [illegible]

Ben, [illegible]

ELECTION.

See Trial, passim.

EQUITY.

See Bankruptcy, 5.
Bonds, 1.
Corporations, 7.
Bonds and Wills, 1, 2.
Jurisdiction, passim.
Jurisdiction, 4.
Lands, 14, 17, 18.
Laches, passim.
Parties-Equity, 2.
Pleading, passim.
Practice, passim.
Railroads, 2, 3.
Taxes, 7, 8.
Trusts and Trustees, passim.

1. A suit in equity will not lie to charge one incorporated company with a judgment recovered against another company.

Gray v. Nat. Bankruptcy Co., [illegible]

2. The levy and collection of taxes for the satisfaction of judgments against counties or towns, is not within the jurisdiction of a court of equity.

Thompson v. Allen County, 472

3. The fact that the remedy at law by mandamus has proved ineffectual, and that no officers can be found to perform the duty of levying and collecting taxes, is no sufficient ground of equity jurisdiction.

Idem, 472

4. The principle is the same where the proper officers of the county or town have levied the tax and no one can be found to accept the office of collector of taxes. This gives no jurisdiction to a court of equity to fill that office or to appoint a receiver to perform its functions.

Idem, 472

5. The inadequacy of the remedy at law, which sometimes justifies the interference of a court of equity, does not consist merely in its failure to produce the money, but that in its nature or character it is not fitted or adapted to the end in view.

Idem, 472

6. The defendant, John F. Pickrell, having made an agreement with a railroad company to construct its road and furnish the iron therefor, and to receive certain bonds in payment, made a contract with the complainants for the iron, payment to be made in said bonds, the contract providing that the bonds should be deposited subject to the order of the parties and the president of the company, who executed a separate contract whereby he agreed to join in such order when the complainants should be entitled to the bonds by the terms of their agreement with Pickrell. Upon a bill based upon the assumption that the railroad company was a party to the contract through Pickrell as its agent, it is held that Pickrell was not the agent of the company; that, to entitle the complainants to have the first contract reformed by substituting the name of the company in place of Pickrell, they must show that it was omitted by mistake or fraud; and that upon the facts the complainants are not entitled to the relief sought.

Baltzer v. Raleigh, etc. R. R. Co., 505

7. Unless the transactions to which charges of fraud or of a breach of trust refer, are such as in their essential nature constitute a fraud or breach of trust, a court of chancery cannot give relief.

Van Weel v. Winston, 384

8. A bill in equity to set aside and restrain the collection of a tax levied upon personal property by a municipal corporation, cannot be maintained solely on the ground of the illegality of the tax by reason of the nonresidence within the limits of the municipality of the person against whom the tax is levied.

Milwaukee v. Kaffer, 612

9. The mere refusal of a party to perform a parol contract for the sale of lands cannot be construed to be such a fraud as will give a court of equity jurisdiction to enforce it.

Dunphy v. Ryan, 703

ERROR.

See Appeal and Error, passim.

ESTOPPEL.

SEE BANKS, 1.
BONDS, 11, 18.
CONTRACTS, 4.
FRAUD, 1.
MORTGAGES, 10, 14.
PLEADINGS, 2.
RAILROADS, 1.

EVIDENCE.

SEE APPEAL AND ERROR, 18, 42, 75.
DUTIES, 5, 7.
INSURANCE, 14, 15.
LANDS, 15.
PRACTICE, 3.
TAXES, 18, 19.
TRUSTS AND TRUSTEES, 3.
WILLS, 1.
WITNESSES, *passim*.

1. The courts of the United States take judicial notice of the law of the States.
Lamar v. Micou, 94

2. The declarations made by an officer or agent of a corporation, in response to timely inquiries, properly addressed to him and relating to matters under his charge, in respect to which he is authorized in the usual course of business to give information, may be given in evidence against the corporation.
Xenia Bank v. Stewart, 101

3. It is within the scope of the general authority of a cashier to receive offers for the securities of the bank and to state whether or not the bank owned securities which a customer wanted to buy.
Idem, 101

4. A letter written upon the paper of a bank by its cashier and appearing with reasonable certainty to have referred to its business is admissible in evidence against the bank.
Idem, 101

5. Proof of the insolvency of a debtor is no more competent to show nonpayment, than proof of his solvency is competent to show the payment of his debts.
Idem, 101

6. Where the complaint alleged a contract for delivery of iron at one place, and the answer a contract for delivery at a different place, evidence offered by the plaintiff which tended to support the averment of the answer was properly admitted under § 2669 of the Revised Statutes of Wisconsin, the defendants having failed at the trial to prove that they were misled by the variance between the complaint and the proof.
Pope v. Allis, 393

7. Averments made under oath, in a pleading in an action at law, are competent evidence in another suit against the party making them; and the fact that the averments are made on information and belief goes only to their weight.
Idem, 393

8. It will be presumed, at least after the lapse of considerable time, that the officers of a bank have performed their duties in accordance with the custom and course of business of the bank.
Knickerbocker L. Ins. Co. v. Pendleton, 432

9. Evidence of the custom and usage of a bank is competent for the purpose of sustaining and corroborating the conviction and belief of its cashier that a draft was duly presented for payment.
Idem, 432

10. Evidence as to the understanding of the parties to a written contract is inadmissible to vary or contradict its terms, or to affect persons not parties to such contract.
Baltzer v. Raleigh, etc., R. R. Co., 505

11. State courts do not take judicial notice of the laws of other States, the several States being considered in this respect foreign to each other.
Hanley v. Donoghue, 535

12. Although this court, in the exercise of its appellate jurisdiction from the lower courts of the United States, takes judicial notice of the laws of all of the States, upon error to the highest court of a State it takes judicial notice of the laws of that State but not of the laws of other States, such laws being only known to the court below as facts to be proved as such.
Idem, 535

13. Declarations of the vendor of personal property and the agent of the vendee made after the surrender of possession by the vendor to such agent, are inadmissible against the vendee to show the character of the sale when made.
Winchester & P. Mfg. Co. v. Creary, 591

14. Declarations of the vendor after sale are inadmissible against the vendee in support of a charge of combination or conspiracy to defraud creditors, unless the alleged common purpose to defraud is first established by independent evidence, and unless such declarations have such relation to its execution as to constitute a part of the *res gestæ*.
Idem, 591

15. Where the vendor remains, after surrender of possession, merely as clerk or salesman, he is not in possession within the meaning of the rule allowing, in favor of creditors, proof of the declarations of a vendor of personal property, who is allowed to control, manage and dispose of it after sale.
Idem, 591

16. The surrender of the power to tax will never be presumed, but must be shown by clear and unambiguous language admitting of no other reasonable construction.
Southwestern R. R. Co. v. Wright, 626

17. The limited exemption from taxation contained in the original charter of the Southwestern Railroad Company of Georgia applies only to such parts of its road as were built under that charter.
Idem, 626

18. The admissions or declarations of the vendor of personal property are admissible against the vendee when it appears from independent evidence that they were engaged in a common purpose to defraud the creditors of the former, and the admissions or declarations had such relation to the execution of such purpose as fairly to constitute a part of the *res gestæ*.
Jones v. Simpson, 742

19. An affidavit filed for the purpose of obtaining an order requiring the plaintiff to give security for costs, was competent evidence against the defendant on the trial of another issue; and the fact that it was sworn to on information and belief affected only its weight and not its competency.
Chicago & N. W. R. R. Co. v. Ohle, 837

20. In an action of ejectment deeds are admissible in evidence when their appearance affords strong evidence of their genuineness and antiquity, and they are free from any badge that would excite suspicion of fraud or forgery.
Applegate v. Lexington & Carter Co. Mining Co., 892

21. The record of a former case is admissible in evidence against persons not parties or privies, to prove the collateral fact of the antiquity of original deeds therein contained and to account for their custody.
Idem, 892

22. The certificate of a recorder indorsed on a deed which is apparently ancient and genuine, is competent and sufficient evidence that it was recorded at the time therein stated.
Idem, 892

23. An ancient deed is admissible in evidence if it appears to be at least thirty years old, is found in proper custody, and either possession under it is shown, or some other corroborative evidence freeing it from all just grounds of suspicion.
Idem, 892

24. A deed sixty-one years old, produced from the custody of the heirs of the grantee, is held to have been rightfully admitted as an ancient document by the court below, without proof by the subscribing witnesses, or possession by the plaintiffs or those under whom they claim.
Fulkerson v. Holmes, 915

25. After a lapse of sixty-one years, the declaration of the grantor deliberately made in an ancient deed, signed, sealed, witnessed, acknowledged and recorded, to the effect that he was the only child and heir of the patentee of the lands in controversy, and that the patentee was dead, was properly admitted as evidence of the facts recited.
Idem, 915

26. The refusal of the court below to instruct the jury upon the question of the forfeiture of the lands in controversy, under the revenue laws of Virginia, was proper, the defendants having completely failed to show a forfeiture.
Idem, 915

27. Upon the trial of an issue involving the value of lands which have been taken for a public park, evidence as to prices paid for lands adjoining the park, or within its immediate vicinity, on sales made after its boundaries had been fixed, is inadmissible.
Kerr v. South Park Comrs., 927

28. A court will take judicial notice of the territorial extent of its jurisdiction.
Hoyt v. Russell, 914

29. The Act of the Legislature of Montana of May

6, 1872, affecting the mode of making proof of the location of mining claims, was not in force in the County of Lewis and Clark, on May 13, 1873, and of this fact the court below should have taken judicial notice.
Hoyt v. Russell, 914
30. Evidence tending to show that a promissory note was not intended by the parties to be a promissory note, is inadmissible in an action at law brought by the holder on such note.
Burnes v. Scott, 991
31. Such evidence is inadmissible in an action at law to show want of consideration where the question of the alleged want of consideration involves the settlement of a partnership, and the matter amounts only to an equitable defense.
Idem, 991

EXPORTS.

SEE CONSTITUTIONAL LAW, 38, 80, 81.

FEES.

Under sec. 847, R. S., a commissioner of a Circuit Court, when required to keep a docket of warrants issued and proceedings had thereon, is entitled to the same fees allowed to the clerk under sec. 828, R. S.
United States v. Wallace, 675

FERRIES.

SEE CONSTITUTIONAL LAW, 11, 12.
NEGLIGENCE, 2.
REMOVAL OF CAUSES, 21.

FINES.

The mode in which fines and penalties shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are matters of legislative discretion.
Missouri Pac. R. Co. v. Humes, 463

FOREIGN COINS.

1. The value of foreign coins, as ascertained by the estimate of the director of the mint and proclaimed by the Secretary of the Treasury, is conclusive upon custom-house officers and importers.
Hadden v. Merritt, 333
2. Alleged errors in the estimate cannot be shown in judicial proceedings to affect the rights of the government or individuals.
Idem, 333
3. As the duty of ascertaining and declaring the value of such coins is an executive function, which requires skill and the exercise of judgment and discretion, errors can only be corrected by an appeal to the department itself.
Idem, 333

FRAUD.

SEE BANKRUPTCY, 5, 6.
BONDS, 13.
CONTRACTS, 2.
EVIDENCE, 13.
EQUITY, 6, 7, 9.
FRAUDULENT CONVEYANCE 1, 2.
INSURANCE, 5, 15.
LANDS, 5.
LIMITATIONS, 8.
PARTNERSHIP, 4.
SALES, 5-10.
TRUSTS AND TRUSTEES, 5.

1. One who seeks to share in the fruits of a contract, cannot complain that it was fraudulently procured.
Bissell v. Foss, 126
2. Where, by the connivance of a clerk in the office of an assistant treasurer of the United States, a person unlawfully obtains from that office money belonging to the United States, and, to replace it, pays to the clerk money which he obtains by fraud from a bank, the clerk having no knowledge of the means by which the latter money was obtained, the United States is not liable to refund the money to the bank.
State Nat. Bk. v. United States, 149

FRAUDULENT CONVEYANCE.

SEE EVIDENCE, 13, 14, 17.

1. The conveyance, by a debtor in failing circumstances, of his property, in trust, to secure certain of his creditors, though void, does not affect the validity of a subsequent sale to such creditors made in good faith, to pay an actual debt.
Stewart v. Dunham, 327
2. The sale, by a debtor in failing circumstances, of his property to certain of his creditors sustained, the evidence of fraud being held insufficient by this court.
Idem, 330

FUGITIVE FROM JUSTICE.

SEE CRIMINAL LAW.

GARNISHMENT.

1. Garnishment proceedings against a street railroad corporation as a debtor to the city, by a judgment creditor of the City of New Orleans, were warranted by sec. 916 of the Revised Statutes, being authorized by laws of Louisiana in force when sec. 916, was enacted.
Canal & Cl. St. R. R. Co. v. Hart, 226
2. The remedies supplementary to judgment, adopted by sec. 916, were those then provided by the laws of Louisiana in regard to judgments in suits of a like nature or class, and not the provisions of the Act of the Legislature of Louisiana, passed March 17, 1870, in regard to judgments against the City of New Orleans.
Idem, 226

GUARANTY.

A guaranty signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, is in legal effect an offer or proposal on the part of the guarantor, which requires an acceptance to complete the contract.
Davis Sewing Mach. Co. v. Richards, 430

GUARDIAN AND WARD.

A guardian, appointed in a State which is not the domicil of the ward, should not, in accounting in the State of his appointment for his investment of the ward's property, be held, unless in obedience to express statute, to a narrower range of securities than is allowed by the law of the State of the ward's domicil.
Lamar v. Micou, 94

HABEAS CORPUS.

SEE APPEAL AND ERROR, 68.
CRIMINAL LAW, 4, 5.
RULES, *passim*.

1. This court cannot discharge on *habeas corpus* a person imprisoned under the sentence of a Circuit or District Court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold the prisoner under the sentence.
Ex parte Wilson, 39
2. A misrecital of the verdict as upon one count only, in stating the inquiry whether the convict had aught to say, is no ground for discharging him on *habeas corpus*.
Idem, 39
3. A certified copy of the record of a sentence to imprisonment is sufficient to authorise the detention of the prisoner, without any warrant or *mittimus*.
Idem, 39
4. In the record of a judgment of a District Court, sentencing a person convicted in one State to imprisonment in another State, the omission to state that there was no suitable prison in the State in which he was convicted and that the Attorney General had designated the prison in the other State, is no ground for discharging the prisoner on *habeas corpus*.
Idem, 39
5. A person sentenced to imprisonment for an infamous crime, without having been presented or indicted by a grand jury, as required by the Fifth Amendment of the Constitution, is entitled to be discharged on *habeas corpus*.
Idem, 39
6. The writ of *habeas corpus* is not a writ of error. Its purpose is to enable the court to inquire whether

the petitioner is restrained of his liberty, and, if so, whether such restraint is unlawful.
Wales v. Whitney, 277
7. The Acts of Congress concerning this writ contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown for his detention.
Idem, 277
8. Something more than moral restraint is necessary to make a case for *habeas corpus*. There must be actual confinement or the present means of enforcing it.
Idem, 277
9. A writ of *habeas corpus* is not removable from a state court into a Circuit Court of the United States under the Act of March 3, 1875, chap. 137, sec. 2.
Kurtz v. Moffit, 458
10. A police officer of a State or a private citizen, has no authority as such without any warrant or military order, to arrest and detain a deserter from the Army of the United States.
Idem, 458
11. The Circuit Court has jurisdiction on *habeas corpus* to discharge from custody one who is restrained of his liberty in violation of the Constitution, but who, at the time, is held under State process for trial on an indictment charging him with an offense against the laws of the State.
Ex parte Royall, 368
12. Where a person is in custody, under state process, for an alleged offense against the laws of the State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has discretion, whether it will discharge him on *habeas corpus*, in advance of his trial: that discretion, however, to be subordinated to any special circumstances requiring immediate action.
Idem, 368
13. It seems that after the conviction of the accused in the state court, the Circuit Court has still a discretion whether he shall be put to his writ of error, or whether it will proceed by *habeas corpus* summarily to determine whether he is restrained of his liberty in violation of the Constitution.
Idem, 368
14. If this court has legal power on *habeas corpus* to discharge the petitioner, who is held under state process for trial on an indictment charging him with an offense against the laws of the State, it should not be exercised in advance of his trial.
Idem, 368
15. If it has legal power on *habeas corpus* to discharge the petitioner, who has been convicted in a state court of embezzlement of the funds of a national bank, where no reason appears why the Supreme Court of the State may not review the judgment, this court will not act in advance of the orderly course of proceeding for a review of the judgment by writ of error.
Ex parte Fonda, 394

HUSBAND AND WIFE.

1. Neither the liability for provisions supplied at a dwelling house where a husband and wife and their children are living together, nor a promissory note given by the husband, describing himself as trustee for the wife, in payment for such supplies, can be charged in equity upon the wife's separate estate, without clear proof that she contracted the debt in her own behalf, or intended to bind her separate estate for its payment.
Dodge v. Knowles, 144
2. A wife's equitable estate in property held by her husband as trustee, cannot be affected by a conveyance by him, nor can it be made liable for a contract, made by him, to which she was not a party and which she has not sanctioned.
Holgate v. Eaton, 538

IMPORTS.

SEE CONSTITUTIONAL LAW, 37.
DUTIES, *passim*.
INTERNAL REVENUE, 4.

INFORMATION.

SEE APPEAL AND ERROR, 52-55.
CONSTITUTIONAL LAW, 78.

INDIANS.

1. The Fort Hill Indian Reservation is subject to the general jurisdiction of the Territory of Idaho as to all matters not interfering with the rights secured to the Indians by treaty.
Utah & N. R. Co. v. Fisher, 542
2. By force of the cession of the land upon which the road and other property of the Utah & Northern Railway Company are situated, it was, so far as necessary for railroad purposes, withdrawn from the Reservation. The taxation of such property by the Territory does not impair the treaty rights of the Indians.
Idem, 542
3. By various treaties the United States have recognized the Cherokee Indians as one people, composing a single tribe or nation.
Cherokee Indians v. United States, 330
4. The Cherokees in North Carolina dissolved their connection with their nation when they refused to accompany the body of it on its removal, and they have since had no separate political organization.
Idem, 330
5. The Cherokees in North Carolina are not entitled to a share of the commuted fund of $214,000, and of the fund created by sales of Cherokee lands west of the Mississippi. Such Indians must be readmitted to citizenship in the Cherokee nation in compliance with its Constitution and laws if they wish to enjoy the benefits of its common property.
Idem, 330

INDICTMENT.

SEE CONSTITUTIONAL LAW, 78.
POLYGAMY, 2.
In an indictment for a misdemeanor it is sufficient to charge the offense in the words of the statute unless they fail to cover every element of the offense charged.
Cannon v. United States, 561

INFANTS.

Infants having a domicil in one State, who, after the death of both their parents, take up their residence at the home of their paternal grandmother and next of kin in another State, acquire her domicil.
Lamar v. Micou, 94

INJUNCTIONS.

SEE APPEAL AND ERROR, 26, 27, 28.
CONSTITUTIONAL LAW, 49.
CONTRACTS, 7.
EQUITY, 8.
LIMITATIONS, 11.
1. The remedy by injunction to prevent the collection of taxes by distraint upon the property of railroad corporations, after a tender of payment in tax receivable coupons, is sanctioned by repeated decisions of this court, and has become common and unquestioned practice, in similar cases, where exemptions have been claimed in virtue of the Constitution of the United States; the ground of the jurisdiction being that there is no adequate remedy at law.
Allen v. B. & O. R. R. Co., 200
2. The contract right of a coupon holder under the Virginia Act of March 30, 1871, can be exercised only by a taxpayer; and a bill for an injunction to restrain tax collectors from refusing to receive them, will not lie in behalf of a coupon holder who does not allege himself to be also a taxpayer. Such a bill calls for a decree declaring merely an abstract right, and does not show any breach of the contract, or other ground of relief.
Marye v. Parsons, 205
3. Under the statutes of Maryland the tolls and revenues of the Chesapeake & Ohio Canal Company are mortgaged to the State, to secure the repayment of money lent by the State to the company and the payment of dividends and interest on the stock subscribed for by the State; subject to the payment of necessary expenses, and to a mortgage to trustees to secure the payment of certain bonds of the company. At a suit in equity of the State and of such trustees, even before the State has taken possession under its mortgages, a general creditor of the company, who at the time of contracting his debt had notice of the provisions of the statutes and of the mortgages, will be restrained from levying on money deposited by the company

in a bank, and needed to meet such necessary expenses.
Brown v. Maryland, 233

INSURANCE.

SEE MORTGAGES, 16.

1. A violation of any of the prohibitions of a policy of insurance by any one permitted by the assured to occupy the premises, is a violation by the assured himself.
Liverpool & L. & G. Ins. Co. v. Gunther, 575

2. A privilege to use gasoline gas, and apparatus for generating it, does not sanction the storage of gasoline, except for actual use in such apparatus.
Idem, 575

3. Upon payment for a total loss of goods insured the insurer is only subrogated to such rights of action as the assured has against third persons, who caused or are responsible for the loss.
Phœnix Ins. Co. v. Erie & W. Trans. Co., 873

4. A stipulation in a bill of lading allowing the carrier the benefit of any insurance procured by the owner, is valid as between the parties, though the loss be occasioned by the negligence of the carrier or his agents, and, in the absence of fraudulent concealment or misrepresentation, the insurer can maintain no action against the carrier upon any terms inconsistent with the stipulation.
Idem, 873

5. Where both the assured and the insurer are deceived by fraudulent acts of an agent in inserting in the application false answers, when the answers made by the assured were truthful, if both parties act *bona fide*, the policy should be canceled and the premiums returned.
New York L. Ins. Co. v. Fletcher, 934

6. An insurance company can limit the authority of its agents and thus bind all parties dealing with them with knowledge of the limitations. A party insured is presumed to have read his application and to be cognizant of the limitations therein expressed.
Idem, 934

7. An instruction to a jury that the assured was bound by his application if it was not avoided for fraud, and that it was so avoided, and that therefore the representative of the assured could recover was incorrect. If the application was avoided the policy was also avoided.
Idem, 934

8. A retention of a policy of insurance containing a copy of the application by the assured is an approval of such application.
Idem, 934

9. A policy of insurance provided that, after two annual premiums had been paid, the assured should, in case of default in payment of premiums, be entitled to have the policy continued in force for a period of time to be determined in a way provided in the contract, or to receive a paid up policy for the full amount of the premiums paid, but upon this condition, "that unless the policy shall be surrendered and such paid up policy shall be applied for within ninety days after such nonpayment as aforesaid, then this policy shall be void and of no effect." Held; that failure of the assured to surrender the policy and make election within ninety days after default deprived her of the right to have the policy temporarily continued in force as well as of the right to a paid up policy.
Knapp v. Homeopathic Mut. L. Ins. Co., 960

10. Persons cannot be made to assume the relation of partners, as between themselves, when it is their purpose that no partnership shall exist.
London Assur. Co. v. Drennen, 688

11. They may enter into an agreement whereby one of them shall participate in the profits arising from the management of the property involved in a certain business without his becoming a partner with the others, or without his acquiring an interest in the property itself, so as to effect a change of title within the meaning of a clause in an insurance policy providing against a change of title or possession.
Idem, 688

12. An endowment policy of insurance payable to the assured or his assigns at a certain date, or, if he should die before that time, to his legal representatives, is assignable by the assured, where the assignment is not made to cover a mere speculative risk; and the insurance passes to the assignee though the assured dies within the endowment period.
Mut. L. Ins. Co. of N. Y. v. Armstrong, 997

13. Evidence tending to prove that the assignee of such a policy caused the death of the assu[illegible] felonious means, is admissible in an action [illegible] against the company to recover on the polic[illegible]
Idem,

14. Evidence tending to show that the a[illegible] effected insurances upon the life of the assu[illegible] other companies at about the same time, is [illegible] sible in support of the theory of the defense [illegible] in obtaining the insurance in question, it w[illegible] object of the assignee to cheat and defraud t[illegible] fendant company.
Idem,

INTEREST.

SEE APPEAL AND ERROR, 92.
CONTRACTS, 1.
USURY, *passim*.

INTERNAL REVENUE.

SEE APPEAL AND ERROR, 51, 52, 5[illegible]
CONSTITUTIONAL LAW, 66.
JURISDICTION, 25.
PLEADINGS, 9.

1. Upon the sale of manufactured tobacco s[illegible] ated in a bonded warehouse, the broker mak[illegible] such sale cannot be taxed for the revenue stam[illegible] required before removal, unless they were affi[illegible] at the time of the sale.
Jones v. VanBenthuysen, 4[illegible]

2. No suit can be maintained against a collect[illegible] of internal revenue for taxes illegally collected u[illegible] less a claim therefor has been presented to t[illegible] commissioner of internal revenue within the tim[illegible] prescribed by law.
Kings Co. Sav. Inst. v. Blair, 6[illegible]

3. It is not an offense under sec. 12 of the Act [illegible] March 1, 1879, for one merely to have in his poss[illegible] sion a canceled stamp, or a stamp which has bee[illegible] used, or which purports to have been used upon [illegible] package of imported liquors, unless it has been de[illegible] signedly removed by human agency, without de[illegible] facing or destroying it at the time.
United States v. Spiegel, 664

4. In an information under sec. 3257, R. S., the particular means by which the claimant defrauded and attempted to defraud the United States of the tax, need not be set forth nor the particular spirits covered thereby specified.
Coffey v. United States, 681

5. A judgment of acquittal in a criminal prosecution for a violation of the internal revenue laws is conclusive in favor of the defendant as claiman of the property involved in a subsequent suit *in rem*, when, as against him, the existence of the same act or fact involved in the criminal prosecution is in issue as a cause for the forfeiture of the said property.
Idem, 681

6. A legacy which did not become due until after the repealing Act of July 14, 1870, took effect, is held not to be subject to a legacy tax under the Act of June 30, 1864, as amended by the Act of July 13, 1866.
Sturges v. United States, 920

JUDGMENTS AND DECREES.

SEE APPEAL AND ERROR, 3, 33, 60, 61, 70-73, 79, 89.
BANKRUPTCY, 3.
CORPORATIONS, 3.
EJECTMENT, 2.
EQUITY, 2.
INTERNAL REVENUE, 5.
JURISDICTION, 31.
LANDS, 4, 5, 16, 24.
MANDAMUS, 1, 3.
MORTGAGES, 9.
PLEADINGS, 5.
PRACTICE, *passim*.
REMOVAL OF CAUSES, 7, 8, 31.
STATE LAWS AND DECISIONS, 4.

1. A decree against a party who has not been heard, and has had no chance to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other court.
Smith v. Woolfolk, 357

2. The fact that a judgment was erroneous and might have been reversed upon a writ of error, does not destroy a sale made under the judgment while remaining in full force and unreversed.
Gibson v. Lyon, 449

3. Where a judgment of a state court in an action against joint defendants, one of whom has not been duly summoned, is by the law of that State valid as

to those who are summoned, or who appear, it will sustain an action against such defendants in another State.
Hanley v. Donoghue, 535
4. Under sec. 905, R. S., if a joint judgment recovered in a state court against two, of whom but one was served, is enforceable within that State against him severally, it will sustain an action against him in another State.
Renaud v. Abbott, 629
5. A judgment of an inferior court, dismissing a cause for want of due prosecution, can only be reviewed by this court by writ of error or appeal.
Ex parte Brown, 676
6. Where a defendant had, at the time judgment was rendered against him, a good defense, as a discharge in bankruptcy, and failed to present it to a court which had jurisdiction of his case and of all the defenses he might have made, the judgment is valid and such defense cannot afterwards be set up in an action on the judgment.
Dimock v. Revere Copper Co. 394

JURIES.

SEE APPEAL AND ERROR, 3, 4.
NEGLIGENCE, 4.

1. Section 5, Act of March 22, 1882, concerning polygamy, applies to the selection of grand jurors, and an indictment for one of the offenses named, by a grand jury from which persons believing in polygamy were excluded, is good.
Clawson v. United States, 179
2. A *venire* may be issued and the jury completed where the names of 200 jurors, provided for by sec. 4, Act of June 23, 1873, "concerning courts and judicial officers in Utah," have been exhausted.
Idem, 179
3. When the court instructs the jury in a manner sufficiently clear and sound as to the rules applicable to the case, it is not bound to give other instructions asked by counsel on the same subject, whether they are correct or not.
Iron Silver Mining Co. v. Cheesman, 712

JURISDICTION.

SEE APPEAL AND ERROR, 15, 21, 28, 38, 30-32, 46-48, 51, 56, 65, 92-94.
BANKRUPTCY, 1-3.
CONSTITUTIONAL LAW, 35, 35, 46.
EVIDENCE, 27.
EQUITY, *passim*.
HABEAS CORPUS, 11, 14, 15.
INJUNCTIONS, 1.
JUDGMENTS AND DECREES, 6.
LANDS, 12.
MANDAMUS, 6.
PATENTS, 13-16.
PROHIBITION, 9.
REMOVAL OF CAUSES, *passim*.
TERRITORIES, 3.

1. Under the Act of March 3, 1875, the holders of promissory notes or of foreign or domestic bills of exchange, who are citizens of a State in which the decisions of the courts have been adverse to their interests, cannot by collusive transfers to citizens of other States create a case apparently cognizable in the courts of the United States, and have it prosecuted by their assignees in those tribunals for their benefit.
Farmington v. Pillsbury, 114
2. The jurisdiction of this court for the review of a judgment of the highest court of a State depends on the decision by that court of one or more of the questions specified in sec. 709, R. S., and in the way there mentioned.
Detroit City R. Co. v. Guthard, 118
3. To give this court jurisdiction it must appear affirmatively on the face of the record, not only that a federal question was raised, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case.
Idem, 118
4. A bill which sets up a cause of action on which there is an adequate remedy at law, fails for want of equitable jurisdiction.
Litchfield v. Ballou, 132
5. The admiralty courts of the United States have jurisdiction of collisions occurring on the high seas between vessels owned by foreigners of different nationalities.
Steamship Belgenland v. Jensen, 152
6. The courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond their territorial jurisdiction, yet where such controversies are *communis juris* special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged.
Idem, 152
7. Upon appeal the action of the court of first instance in assuming jurisdiction can only be questioned on the ground that its discretion has been exercised on wrong principles, or so unjustly as to justify the court of appeals in holding that it has been exercised wrongly.
Idem, 152
8. Where the parties are not only foreigners but belong to different nations and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured, or doing the service, should ever be denied justice in our courts.
Idem, 152
9. The general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted, should be applied in such cases.
Idem, 152
10. When the question in a state court was, whether the presentation of a check drawn on a banker by a depositor transferred to the holder so much of the debt due the drawer as was sufficient to pay the check, no federal question is presented and this court is without jurisdiction. The subsequent bankruptcy of the drawer and a claim by the bank of a set-off against his deposit under sec. 5073, R. S., do not operate to give this court jurisdiction.
Boatman's Sav. Bk. v. State Sav. Asso., 174
11. The 16th clause of sec. 629, R. S., does not embrace an action of trespass on the case in which the plaintiff seeks a recovery of damages against a tax collector in Virginia, who, having rejected a tender of tax-receivable coupons, issued under the Act of March 30, 1871, seeks to collect a tax for which they were tendered by a seizure and sale of personal property of the plaintiff.
Carter v. Greenhow, 202
12. Although the right to have such coupons received in payment of taxes is founded on a contract with the State, the only mode of redress in case of any disturbance or dispossession of property, or for other legal rights based on such violation of the contract, is to have a judicial determination, in a suit between individuals, of the invalidity of the law, under color of which the wrong has been committed. No direct action for the denial of the right secured by the contract will lie.
Idem, 202
13. This court has jurisdiction to review the judgment of a state court against the validity of a title claimed under a sale in bankruptcy.
N. O., S. F. & L. R. Co. v. Delamore, 244
14. The jurisdiction of the bankruptcy court to adjudicate a railroad company bankrupt and to administer its property, under the Bankruptcy Act is settled by the decisions of the circuit courts, and this court is unwilling at this late day to re-examine the question.
Idem, 244
15. The Court of Claims has no jurisdiction of a claim against the United States for moneys received from Mexico under the Convention or Treaty of July 4, 1868, it being a claim founded on and growing out of a treaty with a foreign nation within sec. 1066, R. S.
Alling v. United States, 272
16. The Act of June 18, 1878, confers authority on the Secretary of State to distribute the awards made by the commission organized under said Treaty.
Idem, 272
17. Neither the Supreme Court of the District of Columbia nor this court has any appellate jurisdiction over the naval court-martial, nor over offenses which such a court has power to try.
Wales v. Whitney, 277
18. Where, upon the face of the record, the value of the property involved is sufficient to give the court jurisdiction, and the appellee declines to appear in this court, it is too late to present extrinsic evidence of the actual value of the property upon a motion to set aside the judgment.
Dodge v. Knowles, 296
19. Where a sale of the lands of a bankrupt estate has been made and confirmed by order of the bankruptcy court, and the lands have been conveyed by the assignee, the Circuit Court of the United States is without jurisdiction at the suit of the purchaser to

enjoin a sale of the same lands about to be made upon the order of a state court.
Sargent v. Helton, 412
20. This court has jurisdiction of a controversy involving a dispute as to the validity of a transfer by a trustee in bankruptcy, and a question involving the limitation prescribed by the Bankrupt Act.
Traer v. Clews, 467
21. Section 9 of the Judiciary Act of 1789, which conferred exclusive jurisdiction on the district courts of suits for penalties and forfeitures under the customs laws of the United States, still remains in force, there being no conflict between said section and sec. 1 of the Act of March 3, 1875.
United States v. Mooney, 550
22. The restricted meaning attached for eighty-six years to the language of sec. 11 of the Act of 1789 is presumed to attach to the same language in the Act of 1875.
Idem, 550
23. This court recalls the mandate in a case decided on the merits earlier in the term, the question of its jurisdiction having now been raised and decided adversely in a similar case.
Cannon v. United States, 561
24. The clause of sec. 1059, R. S., which invests the Court of Claims with jurisdiction of claims referred to it by either house of Congress, is subject to other clauses defining its jurisdiction, and fixing the period within which all claims must be asserted against the United States.
Ford v. United States, 608
25. Suits *in rem* for forfeitures for violations of the internal revenue laws are within the original jurisdiction of the Circuit Court.
Coffey v. United States, 681
26. Where the citizenship of the parties was alleged in the declaration, and was such as, if truly stated, gave the court jurisdiction, and the defendant, purposely omitting to make known his citizenship, pleaded to the merits, the question of citizenship did not arise, and evidence by the defendant, contradicting the allegations in the declaration as to his citizenship, was irrelevant and afforded no basis for the dismissal of the suit.
Hartog v. Memory, 725
27. The Circuit Court cannot dismiss a cause on the ground that it does not involve a dispute or controversy within its jurisdiction, unless the facts, when made distinctly to appear of record, create a legal certainty of the conclusion based on them.
Barry v. Edmunds, 729
28. In an action for a willful and malicious trespass, in seizing and taking personal property, if a claim is made for exemplary damages in excess of the sum necessary to bring the case within its jurisdiction, the court should not dismiss the case merely because the value of the property seized was less than the jurisdictional limit.
Idem, 729
29. It was error for the Circuit Court to hold, as a matter of law, that there could be no recovery in a case such as that stated in the declaration, of an amount equal to that which is necessary to support its jurisdiction.
Idem, 729
30. The district courts established by the Act of the Legislature of Kentucky of December 19, 1795, had jurisdiction of actions to foreclose mortgages.
Applegate v. Lexington & Carter Co. Mining Co., 892
31. Where a court of general jurisdiction is authorized to bring in, by substituted service, nonresident defendants interested in property within its jurisdiction, but is not required to place the proof of service upon the record, and the court orders such service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record, and a judgment affecting the property will be valid.
Idem, 892
32. The Circuit Court of the United States has no jurisdiction of an action brought by a citizen of California against a municipality of New Jersey upon bonds assigned to the plaintiff by citizens of New Jersey for purposes of collection only.
New Providence v. Halsey, 904
33. The Circuit Court of the United States has jurisdiction of an action brought by a citizen of California against a municipality of New Jersey upon bonds purchased by the plaintiff for a valuable consideration from citizens of New Jersey, although he is compelled to rely on the title of his vendors to avoid matters pleaded in bar of the action.
Idem, 904
34. The Supreme Court has jurisdiction to review a decision of a state court to the effect that a discharge in bankruptcy of the defendant was not a bar to the action.
Dimock v. Revere Copper Co., 994
35. It appearing that the decision of a question as to the effect of a discharge in bankruptcy upon the right of a party to enforce a lien upon property in existence at the time of the commencement of the proceedings in bankruptcy, was necessarily involved in the decision of a state court, and that such decision was adverse to the right set up under the discharge, this court has jurisdiction to review the decision.
Long v. Bullard, 1004

LANDS.

SEE CONSTITUTIONAL LAW, 31-36.
EQUITY, 9.
EVIDENCE, 19-26.
MANDAMUS, 8.
MINES, *passim*.
MORTGAGES, *passim*.
PRINCIPAL AND AGENT.
REPLEVIN, 2.
STATUTE OF FRAUDS.
TERRITORIES, 1, 2.

1. To charge the holder of the legal title to land under the patent, as trustee of another, the claimant must show himself entitled to it, and its refusal to him in consequence of errors in the rulings of the Land Department upon the law applicable to the facts found.
Bohall v. Dilla, 61
2. The preemption laws require a residence both continuous and personal. The settler may be excused for temporary absences for causes given.
Idem, 61
3. The United States has the same remedy in a court of equity to set aside or annul a patent for land, on the ground of fraud in procuring its issue, which an individual has.
United States v. Minor, 110
4. The doctrine of the conclusiveness of judgments and decrees as between parties is not applicable to the United States, in proceedings before the land officers in granting patents for public land.
Idem, 110
5. The officers of the Land Department exercise functions in their nature judicial, in cases in which individuals have, as between each other, contested the right to a patent, and their decision as to the facts before them is conclusive between those parties. But fraud or imposition on those officers, or a radical mistake by them of the law, is subject to remedy in a court of equity; and where there has been no contest, and the claimant produces without opposition his *ex parte* proofs of performance of the necessary conditions, it is especially needful that equity should give the government a remedy if those proofs are founded in fraud and perjury.
Idem, 110
6. Under the Act of July 23, 1866, the land grant of the St. Joseph & Denver Railroad Company attached to the adjoining sections when the route was adopted by the company, and a map designating it was filed with the Secretary of the Interior, and accepted by him.
Walden v. Knevals, 167
7. A subsequent entry by one without notice created no interest in him, and the patent issued upon that entry passed none.
Idem, 167
8. Under the Act of July 23, 1866, passed to remedy the effects of the unauthorized survey and selection by the State of California of school lands granted by the Act of March 3, 1853, land claimed to be within a valid Mexican grant is within the excepting clause of sec. 1.
Aurrecoechea v. Bangs, 170
9. After the survey the land thus restored to the public domain is open to preemption, and the preemptor acquires a valid title as against one who claims under the invalid section made by the State.
Idem, 170
10. A patent obtained pending a litigation by the defendant for a new claim affecting the subject matter of the litigation cannot be set up against the plaintiff.
Richmond Mining Co. v. Rose, 273

11. When a contest arises under sec. 2326, R. S., all proceedings are stayed in the Land Department until the controversy is settled by a court of competent jurisdiction, or the adverse claim is waived.
Idem, 273

12. In adjusting Congressional grants of land to a State, the only questions for consideration by the officers of the general government are, whether the State possessed the right to claim the land under her grant, and whether the land was subject to selection by her agents. Those officers have no jurisdiction to review transactions between the State and her purchasers or locating agents.
Frasher v. O'Connor, 311

13. Surveys under the Act of July 23, 1866, "to quiet land titles in California," become operative by approval of the United States Surveyor General for the State, and his filing in the local land office of the township plats. Lands thereby excluded from a confirmed private land claim become subject to state selections and other modes of disposal of public lands. Previous approval of the survey by the commissioner of the General Land Office is not necessary.
Idem, 311

14. Lists of lands certified to the State by the commissioner of the General Land Office, and the Secretary of the Interior, convey as complete a title as patents; and lands embraced therein are not thereafter open to settlement and preemption.
Idem, 311

15. In an action of ejectment for lands in California, where the plaintiff traces title to the lands from a patent of the United States issued to a settler under the preemption laws, oral evidence is inadmissible on the part of the defendant to show that the lands were not open to settlement under those laws.
Ehrhardt v. Hogaboom, 346

16. It is the duty of the Land Department, of which the Secretary of the Interior is the head, to determine whether lands patented to a settler are of the class subject to settlement under the preemption laws, and his judgment as to this fact is not open to contestation, in an action at law, by a mere intruder without title.
Idem, 346

17. Mere occupancy and improvement of public lands give no vested right therein as against the United States or any purchaser from them.
Sparks v. Pierce, 428

18. To entitle a party to relief in equity against a patent of the government he must show a better right to the land than the patentee. It is not sufficient to show that the patentee ought not to have received the patent.
Idem, 428

19. A person who makes improvements upon public land, knowing that he has no title and that the land is open to exploration and sale for its minerals, and makes no effort to secure the title to it as such, has no claim to compensation for his improvements as an adverse holder in good faith when such sale is made to another and the title is passed to him by a patent of the United States.
Idem, 428

20. Lands granted by Congress to aid in the construction of railroads do not revert upon condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings or by some legislative action sufficient to manifest an intention by Congress to reassert title and resume possession.
St. Louis, etc., R. Co. v. McGee, 446

21. The Act of July 28, 1866, does not declare a forfeiture and reassert title in the United States except as to mineral lands included within the original grant, and a new company which succeeded to the rights of the Cairo & Fulton Company holds under the original grant subject to the rights of purchasers of lands sold by the old company.
Idem, 446

22. The lands granted to the Northern Pacific Railroad Company are not subject to taxation by the local authorities while the legal title remains in the United States as security for the payment of the costs of surveying them.
N. P. R. R. Co. v. Traill Co., 477

23. The Act of 1870 requiring the payment of these costs by the company, is valid, though the original grant imposed no such condition.
Idem, 477

24. In proceedings required in the alienation of the public lands, in the absence of fraud or imposition, the action of the Land Department, upon matters of fact cognizable by it, is conclusive.
Lee v. Johnson, 570

25. If the Department issues a patent to one not entitled to it, under a mistake of law, a court of equity will correct the error by requiring a transfer of the legal title to the true owner.
Idem, 570

26. In proceedings before the Department, if it appears that the claim of the moving party is against public policy or the law, it should be disregarded although such objection was not raised by the allegations of the parties.
Idem, 570

27. If the proper officers of the United States approve a selection of lieu school lands, the school selections being in disputed territory outside the limits of an unsettled survey by the United States of a private claim, and issue the proper certified lists, and the purchaser under such a title enters into possession of the land and improves, cultivates, and holds it, no one by forcibly or surreptitiously getting into possession can make a preemption settlement which will defeat his title.
Mower v. Fletcher, 593

28. The Act of March 1, 1886, confirmed the title of the State of California to the lands in question, and such confirmation inured to the benefit of those holding under the State.
Idem, 593

29. The Act of April 10, 1869, to renew certain grants of lands to the State of Alabama, previously granted by the Act of June 3, 1856, to aid a certain railroad company, is not to be construed as making a new grant, but is to be treated as an extension of the time named in the original grant for the completion of the road.
Doe, ex. dem., v. Larmore, 593

30. The completion of the road within the time fixed by the new Act perfected the title of the company under the original grant, and this title inured to the benefit of its prior grantees.
Idem, 593

31. In the construction of land grant Acts in aid of railroads, "granted lands" are held to be those falling within the limits specially designated, the title to which attaches, when the lands are located by an approved and accepted survey of the line, filed in the Land Department, as of the date of the Act of Congress; while "indemnity lands" are those selected in lieu of parcels previously disposed of or reserved, the title to which accrues only from their selection.
Barney v. Winona, etc. R. R. Co., 858

32. The reservation made by the third section of the Act of March 3, 1865, increasing a prior grant of lands to Minnesota for railroad purposes, applies to the "granted lands" of the prior grant falling within the six mile limit, and not to the possible "indemnity lands" which might be subsequently acquired.
Idem, 858

33. Prior to August 1, 1877, title could be acquired under the statutes of Montana by three years' adverse possession.
Dunphy v. Sullivan, 912

34. Where, in case of a grant by an Act of Congress to a State in trust for each of two railroad companies of every alternate section of land, designated by odd numbers, for ten miles in width on each side of their roads, and, in case any of these lands had been disposed of, lands in lieu thereof to be selected within twenty miles of the roads, it was found that the grants overlapped; held, (1) that the title acquired from the United States related back to the date of the grant and that neither company could, by any act of its own, as by prior location or construction, or by any omission of the other road, obtain any superiority, provided that there was no forfeiture of the grant; (2) that this principle did not apply to lieu or indemnity lands outside the ten mile limit; (3) that as to overlapping lands within ten miles of both roads the companies each took an undivided moiety; (4) that as to lands within ten miles of one road and more than ten miles from the other, the nearest took the entire title, though otherwise the further road would have been entitled to indemnity lands therein; (5) that as to lands more than ten, but less than twenty miles from each road, the decree dividing these lands equally was, under the circumstances, correct.
Sioux City & St. P. R. R. Co. v. Chicago, M. & St. P. R. Co., 928

35. Where a debtor executed a deed, absolute in

terms, to his creditor with the verbal agreement that it was to secure a note and that if the note was not paid at maturity the creditor should be authorized to sell the land, a *bona fide* purchaser of the land on a sale by the creditor after default, who paid just the amount due on the note, takes the land free from all rights of creditors of the first grantor who levied an attachment on the land prior to the sale. Such attaching creditors have no right of redemption.
Jackson v. Lawrence, 1024

LICENSE.

SEE CONSTITUTIONAL LAW, 73.

1. Under the laws of Virginia an assessment, made by law a condition precedent to obtaining a license for pursuing a profession, is payable in coupons of bonds issued by the State, being within the meaning of the words, "taxes, debts, dues and demands due the State," as used in the Act of March 30, 1871.
Royall v. Virginia, 735
2. It is the right of the coupon holder to have his coupons received for taxes when offered, and the Act of March 15, 1884, in so far as it forbids their receipt in payment of license taxes, is void as against coupon holders.
Idem, 735
3. Where an applicant for a license has tendered coupons in payment therefor, he need not resort to a *mandamus* to compel its issue when wrongfully withheld, but may, without a license, pursue the business of his calling, which is not unlawful in itself, and which he has a constitutional right to prosecute.
Idem, 735
4. A practising lawyer in Virginia has the right to pay his license tax in the coupons of bonds issued by the State, and the proper officer may be compelled by *mandamus* to receive coupons tendered to him for verification under the Act of January 4, 1882.
Sands v. Edmunds, 739

LIEN.

SEE BONDS, 3, 6, 9.
RAILROADS, 3, 4.

LIMITATIONS.

SEE APPEAL AND ERROR, 84.
BANKRUPTCY, 4.
DUTIES, 4.
JURISDICTION, 20, 24.
LANDS, 33.
TAXES, 19.

1. The Act of Congress of June 11, 1864, concerning limitations of actions, applies to causes and proceedings in the courts of the States as well as to those in the courts of the United States.
Mayfield v. Richards, 334
2. When a trust is repudiated by clear and unequivocal words and acts of the trustee, with the knowledge of the beneficiary, the general rule that the Statute of Limitations does not run against an express trust, does not apply.
Philippi v. Philippe, 336
3. The Supreme Court of Alabama has sustained the general rule that, in the absence of a statute of limitations, if twenty years are allowed to elapse without the commencement of proceedings or the recognition or admission of the trust, a presumption of settlement arises.
Idem, 336
4. A promise to render an account of partnership and trust affairs and make a final settlement of the same, is not an acknowledgment that anything is due. A bill for such settlement which contains no averment that anything is due the complainant, is insufficient.
Idem, 336
5. Under sec. 3 of the Act of July 27, 1868, chap. 276 (15 Stat. 243) now embodied in sec. 1059 R. S., in an action of trover brought against a former secretary of the treasury of the United States, in a court other than the Court of Claims, to recover a sum of money as the value of certain cotton, alleged to have been the private property of the plaintiff, it is held, that, without reference to the question whether the cotton was, in fact, abandoned or captured property within the Act of 1863, the fact that it was taken as being such, under such claim, made in good faith, was a bar to the action, under the Act of 1868, and sec. 1059 of the Revised Statutes.
Lamar v. McCulloch, 360
6. The Mississippi Code of 1871, sec. 2173, by which any action to recover property, because of the invalidity of an administrator's sale by order of a probate court, must be brought within one year, does not apply to an action brought by the heir to recover land bid off by a creditor at such a sale for the payment of his debt, not otherwise paid for than by giving the administrator a receipt for the amount of the bid.
Clay v. Field, 375
7. Under the Civil Code of Louisiana, a widow is not liable *in solido* with the surviving partners for the payment of a note made by the firm of which her husband was a member; and payments made on the note by the surviving partner cannot be given in evidence to show interruption of prescription running in her favor.
Henderson v. Wadsworth, 377
8. Where fraud is the foundation of the action, the limitation of two years under the Bankrupt Act, does not begin to run, in the absence of negligence or laches of the plaintiff, until the discovery of the fraud.
Traer v. Clews, 467
9. The repeal of a statute of limitations does not deprive a debtor in whose favor it had become a defense, of his property without due process of law in violation of the provisions of the Fourteenth Amendment.
Campbell v. Holt, 483
10. There is a distinction between the effect of statutes of limitations in vesting rights to real and personal property, and their operation as a defense to contracts.
Idem, 483
11. A bill in equity to enjoin a judgment, obtained in an action at law on a mere legal title, is a continuation of that suit.
Webb v. Barnwall, 595
12. Such a bill against an assignee in bankruptcy, may be filed within the time limited by sec. 5057, R. S., after the complainant has been evicted, or his title held insufficient, where he was in possession under what he supposed to be a good title.
Idem, 595

MANDAMUS.

SEE BONDS, 15.
COSTS, 3.
EQUITY, 3.
LICENSE, 3, 4.
TAXES, 6.

1. A writ of *mandamus* does not lie to compel the judge of an inferior court to authorise the withdrawal of money from the registry of the court where said court has expressly adjudged that the litigation is not ended.
Ex parte Hughes, 134
2. *Mandamus* lies to require an inferior court to decide a matter within its jurisdiction, but not to control the decision.
Ex parte Morgan, 135
3. The judgment of an inferior court upon a motion to amend its original judgment in a cause cannot be reviewed by *mandamus*.
Idem, 135
4. *Mandamus* to compel officers of the State of Virginia to receive coupons in the payment of taxes does not lie.
Moore v. Greenhow, 240
5. Upon a petition for a *mandamus* to compel the levy of a tax for the payment of a judgment against a county, the answer stated that the proceeds of the maximum levy allowed by law were insufficient to meet the ordinary current expenses of the county government. It is held upon general demurrer to the answer, that the petitioners are not entitled to the writ.
Clay Co. v. McAleer, 482
6. *Mandamus* lies to compel a court to take jurisdiction in a proper case, but not to control its discretion.
Ex parte Brown, 676
7. In matters which require the exercise of judgment and consideration by an executive officer of the government, or which are dependent upon his discretion, no rule to control his action will issue.
U. S. ex rel. Carrick v. Lamar, 677
8. Whether Arsenal Island, situated in the Mississippi River opposite St. Louis, is open to preemption and settlement, and should therefore be sur-

veyed, is a matter of doubt and within executive judgment or discretion.
Idem, 677

MASTER AND SERVANT.

SEE NEGLIGENCE, 5.

1. A person who hires a public hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver.
Little v. Hackett, 652

2. Where fellow servants are engaged in a common employment, each, in undertaking the service, assumes the risk that the others may fail in that care and vigilance which are essential to his safety.
Northern Pac. R. R. Co. v. Herbert, 755

3. It is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery or other means, by which it is to be performed and to keep them in repair and order. No duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from liability. This rule is not changed by the Dakota Code.
Idem, 755

4. The liability of the employer is the same whether he totally fails to provide persons to perform a duty he owes to his servants, or provides persons who are incompetent and unskillful.
Idem, 755

5. The rule of law as to contributory negligence applied to the facts of a particular case.
Idem, 755

MILITIA.

SEE STATES.

MINES.

SEE CONTRACTS, 6.
LANDS, 21.
PARTNERSHIP, 1, 2.

1. A mining claim which includes more than 200 feet, and does not affect rights already acquired, is void only as to the excess.
Richmond Mining Co. v. Rose, 273

2. The right of a locator to hold more than 200 feet additional as discoverer will be sustained after five years, though there was a mistake as to his discovery of a new vein or lode.
Idem, 273

3. The locator of a mining claim who does not interpose an adverse claim in proceedings instituted by another to obtain a patent for a claim including part of his claim, thereby waives his rights and loses the benefit of his location.
Gwillim v. Donnellan, 348

4. In proceedings to obtain a patent for a mining claim, where an adverse claim is not interposed, the United States may assume that no such claim exists, and the holder thereof is barred.
Idem, 348

5. No title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar or copper can be obtained under the preemption or homestead laws, or the town site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas.
Deffeback v. Hawke, 423

6. A certificate of purchase of mineral land upon an entry of the same by a claimant at the local land office, if no adverse claim is filed, and the entry is not canceled or disaffirmed by the Land Department, passes the right of the government to him, and as against the acquisition of title by any other party, is equivalent to a patent. The land thereby ceases to be the subject of sale by the government, which thereafter holds the legal title in trust for the holder of the certificate.
Idem, 423

7. The officers of the land department have no authority to insert in a patent any other terms than those of conveyance, with recitals showing a compliance with the law. The patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location.
Idem, 423

8. There can be no color of title in an occupant of land, who does not hold under an instrument or proceeding, or law purporting to transfer the title or to give the right of possession. Nor can good faith be affirmed of a party in holding adversely, where he knows that he has no title and that under the law he can acquire none. So held where, in an action of ejectment for known mineral land by the holder of a patent of the United States, the occupant set up a claim to improvements made thereon under a statute of Dakota.
Idem, 423

9. It would seem that there may be an entry of a town site, even though within its limits mineral lands are found, the entry and the patent being inoperative as to all lands known at the time to be valuable for its minerals, or discovered to be such before their occupation and improvement for residences or business under the town site title.
Idem, 423

10. Discovery and appropriation are the source of title to mining claims, and development by working is the condition of continued possession.
O'Reilly v. Campbell, 669

11. The location of a vein or lode as running in a certain direction, not marked or developed for years, but simply indicated by a notice, is invalid as against a claim subsequently located on ground different from that indicated, after the development of the latter claim without objection, though subsequent explorations by the first locators disclose the fact that their vein in its true course covers the subsequent claim.
Idem, 669

12. Section 2322, R. S., gives to the owner of a mineral vein or lode the right to follow it when it passes outside of the surface lines extended vertically. But this right is dependent, outside of the lateral limits of the claim, upon the vein outside being identical with and a continuation of the one inside those lines.
Iron Silver Mining Co. v. Cheesman, 712

13. The Acts of Congress use the words "vein, lode," or "ledge" as embracing a more or less continuous body of mineral, lying within a well defined boundary of other rock, in the mass within which it is found.
Idem, 712

14. A vein is by no means always a straight line, or of uniform dip or thickness, or richness of mineral matter, throughout its course. But if the mineral disappears, or the fissure with its walls of the same rock disappears, so that its identity can no longer be traced, the right to pursue it outside of the perpendicular lines of claimant's survey is gone.
Idem, 712

15. Whether any deposit of mineral matter, about which a contest arises before a court or jury, has been shown to belong to one of these veins within a prior location, is a question to be decided by the application of these principles to all the evidence in the case.
Idem, 712

16. In procuring a patent for a placer mining claim under sec. 2333, R. S., where the claimant is also in possession of a lode or vein included within the same boundaries, the patent shall cover both, if he makes this known and pays the amounts required by law.
Reynolds v. Iron Silver Mining Co. 774

17. Where no such vein or lode is known to exist, the patent for a placer claim shall carry all such veins or lodes within its boundaries which may be afterwards found to exist under its surface.
Idem, 774

18. But where a vein or lode is so known to exist, and is not in claimant's possession, and not mentioned in the claim on which the patent issues, the title to it does not pass to the patentee.
Idem, 774

19. Where the title thus remains in the United States, the patentee and those claiming under him can dispossess no one who is in peaceable possession of such vein or lode whether with or without title.
Idem, 774

MISTAKE.

SEE APPEAL AND ERROR, 6.
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MORTGAGES.

SEE APPEAL AND ERROR, 30.
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LANDS, 35.
RAILROADS, 6, 30, 34.
REMOVAL OF CAUSES, 22.
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TRUSTS AND TRUSTEES, 5.

1. In a suit to foreclose a mortgage on land in Louisiana, given to secure the payment of negotiable promissory notes to their holder, it was held on the facts, that the plaintiff was never the owner of the notes, as against the mortgagor, or those holding the land under him by deeds in which they assumed the payment of the notes and mortgage.
Weaver v. Field, 143

2. The authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale, and to transfer them with the corporeal property of the company to the purchaser.
N. O., S. F. & L. R. Co. v. Delamore, 244

3. Where the franchises of a railroad corporation essential to the use of its road, and other tangible property, can, by law, be mortgaged to secure its debts, the surrender of its property, upon the bankruptcy of the company, carries the franchises, and they may be sold at the bankruptcy sale.
Idem, 244

4. Under the decisions of the Supreme Court of Arkansas, to bar a suit to foreclose a mortgage there must not only be an adverse possession for such a length of time as would bar an action of ejectment, but there must be an open and notorious denial of the mortgagee's title.
Smith v. Woolfolk, 357

5. Under a deed of trust, covering land in the District of Columbia, made by a debtor to two grantees, their heirs and assigns, to secure the payment of a promissory note with power, on default, to sell the land at public auction "on such terms and conditions, and at such time and place, and after such previous public advertisement" as they should deem advantageous and proper, and to convey the same in fee simple to the purchaser, a sale was had by public auction, under a notice of sale, signed by both of the trustees, and duly published in a newspaper, but at the sale only one of the trustees was present. Held that the absence from the sale of one of the trustees, was not a sufficient reason, of itself, for setting aside the sale, as against the former owner of the land.
Smith v. Black, 398

6. The creditor was the purchaser at the sale, and it was held that there was nothing shown which disqualified him from becoming such purchaser.
Idem, 398

7. Alleged inadequacy of price considered, and the sale upheld as against the allegation.
Idem, 398

8. The purchaser, at the time he took the deed from the trustees, settled with one of them, on the basis of a purchase for cash, although the terms of sale provided for a credit, and, as holder of the note secured, credited on it the amount of the net proceeds of the sale, leaving a sum still due on the note; held, that no right of the former owner of the land was violated.
Idem, 398

9. Under the laws of Pennsylvania, upon a sale under foreclosure proceedings, the judgment debtor is a party and is bound by the confirmation as by a judicial decree.
Gibson v. Lyon, 440

10. The purchaser of lands sold by the Orphans' Court of Philadelphia, subject to a mortage, is estopped from denying the authority of the court to sell such lands except clear and discharged of all liens.
Idem, 440

11. A mortgagee is not bound to accept a tender by a stranger of the amount due on account of the mortgage and make an assignment thereof.
Idem, 440

12. An agreement merely to take land, subject to a specified incumbrance, is not an agreement to assume and pay the incumbrance.
Shepherd v. May, 456

13. In the absence of the mutual agreement of the grantor, grantee, and holder of the incumbrance to that effect, the relation of principal and surety does not exist between the grantee and grantor, and the latter is not discharged from his liability by an agreement between the other parties to extend the time of payment.
Idem, 456

14. A clause in a trust deed prescribing that the terms of sale should be the amount due on the note, and the expenses of sale, in cash, does not estop the holder from denying payment in full.
Idem, 456

15. The words "all other property" in the mortgage executed by the Alabama and Chattanooga Railroad Company on March 2, 1870, in favor of the State of Alabama, to secure it for a loan of its credit to said company, do not operate to include within the mortgage all of the lands belonging to the company not specifically described.
Alabama v. Montague, 1000

16. A owned in fee an undivided one third in a certain lot and a life estate in the remaining two thirds, of which his two daughters owned the remainder. The three mortgaged the lot for $20,000. For the purpose of partition, the daughters conveyed to their father's appointee the south one third in fee, and the father conveyed to the daughters as tenants in common the remainder in the north two thirds. On payment of $10,000 the mortgagee released the south third. A building was erected on the north two thirds and insured for $15,000, payable in case of loss to the mortgagee to be credited on the mortgage. The entire business was conducted by A who collected and used the rents. The building was totally destroyed by fire and the $15,000 paid to the mortgagee. By contract between A and the mortgagee, of which the daughters had no knowledge, it was provided that the $15,000 should be used in rebuilding, the funds to be deposited in a bank and paid out on the joint order of the mortgagee or his agent and A on certain conditions. The money was so deposited, but none of it was ever paid out on checks signed by the mortgagee or his agent and none of it was used in rebuilding and no building was erected on the lot. In an action to foreclose the mortgage, held: (1) that the policy of insurance was a collateral security for the joint debt and the mortgagee, having received the proceeds, could not surrender them to A or divert them from the purpose to which they had been devoted by the mortgagors without the consent of the daughters; (2) that if the money could be devoted to rebuilding the mortgagee was bound to see that it was so applied and, as to the daughters, was responsible for its diversion: (3) that the whole indebtedness was a lien on A's estate; that the $15,000 was to be credited to the daughters; that the excess of the indebtedness over the $15,000 was a lien on the daughters' estate; that the proceeds of A's estate were to be first applied on the indebtedness for which there was no other security; and that none of them were to be applied to taxes and costs until the debt for which they were the sole security was entirely discharged.
Conn. Mut. L. Ins. Co. v. Scammon, 1007

MUNICIPAL CORPORATIONS.

SEE BONDS, *passim*.
EQUITY, 1, 8.
MANDAMUS, 5.
REMOVAL OF CAUSES, 12, 21.
STATE LAWS AND DECISIONS, 6, 9.
STREETS, *passim*.
TAXES, 5.

In an action of ejectment brought to recover the possession of lands sold for nonpayment of taxes levied generally to defray the expenses of opening Montgomery Avenue, in San Francisco, under the Act of the Legislature of California of April 1, 1872, the landowner may show that the petition for the opening presented to the mayor, although acted on by him, the Board of Public Works and the County Court was not signed by the owners of the requisite amount of frontage.
Zeigler v. Hopkins, 1019

NAVIGATION.

The Healy Slough is not a navigable stream at the point where it is crossed by the bridge maintained by the Chicago & Alton Railroad Company.
Healy v. Joliet & Chi. R. R. Co. 607

NAVY.

SEE PROHIBITION, *passim*.

1. Under the Act of June 16, 1862, if a naval officer is delayed in his promotion because he has not been examined owing to absence on duty, he is entitled when promoted to the increased pay of the new grade from the time when his examination should have taken place.
Hunt v. United States, 674

2. Under the law and regulations, though a first assistant engineer becomes eligible to examination and promotion when he has served two years at sea, he is not entitled to examination until his turn for promotion has arrived or nearly so.
Idem, 674

3. Cadet engineers who had finished their course at the Naval Academy and received their diplomas prior to the passage of the Act of August 5, 1882, became graduates and were not made naval cadets by that Act.
United States v. Redgrave, 697

4. The provision of said Act limiting the number of appointments and providing for the discharge of surplus graduates applied only to those graduating after 1882.
Idem, 697

5. A cadet engineer, a graduate of the Naval Academy in 1881, is an officer within the meaning of sec. 1229, R. S., and he cannot be discharged at will by the Secretary of the Navy.
United States v. Perkins, 700

6. When Congress, by law, vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it deems best for the public interest.
Idem, 700

NEGLIGENCE.

SEE MASTER AND SERVANT, *passim*.
SPECIFIC PERFORMANCE.

1. When the facts found furnish conclusive proof of negligence, it may be regarded as properly found amongst the conclusions of law as a legal inference from those facts.
Steamship Belgenland v. Jensen, 152

2. The mere failure of a steam ferry company to provide a seat for a passenger on its boat is not of itself proof of negligence.
Burton v. West Jersey Ferry Co., 215

3. Where a person approaching a railroad crossing with which he was familiar, could have seen a coming train, within a distance of 70 rods from the crossing, from any point within 600 feet from the crossing, and was struck by the train at the crossing and injured, he was guilty of contributory negligence, even though the train was not a regular one, and was running at a high rate of speed, and did not stop at a depot 70 rods from the crossing in the direction from which the train came, and did not blow a whistle or ring a bell between the depot and the crossing.
Schofield v. C. M. & St. P. R. Co., 224

4. On these facts it was proper for the trial court to direct a verdict for the defendant.
Idem, 224

5. In an action brought against the District of Columbia by a laborer to recover damages from an injury caused by the falling of a gravel bank, it is held by this court that different parts of the instructions of the court below were inconsistent, and that it was error to instruct the jury that, in determining the question of contributory negligence they need only inquire whether the plaintiff continued at his work longer than was reasonably sufficient to enable the supervisor to provide some one to watch the bank.
District of Columbia v. McElligott, 946

6. The questions whether the District of Columbia is liable for the negligence of its supervisor resulting in the personal injury of those who labor under his direction on public works, and whether such supervisor and laborers are fellow servants, are not decided.
Idem, 946

NEW TRIAL.

1. The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the damages awarded him by the verdict of the jury, is within the discretion of the trial court.
Northern Pac. R. R. Co. v. Herbert, 755

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An officer of the army, dismissed from the service during the recent civil war by order of the President, could not be restored to his position merely by a subsequent revocation of that order. The vacancy so created could only be filled by a new appointment.
United States v. *Corson*, 254

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1. Where a bill has been filed on behalf of the complainants and all other creditors, the court may incidentally decree in favor of all other creditors who come in under the bill.
Stewart v. *Dunham*, 329

2. In a suit for the assignment of dower in lots, the legal title to which is in one defendant for the joint use of himself and another defendant, these two defendants being in joint possession and the prayer of the bill being against both for damages as well as for assignment of dower, both are necessary parties.
Rand v. *Walker*, 907

PARTNERSHIP.

SEE ATTACHMENT, 2.
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WITNESSES.

1. There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner to a stranger, or to one of the associates, of his share in the property and business.
Bissell v. *Foss*, 126

2. A mining partner is not entitled to share in a purchase by his copartners of the share of another in the absence of an express contract.
Idem, 126

3. Certain members of a copartnership agreed to pay a retiring member a fixed amount as his capital, all erroneously believing the firm to be solvent. The new firm borrowed on its own notes and applied the proceeds in payment of part of the capital so agreed upon, and of some of the debts of the old firm. Upon the failure of the new firm the holders of its notes cannot charge the old firm or the retiring partner with the money loaned.
Penn Nat. Bk. v. *Furness*, 168

4. Fraudulent misrepresentations of fact by a partner to the injury of innocent persons dealing with him, as representing the firm, and without notice of any limitations upon his general authority as agent for the partnership, bind his partners; especially where the firm appropriates the fruits of the fraudulent conduct of such partner.
Strang v. *Bradner*, 248

5. Where three persons form a partnership and

agree to bear the losses and share the profits in proportion to their contribution to the capital, and two of the partners furnish all of the capital, and do all of the work, they are entitled to be repaid their advances out of the partnership assets before payment of the individual creditors of the other partner.
Hobbs v. McLean, 940

6. Where a person in anticipation of obtaining a government contract forms a partnership with two other parties for the execution of the contract, when it shall have been obtained, such contract of partnership is not, under the circumstances of the case, void, as a violation of either secs. 3477, 3737, R. S.
Idem, 940

7. Where two of three partners are entitled under the articles of partnership to a sum due from the government on a contract with the third partner, an agreement executed by such third partner to pay the sum due to each out of moneys he might thereafter receive from the government does not, as against the assignee in bankruptcy of such third partner, deprive the other partners of their right to the funds paid by the government.
Idem, 940

8. The right of action for the recovery by two of three partners, as assets of the firm, of moneys collected on a contract (the subject of the partnership), between the third partner and the government, does not accrue until the moneys have actually been paid over by the government to the defendant. The bankruptcy and death of the third partner and the substitution of his assignee in bankruptcy as defendant in no respect affects this question.
Idem, 940

PATENT RIGHTS.

SEE COSTS, 6.
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1. A combination is patentable only when the several elements of which it is composed produce by their joint action a new and useful result, or an old result in a cheaper or otherwise more advantageous way.
Stephenson v. Brooklyn Cross-Town R. R. Co. 58

2. Letters patent No. 186369, for improvements in time-locks in which the patented combination includes a bolt turning on an axis, is not infringed by a structure in which the combination lock has not a turning or revolving bolt.
Sargent v. Hall Safe & Lock Co., 67

3. In patents for combinations of mechanism, limitations and provisos imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor.
Idem, 67

4. To be patentable, a thing must not only be new and useful, but must amount to invention or discovery.
Thompson v. Boisselier, 76

5. The third claim of reissued letters patent No. 978, for "improvements in water closets," construed, and the state of the art set forth.
Idem, 76

6. Under the recent decisions of this court said claim does not involve a patentable invention, or it is not infringed.
Idem, 76

7. The first claim of letters patent, No. 21734, for an "improved water closet," namely a drip box "arranged upon the top of or over the trunk," must, in view of the state of the art, be limited to a drip box arranged above or on top of the closet, and is not infringed by a drip box near the top.
Idem, 76

8. To constitute identity of invention, and therefore infringement, not only must the result obtained be the same, but in case of a combination of known elements, the elements combined must be the same, and combined in the same way, so that each element shall perform the same function, provided, however, that the differences alleged are not merely colorable, according to the rule forbidding the use of known equivalents.
Electric R. R. Signal Co. v. Hall R. Signal Co., 96

9. In letters patent, No. 140536, for an improvement in circuits for Electric Railroad Signals, insulated sections of the rails, as circuit closers, constitute an essential element in the combination described, and said patent is not infringed by the use of a separate instrument used as a circuit closer placed near the track and depressed by the wheels of passing trains.
Idem, 96

10. A patent of a combination to operate signals at many stations along the line of a railroad, with one battery by a metallic circuit divisible into a number of subsidiary circuits of unequal size and resistance, and requiring the equalization of the resistances by means of independent and additional devices, is not infringed by a combination for the same purpose, which avoids the necessity of subsequent rectification by an original adjustment of equal resistances, and uses the earth as the return part of the circuit.
Idem, 96

11. Letters patent, No. 140536, is not infringed by the device covered by letters patent, No. 165170, granted July 13, 1875, to Hall & Snow.
Idem, 96

12. Where the defendant has used the complainant's patented machine he will be held accountable for the profits realized thereby, although it appears that the product was an article of merchandise and for sale at a less sum than said profits.
Thomson v. Wooster, 105

13. Section 739, R. S., providing that no civil suit shall be brought before the United States courts against an inhabitant of the United States in any other district than that in which he is an inhabitant, or in which he may be found, applies to suits brought under sec. 4915, concerning the issue of patents.
Butterworth v. Hill, 119

14. The official residence of the Commissioner of Patents is at Washington.
Idem, 119

15. The written acceptance at Washington of the Commissioner of Patents of the service of a subpœna issued by a district court situated elsewhere, "to have the same effect as if duly served by a proper officer," merely admits the service with the same effect it would have if made by an officer in the District of Columbia. No appearance is thereby entered in the cause.
Idem, 119

16. A letter written by the Commissioner at Washington acknowledging the receipt of the bill, returning the subpœna, "service accepted," and stating that he declines to appear, does not amount to a waiver of the objection to the jurisdiction.
Idem, 119

17. Only nominal damages should be allowed where no profits have been made by the defendant.
Dobson v. Hartford Carpet Co., 177

18. Where a bill founded on a design patent with a claim for a pattern and separate claims for each of its parts, is taken as confessed, it alleging infringement of the "invention," the patent will be held valid for the purposes of the suit.
Idem, 177

19. A claim of "the design for a carpet substantially as shown" refers to the description and the drawing, and is valid.
Idem, 177

20. An objection that a patent for a design is for an aggregation of old ornaments, and embodies no "invention," is concluded where the bill alleging infringement of the "invention" is taken as confessed.
Idem, 177

21. Where the master reported no profits, and nominal damages, in a suit in equity for the infringement of a patent for a design, and on exception by the plaintiff, the Circuit Court allowed a sum for damages, and this court reversed its decree, the plaintiff was allowed costs in the Circuit Court to and including the interlocutory decree, and the defendant was allowed his costs after such decree.
Idem, 177

22. Reissued letters patent, No. 6954, for the process of compressing the coating used in the insulation of telegraph wires, is void, having been substantially anticipated by the process described in certain English patents.
West. Elec. Mfg. Co. v. Ansonia Brass and Copper Co., 210

23. Reissued letters patent, No. 6954, for a process, being invalid, it follows that reissued letters patent, No. 6955, for the product, is also invalid.
Idem, 210

24. The scope of letters patent should be limited to the invention covered by the claim, which cannot be enlarged by the language in other parts of the specification.
Idem, 210

25. Under sec. 4888, R. S., an element of an invention not described in the specification is not covered by the patent.
West. Elec. Mfg. Co. v. Ansonia Brass, etc., Co. 210
26. The use in succession of two distinct pairs of dies of well known kinds, not combined in one machine nor co-operating to one result, but each pair doing by itself its own work, is not a patentable invention.
Beecher Mfg. Co. v. Atwater Mfg. Co., 232
27. Letters patent, No. 66130, granted to James B. Clark, June 25, 1867, for an "improvement in the manufacture of blanks for carriage thill shackles," are not infringed by the manufacture of blanks for shackles in accordance with letters patent, No. 106225, granted to Willis B. Smith, August 9, 1870.
Clark v. Beecher Mfg. Co., 352
28. In the construction of letters patent reference will be made to the existing state of the art at the time of the invention.
Wollensak v. Reiher, 355
29. Reissued letters patent, No. 9307, original patent No. 136801, limited to the combination claimed.
Idem, 355
30. A patentee who has claimed less than that to which he is entitled, is bound to discover the defect within a reasonable time or he loses his right to a reissue. *Idem*, 355
31. Where it appears from the bill that the sole object of the reissue was to enlarge and expand the claims of the original patent, and that a delay of two or more years has taken place in applying for the reissue, not explained by special circumstances showing it to be reasonable, a general demurrer lies to the bill for want of equity.
Idem, 355
32. The decision of the Patent Office as to the reasonableness of the delay is not conclusive.
Idem, 355
33. The delay being *prima facie* unlawful, it is incumbent on the party seeking to establish the jurisdiction of the Patent Office to grant the reissue to show the facts on which it rests.
Idem, 355
34. In view of the state of the art, the only invention covered by letters patent, No. 142154, consists in the particular organization of the machine described.
Eachus v. Broomall, 419
35. In the absence of an error arising from inadvertence, accident, or mistake, a patent for a machine will not sustain a reissue for a process.
Idem, 419
36. The application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.
Miller v. Foree, 552
37. Letters patent, No. 185119, and reissue thereof, No. 8060, are invalid, as the evidence shows that the invention was anticipated. And, independent of this, the state of the art at the time of the application for the patent was such as to leave no ground for its issue.
Idem, 552
38. Letters patent, No. 155077, for an improvement in glove fastenings, is not infringed by a spring fastening which acts in a different manner.
Field v. De Comeau, 596
39. Where a lever or its equivalent as a mechanical instrument is made an essential element of a claim in a patent, the use of the human hand instead is not the use of an equivalent.
Brown v. Davis, 659
40. Reissued letters patent, No. 8589, for an improvement in grain drills construed and limited, and held not to be infringed by the defendant's machine.
Idem, 659
41. Where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot, after the issue of the patent, broaden his claim by dropping such element.
Shepard v. Carrigan, 723
42. In a patent for an improved hose carriage certain elements and their combination being old, the description of the hose reel as "a reel of large diameter to allow the water to pass through the hose when partially wound thereon" is not sufficient to sustain the patent.
Preston v. Manard, 763
43. A variation of eccentricity in the rollers is a material feature of the invention secured by letters patent No. 98622, for an improvement in permutation locks, or is made so by the description and claim, and said patent is not infringed by a lock in which the same combination or an equivalent is not used.
Yale Lock Mfg. Co. v. Sargent, 950
44. The scope of letters patent must be limited to the invention covered by the claim, which may be illustrated but cannot be enlarged by language used in other parts of the specification.
Yale Lock Mfg. Co. v. Greenleaf, 952
45. A change in a mechanical device, which would occur to an unskilled mechanic, is not patentable.
Idem, 952
46. The first claim of reissued letters patent granted to George Rosner, July 25, 1871, for an "improvement in permutation locks" was anticipated, and is, therefore, void.
Idem, 952
47. The first claim of reissued letters patent No. 4696 for an improvement in locks is not an unlawful expansion of the claims of the original patent.
Yale Lock Mfg. Co. v. Sargent, 954
48. A patent for an improvement in locks, held not to be void for want of novelty.
Idem, 954
49. A patent for an improvement in locks, held to be infringed by a competing device.
Idem, 954
50. In an action for infringement of a patent for a "turning bolt device," an improvement in locks, where the complainant had granted no licenses but was himself the manufacturer of his locks, and where the patented device was an essential feature, both of complainant's and the infringing locks, and where the patented device could not be sold except as embodied in a lock, and where the complainant had been compelled to reduce the price of his locks by defendant's competition, the defendant's infringement must be held to have caused the entire loss of complainant by such reduction of price, allowance being made for other causes which gave the defendant an advantage in selling his locks.
Idem, 954
51. The owner of the patent is the proper party to sue for damages for infringement, although he may have a partner engaged with him in the manufacture of the patented article.
Idem, 954
52. Two patents may both be valid when the invention secured by the second is an improvement on that secured by the first, but if the second includes the first, neither grantee can use the invention of the other without his consent; and a stranger who is an infringer of both cannot set up the first patent as an excuse for infringing the second.
Cantrell v. Wallick, 1017
53. Two mechanical devices are identical in the sense of the patent law when they perform substantially the same function in substantially the same way, to obtain the same result.
Idem, 1017
54. Where want of novelty is set up as a defense to a suit for infringement of a patent, the burden of proof is upon the defendant, and he must establish the defense set up beyond a reasonable doubt.
Idem, 1017

PAYMENT.

SEE ACTIONS, 2.
CONFEDERATE NOTES, 4.
CONSTITUTIONAL LAW, 16, 18.
EVIDENCE, 5.
HUSBAND AND WIFE, 1.
LICENSE, 3.
MORTGAGES, 14.
PRINCIPAL AND AGENT.
TAXES, 13.

1. The payment by the District of Columbia of certificates of the Auditor of the Board of Public Works to a third person, where they have been indorsed in blank and placed in his hands by the owner, in the absence of want of actual authority to collect them, discharges the debt.
Laughlin v. District of Columbia, 701
2. A letter by the attorney of the owner sent to the Treasurer of the Board of Public Works, merely requesting him not to pay the certificates, was not sufficient to make the district liable.
Idem, 701

PENALTIES.

1. A remission by the Secretary of the Treasury

under section 5394, R. S., of penalties incurred by a steam vessel for taking on board an unlawful number of passengers, when applied for before a suit *in rem*, brought by an informer, is tried, is a bar to the suit.
Pollock v. Bridgeport Steamboat Co., 147
2. The practice of granting remissions of pecuniary penalties and forfeitures, by officers other than the President, sanctioned by statute and acquiescence for nearly a century, is too firmly established to be questioned.
Idem, 147

PENSIONS.

1. The words "total disability" in the pension laws have a technical signification which cannot be disregarded.
Burnett v. United States, 586
2. Under section 4702, R. S., the widow is only entitled to receive the same pension to which her husband would have been entitled for a "total disability," although in fact he had received a larger pension because of a "permanent specific disability."
Idem, 586

PLEADINGS.

SEE EVIDENCE, 6, 7.
JURISDICTION, 23.
PRACTICE, *passim*.
REMOVAL OF CAUSES, 6, 7.
TRUSTS AND TRUSTEES, 4.

1. An answer which states material facts omitted from the bill, waives any objection to such omission.
Cavender v. Cavender, 212
2. A defendant to a bill, who states in his answer under oath the provisions of a writing, which is presumed to be in his possession, cannot complain that the court acted upon his admission without the production of the writing.
Idem, 212
3. Pleadings must state facts, not conclusions of law.
Alabama v. Burr, 435
4. A demurrer admits all facts well pleaded, but not necessarily all statements of conclusions of law.
Pullman Palace Car Co. v. Missouri Pac. R. Co., 499
5. In an action brought in a state court upon a judgment rendered in another State, an allegation as to the legal effect of the judgment in that State is admitted by demurrer.
Hanley v. Donoghue, 535
6. Two alternative claims, each belonging to many persons, one of whom has no interest in one claim, and others of whom have no interest in the other, cannot be joined in one bill in equity.
Stebbins v. Town of St. Anne, 667
7. The denial of the making of a contract lets in the defense of the Statute of Frauds as effectively as if it had been specifically pleaded.
Dunphy v. Ryan, 703
8. In some cases where a matter has not been put in issue with sufficient precision by the bill, or the prayer is not consistent with the case made, a court of equity will permit an amendment at the trial.
Graham v. Burgess, 839
9. The general rules of pleading in regard to admiralty suits *in rem* apply to suits *in rem* for a forfeiture brought by the United States after a seizure on land, the Act of June 1, 1872, having made no change in the practice in such cases.
Coffey v. United States (3 Cases), 631, 890

POLYGAMY.

SEE JURIES, 1, 2.
UTAH, *passim*.

1. Under the Act of March 22, 1882, a man "cohabits" with more than one woman, when, holding out to the world two or more women as his wives, by his language or conduct, or both, he lives in the same house with them, and eats at the table of each a portion of the time, although he may not occupy the same bed, sleep in the same room, or actually have sexual intercourse with either of them.
Cannon v. United States, 561
2. Objections that the indictment does not allege that the defendant is a male person, and does not allege a cohabitation with the women as wives, or as persons held out as wives, cannot be raised after the defendant has pleaded to it, especially as no substantial right was thereby prejudiced.
Idem, 561
3. This court cannot indicate in advance what the conduct of a polygamous husband towards his plural wives must be in order to conform to the requirements of the law.
Idem, 561

POST OFFICE.

SEE UNION PACIFIC RAILWAY COMPANY.

PRACTICE.

SEE APPEAL AND ERROR, *passim*, 7-9, 11-14.
BANKS, 3.
COSTS.
EVIDENCE, 25.
HABEAS CORPUS, 12-15.
INSURANCE, 7.
JUDGMENTS AND DECREES, 5. 6.
JURIES, 3.
JURISDICTION, 23, 26-29.
LANDS, 26.
LIMITATIONS, 12.
NEGLIGENCE, 4.
PATENT RIGHTS, 15, 16.
PLEADINGS, *passim*.
POLYGAMY, 3.
PROHIBITION, 8.
REMOVAL OF CAUSES, *passim*.

1. A decree *pro confesso*, under the rules and practice of this court, is not a decree as of course according to the prayer of the bill. It is made by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true.
Thomson v. Wooster, 105
2. Where a decree is taken *pro confesso*, the allegations of the bill cannot be questioned in subsequent proceedings in the court below or upon appeal. Anything in the allegations themselves tending to show that the decree is erroneous is assignable for error; but facts not found in the allegations of the bill are inadmissible to affect the decree.
Idem, 105
3. Evidence questioning the validity of the patent is inadmissible in proceedings before a master, or on appeal, after a decree has been taken *pro confesso* on a bill for infringement and an account.
Idem, 105
4. After a final decree the parties are not bound to take notice of subsequent proceedings unless they are served with process or enter their voluntary appearance.
Smith v. Woolfolk, 357
5. Where a petition, filed subsequent to a decree, institutes a new litigation between parties who were complainants in the original cause, service of process on the parties against whom relief is sought is necessary.
Idem, 357
6. The statutes of Arkansas do not authorize service of process by letter or on the attorney of the party.
Idem, 357
7. A complainant can have a decree against another complainant upon a supplemental or amended bill only upon notice to the latter. No decree can be had by one complainant against another without notice, if at all.
Idem, 357
8. Under the practice of New York, where the answer fairly covered a certain defense, although so indefinitely that greater certainty might have been required, and evidence proper to establish such defense had been admitted without objection, it was improper to instruct the jury not to consider such evidence.
Liverpool & L. & G. Ins. Co. v. Gunther, 575
9. Under the practice authorized by the Code of California, where the agent of a foreign corporation, which is charged with contempt, willfully conceals himself to avoid service of an order to show cause, service may be made upon its attorney of record.
Eureka Lake & Y. Canal Co. v. Superior Ct., 671
10. The general rules of pleading in admiralty suits *in rem* apply to suits *in rem* for a forfeiture, brought by the United States, after a seizure on land.
Coffey v. United States, 631
11. In a proceeding kindred to an admiralty proceeding *in rem*, a plea of former conviction is held to have been put in issue without a reply or replication to the answer, and the issue of fact thus raised is held to have been found against the claimant by

the general verdict there having been no demurrer to the answer, or bill of exceptions raising specific questions.
Coffey v. United States, 681
12. Decrees of the Supreme Court already entered, modified in accordance with stipulation of counsel.
"*Express Cases*," 791
13. Where, giving the defendant the benefit of every inference that could have been fairly drawn from the evidence, it was insufficient to authorize a judgment in his favor, a peremptory instruction for the plaintiff was proper.
Marshall v. Hubbard, 919
14. The Supreme Court of the District of Columbia has not, at a special term, the same discretionary power over its judgments, rendered at a previous term, without any motion or other proceeding to that end made or taken at that term, to set them aside and grant new trials, which it has over judgments when such proceedings are taken during the term at which they were rendered.
Phillips v. Negley, 1013
15. After the term at which judgments were rendered the power of the court over the parties and over the record remains only in certain excepted cases, when on motion it may be purged of clerical errors, or the judgment reversed by proceedings for errors of fact, in analogy to the practice in cases of writs of error *coram vobis*, unless it be invoked by bill in equity.
Idem, 1013
16. The decisions of the Maryland courts, founded on general principles, rendered since the organization of the District of Columbia, are not binding on the courts of the district as authorities.
Idem, 1013

PRINCIPAL AND AGENT.

SEE BANKS, 2.
EQUITY, 6.
INSURANCE, 5.

Under the circumstances of the case presented the purchaser of the land was not the agent of the other party, and the law implies no promise by the latter to repay the price as for money paid out at his request.
Dunphy v. Ryan, 703

PRINCIPAL AND SURETY.

In the absence of the mutual agreement of the grantor, grantee, and holder of the incumbrance to that effect, the relation of principal and surety does not exist between the grantee and grantor, and the latter is not discharged from his liability by an agreement between the other parties to extend the time of payment.
Shepherd v. May, 456

PROHIBITION.

1. The final judgment of the Supreme Court of the District of Columbia on a petition for a writ of prohibition to the Secretary of the Navy and a court martial convened by his order to try a public officer for offenses punishable by dismissal, may be reviewed by this court if the salary of which such officer might be deprived upon conviction exceeds $5,000.
Smith v. Whitney, 601
2. Whether the court below should grant or refuse a writ of prohibition, is not a matter of discretion when the court whose action is sought to be prohibited is clearly without jurisdiction, and the defendant objected to its jurisdiction at the outset and is without other remedy, and a refusal to grant it, where all of the proceedings appear of record, may be reviewed by this court.
Idem, 601
3. If an officer of the navy, while serving by appointment of the President as chief of a bureau and Paymaster General in the Navy Department, makes unlawful contracts or payments to promote the interests of contractors, he may lawfully be tried and convicted of scandalous conduct tending to the destruction of good morals, and to the dishonor of the naval service, by a court martial composed of naval officers, and a writ of prohibition will not be issued to prevent such trial and conviction.
Idem, 601
4. Where a court martial has jurisdiction of the subject matter of the principal charge, the addition of another charge varying in form, but for the same or similar acts, affords no ground for issuing a writ of prohibition.
Idem, 601
5. A naval court martial may, at any time before its dissolution by the Secretary of the Navy, be reconvened by him to reconsider its proceedings.
Idem, 601
6. A writ of prohibition cannot be made to serve the purpose of a writ of error or *certiorari*.
Idem, 601
7. Upon an application for a writ of prohibition to a naval court martial, the Secretary of the Navy should not be joined as a party defendant.
Idem, 601
8. It seems that proceedings upon a petition for a writ of prohibition must be considered as on the common-law side of a court having both common law and equity powers.
Idem, 601
9. Whether the Supreme Court of the District of Columbia has power in any case to issue a writ of prohibition to a court martial is not decided.
Idem, 601

PUBLIC LANDS.

SEE LANDS, *passim*.

RAILROADS.

SEE APPEAL AND ERROR, 30.
BONDS, 1, 8, 9, 13.
CARRIERS, *passim*.
CONSTITUTIONAL LAW, 44, 45, 46, 73.
EQUITY, 6
INDIANS, 2.
JURISDICTION, 14.
LANDS, 6, 20-23, 30-34.
MASTER AND SERVANT, 2-5.
MORTGAGES, 2, 3, 15.
NAVIGATION.
NEGLIGENCE, 3.
PATENTS, 9, 10.
REMOVAL OF CAUSES, 10, 11.
STREETS, 2-4.
TAXES, 1-4, 7-19.

1. A judgment creditor of a railroad company, having a right of way acquired by grants from the owners and by statutory proceedings, levied on such right of way and purchased it at sheriff's sale. He subsequently contracted with another company to complete the road and convey to it all his title to the franchises, right of way and property of the old company. He completed the road and gave possession, though not paid in full, to the corporation, the franchises of which with its interest in the road subsequently passed by foreclosure to a third company, against which the said purchaser brought ejectment. Held, that he could not recover; that the right of way could not be sold to one who did not own the franchise, and that the defendant was not estopped from disputing his right to recover.
East Ala. R. Co. v. Doe, 136
2. The authority of the Kansas Pacific Railway Company to extend its road into Missouri was granted by Congress under its power "to regulate commerce among the several States."
Union Pac. R. Co. v. Myers, 319
3. The statutes of North Carolina giving a lien to mechanics and laborers and regulating sales under mortgages given by corporations, do not give to those performing labor and furnishing materials in the construction of railroads, a lien upon the property and franchises of the corporation owning and operating such roads. Ordinary mechanic's lien laws should not be interpreted as giving a lien upon the roadway, bridges, or other property of a railroad company, that may be essential in the operation and maintenance of its road for the public purpose for which it was established.
Comrs. of Buncombe Co. v. Tommey, 305
4. On petition for rehearing this court adheres to its original opinion that in North Carolina railroads are not subject to ordinary lien laws.
Idem, 305
5. The president of a railroad company is not personally liable for losses alleged to have resulted to the purchasers of its bonds through fraudulent representations contained in circulars of the company signed by him as president.
Van Weel v. Winston, 384
6. Representations contained in circulars issued by a railroad company to advertise a new issue of bonds for the construction of a branch line, are held to have been superseded by the mortgage, giv-

en by the company to secure the bonds, in so far as said representations differed from the terms of that instrument.
Idem, 384
7. A provision that the branch line should not exceed fifty miles in length does not require that it should be of that length, especially as the holders of the bonds were also given a second mortgage on the company's main line.
Idem, 384
8. There is no privity or trust relation existing between the president of a railroad company and the purchasers of its bonds. In this case the purchasers obtained in the mortgage the only security for which they contracted. For any improper or fraudulent appropriation of the proceeds of the bonds the president is only liable to the company or its stockholders, unless it be to a judgment creditor, with an execution returned *nulla bona*.
Idem, 384
9. The Legislature of a State may fix the amount of damages beyond compensation to be awarded to a party injured by the gross negligence of a railroad company to provide suitable fences and guards of its road, or prescribe the limit within which the jury, in assessing such damages, may exercise their discretion. The additional damages are by way of punishment to the company for its negligence; and it is not a valid objection that the sufferer instead of the State receives them.
Mo. P. R. Co. v. Humes, 463
10. The present Missouri Pacific Railway Company was created by the dissolution of several old companies, under the laws of Missouri, and the establishment of the new company to take their place.
Pullman Palace Car Co. v. Missouri Pac. R. Co. 499
11. A contract made by the former Missouri Pacific Company with Pullman's Palace Car Company to use the latter's cars on "its own road, and all roads which it now controls, or may hereafter control, by ownership, lease, or otherwise," during a certain period, is binding on the new company only as to all roads owned or controlled by the former company at the time of the consolidation.
Idem, 499
12. The St. Louis, Iron Mountain & Southern Railway Company is not controlled by the Missouri Pacific Railway Company within the meaning of the contract, although the controlling interest in the stock of the former company is owned by the latter.
Idem, 499
13. A court of chancery can grant no relief to the Pullman Company based on the nature of its business and its past relations to the St. Louis Company.
Idem, 499
14. A State has power to limit railroad charges for transportation within its own jurisdiction, unless restrained by contract, or the power of Congress, and this power can only be bargained away, if at all, by words of positive grant or their equivalent.
Stone v. Farm. Loan & T. Co., 636
15. The grant of power to the directors of a railroad company to make by-laws, rules and regulations for the management of its affairs, does not exempt it from the operation of laws subsequently enacted, within the scope of legislative power, for the regulation of the business in which it is authorized to engage.
Idem, 636
16. The grant to a railroad company of the power "from time to time to fix, regulate and receive the toll and charges" to be received by it for transportation confers merely the power to fix reasonable charges, leaving the State free, within the limits of its general authority, to declare what shall be deemed reasonable.
Idem, 636
17. The charter of the Mobile & Ohio Railroad Company contains no contract the obligation of which is impaired by the Mississippi statute of March 11, 1884, creating a commission to provide for the regulation of freight and passenger rates, prevent unjust discrimination, and enforce certain police regulations affecting railroad companies doing business in that State.
Idem, 636
18. A railroad company chartered by, and carrying on its business in two or more States, is, for all purposes of local government, a domestic corporation in each State, and, within each State, subject to its laws as to all matters not within the exclusive control of Congress.
Idem, 636
19. The Act in question does not deny to the company the equal protection of the laws, nor deprive it of its property without due process of law, within the meaning of the Fourteenth Amendment.
Idem, 636
20. This court agrees with the Supreme Court of Mississippi that said Act is not repugnant to the Constitution of that State.
Idem, 636
21. This court also holds that said Act is not so inconsistent and uncertain as to be absolutely void upon its face.
Idem, 636
22. The grant of power to the president and directors of a railroad company to establish such rates for transportation as they may deem proper and to change them at pleasure, leaves the State free, within the limits of its general authority, to act as to the reasonableness of such rates.
Stone v. Ill. Cent. R. R. Co., 650
23. A corporation of one State when operating a road in another State as lessee subjects itself, as to that road, to such local legislation as would have been applicable to the lessor had no lease been made.
Idem, 650
24. The provision in the charter of the New Orleans & Northeastern Railroad Company, that in fixing rates there shall be no discrimination in favor of any other road, does not bring into that charter the rate clauses in charters subsequently granted fixing maximum rates so as to exempt said company from the operation of the Railroad Supervision Act of Mississippi.
Stone v. N. O. & N. R. R. Co., 651
25. Where a statute provides that certain property of a railroad corporation shall be exempt from taxation "for ten years after the completion of said road," the time preceding the completion of the road is as distinctly excluded as the time succeeding ten years after its completion.
Vicksburg, S. & P. R. R. Co. v. Dennis, 770
26. An intention to surrender the taxing power will not be presumed where the Legislature has not manifested it in clear and unmistakable terms.
Idem, 770
27. The omission of the taxing officers of the State in previous years to assess the property in question cannot control the duty imposed by law upon their successors, or the power of the Legislature, or the legal construction of a statute under which an exemption is claimed.
Idem, 770
28. The Kentucky & Great Eastern Railroad Construction Company acquired no ownership of, or lien on, the constructed road between Newport and Catlettsburgh under its contract of May 22, 1873, with the Kentucky & Great Eastern Railway Company for the construction of said road.
Wright v. Kentucky & G. E. R. Co., 821
29. The Construction Company's contract was subject to the terms and conditions of the contract of January 15, 1873, between the owners of the Maysville & Big Sandy Railroad and the Kentucky & Great Eastern Railway Company for a conditional sale of said road to the Railway Company, of which contract the Construction Company had notice.
Idem, 821
30. Under the mortgage executed by the Kentucky & Great Eastern Railway Company on February 15, 1872, the Farmers' Loan and Trust Company, as mortgagee, took only such rights as the mortgagor had, or subsequently obtained, as against the vendors of the Maysville & Big Sandy Railroad, and was therefore bound by the forfeiture under the conditional sale; and as to any rights of way acquired by the mortgagor along the line of the Maysville & Big Sandy Railroad, other than those purchased from the owners of said road, the cross bill is not so drawn, nor the evidence such that they can be subjected to the mortgage in this proceeding.
Idem, 821
31. A grant to a railroad company of "all the rights, powers, and privileges," or "all the powers and privileges" of another company, entitles it to the same exemptions from taxation that the other company has. The application of this rule to a statute of Tennessee is not affected by art. XI, sec. 7, of the Constitution of 1834, of that State.
Tennessee v. Whitworth, 833
32. Upon the consolidation of two or more railroad companies, under authority of law, the presumption is that the new company has all the powers and privileges of the old companies.
Idem, 833
33. Where the Act of consolidation provided that the new company should, "for its government, be en-

entitled to all the powers and privileges, and be subject to all restrictions and liabilities, conferred and imposed" upon another company, the phrase "for its government," is held to have been intended, not as a limitation of its powers, but for its regulation and control.
Pennoyer v. Whitsworth, 853

38. The Peoria, Atlanta & Decatur Railroad Company, the Paris & Decatur Railroad Company, and the Paris & Terre Haute Railroad Company, three Illinois corporations, each constructed a certain line of road and issued bonds secured by mortgage thereon. Subsequently the other companies conveyed all of their property to the Peoria, Atlanta & Decatur Company, and that company soon thereafter changed its name to that of the "Illinois Midland Railway Company," and issued its bonds secured by a mortgage to the Union Trust Company covering all of its property, including that purchased from the other companies.

Pending subsequent litigation in a state court and the court below, to which various stockholders, judgment creditors, bondholders and others were or became parties, the property was controlled and operated under directions of said courts by successive receivers, who issued eighteen distinct series of receiver's certificates on account of repairs, taxes, betterments and operating expenses. Many of the questions presented have arisen out of the issue of said receiver's certificates, the contest being substantially one between the Peoria and Decatur bondholders and those, who as holders of said certificates or otherwise, claim priority of lien, and this court holds:

1. That certificates issued for necessary repairs are entitled to priority.

2. That the bill filed in the state court by Harvey, the holder of a majority of the stock of the corporations, and certain judgment creditors, was sufficient to enable the court to administer the property as a trust fund and marshal the debts, making proper parties before adjudging the merits.

3. That the power of a court of equity, having charge of railroad property, to make necessary repairs does not depend on the consent of those interested, nor on prior notice to them.

4. That a subsequent opportunity to be heard, as to the propriety of the expenditures and of making them a first lien, is judicially equivalent to prior notice, the receiver and those lending money to him, on certificates issued on orders made without prior notice, taking the risk of the final action of the court. But such final action will only be affected by such objections to the merits as would have been availing if made before.

5. That certificates issued to pay tax liens are entitled to priority.

6. That third persons, not connected with the case or with the parties who bought directly from the receiver his certificates, were not bound to see to the application of the proceeds.

7. That holders of certificates sold within the limit of discount, fixed by the court, are entitled to their face with interest.

8. That certificates issued to replace earnings diverted from paying for operating expenses and ordinary repairs, to pay for necessary betterments or improvements, leaving large debts on account of such expenses and repairs, are entitled to priority.

9. That, in view of the facts presented, the Paris and Decatur bondholders cannot insist that want of affirmative consent by them or their trustee, deprived the court of power to create, on the *corpus* of the property, any lien taking priority over the mortgage lien.

10. That while the ordinary expenses of the receiver in operating the road are first payable out of income, if any, the *corpus* may be resorted to when the items are proper, after scrutiny and opportunity for those opposing to be heard.

11. That wages due the employees of the Illinois Midland Company within six months immediately preceding the appointment of the first receiver, were properly allowed priority.

12. That the terms of the orders, appointing the various receivers, did not impair or exclude the ample authority of the court to order said ordinary expenses and "six months' labor claims" paid out of the property itself, with priority.

13. That the final decree of the court below properly provided that the receiver's certificates, so made liens prior to the bonds, should be borne by the three several railroad properties in proportion to their relative lengths, although the terminal rentals and charges of the different roads were relatively unequal.

14. That the legality of the sales by the other companies of their properties to the Peoria, Atlanta & Decatur Company cannot now be questioned by the Paris and Decatur bondholders, their acquiescence, pending litigation and the contraction of debts by the receivers with respect to the whole line operated as a unit, amounting to an estoppel.

15. That the expenses of the various receiverships, incurred under the direction of the court for the benefit of all of the roads, should be borne by each in proportion to its length, such expenses not being chargeable to the purchasing company alone.

16. That 294 bonds of the Paris and Decatur issue, held by Waring Brothers, having been surrendered and exchanged for Illinois Midland bonds, were cancelled, and are now invalid and cannot be placed on a footing with other Paris and Decatur bonds not so exchanged, surrendered and cancelled.

17. That no valid objection lies to the clause in the decree which provides that the several properties shall be offered for sale separately and then as a whole; that the highest bid received for the entire properties shall be accepted, if it exceeds the aggregate of the highest bids for them when offered separately; and that the proceeds shall then be applied in proportion to said separate bids.

18. That certain claims for terminal facilities, track rents, traffic balances, stores supplied and labor performed, are entitled to priority.

19. That claims for certain large amounts borrowed from various banks by one of the receivers, without previous authority of the court, are not entitled to priority, although they were applied toward the payment of the proper expenses of the receivership.

20. That eight receiver's notes aggregating a large amount, although representing, in the main at least, proper expenses of the receivership, are not entitled to priority, the receiver having borrowed the money for which they were given without previous authority of the court.

21. That claims for rent and extraordinary depreciation of rolling stock, right of way and certain other claims, are not entitled to priority.

22. That, with the exception of debts for taxes and receiver's certificates issued to pay taxes, there should be no priority or preference among the various debts and claims allowed precedence over the mortgage bonds of any road, notwithstanding certain orders made by the court below.
Union Trust Co. v. Ill. Midland R. Co., 963

23. No costs are allowed in this court for or against any party, and the expense of printing the record is to be borne equally by certain of the appellants.
Idem, 963

RELEASE.

SEE ACCORD AND SATISFACTION.

RELIGIOUS SOCIETIES.

SEE TAXES, 7.

REMEDIES.

SEE EQUITY, 3, 4, 5.
GARNISHMENT, passim.
JURISDICTION, 12.
MANDAMUS, 4.

REMOVAL OF CAUSES.

SEE HABEAS CORPUS, 9.

1. The last clause of sec. 2 of the Act of March 3, 1875, refers only to suits where exists a separate and distinct cause of action, on which a separate and distinct suit might be maintained. It has no application to cases in which the defendants are sued jointly and as joint contractors.
Louisville & N. R. R. Co. v. Ide, 63
Putnam v. Ingraham, 65

2. A separate controversy is not introduced into the case by separate defenses to the same cause of action.
Idem, 63
Idem, 65

3. A defendant cannot make an action several which a plaintiff has elected to make joint.
Idem, 63
Idem, 65

4. An action brought in a state court against an incorporated company of that State and a citizen of another State to compel the transfer of stock on the books of the company, is not removable into the

federal courts. The company is a necessary party although the citizen of the other State raises a separate issue as to the validity of the proceedings under which said sale was had.
St. Louis & S. F. R. Co. v. Wilson, 66
5. A petition, showing a right to removal, signed by plaintiff's attorneys, and not sworn to, but accompanied by an affidavit by the plaintiff made prior to the commencement of the suit, will sustain a removal of the cause, the affidavit being sufficient under sec. 639, R. S. and the absence of an oath to the petition being an informality which the defendant waived by not taking the objection on a motion to remand.
Canal and Cl. St. R. R. Co. v. Hart, 226
6. In a suit in a court of New York against a corporation of that State upon a judgment recovered in the Circuit Court of the United States for the Northern District of Ohio, merely alleging in a petition for removal, that the defendant was not an inhabitant of Ohio, and was not found there, and was not personally served with process by itself or its officers, was not sufficient to raise a defense under sec. 739, R. S. of want of jurisdiction in the circuit court, without also negativing service of process on an agent of the defendant in Ohio and the actual appearance of the defendant to the suit.
Prov. Sav. L. Assur. Soc. v. Ford, 261
7. Want of jurisdiction set up to avoid a judgment must be shown with the greatest certainty.
Idem, 261
8. The mere fact that a suit in a state court is brought on a judgment recovered in a federal court does not entitle the defendant to removal.
Idem, 261
9. The colorable transfer of a right of action from a person against whom the defendant would have a right of removal to one against whom he has no such right, made to deprive the federal court of jurisdiction is not a ground for removal.
Idem, 261
10. Corporations of the United States are entitled as such to remove into the Circuit Courts of the United States, suits brought against them in state courts.
Union Pac. R. Co. v. Myers, 319
11. The Union Pacific Railroad Company and the Texas Pacific Railway Company are corporations of the United States though certain state and territorial corporations have been consolidated with them.
Idem, 319
12. In proceedings for widening a street a trial before the mayor is in its nature an inquest of valuations and assessments, not having the character of a suit, and a petition for removal may be filed after appeal taken to a state court.
Idem, 319
13. Under such proceedings there is a distinct controversy between the city and the company, although many others are made parties defendant.
Idem, 319
14. A suit brought by citizens of one State against citizens of the same State and citizens of another State, is not removable though there be separate defenses.
Pirie v. Tvedt, 331
15. Where the cause of action is several as well as joint, the plaintiff may elect to sue each defendant separately, or all jointly, and the defendants are not permitted to object.
Idem, 331
16. The fact that judgment may be rendered against a part of the defendants only, does not divide a joint action in tort into separate parts any more than it does a joint action on contract.
Idem, 331
17. A suit in equity brought by a citizen of one State, against a corporation of the same State, and a citizen of another State, is not removable into the Circuit Court of the United States under sec. 2 of the Act of March 3, 1875.
Crump v. Thurber, 328
18. After a cause has been properly removed, the introduction of new parties cannot oust the jurisdiction.
Stewart v. Dunham, 329
19. Where it appears that some title, right, privilege or immunity on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case is one arising under the Constitution or laws of the United States.
Starin v. Mayor etc. of N. Y. 388
20. A separate defense by one defendant in a joint suit against him and others upon a joint or joint and several cause of action, does not create a separate controversy so as to entitle him to removal under the Act of 1875.
Idem, 388
21. The decision of the questions whether the City of New York has, under its charter, the exclusive right to establish ferries between Manhattan Island and the shore of Staten Island on the Kill Von Kull; and, if so, whether the defendants have, in law and in fact, interfered with that right by setting up and operating such a ferry, does not depend on the Constitution or the laws of the United States.
Idem, 388
22. In a suit to foreclose a mortgage under the Connecticut statute brought against the grantee of the mortgagor, the latter is an indispensable party where it is sought to charge him with any insufficiency in the appraised value of the property to discharge the debt, and if he and the mortgagee are citizens of the same State the cause cannot be removed.
Coney v. Winchell, 610
23. A joint cause of action cannot be removed by the defendants unless all join and are citizens of different States from the plaintiffs. All are affected by the loss by one of his right to remove.
Fletcher v. Hamlet, 679
24. A suit begun in a state court of Louisiana by service of process on a firm through one of its members, is not so changed in character as to make it a new suit by subsequent service on another member of the firm.
Idem, 679
25. A suit cannot be removed from a state to a federal court on the ground of citizenship of parties unless the plaintiff and defendant are citizens of different States at the time when the suit was brought as well as at the time when the petition for removal is filed.
Smith v. Akers, 888
26. Where the Circuit Court has acquired jurisdiction of a cause by removal because of citizenship, it is not devested by the introduction, under a state statute, of the defendant's landlord, who is a citizen of the same State as the plaintiff, as a codefendant.
Phelps v. Oaks, 888
27. Under sec. 914, R. S., a court of the United States is not required to conform its practice to that of the state courts where the effect would be to defeat its jurisdiction once lawfully attached under an Act of Congress.
Idem, 888
28. It was proper in this case for the court below to admit the landlord as codefendant with the tenant, but this did not arrest or interfere with the jurisdiction already established by the plaintiffs against the tenant in possession.
Idem, 888
29. Removals of actions from state to federal courts on the ground of local prejudice can only be had where all the parties on one side are citizens of different States from those on the other side.
Jefferson v. Driver, 897
30. A person who purchases property *pendente lite*, and who is made a party, comes into the suit subject to the disabilities of the other parties, in respect to a removal of the cause, at the time he came in.
Idem, 897
31. A creditor's bill to subject incumbered property to the payment of a judgment by sale and distribution of the proceeds among lien holders according to their respective priorities, constitutes but a single cause of action. Though separate defendants have separate defenses this does not create separate controversies within the meaning of the Removal Act.
Fidelity Ins. Trust & Safe Deposit Co. v. Huntington, 898
32. An action of tort against several defendants for a wrongful seizure of the property of the plaintiff is not removable, though separate answers are filed, if a necessary defendant and the plaintiff are citizens of the same State.
Sloane v. Anderson, 899
33. The right to remove a suit on the ground of separable controversy is, by the statute, confined to the parties to that controversy.
Rand v. Walker, 907
34. Where a party by a supplemental bill seeks to avoid the effect of a judgment of a federal court, not by avoiding the judgment as between the parties, but by showing that as to her it is of no effect, she not having been a party to it, no question is

raised under the authority of the United States so as to confer jurisdiction on the Circuit Court.
Rand v. Walker, 907
35. After a case has been tried in a state court and the judgment reversed by a superior state court and the case remanded for a new trial, it is too late to file a petition for a removal of the case to the federal court.
Core v. Vinal, 912
36. In a joint action for tort against two defendants, one of the defendants cannot remove the cause on the ground of citizenship if the other defendant is a citizen of the same State as the plaintiff.
Idem, 912
37. The right to remove a suit under the Act of March 3, 1875, is lost by a failure to file a petition "before or at the term at which said cause could be first tried and before the trial thereof," and it is not restored by a subsequent amendment of the pleadings presenting different issues.
Phœnix Mut. L. Ins. Co. v. Walrath, 924
38. A state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made, which, on its face, shows that the petitioner has a right to the transfer.
Stone v. South Carolina, 962
39. All issues of fact made on the petition for removal must be tried in the circuit court, but the state court is at liberty to determine for itself whether on the face of the record a removal has been effected. If it decides against the removal its action will, after final judgment, be reviewable in the Supreme Court of the United States.
Idem, 962
40. An action in which a State is a party is not removable from a state to a federal court on the ground of citizenship.
Idem, 962
41. An action against partners for money, paid to them as such is not removable unless all the parties on one side of the controversy unite in the petition for removal.
Idem, 962
42. A proceeding under the Act of Assembly of Virginia approved January 14, 1882, as amended by the Act of March 12, 1884, for the identification and verification of coupons tendered in payment of taxes, debts, or demands due the State is not a suit of a civil nature arising under the Constitution or laws of the United States within the meaning of the Act of Congress of March 3, 1875.
Stewart v. Virginia, 1006

REPLEVIN.

1. A tenant in common cannot maintain replevin against a cotenant, because they have each and equally a right of possession. This rule is recognized in Pennsylvania.
Bohlen v. Arthurs, 454
2. Where, under a contract for the purchase of an undivided interest in land, the purchaser cuts timber and removes it, and the owners of the remaining interest take possession of it, he cannot maintain replevin against them.
Idem, 454
3. The Pennsylvania Act of May 15, 1871, No. 249, sec. 6, concerning actions of replevin, has no operation as between tenants in common.
Idem, 454

RULES.

1. Custody of prisoner on *habeas corpus* pending appeals. 4

SALES.

SEE APPEAL AND ERROR, 35.
CONTRACTS, 1, 4, 5, 6, 9.
FRAUDULENT CONVEYANCE, 1, 2.
INTERNAL REVENUE, 1.
JUDGMENTS AND DECREES, 2.
LIMITATIONS, 6.
1. In a mercantile contract, a statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole agreement.
Norrington v. Wright 366
Filley v. Pope, 372
2. Under a contract for the sale of "5,000 tons of iron rails, for shipment from a European port or ports, at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880," the sellers are bound to ship 1,000 tons in each month from February to June inclusive, except that slight and unimportant deficiencies may be made up in July.
Idem, 366
3. Under a contract for the sale of 500 tons of pig iron, "shipment from Glasgow as soon as possible," shipment from Glasgow is a condition precedent.
Filley v. Pope, 372
4. Where goods of a specified quality, not in existence or ascertained, are sold, and the seller undertakes to ship them to a distant buyer, and, when they are made or ascertained, delivers them to a carrier for the buyer, the latter, on their arrival, has the right if they are not of the quality required by the contract, to reject them, and rescind the sale, and, if he has paid for them, to recover back the price in a suit against the seller.
Pope v. Allis, 393
5. Under the laws of Kansas a sale by the vendor to defraud his creditors is not invalid as against the vendee if he purchased in good faith and for a sufficient consideration.
Jones v. Simpson, 742
6. The law presumes the possession of the vendee to have been rightfully acquired; and when it appears that a sufficient consideration was paid the vendee is entitled to a verdict and judgment, unless it appears affirmatively that he purchased in bad faith.
Idem, 742
7. A sale will not be set aside for inadequacy of price unless it is so great as to shock the conscience, or unless there be additional circumstances against its fairness.
Graham v. Burgess, 839
8. If, in addition to gross inadequacy of price, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner or party interested in the property has been misled or surprised, the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem.
Idem, 839
9. In judicial, as well as private sales, great inadequacy of price is a circumstance which a court of equity will always regard with suspicion, unless it appears that it was no fault of the buyer.
Idem, 839
10. Upon examination of the entire case this court finds a design on the part of the defendant to mislead the complainant and lull her into security, and thus to prevent her from redeeming the property in question within the time prescribed by law; and sustains the decree of the court below allowing further time to redeem.
Idem, 839

SET-OFF.

SEE CONSTITUTIONAL LAW, 13, 26.
1. A counterclaim cannot be sustained to recover money, which the defendant alleges in his pleadings to have been advanced by him, and used with his concurrence, to carry on a gambling transaction. And the fact that the plaintiff believed the transaction to be legal does not affect the right of the defendant to recover on his counterclaim.
Higgins v. McOrea, 764
2. Under the Ohio Code a counterclaim stands on the same footing and is to be tested by the same rules as if it were an independent action.
Idem, 764

SPECIFIC PERFORMANCE.

In case of gross laches or inexcusable negligence on the part of a party who seeks a specific performance, or a material change in the circumstances affecting the rights of the parties, where time is not expressly or impliedly of the essence of the contract, a court of equity will refuse to decree a specific performance.
Holgate v. Eaton, 538

STATE LAWS AND DECISIONS.

SEE APPEAL AND ERROR, 10, 41.
BONDS, 9.
CONSTITUTIONAL LAW, 13-30, 35, 41-65, 73, 76, 78.
CORPORATIONS, 2, 4.

CRIMINAL LAW, *passim.*
EVIDENCE, *passim.*
GARNISHMENT, *passim.*
GUARDIAN AND WARD, *passim.*
JURISDICTION, 1-3, 30, 31.
LIMITATIONS, 3, 4, 6, 7.
MORTGAGES, 1, 4, 9, 10, 15.
PRACTICE, 6, 9, 16.
RAILROADS, 9, 10, 15, 16, 18-25, 31, 30.
REMOVAL OF CAUSES, 22, 42.
REPLEVIN, 3.
SET-OFF, 2.
STREETS, 4.
TAXES, 1, 4, 15.

1. The decision of the Supreme Court of the State, though single, is entitled to peculiar respect, the questions involved arising upon the local law of the State; but it is not conclusive in the courts of the United States unless it has become a rule of property.
Gibson v. Lyon, 440
2. Where the decisions of the highest court of a State establish a rule of property they will as a rule be followed by this court.
Gage v. Pumpelly, 449
3. Under the decision of the Supreme Court of Illinois, a tax sale of real estate is void when a part of the tax for which it is made is illegal.
Idem, 449
4. Under the decisions of the same court a judgment by default, in a tax sale proceeding, is not conclusive upon the taxpayer, but may be impeached collaterally.
Idem, 449
5. This court cannot consider an objection raised by the appellee to the decree appealed from.
Idem, 449
6. Where the liability of a municipal corporation upon negotiable securities, depends upon a local statute, the rights of the parties are to be determined according to the law as declared by the state courts at the time such securities were issued.
Anderson v. Santa Anna, 633
7. While the courts of the United States accept and apply the construction of the courts of a State of its Constitution and statutes, it is the settled doctrine of this court, that rights accruing under one construction will not be lost merely by a change of opinion in the state court.
Idem, 633
8. Where such rights have accrued before the state court has announced its construction, the federal court although leaning to an agreement with the state court, must determine the question upon their own independent judgment.
Idem, 633
9. The Act of the Legislature of Illinois of February 28, 1867, is held by this court to be valid as within the principle that the Legislature may, by retroactive statutes when not restricted by the Constitution, legalize the unauthorized acts and proceedings of subordinate municipal agencies, where such acts and proceedings might have been previously authorized by the Legislature.
Idem, 633

STATES.

SEE CONSTITUTIONAL LAW, 5, 8, 10, 17, 33.
STATE LAWS AND DECISIONS, *passim.*
LANDS, 12, 13.
LIMITATIONS, 1.
RAILROADS, 14, 15.
REMOVAL OF CAUSES, 40.
TAXES, 9.
TERRITORIES, 1.

The States have the power to control and regulate the organization, drilling and parading of military bodies and associations, except when they are authorized by the military laws of the United States.
Presser v. Illinois, 615

STATUTE OF FRAUDS.

SEE DEBTOR AND CREDITOR, 3.
PLEADINGS, 7.

A parol agreement that one of the parties to it shall purchase a tract of land on the best terms possible, and then convey an interest therein to the other, is within the Statute of Frauds and cannot be enforced.
Dunphy v. Ryan, 703

STATUTE OF LIMITATIONS.

SEE LIMITATIONS, *passim.*

STATUTES.

SEE CONSTITUTIONAL LAW, 23.
POLYGAMY, 1.
RAILROADS, *passim.*
STATE LAWS AND DECISIONS, *passim.*
UNION PACIFIC RAILWAY COMPANY, *passim.*

1. In the Revised Statutes, sec. 699 stands separate from the other parts of the "Civil Rights" Acts, and is to be construed accordingly, but with reference to the general rules of interpretation applicable to the revision.
Bowman v. Chicago & N. W. R. R. Co., 502
2. The Constitution and a statute under it will be construed together as one law.
Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 414
3. Statutes must be interpreted, if possible, so as to make them consistent with the Constitution and the paramount law.
Presser v. Illinois, 615
4. Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the parts are separable.
Idem, 615
5. In construing statutes which are binding on States as contracts, the words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have.
Tennessee v. Whitworth, 830

STREETS.

1. The title to the streets of Washington is in the United States, and the right to use them for any other than the ordinary use of streets should proceed from Congress.
Edmonds v. Baltimore & P. R. R. Co., 216
2. The Baltimore & Potomac Railroad Company can occupy only such streets in the City of Washington as have been expressly designated by Congress for that purpose.
Idem, 216
3. The said company was not organized under the general corporation law of the District of Columbia and it derives no authority under that Act to use the streets of the City of Washington.
Idem, 216
4. The Maryland charter of the said company does not confer any power to use the streets of a city as an incident of its right to run to or from such city.
Idem, 216

SUBROGATION.

SEE INSURANCE, 3.

TAXES.

SEE ACTIONS, 1.
CONSTITUTIONAL LAW, 12, 14-29, 31, 34, 38-44, 73, 76, 77.
BONDS, 15.
EVIDENCE, 15, 16.
EQUITY, 18.
INDIANS, 2.
INJUNCTIONS, 1, 2.
INTERNAL REVENUE, 2, 6.
JURISDICTION, 11, 12.
LANDS, 22.
LICENSE, *passim.*
MANDAMUS, 4, 5.
MUNICIPAL CORPORATIONS.
RAILROADS, 25-27, 31, 32, 34.
STATE LAWS AND DECISIONS, 3, 4.

1. The exemption from taxation of the property of the Covington & Ohio Railroad Company, granted by the Act of the Legislature of West Virginia of March 1, 1866, incorporating said company, was a privilege personal to the corporation, which did not pass to the purchaser of the property under foreclosure proceedings.
Chesapeake and O. R. Co. v. Miller, 121
2. Under the Act of the Legislature of West Virginia of February 18, 1871, amended February 20, 1877, relating to sales under trust deeds and mortgages, and to judicial sales of the property of railroad or other internal improvement companies, the purchaser does not take any exemption or immunity from taxation which belonged to the old company.
Idem, 121
3. Immunity from taxation is not a franchise.
Idem, 121
4. Stock held by a citizen of Ohio in a foreign cor-

poration is taxable notwithstanding the payment by the corporation of a tax on its property situated in the State.
Sturges v. Carter, 240
5. The law of Louisiana requiring the court, when rendering a judgment against a parish to order the levy of a tax to pay it, is properly construed with reference to the tax limit fixed by the Act of 1872.
Stewart v. Police Jury of Jefferson. 588
6. A judgment creditor, upon a judgment obtained on a contract made subsequent to the passage of the Act of 1872, is not entitled to a *mandamus* to compel the levy of a tax in excess of the limit fixed by that Act.
Idem, 588
7. Land, owned by a religious corporation or society in the District of Columbia, which is neither actually occupied for a church building, nor reasonably needed and actually used for the convenient enjoyment of such building as a church, is not exempt from taxation, whether used for any other purpose or not.
Gibbons v. District of Columbia, 680
8. In the exercise of its power to levy taxes in the District of Columbia for district purposes, Congress may exempt certain classes of property, or tax them at different rates.
Idem, 680
9. The right of a State in which personal property is situated to tax it is not affected by the fact that the owner resides in another State, which taxes him for the same property as a part of his general estate attached to his person.
Coe v. Town of Errol, 715
10. Products of a State, though intended for export to another State and partially prepared for that purpose by being deposited at a place or port of shipment within the State, are liable to be taxed like other property within the State.
Idem, 715
11. Exportation is not begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until that time they are taxable as a part of the general mass of property in the State, though they are not taxable as exports.
Idem, 715
12. The carrying of property in carts or vehicles, or even floating it, to the depot where the journey is to commence is no part of the journey.
Idem, 715
13. A lawful tender of payment, as well as an actual payment, of taxes deprives the collecting officer of all authority for further action to enforce payment, and renders every subsequent step illegal and void.
Royall v. Virginia, 735
14. The taxes of the Blue Ridge Railroad Company are not payable in the revenue bond scrip issued by the State of South Carolina in exchange for the bonds of the company guaranteed by the State.
Hagood v. Southern, 805
15. The holder of revenue bond scrip, issued under the Act of the Legislature of South Carolina of March 2, 1872, has no legal right to have such scrip received for taxes, unless he owes taxes for which it is receivable. There is no breach of contract until a tender for taxes due from the holder has been refused.
Idem, 805
16. The charter exemption from taxation of the capital stock of the Nashville, Chattanooga & St. Louis Railroad Company, applies to its shares of stock in the hands of individual stockholders.
Tennessee v. Whitworth, 830
17. The capital stock of the Nashville & Decatur Railroad Company is exempt from taxation in Tennessee, although it resulted from the consolidation of two corporations of Tennessee with a corporation of Alabama.
Tennessee v. Whitworth, 833
18. The relinquishment of taxing power is never to be presumed.
Idem, 833
19. Exemption from taxation, being a special privilege granted by the government to an individual, is a franchise; and acquiescence by the grantee or his successors for a long period of time (in this case sixty years), in the imposition of taxes, raises a presumption that such franchise has been surrendered.
New Jersey v. Wright, 1021

TERRITORIES.

1. Unless otherwise declared by Congress, the title of every species of property owned by a territory passes to the State upon its admission to the Union.
Brown v. Grant, 598
2. Lands conveyed to a territory, "its successors and assigns forever," and duly accepted as the site for its capitol, pass to the State when admitted, although the territory may not have occupied them, there being no condition requiring the erection of buildings thereon within any specified time.
Idem, 598
3. The question whether the grantor has been deprived of his property without due process of law, is within the jurisdiction of this court.
Idem, 598

TREATIES.

SEE JURISDICTION, 15, 16.

TRUSTS AND TRUSTEES.

SEE BONDS, 5.
HUSBAND AND WIFE, 1, 2.
PARTNERSHIP, 1, 2.
LANDS, 1.
LIMITATIONS, 2.
MORTGAGES, 5, 14.
1. Where the acts or omissions of a trustee are such as to show a want of reasonable fidelity, a court of equity will remove him.
Cavender v. Cavender, 212
2. Where trust funds are to be invested by the trustee, neglect to invest constitutes of itself a breach of trust, and is ground for removal.
Idem, 212
3. Where one person is to pay and receive the same money, and nothing remains but to make proper entries in his accounts, the law will consider that as done which ought to be done.
Idem, 212
4. A demurrer to a bill setting up a trust will not be sustained on the ground that the nature of the trust is not sufficiently set forth, when the facts stated are sufficient, if true, to enable the court to act intelligently.
Idem, 212
5. Where the payee of a promissory note secured by a trust deed on two lots, the trustee having power under the trust deed to sell the lots at private sale on direction of the payee, accepted the lots in satisfaction of his debt, which was of thrice their value, and directed their conveyance in trust for the children of the maker of the note as a gift to them, it is held that such conveyance is valid as against other creditors.
Van Riswick v. Spalding, 913

UNION PACIFIC RAILWAY COMPANY.

1. In a controversy between the Union Pacific Railway Company and the United States arising under the Act of July 1, 1862, it is immaterial whether the amount actually found to be due for transportation of the mails, "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service," as required by said section, is ascertained upon evidence comparing them with the rates previously determined and fixed by the company, or with those allowed by the accounting officers of the government. The only material thing is to adjudge what is due according to the rule prescribed by the statute.
Union Pac. R. Co v. United States, 920
2. The bridge of the Union Pacific Railway Company between Council Bluffs and Omaha is subject to the provisions of the Act of July 1, 1862, as to the rates to be paid by the government for transportation service over it.
Idem, 920

USURY.

1. To constitute usury, there must be an intention knowingly to contract for or to take usurious interest.
Call v. Palmer, 559
2. When an agent who is authorized by his principal to lend money for lawful interest exacts for his own benefit more than the lawful rate, without authority or knowledge of his principal, the loan is not thereby rendered usurious.
Idem, 559

3. Where the promisor in a usurious contract makes it the consideration of a new contract with a third person not a party to the original contract, or to the usury paid or reserved upon it, and the new contract is not a contrivance to evade the statutes against usury, the latter is not illegal or usurious.
Call v. Palmer, 559

UTAH.

SEE APPEAL AND ERROR, 3.
POLYGAMY, *passim*.

1. The Board of Commissioners appointed for the Territory of Utah under the Act of March 22, 1882, have no power over the registration of voters or the conduct of elections. Their authority is limited to the appointment of registration and election officers, to the canvass of the returns made by such officers of election, and to the issue of certificates of election to the persons appearing by such canvass to be elected.
Murphy v. Ramsey, 47

2. The registration and election officers thus appointed are required, until other provisions be made by the Legislative Assembly of the territory, to perform their duties under the existing laws of the United States, including the Act of March 22, 1882, and of the territory, so far as not inconsistent therewith.
Idem, 47

3. Any rules promulgated by said board to govern the registration and election of officers were null and void; but their illegality is no ground of liability against the Board of Commissioners.
Idem, 47

4. The registration officers were bound to register only such persons as, being qualified under the laws previously in force, and offering to take the oath as to such qualifications prescribed by the territorial Act of 1878, were also not disqualified by the eighth section of the Act of Congress of March 22, 1882.
Idem, 47

5. The registration officer must either require such disqualifications to be negatived by a modification of the oath, the form of which is given in the territorial Act, or otherwise to satisfy himself by due inquiry that such disqualifications do not exist.
Idem, 47

6. The plaintiffs in actions seeking to recover damages for being unlawfully deprived of their right to be registered as voters, must allege in their declarations, as matter of fact, that they were legally qualified voters, or, that allegation being omitted, must allege all the facts necessary to show as matter of law, that they were qualified voters; and to this end it is necessary that they should negative all the disqualifications pronounced by the law.
Idem, 47

7. A bigamist or polygamist, in the sense of the eighth section of the Act is a man who, having contracted a bigamous or polygamous marriage, and become the husband, at one time, of two or more wives, maintains that relation and status at the time when he offers to be registered as a voter. The eighth section of the Act does not operate as an additional penalty prescribed for the punishment of the offense of polygamy. It is not objectionable as an *ex post facto* law. The disfranchisement operates upon the existing state and condition of the person and not upon a past offense.
Idem, 47

WAGER.

SEE SET-OFF, 1.

WARRANTY.

SEE SALES, 1.

WILLS.

1. In the construction of wills a latent ambiguity may be removed by extrinsic evidence.
Patch v. White, 360

2. A latent ambiguity may arise upon a will, when it names a person as the subject of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or it may arise when the will contains a misdescription of the object or subject.
Idem, 360

3. Where a latent ambiguity consists of a misdescription, if it can be struck out and enough remain in the will to identify the person or thing, the court will so deal with it; or if it is an obvious mistake, will read it as if corrected.
Idem, 360

4. Where the testator devised to a brother "lot 6" in a certain block, and disposed of the remainder of his estate to others, and it appeared that he did not own "lot 6" but did own lot 3 in said block, and that lot 3 was otherwise properly described in the will, said lot 3 is held by this court to have been lawfully devised.
Idem, 360

WITNESSES.

SEE CONSTITUTIONAL LAW, 69, 70.

1. Contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation.
Steamboat Charles Morgan v. Kouns, 316

2. The exception in sec. 858, R. S., to the provision that parties may testify in federal courts in their own behalf cannot be extended by the court so as to exclude parties from testifying in their own behalf against assignees in bankruptcy.
Hobbs v. McLean, 940

3. Where, in an action by one of three partners against the government, the other two partners testify in behalf of the claimant that they have no interest in the claim except as shown by a certain memorandum, such witnesses are not estopped thereby from showing, in an action by them against the assignee of the claimant, that they had an interest in the claim, further than was shown by such memorandum.
Idem, 940

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